Resolutions with Reports to the House of Delegates
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AMERICAN BAR ASSOCIATION

2014 ANNUAL MEETING • BOSTON, MASSACHUSETTS • AUGUST 11-12, 2014

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### RESOLUTIONS WITH REPORTS

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<tr>
<td>100</td>
<td>Section of International Law</td>
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</tbody>
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Resolutions with Reports numbered 10A, 100 through 115, 177B, 300, 400A and 400B can be found in this book. Proposals to amend the Association’s Constitution and Bylaws are numbered 11-1 through 11-15 and also can be found in this book. Any additional Resolutions with Reports submitted by state and/or local bar associations will be numbered in the “10” series. Late Resolutions with Reports will be numbered in the “300” series. These reports will be distributed at the opening session of the House of Delegates meeting. Informational Reports can be found on the ABA’s website at [http://www.americanbar.org/groups/leadership/house_of_delegates/2014-boston-annual-meeting.html](http://www.americanbar.org/groups/leadership/house_of_delegates/2014-boston-annual-meeting.html) (click on Informational Reports).
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* This resolution with report was received after the May 6 filing deadline. Pursuant to §45.5 of the House Rules of Procedure, this late resolution will be considered by the House of Delegates if the Committee on Rules and Calendar recommends a waiver of the late requirement and the resolution is approved by a two-thirds vote of the delegates voting.
All sessions of the House of Delegates will be held on Monday, August 11 and Tuesday, August 12, 2014, in the Grand Ballroom, Level 3, in the Hynes Convention Center, in Boston, Massachusetts. It is anticipated that the first session of the House meeting will begin at 9:00 a.m. on Monday morning and will recess at approximately 5:00 p.m. On Tuesday morning, the meeting will reconvene at 9:00 a.m. and will adjourn that afternoon when the House has completed its agenda.

The Final Calendar of the House of Delegates meeting will be placed on House members’ desks at the opening session on Monday morning, August 11. 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 May 6, 2014 filing deadline. Resolutions with Reports numbered 10A, 100 through 115, 177B, 300, 400A and 400B appear in this book. Proposals to amend the Association’s Constitution and Bylaws are numbered 11-1 through 11-15 and also appear in this book: Informational Reports can be found on the ABA’s website at [http://www.americanbar.org/groups/leadership/house_of_delegates/2014-boston-annual-meeting.html](http://www.americanbar.org/groups/leadership/house_of_delegates/2014-boston-annual-meeting.html) (click on Informational Reports).

Any late Resolutions with Reports, those received after May 6, 2014, will be considered by the House if the Committee on Rules and Calendar recommends a waiver of the time requirement and the recommendation is approved by a two-thirds vote of the delegates voting. Late Resolutions with Reports will be distributed at the opening session of the House, along with any additional Resolutions with Reports submitted by state or local bar associations.

The preliminary calendar of the House of Delegates meeting is as follows:
Presentation of Colors

Invocation

1. Report of the Committee on Credentials and Admissions
   Reginald M. Turner, Jr., Michigan
   Approval of the Roster

2. Report of the Committee on Rules and Calendar
   Hilarie Bass, Florida
   Approval of the Final Calendar

3. Report of the Secretary
   Hon. Cara Lee T. Neville, Minnesota
   Approval of the Summary of Action

4. Statement by the Chair of the House of Delegates
   Robert M. Carlson, Montana

5. Statement by the President
   James R. Silkenat, New York

6. Statement by the Treasurer
   Lucian T. Pera, Tennessee

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

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

9. Presentation of Proposals to Amend the Association's Constitution and Bylaws
   11-1 through 11-15

10. Presentation of Resolutions with Reports of Sections, Committees and Other
    Entities
    100-115 Resolutions with Reports
    300 Late Resolutions with Reports
    177B Board of Governors
    400A-B Resolutions with Reports on Archiving

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AMERICAN BAR ASSOCIATION  
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<thead>
<tr>
<th>Position</th>
<th>2014</th>
<th>Name</th>
<th>City, State</th>
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<tr>
<td>Section Members-at-Large</td>
<td>2014</td>
<td>Charles A. Collier, Jr.</td>
<td>Los Angeles, CA</td>
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<td></td>
<td>2014</td>
<td>Barbara Mendel Mayden</td>
<td>Nashville, TN</td>
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<td>2015</td>
<td>Kenneth W. Gideon</td>
<td>Washington, DC</td>
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<td>2015</td>
<td>Timothy B. Walker</td>
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<td></td>
<td>2016</td>
<td>Pamela C. Enslen</td>
<td>Kalamazoo, MI</td>
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<td></td>
<td>2014</td>
<td>David R. Poe</td>
<td>Washington, DC</td>
</tr>
<tr>
<td>Minority Members-at-Large</td>
<td>2014</td>
<td>Harold D. Pope III</td>
<td>Southfield, MI</td>
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<td></td>
<td>2015</td>
<td>Michael E. Flowers</td>
<td>Columbus, OH</td>
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<tr>
<td>Women Members-at-Large</td>
<td>2014</td>
<td>Sandra R. McCandless</td>
<td>San Francisco, CA</td>
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<tr>
<td></td>
<td>2016</td>
<td>Marcia M. Ridings</td>
<td>London, KY</td>
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<td>Young Lawyer Members-at-Large</td>
<td>2014</td>
<td>Michael Pellicciotti</td>
<td>Olympia, WA</td>
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<td></td>
<td>2015</td>
<td>William Ferreira</td>
<td>Morristown, NJ</td>
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<tr>
<td>Law Student Member-at-Large</td>
<td>2014</td>
<td>James C. Manning</td>
<td>Charlottesville, VA</td>
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<tr>
<td></td>
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<td>Morristown, NJ</td>
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- Deborah Perfuss, Seattle, WA
- Jennifer A. Rymell, Fort Worth, TX
- John E. Thies, Urbana, IL
- Richard L. Travis, Sioux Falls, SD

TELLERS

CHAIR: Min Ki Cho, Orlando, FL
VICE-CHAIR: Roula Alouch, Covington, KY
MEMBERS:
- Christina Cullom, Springfield, IL
- Jennifer G. Daugherty, Minneapolis, MN
- Joseph Zeldner, Audubon, PA
The report of the President will be presented at the time of the Annual 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 Annual Meeting of the House of Delegates.
This report highlights American Bar Association activities from December 6, 2013, to June 5, 2014.

Introduction

This has been a year of big challenges and great opportunities. The Board of Governors' approval of ABAction! in June of 2013 set the stage for a new paradigm for the matters that are most important to our Association. We simply must do a better job with our value proposition. And that value proposition must yield results with better recruitment -- and substantially improved retention -- of members. And we need to lessen dramatically our dependence on dues by maximizing our non-dues revenue opportunities and results.

Our staff knows that each of them, individually, has responsibility to think about and help with our membership and non-dues revenue efforts. In order to help us better support the goals of ABAction!, we need more than good plans ... we need action and substantial results. I am absolutely committed to that. Staff devised the dynamic ABAction! plans that have changed our model and will lead to dramatic success.

ABAction!

The pervasive ABAction! initiatives remain our top priority and continue to show many very positive signs. Through the end of April, non-dues revenue is up almost $1.3 million compared with last fiscal year. Among ABAction!’s current portfolio of 42 initiatives are the following examples that demonstrate our progress:

On May 28, “The Mother Court” rose to the #1 ranking in its category on Amazon’s bestseller list. The ABA-published book has exceeded expectations, with more than 10,000 copies sold before its formal release. This summer, all Barnes and Nobles stores in the New York and New Jersey area will showcase “The Mother Court” and another new ABA book, “The Sasquatch Ordinance,” with prominent displays usually reserved for best-selling novelists. With such fresh marketing strategies, the Flagship Book Program is on track to net more than $500,000 in net revenues in fiscal year 2014.

We have expanded the reach of our products among many new audiences. We are in final negotiations with Lexis-Nexis to offer our e-book content to the law libraries of its broad client base in both public and private industry. And a pending co-op agreement with a new distributor will allow us to break into the untapped school and library markets, through access to almost 40,000 customers worldwide.
The ABA Academy continues to grow. In April, we launched a series of three CLE programs on business continuity under the Minding Your Business banner. Our other new track of CLE programs, Essentials, is also thriving, with 32 basic-skills programs broadcast over the past several months. We will soon inaugurate the ABA Value Pass, a new subscription option that will allow users unlimited access to most of the ABA CLE library. The pass is expected to attract new users and build ABA brand loyalty through regular customer engagement.

Our efforts to boost the value of membership are also strong. The Free Career Advice Series (formerly called CareerAdvice LIVE!) has grown in popularity in recent months. The program on business development attracted almost 1,400 registrants -- the highest number of registrants since its first program in October. The April webinar on recovering from mistakes and the February program on alternative careers attracted the series’ second and third highest registrations, respectively. As of this writing, registration is open for the sessions in June on strategies to deliver bad news and in July on work-life balance.

In May we debuted our latest value offering, the ABA Bar Exam Prep Online Resource, developed by the Law Student, Young Lawyer, and Membership and Marketing Divisions. Available at no cost to members, the website offers practical tips from young lawyers who recently passed the bar exam.

And, our large law firm recruitment efforts are getting very positive results. Since the beginning of FY2014, the ABA has secured participation of 12 new firms in the Full Firm Membership Program. Due-paying members in the program now number 20,000, of which 3,465 are new this fiscal year (and we anticipate adding several hundred more as complete lists of attorneys are provided by the firms).

Other Membership and Non-Dues Revenue Initiatives

Member recruitment is in full swing, with three campaigns launched in the last several months, including “Become a Leader” for law students; “In Good Company” for lawyer enrollment; and “Work Life Balance,” our annual member-get-a-member effort, which is featured as a model of success in a guidebook published by the American Society of Association Executives.

ABA Advantage will exceed its budget goal of $5.4 million in non-dues revenue for this fiscal year. The program’s relationship with its longest-standing partner, Hertz, has been extended through 2018, with an increase in guaranteed annual non-dues revenue of more than $1 million over the term of the agreement. Among the latest companies to join the member-discount program are Hilton Hotels and Resorts, Clio, and LawPay.

ABA Publishing released almost 50 new titles in the past three months and is on track to exceed last year’s record number with 210 books in fiscal year 2014. Thanks to a more efficient process that reduces the e-book conversion process from one month to one week, the rate of production has doubled over the past fiscal year. Shop.americanbar.org now offers nearly 300 e-books, and 91 of those were made available since September 1, 2013.
ABA social media continues its impressive growth, with a 40 percent increase in followers since the beginning of the fiscal year. In May, the Association increased its base of followers by more than 1,400 on Twitter, more than 1,000 on LinkedIn, and nearly 1,200 on Facebook. A summary of the ABA’s social media footprint is available here.

**Finances and Operations**

In April, the Finance Committee tentatively approved the new consolidated budget for fiscal year 2015, which anticipates $211 million in revenue and $213 million in expenses. While largely complete, the budget will be refined at the June Board of Governors meeting and over the following months in preparation for formal approval at the Annual Meeting in August.

The long-awaited launch of our new association management system, Personify, occurred on May 1. We negotiated financial accommodations totaling more than $450,000 to compensate for the delayed implementation. Through the first month, we’re working with issues that are typical with such a massive technological change. We’ll get through those, and for years to come the American Bar Association will benefit from the very latest, full suite of Personify capabilities. We’re excited about our new capacity for state-of-the-art services.

Personify will be a critical component of ABAction! and our other growth plans. The system will allow us to provide new levels of service to our members – from more personalized marketing and a more streamlined shopping experience in the ABA Web Store to better data gathering and reporting functions.

**Advocacy, Communications, and Civic Engagement**

In April, more than 350 ABA members and bar association leaders joined together on Capitol Hill to advocate for the legal profession. Through more than 400 visits with legislators or their staff, participants urged funding for Legal Services Corporation and expressed strong opposition to proposed legislation that would put an undue tax burden on lawyers through an accrual accounting requirement placed on many attorneys and other professionals.

Building the case against the tax proposal has been a priority for several months. Following a January 31 legislative action alert to all state and local bar associations, the Governmental Affairs Office (GAO) and President James R. Silkenat sent correspondence to ABA members and almost 400 law firm managing partners to urge their support to defeat the legislation. Since ABA Day, GAO staff has personally met with 35 of those managing partners and held an April 21 briefing for about 50 congressional staff members on the legislation’s harmful effects on the overall economy.

President Silkenat met with National Security Agency (NSA) General Counsel Rajesh De in May to discuss government procedures for protection of the attorney-client privileged status of material obtained through government surveillance and how those procedures may be further strengthened. In a statement to the media, Silkenat said that “more can be done -- and should be done -- to preserve fundamental attorney-client privilege protections and help restore public confidence.”

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confidence in the privacy of privileged communications." The discussions with NSA began with a February letter to the agency and are continuing.

As President Barack Obama issued a proclamation to commemorate Law Day on May 1, the Division for Public Education joined organizations around the country in celebration of the rule of law with several events in Washington, D.C., centered on this year’s theme of voting rights, including an interactive discussion with 314 middle and high school students, a roundtable featuring leaders of 15 bar and advocacy groups, and a public discussion on universal suffrage with leading academics.

To help spread the Law Day theme, "Why Every Vote Matters," President Silkenat issued a radio news release that urged Congress to pass the Voting Rights Amendment Act of 2014. Silkenat’s message reached more than 19.8 million Americans through hundreds of radio stations nationwide.

Voting reform is the topic of "Dialogues on Election Reform: A Continuing Conversation with the States," a discussion paper published in May by the Standing Committee on Election Law. The report details needed improvements around the country and was the result of a yearlong series of Town Hall meetings held in five cities: in Miami on early voting, in Philadelphia on voter identification, in Columbus, Ohio, on voter registration, in Austin, Texas, on redistricting and election administration, and in Tempe, Ariz., on election reform and next steps.

In April, First Lady Michelle Obama and Dr. Jill Biden announced the ABA’s new partnership with the Military Officers Association to create a first-of-its-kind online guidebook for use by the estimated 5.5 million caregivers of military personnel and veterans. The initiative builds on the Association’s other work on behalf of service members, which includes the ABA Veterans Claims and Assistance Network, a multi-stakeholder effort to help clear the large backlog of veterans’ claims, also co-sponsored by the White House.

As the Section of Legal Education and Admissions to the Bar released employment data for 2013 law graduates that indicated a mild growth in jobs, the Legal Access Job Corps Task Force began in May to review the hundreds of applications for its catalyst grants that will build programs to help fill the jobs gap. The Task Force recently activated its website, which includes a new explanatory video and resource center to connect lawyers with low- and moderate-income people in need of assistance.

In May, the ABA announced the formation of the ABA Task Force on the Financing of Legal Education, which will study the cost of legal education and the financing of law schools, student loans, and educational debt. Led by former ABA President Dennis Archer, the Task Force will produce recommendations to inform policymakers throughout the legal community. The new group comes on the heels of the final report of the ABA Task Force on the Future of Legal Education, which proposed a redesign of the financial model now prevalent in law schools and an expansion of opportunities for delivery of legal services, among its recommendations.

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Rather than rely on expensive outside consultants, we developed and are implementing our action plans with the people that best know and have a passion for the ABA: our members and our staff. We’re the ones with a real stake to achieve important goals. We’ll use the right consultants for assistance as needed. But unlike consultant-driven plans, staff teams responsible for specific tasks, working with members, will follow through to implementation and beyond.

Following careful study, earlier this year I directed a significant staff reorganization to better facilitate an entrepreneurial and creative culture. We now have three groups: Revenue Generation Programs, ABA Operations and Support, and Member and Association Programs. Staff understands the importance to interface at all levels. For too long, many on staff operated in their silos and did not understand the importance of the big picture.

The reorganization included some realignment of existing staff. The quality of our Senior Managers is very high, and they are diverse: Of my 20 direct reports, 11 are women (including three women of color) and one is Hispanic. And of those 20, only three are performing substantially the same duties as when I arrived at the ABA four years ago.

On September 8, Elizabeth Andersen will be the new director of the ABA Rule of Law Initiative. Andersen served from 2003 to 2006 as executive director of the ABA Central European and Eurasian Law Initiative, the predecessor of ROLI. Most recently, she was executive director and executive vice president of the American Society of International Law. Pending her arrival, ABA ROLI is led by Steve Lepper.

Closing

We are very actively pursuing significant improvements for the Association. ABAction! is an exciting, comprehensive initiative with great potential — but it will only succeed if our members, leaders, and staff work together on the proposals.

More than ever, we need strong leadership and involvement by the members of the House of Delegates. Your ongoing support is critical as we implement our growth initiatives. I look forward to being with you in August in Boston!

Respectfully submitted,

Jack L. Rives
Executive Officer and
Chief Operating Officer

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

Scope held its last meeting April 25-26, 2014, in Santa Fe, New Mexico. Scope’s next meeting will be held in conjunction with the ABA’s Annual Meeting in Boston, Massachusetts, on Sunday, August 10, 2014.

Scope recommends the following entities sunset at the conclusion of the 2014 Annual Meeting:

Standing Committees on Federal Judicial Improvements/Judicial Independence (SCFJI / SCJI) - Scope agreed to cosponsor the SCFJI and SCJI resolution as presented to amend the ABA’s Bylaws to eliminate the Standing Committee on Federal Judicial Improvements and the Standing Committee on Judicial Independence, and to create one entity, the Standing Committee on the American Judicial System, which shall include a Subcommittee on State Courts and a Subcommittee on Federal Courts.

Task Force on Preservation of the Justice System - Scope’s recommendation is that the Board of Governors’ Task Force on Preservation of the Justice System sunset at the conclusion of the 2014 Annual meeting, and that the work of the Task Force shall become the responsibility of the Subcommittee on Preservation of the Justice System of the new Standing Committee on the American Judicial System.

Task Force on Solo and Small Firm Membership Development - Scope supports the recommendation of the Task Force that the Task Force on Solo and Small Firm Membership Development sunset at the conclusion of the 2014 Annual meeting, and the maintenance of the Solo and Small Firm Resource Center be transferred to the Solo, Small Firm and General Practice Division.

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Scope supports the recommendation of the Task Force that the Task Force on the Future of Legal Education sunset at the conclusion of the 2014 Annual meeting.

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:

- ABA Journal Board of Editors
- Rule of Law Initiative
- Africa Law Initiative Council
- Asia Law Initiative Council
- Central European and Eurasian Law Initiative Council
- Latin America and Caribbean Law Initiative Council
- Middle East and North Africa Law Initiative Council
- Standing Committee on Bar Activities and Services
- Standing Committee on Gavel Awards
- Standing Committee on Publishing Oversight
- Standing Committee on Public Education - Scope encourages the Standing Committee to continue to explore and develop new methods of operating and use of technology and social media for more cost effective and impactful outreach.
- Cybersecurity Legal Task Force
- Task Force on Gatekeeper Regulation and the Profession
- Task Force on Human Trafficking
- Task Force on Stand Your Ground Law

Scope recommends the following entities sunset at the conclusion of the 2015 Annual Meeting:

- Task Force on Gender Equity
- Legal Access Job Corps Task Force
- Task Force on Sustainable Development

Scope’s revised recommendation(s):

Special Committee on Hispanic Legal Rights and Responsibilities - Special Committee create a working group that would foster communication and collaboration among the four diversity entities. The working group should focus on ensuring that the substantive issues of the Special Committee on Hispanic Legal Rights and Responsibilities are integrated into the three (3) diversity entities by the conclusion of the 2016 Annual meeting. The working group shall consist of six (6) members: three (3) representatives from the Special Committee on Hispanic Legal Rights and Responsibilities, and one (1) representative from each of the three (3) diversity entities: the Commission on Racial and Ethnic Diversity in the Profession, Coalition on Racial and Ethnic Justice, and the Council for Racial & Ethnic Diversity in the Educational Pipeline. The working group shall not have a separate budget; The three (3) representatives from the three (3) “racial and ethnic” diversity entities shall act as liaisons to the Special Committee on
Hispanic Legal Rights and Responsibilities and shall regularly attend its meetings; and each of the three (3) representatives from the Special Committee on Hispanic Legal Rights and Responsibilities will be assigned one liaison assignment and will act as the liaison between the Special Committee on Hispanic Legal Rights and Responsibilities and the assigned diversity entity, including regular attendance at that entity’s meetings.

Scope will review the Diversity Center and the four diversity entities in the spring of 2016 (Special Committee on Hispanic Legal Rights and Responsibilities will be included in this review).

Scope’s 2014 Annual and Fall Agendas will include:

2014 Annual Meeting: Standing Committees on Annual Meeting Program and Planning, Audit, Constitution and Bylaws, Meetings and Travel, Membership, and Technology and Information Systems

2014 Fall Meeting: Standing Committees on Delivery of Legal Services, Group and Prepaid Legal Services, Lawyer Referral and Information Service, Lawyers' Professional Liability, Legal Aid and Indigent Defendants, Paralegals, Pro Bono and Public Services; Commissions on Interest on Lawyer Trust Accounts, and Lawyer Assistance Programs; Special Committee on Death Penalty Representation; and Task Force on International Trade in Legal Services

Respectfully Submitted,

Estelle H. Rogers, Chair
Richard A. Soden, Vice Chair
John L. McDonnell, Jr., Secretary
Sharon Stern Gerstman, Member
Leslie Miller, Member
Michael E. Burke, IV, Chair, SOC
Sandra R. McCandless, ex-officio
Michael Pellicciotti, ex-officio

Dated: June, 2014
The Committee on Scope and Correlation of Work ("Scope") consists of five members of the Association, one of whom is elected each year by the House of Delegates to serve a full (5 years) term beginning with the adjournment of the Annual Meeting during which he or she is elected.

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

The Nominating Committee was fortunate to have the difficult task of selecting from thirteen (13) exceptional applicants with impressive credentials. However, only one nominee could be selected, the Nominating Committee voted to nominate Thomas M. Fitzpatrick of Tukwila, Washington to fill the vacancy that will occur at the conclusion of the 2014 Annual Meeting.

It is the belief of the Nominating Committee that the breadth of Mr. Fitzpatrick's extensive background in bar activities and knowledge of the Association as a whole qualifies him for membership on the Committee on Scope and Correlation of Work.

Respectfully Submitted,

Robert M. Carlson, Chair
Michael Pelliccotti
Sharon Stern Gerstman
Estelle H. Rogers
Michael E. Burke, IV

Dated: June 2014
RESOLVED, That the American Bar Association urges Congress to amend 28 U.S.C. § 44(c) to insert the phrase "and territory" after the phrase "each state", so that all states and territories within the jurisdiction of the federal courts of appeal may be represented on its bench; and

FURTHER RESOLVED, That the American Bar Association urges the President of the United States to nominate judges of federal courts of appeal that are representative of the geographic areas over which they exercise jurisdiction and, notwithstanding the lack of a statutory mandate, to nominate a Virgin Islands judge or attorney to the United States Court of Appeals for the Third Circuit to the current vacancy for which a nominee has not been named, and to nominate a Guam or Northern Mariana Islands judge or attorney to the next vacancy on the United States Court of Appeals for the Ninth Circuit.
That which has been characterized as “government of the people, by the people and for the people” is as eternally difficult a business as it is an exciting and inciting idea.\footnote{William Henry Hastie, Dedication Ceremony at Independence Hall, 436 ANNALS 1, 1 (1976).}


The practice in filling circuit vacancies has been to replace each with a nominee from the same State from which his or her predecessor was nominated. \ldots \footnote{Hearing on Ninth Circuit Nominee Owens Postponed, METROPOLITAN NEWS-ENTERPRISE (Oct. 23, 2013), http://www.mrnnews.com/articles/20130202021212.htm.}

\textbf{Patrick Leahy} (D-VT), United States Senator (1975-Present), Chair, Senate Committee on the Judiciary (2007-Present).

\section*{BACKGROUND
Qualifications and Appointment Procedure}

Each of the federal district courts is assigned to one of 12 regional federal courts of appeal, and hears appeals from the district courts located within its circuit. Pursuant to section 44 of title 28 of the United States Code, the only residency requirement for court of appeals judges, outside of the District of Columbia, is that the judge “be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service,” and that there “be at least one circuit judge in regular active service appointed from the residents of each state in that circuit.”\footnote{28 U.S.C. § 44(c).}

Although particular seats on the courts of appeal are ostensibly not assigned to any particular state or territory, it has been a long-standing practice for the President of the United States to consult with “home-state” senators when a vacancy arises.\footnote{Orrin G Hatch, At Last a Look at the Facts: The Truth About the Judicial Selection Process. Each is Entitled to His or Her Own Opinion, But Not to His Own Facts, 11 GEO. MASON L. REV. 467, 476-76 (2003).} This tradition started as an informal senatorial courtesy, but later became institutionalized through the “blue-slip” procedure, in which the Senate Committee on the Judiciary takes no action on a judicial nominee unless both “home-state” senators return a slip of paper certifying that they do not object to the appointment.

\footnote{Orrin G Hatch, At Last a Look at the Facts: The Truth About the Judicial Selection Process. Each is Entitled to His or Her Own Opinion, But Not to His Own Facts, 11 GEO. MASON L. REV. 467, 476-76 (2003).}
nomination. For purposes of this procedure, the "home-state" senators are often determined by ascertaining the residency of the court of appeals judge who previously held the seat, which has occasionally led to conflict if a judge moved his chambers after confirmation. Thus, attempts to "transfer" a court of appeals judgeship from one state to another are rarely successful, although not unprecedented.

Court of Appeals Judgeships: Appointments From Outside the Contiguous 48 States

Jurisdictions outside of the contiguous United States have been particularly susceptible to having seats transferred or simply having no representation at all. Although Hawai‘i was assigned to the United States Court of Appeals for the Ninth Circuit in 1900 and achieved statehood in 1959, Hawai‘i was unrepresented on the Ninth Circuit until April 23, 1971, with the appointment of Herbert Choy by President Richard M. Nixon. Similarly, while Alaska was assigned to the Ninth Circuit in 1948 and became a state in 1959, Alaska had no representation on the Ninth Circuit until 1980, when President Jimmy Carter appointed Robert Boochever.

Perhaps most notably, Hawai‘i and Alaska both completely lost their representation on the Ninth Circuit when those initial judges assumed senior status. Rather than nominating an Alaskan judge or attorney to succeed Judge Boochever when he assumed senior status in 1986, President Ronald Reagan appointed an Oregon attorney, Diarmuid O'Scannlain. While Alaska's lack of representation was relatively brief, in that President George H.W. Bush subsequently nominated Alaskan judge Andrew Jay Kleinfeld to the Ninth Circuit in 1991, Hawai‘i was without a Ninth Circuit judge for more than two decades. When Judge Choy assumed senior status in 1981, President Reagan appointed Melvin Brunetti, a Nevada attorney, to replace him, and no attempt was made to appoint another Hawai‘ian to the Ninth Circuit. Significantly, the failure to replace Judge Choy with a fellow Hawai‘ian resident is precisely what

2 Ninth Circuit Nominees, supra note 2.
4 Hatch, supra note 4, at 50 n.11.
7 Notably, Judge Kleinfeld's nomination to the Ninth Circuit is credited, at least in part, to the fact that Judge Boochever immediately moved his chambers from Alaska to California upon assuming senior status, which provided "Alaska senators a compelling argument for a new judge in their state during the Bush administration." Jennifer E. Sping, The Icebox Cometh A Former Clerk's View of the Proposed Ninth Circuit Split, 73 WASH. L. REV. 875, 941 n.314 (1998).
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caused Congress to amend section 44(c) of title 28 to specify that at least one active federal court of appeals judge be a resident of each state within the circuit.13 As a result of that legislation, Hawai‘i attorney Richard Clifton became the second resident of Hawai‘i to serve on the Ninth Circuit upon his appointment by President George W. Bush in 2002.

The situation for United States territories is even bleaker. Unlike states, which constitute their own sovereigns under our federalist system, territories lack any separate sovereignty, and are thus subject to plenary control by Congress.14 Except for American Samoa, which lacks a federal district court, the inhabited territories are each assigned to a geographic circuit, with Puerto Rico belonging to the First Circuit, the Virgin Islands being a part of the Third Circuit, and Guam and the Northern Mariana Islands both allocated to the Ninth Circuit.15 The Virgin Islands and Puerto Rico have been more fortunate than Guam and the Northern Mariana Islands; while Guam and the Northern Mariana Islands have never had any representation on the Ninth Circuit bench, a Virgin Islander and a Puerto Rican have respectively served on the Third Circuit and First Circuit.

William Henry Hastie achieved many milestones in his long, distinguished career of public service, including becoming the first African American federal judge, the first African American Governor of the Virgin Islands, and the first African American federal court of appeals judge.16 That last milestone occurred on October 21, 1949, when President Harry S. Truman appointed Judge Hastie to a newly authorized judgeship on the Third Circuit. Judge Hastie served as an active judge on the Third Circuit, including as Chief Judge, until he assumed senior status on May 31, 1971, and continued to serve in that capacity until his death on April 14, 1976.

Although rightfully celebrated as one of the pioneers of the civil rights movement, it is often forgotten that, upon his appointment to the Third Circuit, Judge Hastie also became the first judge or lawyer from a United States territory to sit on the federal court of appeals to which that territory is assigned.17 Drawing on his experience as both a Virgin Islands judge and
Governor of the Virgin Islands, Judge Hastie ensured that the citizens of the Virgin Islands possessed a voice on the federal court that, during his period of service, acted as the de jure court of last resort for the Virgin Islands. But as with Judge Boochever and Judge Choy, a fellow Virgin Islander did not succeed Judge Hastie on the Third Circuit bench; rather, President Richard M. Nixon appointed a New Jersey judge, James Rosen, to the position. Today, the Virgin Islands remains without representation on the Third Circuit, even though the number of appeals originating in the Virgin Islands are roughly comparable to those originating from Delaware, a jurisdiction which has two active and two senior judges on the Third Circuit.

Only one territory, Puerto Rico, is presently represented on any federal court of appeals. Juan Torruella, a judge of the United States District Court for the District of Puerto Rico, was appointed by President Reagan on October 3, 1984, to a newly-authorized judgeship on the United States Court of Appeals for the First Circuit. Judge Torruella remains an active judge on that court to this date, and served as its Chief Judge from 1994 to 2001. However, given that section 44(c) of title 28 of the United States Code only mandates there “be at least one circuit judge in regular active service appointed from the residents of each state in that circuit,” there is no guarantee that Judge Torruella, upon his retirement, will be succeeded by another Puerto Rican judge—notwithstanding the fact that appeals from Puerto Rico have historically accounted for approximately 30 to 40 percent of the First Circuit’s traditional appellate case load.

THE NEED FOR TERRITORIAL REPRESENTATION ON THE COURTS OF APPEAL

Judge Kleinfeld, in written testimony to the Commission on Structural Alternatives for the Federal Courts of Appeals, explained how the homogeneity of the composition of Ninth Circuit—the vast majority of whom hale from California—adversely affects the quality of appellate decisions:

41 Until the establishment of the Supreme Court of the Virgin Islands in January 2007, the Virgin Islands did not have a fully developed local judicial system, with decisions of the local trial courts appealable as of right to the District Court of the Virgin Islands. With de facto court of last resort for the Virgin Islands. But as with Judge Boochever and Judge Choy, a fellow Virgin Islander did not succeed Judge Hastie on the Third Circuit bench; rather, President Richard M. Nixon appointed a New Jersey judge, James Rosen, to the position. Today, the Virgin Islands remains without representation on the Third Circuit, even though the number of appeals originating in the Virgin Islands are roughly comparable to those originating from Delaware, a jurisdiction which has two active and two senior judges on the Third Circuit.

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41 Until the establishment of the Supreme Court of the Virgin Islands in January 2007, the Virgin Islands did not have a fully developed local judicial system, with decisions of the local trial courts appealable as of right to the District Court of the Virgin Islands with a further appeal as of right permitted to the Third Circuit. See Edwards v. HOVensa LLC, 497 F.3d 355, 361 n.3 (3d Cir. 2007) (summarizing historical relationship between Virgin Islands Judiciary and the federal courts).


43 Delaware is currently represented on the Third Circuit by active judges Thomas I. Ambro and Kent A. Jordan, as well as senior judge Walter Stapleton and Jane Roth.


Much federal law is not national in scope. Quite a lot of federal litigation arises out of federal laws of only local applicability, such as the Bonneville Power Administration laws, the laws regarding Ilopi and Navaho relations, the Alaska National Interest Lands Conservation Act, and the Alaska Native Claims Settlement Act. It is easy to make a mistake construing these laws when unfamiliar with them, as we often are, or not interpreting them regularly, as we never do.

Much federal procedure mirrors state procedure in the particular district. For example, Federal Rule of Civil Procedure 4 imports state procedure. Where law is not specified, bar and bench customs in the different localities often fill it in. It is very helpful for judges to know how releases, attorney’s fees contracts, and other documents for common transactions, are typically written in a state, so that they know when something is suspicious and when it is ordinary. In diversity cases, we are required to apply state law in federal court.

Yet on our court, ordinarily no judge on the panel has intimate familiarity with the law and practices of the state in which the case arose, unless that state is California. A judge on my court sits in Alaska perhaps once in ten years, and ordinarily never sits in Montana, Idaho, Nevada, or Arizona.

Social conditions also vary, in ways that can color judges’ reactions to facts, and disable them from understanding the factual settings of cases not arising in California. For example, judges from Los Angeles have different assumptions about what kind of people have guns than judges from Idaho, Montana, and Alaska, who tend to associate gun ownership with a high proportion, perhaps a considerable majority, of the longtime law-abiding residents of the state. Native Americans have reservations in most states in our circuit, but in Alaska reservations have generally been abolished. It is quite possible for Alaska lawyers not to point this out in a brief because it is so obvious and well known, and for Ninth Circuit judges on a panel and their law clerks, who have never been to Alaska, not to know it.24

These considerations apply with even greater weight to the territories. While federal courts of appeal typically only interpret state law in diversity cases, they must resolve issues of territorial law much more frequently. Unlike the states, where the state supreme court possesses the final word over interpretation of the state constitution, the highest courts of the territories of Puerto Rico, Guam, the Northern Mariana Islands, and the Virgin Islands share concurrent jurisdiction with the federal courts to interpret their respective constitutions or organic acts. This is because territories are not separate sovereigns, but rather derive their sovereignty from the United States; as a result, the constitutions and organic acts of the territories are actually federal statutes which may be freely interpreted by federal courts without providing any deference to the

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Another peculiarity stemming from the fact that the territories and the United States are treated as a "single sovereign" is that, while state criminal prosecutions can never be brought in federal court, violations of both federal and territorial law must be simultaneous prosecuted in federal court in order to comply with the Double Jeopardy Clause of the United States Constitution. As a result, federal courts of appeal must interpret territorial criminal law on a regular basis, often without any guidance from the territorial supreme court, which may lead to surprising decisions.

Moreover, each territory only became a part of the United States relatively recently—at least in comparison to the 50 states—and as a result has retained its own distinct culture which continues to influence its legal system. Puerto Rico, having been acquired from Spain at the conclusion of the Spanish-American War in 1898, maintains Spanish as an official language, and follows the civil law system. Guam, also acquired from Spain, operated under nearly-absolute military rule until 1950, and is the only jurisdiction under the United States flag to have actually been invaded and occupied by a foreign power. The Virgin Islands, purchased from Denmark in 1917, has been outside of the United States customs zone since its acquisition, and retains several remnants of European influence, such as by rejecting the American rule on attorney's fees in favor of the English rule. And the Northern Mariana Islands, having negotiated its entry into the United States in 1978 in lieu of becoming an independent nation, is

21 See, e.g., Guam v. Guerrero, 290 F.3d 1210, 1214 (9th Cir. 2002) (“[D]espite the fact that we are dealing with Guam's ‘Bill of Rights,’ we cannot ignore the fact that § 1421b(a) is a federal statute dealing with an issue of federal constitutional import, not a local law. As such, we employ a de novo standard of review.”).

22 See, e.g., Gov't of the V.I. v. Dowling, 633 F.2d 660, 669 (3d Cir. 1980).

23 See, e.g., Gov't of the V.I. v. Lewis, 620 F.3d 359, 364 n.5 (3d Cir. 2010) (determining, in the first instance, whether Virgin Islands law allows for a justification defense).

24 For example, the Third Circuit has repeatedly held that, unlike the laws of Delaware and other states, “Virgin Islands law contains no presumption that an individual lacks a permit to carry a firearm,” and therefore “the Government bears the burden of proof in the Virgin Islands that the defendant had no license for a recovered firearm.” United States v. Lewis, 672 F.3d 232, 240 (3d Cir. 2012) (citing United States v. Gatlin, 614 F.3d 374, 378-79 (3d Cir. 2006)). The Supreme Court of the Virgin Islands, however, has expressed some puzzlement at this time of decisions, given longstanding prior case law in Virgin Islands local courts holding the opposite that were simply ignored by the Third Circuit panels, as well as the fact that the pertinent Virgin Islands statutes included language nearly word-for-word identical as statutes from other states in which courts also held the opposite. People of the V.I. v. Murrell, 56 V.I. 796, 809-10 (V.I. 2012).


29 United States v. Hyde, 37 F.3d 116, 121 (3d Cir. 1994).

30 See Baptiste v. Gov't of the V.I., 529 F.2d 100, 102 (3d Cir. 1976).
able to exercise numerous powers that would be easily held unconstitutional if attempted by any other jurisdiction, such as restricting land ownership solely to those of Northern Mariana descent. But while each territory’s distinct culture and practices should, when appropriate, be considered by a federal court hearing a case originating from the territory, it is simply not possible for a federal judge based in Philadelphia to obtain the same knowledge of the Virgin Islands as a judge who keeps his chambers in St. Thomas, or for a judge who lives in Boston to be as familiar with the Puerto Rican legal community as one based in San Juan.

Additionally, this knowledge gap cannot be bridged by allowing federal district court judges assigned to the territories to sit on the federal courts of appeals by designation. Although the United States District Court for the District of Puerto Rico became an Article III court in 1966, the District Court of Guam, District Court of the Northern Mariana Islands, and District Court of the Virgin Islands, despite their names, all remain Article IV courts. As a result, the Supreme Court of the United States has held that federal district judges in Guam, the Northern Mariana Islands, and the Virgin Islands are prohibited from sitting by designation on a federal court of appeal. Consequently, the only way to ensure that all territories are represented on the federal courts of appeal is for the President to nominate, and the Senate to confirm, residents of each territory to positions on the respective court of appeals, as had been previously done with Judge Hastie and Judge Torruella.

Of course, because every federal court of appeals hears cases in panels, with judges typically assigned to panels by random draw, there is no guarantee that—for example—a Virgin Islands judge sitting on the Third Circuit would hear a Virgin Islands case. However, judges from the territories would still be able to influence the decision-making process simply from being on the court, even if not assigned to a particular case. Many courts of appeal, such as the Third Circuit, require that precedential opinions be circulated to the entire court for review, rather than just to the members of the panel, which would allow a judge appointed from a territory to inform the panel of an obvious error or misconception before it becomes binding precedent. And in all of the federal courts of appeals any active judge may initiate a vote to have a case heard en banc.

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![Image](10A.png)
THE ROLE OF THE AMERICAN BAR ASSOCIATION

The American Bar Association, as the national representative of the legal profession, has established goals to further its mission of defending liberty and delivering justice. Specifically, the American Bar Association has made it its objective to “[p]romote full and equal participation in the association, our profession, and the justice system by all persons,” ABA Goal III.1, and to “[w]ork for just laws, including human rights, and a fair legal process.” ABA Goal IV.3. Consistent with its mission, the American Bar Association, on its website promoting its theme for Law Day 2014, “American Democracy and the Rule of Law: Why Every Vote Matters,” states in the very first paragraph that

One of our most cherished national ideals, expressed eloquently by Abraham Lincoln, is “government of the people, by the people, for the people.” It is a principle enshrined in our Nation’s founding documents, from the Declaration of Independence’s assurance that governments derive their powers from the consent of the governed, to the opening three words of the Preamble to the U.S. Constitution, “We the People.”

To this end, the American Bar Association has seen fit to advocate for the interests of the territories, such as in 1990, when the House of Delegates passed Resolution 8f to specifically urge President George H.W. Bush to nominate, and the Senate confirm, an appointee to the District Court of the Virgin Islands, which at the time had no full-time active judge for an unacceptably long period of time.

Unquestionably, several aspects of the relationship between the United States and its territories are inherently undemocratic; for instance, citizens residing in the territories lack the right to vote for President or for any voting members of Congress. However, while some of these inequities may only be remedied through a constitutional amendment or by overturning United States Supreme Court precedent, ensuring that the territories are permanently represented on the federal courts of appeal can be achieved through ordinary legislation.

Under current federal law, it is mandatory that, for the 12 regional circuit courts of appeal, there “be at least one circuit judge in regular active service appointed from the residents of each state in that circuit.” Significantly, this provision was itself adopted in 1997 in direct response to the collective failure of Presidents Reagan, Bush, and Clinton to appoint a Hawai’i judge to the Ninth Circuit after Judge Choy assumed senior status. Simply amending this provision to insert “and territory” after the words “each state” would be sufficient to ensure that

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42 Approved by the ABA House of Delegates (February 1990).
44 Brand, supra note 7, at 50 n.11.
at least one judge from each territory will serve on the pertinent court of appeals. Given that none of the territories are privileged with a voting representative in either the House of Representative or the Senate, action by the American Bar Association would greatly increase the likelihood of Congress enacting such legislation.

Additionally, the territories’ lack of representation could also be immediately remedied by the President nominating residents of the territories to vacancies on the pertinent courts of appeals. As the appointments of Judge Hastie to the Third Circuit and Judge Torruella to the First Circuit illustrate, nothing precludes residents of the territories from serving on the federal courts of appeals. However, this is not an effective long-term solution, given that the territories lack any representation in the Senate—voting or otherwise—and cannot vote for President. In light of the territories’ substantially reduced political power relative to the states, there is a significant danger that—in the absence of legislation mandating that at least one judge be a resident of each territory—the seat will simply be transferred from the territory to a state, as was the case when Judge Hastie assumed senior status. Moreover, it is worth noting that the only territorial judges appointed to the courts of appeal—Judge Hastie and Judge Torruella—were both nominated to newly-created judgeships that had not yet been “claimed” by any “home-state” senators, and that simply urging the President to, in effect, “transfer” existing seats to the territories could prove politically difficult. Nevertheless, seats on the federal courts of appeal do not belong to any particular state or territory, and thus nothing, other than informal Senate custom, precludes such a nomination. As again, as the territories lack any representation in the Senate, the support of the American Bar Association would be critical to ensuring that such nominees could be successfully confirmed.

SUMMARY

The recommended resolutions will enable the American Bar Association to facilitate its long-standing mission of promoting the administration of justice and ensuring that all Americans, regardless of the state or territory in which they reside, are represented on the federal courts of appeals.

Respectfully submitted,

Nycole Thompson
Virgin Islands Bar Association
August 2014

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GENERAL INFORMATION FORM

Submitting Entity: Virgin Islands Bar Association

Submitted By: Adriane J. Dudley

1. Summary of Resolution(s). The purpose of this resolution is to amend existing federal law, 28 U.S.C. § 44(c), to insert the phrase “and territory” after the phrase “each state,” to ensure that all states and territories within the jurisdiction of the federal courts of appeal are represented on its bench. The resolution also urges, in the interim, that the President nominate, and the Senate confirm, a member of the Virgin Islands Bar to the current vacancy on the United States Court of Appeals for the Third Circuit for which a nominee has not been named, and a member of the Guam or Northern Marianas Island Bars to a future vacancy on the United States Court of Appeals for the Ninth Circuit.

2. Approval by Submitting Entity. Approved by the Virgin Islands Bar Association Board of Governors on April 17, 2014.

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

No

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

The American Bar Association has made it its objective to “[p]romote full and equal participation in the association, our profession, and the justice system by all persons,” ABA Goal III.1, and to “[w]ork for just laws, including human rights, and a fair legal process.” ABA Goal IV.3. Additionally, the ABA has designated “American Democracy and the Rule of Law: Why Every Vote Matters” as its theme for Law Day 2014. Passage of this resolution furthers all of these existing policies, in that it would ensure that all Americans, regardless of the state or territory in which they reside, have a representative from their jurisdiction on their federal court of appeals.

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.

A copy of the resolution would be distributed to the President of the United States and all members of Congress.

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

None, other than the costs of transmitting the resolution to the President and members of Congress.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

American Bar Association Young Lawyers Division
Standing Committee on Federal Judicial Improvements
Standing Committee on the Federal Judiciary
Commission on Racial and Ethnic Diversity in the Profession

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

Adriane J. Dudley
Dudley Rich Davis LLP
5194 Dronningens Gade Suite 3
St Thomas, VI 00802
340.776.7474
adudley@dudleylaw.com

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

Adriane J. Dudley
Dudley Rich Davis LLP
5194 Dronningens Gade Suite 3
St Thomas, VI 00802
340.776.7474
adudley@dudleylaw.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The purpose of this resolution is to amend existing federal law, 28 U.S.C. § 44(c), to insert the phrase “and territory” after the phrase “each state,” to ensure that all states and territories within the jurisdiction of the federal courts of appeal are represented on its bench. The resolution also urges, in the interim, that the President nominate, and the Senate confirm, a member of the Virgin Islands Bar to the current vacancy on the United States Court of Appeals for the Third Circuit for which a nominee has not been named, and a member of the Guam or Northern Marianas Island Bars to a future vacancy on the United States Court of Appeals for the Ninth Circuit.

2. Summary of the Issue that the Resolution Addresses

All federal district courts, including those based in United States territories, are assigned to one of the 12 regional federal courts of appeals. Under federal law, it is required that there be at least one circuit judge in regular active service appointed from the residents of each state in that circuit. However, no such provision requires that there be one circuit judge in active service appointed from the territories that are assigned to that circuit. As a result, since their establishment, only two judges hailing from the territories have ever been appointed to a federal court of appeals.

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

The resolution will address this issue by amending existing law to require that there “be at least one circuit judge in regular active service appointed from the residents of each state and territory in that circuit.” Until such legislation is passed, the resolution urges the President to nominate, and the Senate to confirm, a Virgin Islands attorney or judge to the current vacancy on the Third Circuit, and a Guam or Northern Marianas Islands attorney or judge to the next vacancy on the Ninth Circuit.

4. Summary of Minority Views

No minority views were expressed when the Virgin Islands Bar Association considered this issue.

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No minority views were expressed when the Virgin Islands Bar Association considered this issue.
SPONSOR: Edward Haskins Jacobs

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

Amends §1.2 of the Constitution to read as follows:

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

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

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On a Proposal to Amend the ABA Constitution

Add this as a fundamental ABA purpose:

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

For consideration at the August 11 and 12, 2014 Annual Meeting

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

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

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

Once again, God willing, I will move for the adoption of this proposal at the House of Delegates in Boston in August 2014. I made the same motion before the House of Delegates the last thirteen years in a row. My hope continues that some day our culture of death will be overcome. We lawyers must not turn a blind eye to our children being poisoned to death and torn apart in our midst. I may be crying in the wilderness, but the cry - and the thirst for justice it represents - will never die.
In none of the thirteen earlier meetings of the House of Delegates where this proposal was considered was there an actual vote on the proposal. The first ten times, after the presentation of the proposal, the Standing Committee on Constitution and Bylaws reported to the House that the proposal is inconsistent with another purpose of the ABA - to uphold and defend the Constitution of the United States - and that therefore the proposal was "out of order." Each time the Committee made that bold assertion without explaining why it is so (despite my explicit written request to the Committee in each of the last several years to explain in writing why this position is taken). And in each of those ten meetings, then a motion was made that the House postpone indefinitely action on my proposal. In 2010, a member of the House who disagrees with this proposal nevertheless tried to get the House to vote on the proposal, but his motion was rejected. I didn't quite catch his name then, but now I think it may have been Robert L. Weinberg - thank you, Bob.

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

In 2012, the Committee chairperson said that the proposal is inconsistent with other purposes of the Association and should be rejected, but he did not state why he concluded that the proposal is inconsistent with other purposes of the Association and did not specifically mention any of the inconsistent purposes. Then someone else moved, not that the proposal be rejected as suggested by the Chairperson, but rather that the proposal be postponed indefinitely. In the voice vote then taken, I'd say about 10 delegates opposed the motion, some quite vociferously. By overwhelming voice vote, the proposal was postponed indefinitely.

In 2013, Bob Weinberg again opposed the motion to postpone indefinitely, arguing for a vote on the proposal itself; and another delegate, who also seemed to be opposed to the proposal, rose to say he agreed it should be voted on, and stated that the ABA can take positions on "moral issues," and said the proposal is not inconsistent with upholding and defending the Constitution of the United States - such supposed inconsistency being the reason given for postponing action on the proposal year after year after year. This year there were many "nayes" on the vote to postpone indefinitely.

1 Of course, even if the proposal were voted upon and rejected, it could continue to be made year after year, into the future.

2 In 2001 by a non-committee member of the House, and in each time thereafter by the Committee representative himself or herself.

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

In 2012, the Committee chairperson said that the proposal is inconsistent with other purposes of the Association and should be rejected, but he did not state why he concluded that the proposal is inconsistent with other purposes of the Association and did not specifically mention any of the inconsistent purposes. Then someone else moved, not that the proposal be rejected as suggested by the Chairperson, but rather that the proposal be postponed indefinitely. In the voice vote then taken, I'd say about 10 delegates opposed the motion, some quite vociferously. By overwhelming voice vote, the proposal was postponed indefinitely.

In 2013, Bob Weinberg again opposed the motion to postpone indefinitely, arguing for a vote on the proposal itself; and another delegate, who also seemed to be opposed to the proposal, rose to say he agreed it should be voted on, and stated that the ABA can take positions on "moral issues," and said the proposal is not inconsistent with upholding and defending the Constitution of the United States - such supposed inconsistency being the reason given for postponing action on the proposal year after year after year. This year there were many "nayes" on the vote to postpone indefinitely.

1 Of course, even if the proposal were voted upon and rejected, it could continue to be made year after year, into the future.

2 In 2001 by a non-committee member of the House, and in each time thereafter by the Committee representative himself or herself.
probably because more delegates wanted to vote the proposal down directly - but
despite what appeared to be about equal “ayes” and “nayes,” the chairperson declared
upon the voice vote that the ayes had it, and the proposal was again postponed
indefinitely on the extraordinarily odd contention that defending the right to life of all
innocent human beings is inconsistent with upholding and defending the Constitution
of the United States. What a Constitution we must have!

In 2001 the vote on the motion to postpone indefinitively was 209 to 39, but
you will never find the precise vote in the record of proceedings of that meeting, because
even though the vote was displayed electronically on a large screen in the front of the
room, the precise vote itself was not recorded. In 2002 through 2011 the vote on the
motion to postpone indefinitively was taken by voice vote. In 2002 through 2010, many
transmitted voices intoned “yes,” and perhaps two to four people said “no,” except 2005,
when I thought I heard maybe ten courageous “no’s”.

I want to see the House pass this proposal, but I realize passage now would take a
miracle. This is driven home in each when new members of the House who have never
been members before stand up in order to be introduced to the assemblage. Each year
there are well fewer than twenty new members. And, of course, the House several years
ago defeated a term limits proposal. It would seem, then, that the House of Delegates is
a pretty closed club with lots of long-term members. In addition to looking for that
miracle, I am also hoping that the consciences of a few of the members will be pricked
enough that they will be willing to “submit a salmon slip” and stand up in the House and
speak out for the right to life of the innocents in the face of embarrassment and possible
 ostracism. Even if I have no chance short of a miracle for passage of the proposal, if we
can just “get the ball rolling” with a little bit of courage from members who agree, who
knows? Maybe before too many more years baby-killing-in-the-womb will go the way of
slavery. It could happen. “My section [bar association, committee, etc.] does not want

Although the ABA has an annual budget of over $150 million, the House of Delegates is not willing
to commit the relatively minor sum it would take in order to bring transparency and accountability to the
actions of the House by having every member’s vote electronically recorded when it deals with the most
important matters, such as amendments to the ABA constitution or bylaws, and the election, amendment, or rescission of ABA policy positions. I presented to the ABA House of Delegates a proposal to bring that
transparency and accountability to the House and to have the results posted for a year on the ABA
website. It failed miserably, with only about ten of the 500 or so in attendance voting in favor (based upon
my guesstimate at the time of the voice vote). Transparency in actions of the House of Delegates should be
pressed for every year until it is reached, but for now at least I leave that to others. In 2005 the
chairperson of the House mentioned in his remarks that he, too, thinks the House should have electronic
voting. And it would not take much money to bring accountability to the House of Delegates. At a CLE
program in the Virgin Islands not too long ago, hand-held voting devices were given to the attendees
to make part of the program interactive, so it cannot be very expensive, even if the individual votes, tied to
specific members, are permanently recorded as part of the process. It is amazing in this day and age that
the ABA, the House of Delegates is a pretty closed club with lots of long-term members. In addition to looking for that
miracle, I am also hoping that the consciences of a few of the members will be pricked
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can just “get the ball rolling” with a little bit of courage from members who agree, who
knows? Maybe before too many more years baby-killing-in-the-womb will go the way of
slavery. It could happen. “My section [bar association, committee, etc.] does not want
its representative to vote on this kind of social issue" is not a legitimate position to take, is it? The House of Delegates addresses these kinds of issues every annual meeting. The representative of your section, etc., must be ready to address them also if your section, etc. is to be fully represented in the House. Please, stand up and be counted. If you don’t, won’t you regret it in the end, when you look back on your life seeking evidence of courage? I write as I do in this paragraph because I cannot believe that only ten members of the House, or fewer, recognize the obvious truth of my argument. So, once again, on to the meat of the issue:

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

Or does your child, by her mere humanity, have a sacrosanct right to live, and continue to develop and grow in liberty and pursue happiness as she comes to know it? The answer: Human life, including that of our littlest ones, is sacred. This realization was one of the greatest advances of Christianity over the paganism that condoned exposing unto death the unwanted child. Abortion in our society is quicker than exposure, and is hidden away in the womb (or at the end of the birth canal) so that we can lie to ourselves about what we are doing. But respect for innocent human life must be fundamental to civilized society, as “Thou Shalt Not Kill” signifies.

We should know that human life is sacred and to be defended against all competing claims of “right.” Our nation’s declaration of birth - the Declaration of Independence of July 4, 1776 - set forth the raison d’être for the United States of America as a separate nation. The Declaration asserted that it is self-evident that all men are endowed by their Creator with the unalienable right to life; and that governments are instituted among men to secure the rights to life, liberty, and the pursuit of happiness. This insistence upon governmental protection of the right to life of all innocent human beings must be a fundamental function of any legitimate government.

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

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

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

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

But can any of us, with what we know about the child’s unique set of DNA
beginning at conception, even pretend now that this is not true? The possibility of
twinning does not diminish the recognition that upon conception there is brand new,
separate, unique human life in the mother’s body – a new person or persons. The
mother is responsible for taking care of that child, but she does not own the child – God
doos. Slavery made the mistake of thinking that one human being can own another. We
now know that no man should be permitted under man’s law to own another. But how

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doos. Slavery made the mistake of thinking that one human being can own another. We
now know that no man should be permitted under man’s law to own another. But how
can one justify killing another innocent human being if one does not own him? The inconvenience and burden of the other’s life on one’s own is not enough. The burden of the dependent relation does not end at the birth canal. How far should the right to kill those dependent upon us go? Should the standard evolve from the complete dependence of the womb to the excessive dependence of severe mental retardation and severe physical handicaps?

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

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

Motherly love was known through the centuries until recently as the gold standard of love - unselfish and without limit - the willingness to give one’s very life for one’s child. This love is the foundation for a culture of life. Abortion is the foundation for a culture of death. Speaking of being bamboozled, recall the serpent in the Garden of Eden, enticing Eve to eat the forbidden fruit on the promise that she would become like God. Now mothers are enticed into abortion with the lie that they can become like men, and needn’t be burdened with child in the womb or that child after birth. Eat the fruit of abandonment of your child and freedom is yours. A Faustian bargain if ever there were one.

The United States of America fails in its fundamental mission if it refuses to secure for the weakest and most vulnerable innocent people amongst us the rights to life, liberty, and the pursuit of happiness. The ABA fails in its mission if it fails to stand up for the rights of the powerless. If we deny the right to life for children in the womb because they are developmentally immature (and therefore, in the eyes of some, not “persons”), then we not only tragically deny these children their rights - we open the door to infanticide and the killing of other weak and infirm people. There is a crisis in the United States over the loss of our moral roots. The ABA, which claims to be the voice of the legal profession, and to be an advocate of the protection of fundamental rights, should become a strong voice for all the weak and vulnerable innocents who so desperately need champions now.
We would do well also to realize that the Constitution of the United States - and the Supreme Court's interpretation of it - is not the fundamental source of human rights within the United States. Our rights to life, liberty, and the pursuit of happiness do not arise out of our own "social contract" - the Constitution. To the contrary, as the Declaration asserts, these rights are endowed upon us by our Creator. The rights of the child are a burden to the mother, but fundamental rights of others are a burden we must bear.

At the 2001 Annual Meeting, the Chair of the Standing Committee on Constitution and Bylaws reported that the Committee "voted to recommend to the House that the proposal be considered out of order, in that it is inconsistent with the first purpose clause of Association's Constitution, which is ... 'To uphold and defend the Constitution of the United States and maintain representative government.'" The same claim was made in subsequent years, until 2011, when the Committee took no position "on the merits of the proposal," but asserted the proposed language does not merit inclusion in the purposes section of the ABA constitution. Then in 2019 the Committee said the proposal should be rejected due to unexplained inconsistencies with other Association purposes.

Although the Committee changed its position in 2011, I believe it is important to explain again why defending the right to life of all innocent human beings, including all those conceived but not yet born, is consistent with supporting and defending the Constitution of the United States, and that analysis follows. This analysis is included again because for ten years straight the House of Delegates used the inconsistency argument as a reason to postpone the proposal indefinitely, and raised it again, but without specificity, in 2012. Later in this report I explain why the language I propose does belong in the purposes section of the ABA constitution. That explanation addresses the 2011 position of the Standing Committee on Constitution and Bylaws.

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

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4 It is good that the Committee's position in the first ten years implicitly admitted that the children being killed in their mother's womb are in fact innocent human beings, not just blobs of tissue that are part of the mother's body. That realization is step number one.
language of the Constitution, let us go beyond the actual language of the Constitution and try to articulate the argument. The inconsistency argument could be so stated:

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

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

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

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

But it cannot be reasonably be said (1) that the holdings of *Roe v. Wade* as modified by *Planned Parenthood v. Casey* are the Constitution itself - and (2) that if one opposes *Roe* and *Planned Parenthood*, one is opposing the Constitution itself - and failing to uphold and defend it. The lack of identity of particular Supreme Court interpretations of the Constitution with the Constitution itself should be rather self-evident. No doubt you (the members of the House) are aware that legal conclusions underlying many Supreme Court decisions - including those interpreting the Constitution - have been rejected by later Supreme Court decisions although the relevant language of the Constitution has not changed in the interim. Thus, generally, contending that opposition to a particular Supreme Court interpretation of the Constitution constitutes opposition to the Constitution itself is stretching language and logic to the breaking point.

Now, maybe a persuasive argument could be made that although some Supreme Court interpretations of the Constitution are subject to later change, some are so indisputably correct that in some real sense the interpretation could be said to be the Constitution itself. If the Supreme Court rationale for *Roe v. Wade* and *Planned Parenthood v. Casey* were so rock-solid and accepted by American society in general as the proper articulation of a virtually undisputed fundamental individual right grounded in the Constitution, one could argue that in effect these Supreme Court decisions are equivalent to the Constitution; but that is certainly not the case with *Roe v. Wade* and *Planned Parenthood v. Casey*. Like St. Thomas Aquinas, I construct the argument against my position. I repeatedly asked the Standing Committee on Constitution and Bylaws to articulate the reason for its position - either orally or in writing.
Planned Parenthood v. Casey. (And note that Planned Parenthood itself modified fundamental holdings of Roe.)

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

Based on the faulty contention that the child in the womb cannot properly be legislatively determined to be a human being, the Supreme Court designated the child to the status "potential life," stripping the child of her rightful status under the law as a human being. The Court then set up a false dichotomy of competing rights: the mother's "right to privacy" right to kill the non-human blob in her womb versus the State's interest in protecting the "potential life" in the womb and the health of the mother. (Referencing to a living being with its own DNA as "potential life" is doublespeak at its best.) The hand dealt the child in the womb by the Supreme Court was dealt from a stacked deck - based upon the lie that the child in the womb is not really a child. As a "potential life" rather than a real, live human being, the child's real rights get pushed aside by the Supreme Court. The rationale of Roe v. Wade is not indispensible (and thus, one might argue, the Constitution itself); rather, the rationale of Roe v. Wade is fantastic.

Finally, the proposal (and all already articulated purposes in ABA Constitution Section 1.2) presupposes the ABA defense of the right to life of the innocents will be undertaken by lawful means. Suppose the ABA as an organization were to advocate a change through lawful means in the United States Constitution (or in a Supreme Court interpretation of the Constitution). Would this mean the ABA had abandoned its purpose to uphold and defend the Constitution? Of course not. We have an obligation to address constitutional issues that need addressing. We honor the Constitution by doing so. So, even if I were advocating change in the language of the Constitution by lawful means, my proposal would not conflict with the ABA purpose to uphold and defend the Constitution.

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

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

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

The Committee claimed that the subject of the proposal is not fundamental enough - or is not of the right character - to be included in the purposes section of the ABA constitution. But compare a stance against stripping the right to life from millions of innocents to the purposes that are in the ABA constitution. Defending the right to life of innocents when it is being denied by our "law" is much more fundamental than even the upholding and defending of our hallowed U.S. Constitution and representative government. The ABA purpose I propose goes to the very heart of what an association of American lawyers should be all about. We are supposed to be the upholders of the law. We are supposed to champion those whose rights are being disrespected. Incredibly, a fundamental disrespect for a category of persons' rights has been incorporated as a fundamental tenant of our American "law." A stand against this cries out for inclusion in the purposes section of the ABA constitution.
Matters of much lower import and importance to our law and our role as lawyers are already included in the articulation of ABA purposes. My proposal is more fundamental than the ABA constitution existing purposes to “advance the science of jurisprudence”, “promote the uniformity of legislation and of judicial decisions”, “uphold the honor of the profession of law”, and to “encourage cordial intercourse among members of the American Bar.” The Committee is wrong when it says that my proposal does not belong in the purposes section of the ABA constitution.

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

The ABA Policy and Procedures Handbook lists hundreds of standing policies adopted by the ABA over the years, although apparently some sort of action was taken at the 2001 meeting to “archive” some policies over ten years old. I have not investigated what policies have been archived, if any. Way back in 1978, the ABA adopted a policy, still in the Handbook, supporting federal and state legislation to “finance abortion services for indigent women.” In 1991, the ABA adopted a policy supporting legislation to promote “full counseling and referrals on all medical options” in federally funded family planning clinics. In 1992, the ABA adopted a policy opposing federal legislation restricting abortions prior to viability and thereafter if the abortion is “necessary to protect the life or health of the woman ....” And in 1994, the ABA adopted a policy recommending that the United States, at the Fourth World Conference on Women in Beijing, China, in 1995, “actively support the inclusion in the Platform for Action of [effective measures to accelerate the removal of the remaining obstacles to the realization of women’s basic rights.” At the annual meeting in 2001 the ABA adopted a policy provision opposing the Mexico City Policy, which prohibits overseas funding by the United States of nongovernmental organizations that provide abortion-related health or medical services. The ABA House of Delegates has also fairly recently adopted a policy implicitly approving government-funded killing of innocent human beings in their embryonic stage for stem cell and other research work.

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

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

Feel free to email me at edwardjacobs@yahoo.com
SPONSORS: William M. Hill (Principal Sponsor), Andrew D. Ness, Terrence L. Brookie, and Steven B. Lesser

PROPOSAL: Amend Section 10.3 and 32.1(d) of the Constitution, pursuant to Section 32.1(g) of the Bylaws, to change the name “Forum Committee on the Construction Industry” to “Forum on Construction Law,” and authorize ABA staff to take such other internal administrative actions as may be necessary to effectuate that name change.

Amends §§10.3 and 32.1(d) of the Constitution and Bylaws to read as follows:

§Article 10.3 Forums. There are within the Association the following forums:

1. Forum Committee on Affordable Housing and Community Development Law
2. Forum Committee on Air and Space Law
3. Forum Committee on Communications Law
4. Forum Committee on Construction Law
5. Forum Committee on Entertainment and Sports Industry
6. Forum Committee on Franchising

Changes in this section are governed by §31.1 (c). (Legislative Draft – deletions struck through additions underlined)

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§32.1(d) Each forum committee shall have a governing committee selected in accordance with that committee’s bylaws. Non-U.S. Lawyer Associates may serve on the Governing Committee of the Forum on the Construction Industry Law as its bylaws may provide.

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The proposed Amendment is intended to recognize the core constituency and mission of the Construction Forum: a group of construction lawyers concerned primarily with education and thought leadership on legal issues impacting the greater construction industry. In an industry with dozens of professional groups and trade associations, the Construction Forum believes the name change will better state its industry role, mission and brand. Within the ABA, the name change will be consistent with that of three other Forums that already include the word “Law” in their title (Communications Law, Air & Space Law, and Affordable Housing & Community Development Law).

Major professional organizations within the broader construction industry almost uniformly include their profession or constituency within the broader industry in their names: American Institute of Architects, Association of General Contractors, Construction Management Association of America, Design-Build Institute of America, etc. At a time when diverse membership organizations are trying to build their brands and images, the Construction Forum – with a constituency of roughly 5,000 lawyer and associate members making it the largest organization of construction lawyers in the world – strongly believes the proposed name change creates the optimum platform to distinguish our specific role and contribution to the construction industry. Importantly, as the Construction Forum expands its marketing to and collaboration with non-legal construction organizations, the new name better positions us for those efforts – which are at the core of the Construction Forum’s efforts to enhance non-dues revenues from both ABA members and non-members. While current Construction Forum members clearly know who we are, the proposed name change is targeted at expanding our recognition, reach and appeal outside the current ABA membership community.

As noted, this proposed name change is supported by the Forum on the Construction Industry’s Governing Committee and was approved on June 22, 2013. If the proposed Amendment is approved, the name change will be accompanied by a unified campaign initiated by the Forum on Construction Law intended to enhance brand awareness among our current constituency and the broader industry – all geared toward expanding that constituency. It is likely that the new name will be “launched” at the time of the Forum’s Fall Meeting (October 16-17, 2014).

The proposed amendment was presented in a letter from me and discussed by Andrew Ness, Immediate Past Chair of the Forum, who was present at the February 8, 2014 open hearing held by the Standing Committee on the Constitution and Bylaws during the Mid-Year Meeting.

I thank the members of the House your consideration of this proposal.
PROPOSAL: Amend Sections 10.3 and 13.1(c) of the Constitution, and Section 32.1 of the Bylaws to change all references to “forum committee(s)” to “forum(s),” and to amend the names of each of the six existing ABA Forums by deleting the word “Committee” therefrom.

Amends §§10.3, 13.1(c) and 32.1 of the Constitution to read as follows:

§Article 10.3 Forums. There are within the Association the following forums:

1. Forum on Affordable Housing and Community Development Law
2. Forum on Air and Space Law
3. Forum on Communications Law
4. Forum on the Construction Industry
5. Forum on Entertainment and Sports Industry
6. Forum on Franchising

Changes in this section are governed by §31.1 (c).

§ 13.1 (c) A forum may be created or discontinued, or in the name of a forum changed in the manner prescribed by the Bylaws.

§ Article 32. Forums

§32.1 Forums. (a) The House of Delegates may, by a majority vote, create a forum to carry out, in a specified field, a responsibility that is principally to educate its members in that field, is within the purposes of the Association, and is not otherwise served within the Association. The forum shall also investigate and study the matters within its responsibilities. (b) During each Association year, a forum shall hold one or more educational meetings, open to any member of the Association. (c) A forum is unlimited in number and indefinite in duration. Any member of a section of the Association may be a member. Each forum shall adopt bylaws not inconsistent with the Constitution and Bylaws. The bylaws become effective when approved by the House. (d) Each forum shall have a governing selected in accordance with that forum’s bylaws. Non-U.S. Lawyer Associates may serve on the Governing Committee of the Forum on the Construction Industry as its bylaws may provide.
In carrying out its responsibilities under this section, a forum shall coordinate its activities with those of each section or other committee of the Association that is concerned with a matter that is also with the forum's responsibilities.

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

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

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Changes in this section are governed by §31.1 (c).

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Article 32. Forums Committees

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

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(d) Each forum committee shall have a governing committee selected in accordance with that committee’s forum’s bylaws. Non-U.S. Lawyer Associates may serve on the Governing Committee of the Forum on the Construction Industry as its bylaws may provide.

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

(f) To cover its expenses, a forum committee may impose such dues as the Board of Governors approves.
(g) The House may discontinue or change the name of a forum committee. The House shall discontinue a forum committee if, for any Association year, its expenditures exceed the dues received and advance provision has not been made to cover the excess.
The proposed Amendment is to remedy an issue that affects all of the ABA Forums. The unwieldy name “Forum Committee” was dropped in favor of the shorter “Forum” by each of the six ABA Forums many years ago, at least for all purposes that the individual Forums could control. For example, the Governing Committee of the Forum on the Construction Industry voted in 1984, a full 30 years ago, to drop the name “Forum Committee” in favor of “Forum,” and has held to that usage consistently ever since in all of its internal and external communications.

To a limited extent, the overall ABA has accommodated this change. For example, the 2013 ABA Green Book references “Forums” and not “Forum Committees.”

However, since the Constitution and Bylaws have never been amended accordingly, the name “Forum Committee” persists in a variety of ABA usages. It is found in various internal and external ABA communications, and most notably, is the name still used on the title banner of five of six Forum web pages, in the ABA Red Book, and with reference to all Forum publications in the ABA webstore. There is no particular reason for this continued use of “Forum Committee” other than a lack of a formal Constitutional amendment.

The purpose of the proposed Amendment is accordingly to bring the Constitution and Bylaws into alignment with the longstanding practice and usage by all six Forums. Its effect will be to permit uniformity and consistency of usage within and without ABA as to the names of the Forums, and thereby promote and enhance their name recognition and brand both within and without ABA.

This proposed Amendment is unanimously supported by the six Forums. The Governing Committees of each have passed resolutions in support, and the co-sponsors include past and present Officers of the Forums. Each Forum is also prepared to make amendments to its bylaws as needed to implement the change.

This proposed Amendment was discussed at the open hearing held by the Standing Committee on the Constitution & Bylaws on February 8, 2014 at the Mid-Year Meeting.

The sponsors of this proposal thank the members of the House your consideration of this proposal.
Amends §3.1 and §3.3 of the Constitution to read as follows:

(Article 3. Membership

§3.1 Members. Any person of good moral character in good standing at the bar of a state, territory, possession, or tribal court of any federally recognized tribe of the United States is eligible to be a member of the Association in accordance with the Bylaws. The Bylaws may specify classes of members.

§3.3 Termination of Membership. (a) A member may resign from the Association at any time effective upon receipt of the member’s resignation.

(b) A member who is in default in the payment of dues or other monetary obligation to the Association may be dropped from membership. A member who, by a final order or judgment, (1) is convicted of a felony or (2) is disbarred or suspended for a period longer than six months from the practice of law in a state, territory, or possession of the United States in any jurisdiction, ceases to be a member of the Association. A member who, because of misconduct ceases to be a member of the bar of a state, territory, or possession of the United States authorized to practice law, also ceases to be a member of the Association. For other good cause, after a hearing at which the member is given reasonable opportunity to be present with counsel and be heard in his or her own defense, a member may be censured, suspended, or dropped from membership by the Board of Governors.

SPONSORS: Danny Van Horn (Principal Sponsor) and Mary Smith

PROPOSAL: Amends §3.1 to include individuals in good standing with federally recognized tribal courts, amends §3.3 to remove from membership any individual not in good standing in any jurisdiction.

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SPONSORS: Danny Van Horn (Principal Sponsor) and Mary Smith

PROPOSAL: Amends §3.1 to include individuals in good standing with federally recognized tribal courts, amends §3.3 to remove from membership any individual not in good standing in any jurisdiction.
The American Bar Association has long supported measures to promote diversity in the legal profession. In 1986, our Association adopted Goal IX. That goal supported "the full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities." In 2008, the ABA revised its goals, and Goal IX became Goal III, to eliminate bias and enhance diversity. The objectives of Goal III are to promote full and equal participation in the Association, our profession, and the justice system by all persons and to eliminate bias in the legal profession and justice system.

While the Association has made significant strides towards inclusion, there is a glaring injustice that needs to be corrected to fully embrace Goal III - full membership for American citizens who happen to be licensed through a tribal court as opposed to a state, federal or territorial bar. Under the ABA Constitution and bylaws as currently drafted, anyone licensed in a state, federal or territorial jurisdiction within the United States may join the Association as a full member with all rights and responsibilities. That policy does not extend to those who are licensed through a tribal court of a federally recognized tribe. Thus, there is a class of American citizens, most of whom attended an ABA accredited law school, who are denied the opportunity for full membership in our Association because they practice solely in a tribal court. As a policy decision, the ABA extends the opportunity for full membership to lawyers who practice in Guam, American Samoa, Puerto Rico and the Virgin Islands. The same inclusive policy should apply to individuals practicing before tribal courts within the United States. These American citizens deserve an opportunity for full participation in our Association.

In recognition of the three sovereign court systems in the United States (federal, state and tribal) and the justice served by these court systems, this resolution seeks to permit tribal court practitioners - who are not currently eligible to be ABA members - to become full members of the ABA. This resolution will - at long last - put tribal court bar admissions on equal footing with the bars of states, territories and possessions of the United States.

I. THE THIRD SOVEREIGN IN THE AMERICAN SYSTEM OF JUSTICE: TRIBAL JUSTICE SYSTEMS

American Indian and Alaska Native Nations constitute a third sovereign within the American system of justice. The status of Indian tribes and tribal justice systems was articulated by Supreme Court Justice Sandra Day O'Connor when she stated the following:

"Today, in the United States, we have three types of sovereign entities -- the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country."  

I

Most of the tribal courts that exist today date from the Indian Reorganization Act of 1934. The Indian Reorganization Act recognized the inherent sovereignty of tribes to organize their governments, to draft their own constitutions, to adopt their own laws through tribal councils, and to set up their own court systems. By that time, however, previous U.S. policies directed at American Indians (such as forced migration, settlement on the reservations, and the allotment system) had wreaked havoc on customary Native American life. Consequently, in 1934, most tribes were not in a position to recreate historical forms of justice. Therefore, while a few tribes have "traditional courts" based on Indian custom, most modern reservation judicial systems do not trace their roots to traditional Indian fora for dispute resolution. Because the tribes were familiar with the regulations and procedures of the Bureau of Indian Affairs, under the provisions of the Code of Federal Regulations (CFR), that model provided the framework for many tribal courts at the time of the Indian Reorganization Act.

Today, the vast majority of the more than 350 tribal justice systems function in isolated rural communities. These tribal justice systems face many of the same difficulties faced by other isolated rural communities, but these problems are greatly magnified by many other complex problems unique to Indian country. Tribal justice systems are faced with a lack of jurisdiction over non-Indians, complex jurisdictional relationships with federal and state criminal justice systems, inadequate law enforcement, lack of detention staff and facilities, lack of sentencing or disposition alternatives, lack of access to advanced technology, and lack of substance abuse testing and treatment options. Tribal courts must work to satisfy the sometimes-competing demands of those inside and outside the tribal communities. But while the challenges are enormous, "the effective operation of tribal courts is essential to promote the sovereignty and self-governance of the Indian tribes." As the Supreme Court has recognized, "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." As one prominent commentator has observed: "Tribal courts constitute the frontline tribal institutions that most often confront issues of self-determination and sovereignty, while at the same time they are charged with providing reliable and equitable adjudication in the many and increasingly diverse matters that come before them." Tribal justice systems are the primary and most appropriate institutions for maintaining order in tribal communities.

Tribal courts preside over many of the same issues state and federal courts confront in the criminal context, such as, child sexual abuse, alcohol and substance abuse, gang violence and violence against women. These courts, however, while trying to address these complex issues with far fewer financial resources than their federal and state counterparts, must also "strive to..."
respond competently and creatively to federal and state pressures coming from the outside, and to cultural values and imperatives from within." 9

Tribal courts must deal with a wide range of difficult criminal and civil justice problems on a daily basis. The scope, numbers, and complexity of tribal court civil caseloads have been rapidly expanding. But issues related to the tribal court criminal caseloads are even more problematic. It should be noted that in most tribal justice systems, 80-90% of the cases are criminal case and 90% of these cases involve the difficult problems of alcohol and/or substance abuse.9 While the crime rate, especially the violent crime rate, has been declining nationally, it has increased substantially in Indian Country. In fact, the rate of violent crime estimated from self-reported victimizations for American Indians is well above that of other U.S. racial or ethnic groups and is more than twice the national average.10 Tribal justice systems are grossly underfunded to deal with these criminal justice problems.11

II. BACKGROUND ON TRIBAL COURT PRACTITIONERS

There are 566 federally-recognized tribes in the United States, and there are over 200 tribal court systems. The 2010 Census reports that there are 5.2 million Native Americans in the United States, either alone or in combination with one or more races.12 Out of this total, 2.9 million persons identify as American Indian and Alaska Native alone.13 Since 2000, the Native American population has experienced rapid growth, increasing by 39 percent.14 It is estimated that there are approximately 2500 Native American lawyers in the United States.

The ten largest reservations are located in four states – Arizona, South Dakota, Oklahoma and Montana.15 The Navajo Nation was the American Indian reservation with the largest total population of 174,000, and the largest Native American alone-or-in-combination population of 169,000.16

IV. CRISIS IN TRIBAL JUSTICE SYSTEMS

The below section sets forth the consequences of this chronic underfunding. Some believe that the most stable funding for tribal justice systems would likely be through tribal percentage set asides in mainstream funding legislation such as the methodology that has been successfully utilized in the Violence Against Women Act (VAWA), which was recently reauthorized, including Title IX which specifically addresses Safety for Indian Women. See, e.g., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1410 (Neil Jessup Newton ed., LexisNexis 2005).

13 Id.
14 Id., at 14 (Table 7).
15 Id.
16 Id.
18 See NAICJA Testimony.
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23 Id.
24 Id., at 14 (Table 7).
25 Id.
26 Id.
Although there is no comprehensive study of the requirements to be a member of a tribal bar association or to practice before a tribal court, in general, there are essentially four categories of requirements to practice before a tribal court: (1) admission to any state bar alone; (2) admission to a state bar with additional requirements of knowledge of tribal law or custom; (3) other admission requirements without any requirement of admission to a state bar; and (4) mere payment of a fee.

This particular resolution concerns only the latter two categories – those that do not require admission to a state bar to practice before a tribal court. With respect to the above first two categories, these persons are already eligible to be full ABA members.

While some tribes have had court systems for many decades, preliminary research indicates that there has been a proliferation of tribal court systems in the last decade. As such, tribal court systems can range from very sophisticated systems with multiple levels of courts and a very rigorous bar admission process to part-time courts with jurisdiction over very narrow and limited types of cases.

This section describes examples of tribal courts with admission requirements in each of the latter two categories (described above).

A. Tribal Courts That Have Admission Requirements But Do Not Require Admission to a State Bar

The Navajo Nation court system is the largest Indian court system in the United States and has been called the “flagship” of American tribal courts. The Navajo Nation operates a two-level court system: the trial courts and the Navajo Nation Supreme Court, which is the appellate court. The Navajo Nation courts have general civil jurisdiction and limited criminal jurisdiction. The civil jurisdiction covers all persons (Indian and non-Indian) who reside in the Navajo Reservation or have caused an action to occur in the Navajo Reservation. The criminal jurisdiction covers all crimes codified in the Navajo Nation Code along with its terms of punishment.

Navajo Nation Bar Association (NNBA) membership is required to practice law in the Navajo Nation courts. To become a member, an applicant must have proper moral character and fitness, and pass an examination. There are over 400 members of the NNBA. The membership consists of attorneys and lay advocates. Advocates—individuals not barred in Arizona, New Mexico, Colorado, and Utah; and advocates—individuals not barred in Arizona, New Mexico, Colorado, and Utah.

17 See www.navajocourts.org. The development of a court system in the Navajo Nation began with the Navajo Court of Indian Offenses established by the Bureau of Indian Affairs Court in 1892. The Navajo Nation court system was established in 1959 with trial courts and, in the 1970s, a Supreme Judicial Council was added. In 1985, the Navajo Nation Council passed the Judicial Reform Act to create the Navajo Nation Supreme Court, streamline court operations and, at the same time, abolish both the Navajo Nation Court of Appeals and the Supreme Judicial Council.

18 In order to take the Navajo Nation Bar Examination, a person who is not an enrolled member of any tribe must have a member of good standing of the bar of Arizona, Colorado, New Mexico, or Utah; reside in one of those states; and be a law school graduate.

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Mexico, and Utah—must be enrolled members of a federally recognized tribes and (1) present proof of tribal membership; and (2) received legal training by completing law school, college, a course of study approved by NNBA, or an advocacy program certified by NNBA.

Tribal Courts That Merely Require Payment of a Fee or Have No Requirements

An example of some tribal courts that merely require the payment of a fee or have no other requirements are: the following five tribal courts in Arizona: Chemehuevi, Havasupai, Hualapai, and Yavapai-Apache.

IV. CONCLUSION

Tribal justice systems are the primary and most appropriate institutions for maintaining order in tribal communities. They are the keystone to tribal economic development and self-sufficiency. In recognition of their sovereignty and the justice they provide to tribal communities, members of tribal bars who are not otherwise eligible for full ABA membership should be permitted to become full members. Adherence to Goal III requires the Association to correct this historical injustice and extend eligibility for full ABA membership to these American citizen tribal court practitioners. Their inclusion will further the ABA’s goals of improving the legal profession, eliminating bias and enhancing diversity, and advancing the rule of law throughout the United States and around the world.

Respectfully Submitted,

April 2014
SPONSOR: Danny Van Horn

PROPOSAL: Insert new §3.2, amendments to §3.4, and §6.6 of Constitution to include a new lawyer member category for international lawyers; insert new §21.3, and amendments to §21.11 and §30.5 of Bylaws to reflect the new lawyer member category.

Article 3. Membership

§3.1 Members. Any person of good moral character in good standing at the bar of a state, territory, or possession of the United States is eligible to be a member of the Association in accordance with the Bylaws. The Bylaws may specify classes of members.

§3.2 International Lawyer Members. Members of the legal profession of another country who are admitted to practice law, but are not admitted to the bar of any state, territory, or possession of the United States are eligible to become International Lawyer Members of the Association under such conditions and with such rights, privileges, and limitations as the Bylaws may provide.

§3.3 Law Student Members. Any law student is eligible to become a law student member of the Association under such conditions and with such rights, privileges, and limitations as the Bylaws may provide.

§3.4 Associates. Nothing in this Article prevents the establishment by bylaw of classes of associates composed of nonmembers with whom affiliation is considered to be in the interests of the Association.

SPONSOR: Danny Van Horn

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§3.4 Associates. Nothing in this Article prevents the establishment by bylaw of classes of associates composed of nonmembers with whom affiliation is considered to be in the interests of the Association.
§6.6 Section Delegates.

At the conclusion of the 2005 Annual Meeting, each section shall be entitled to two delegates with staggered terms ending in Association years 2005 and 2006. At the end of those respective terms and in each succeeding third year, each of those positions shall then be elected for a term of three Association years. In 1990 each section with more than 25,000 members and International Lawyer Members shall elect from its membership one additional delegate to the House to serve for two years. In 1992 and in each succeeding third year, a section with more than 25,000 members and International Lawyer Members shall elect from its membership one additional delegate to the House. In 1990 and in each succeeding third year, a section with more than 50,000 members and International Lawyer Members shall elect from its membership one additional delegate. The term of a Section Delegate is three Association years, beginning with the adjournment of the annual meeting during which elected. A Section Delegate elected as an officer or member of the Board of Governors ceases to be a Section Delegate at the beginning of the term as officer or governor. If a vacancy occurs, the council of the section shall select a successor for the unexpired term. This section does not apply to divisions.

(Proposed insertion to Bylaws - new §21.13)

International Lawyer Members

Members of the legal profession of another country who are admitted to practice law, but are not admitted to the bar of any state, territory, or possession of the United States, International Lawyer Members shall have the rights and privileges of ABA Members and be deemed ABA Members with the conditions as prescribed below.

International Lawyer Members:

(1) may vote in Association-wide elections including but not limited to Association elections of Delegates-at-large and referenda;
(2) may serve as an officer or district member of a Section, Division or Forum that is not of the Association as permitted by the bylaws of the applicable entity;
(3) may serve on an Association standing and special committees or task forces;
(4) may serve as a Section or Division Delegate in the House, and as a Delegate-at-Large in the House; and
(5) may participate in other activities of the Association as authorized by the House.

§21.11 Associates.

Persons who are ineligible to be members, International Lawyer Members or Law Student members of the Association may qualify as associates if they are in one of the following classifications, have never been disbarred or suspended from the practice of law in any jurisdiction, are of good moral character, and satisfy such further eligibility requirements as may be approved by the Board:

(a) General Associates. Individuals who are not admitted to practice law in any jurisdiction, but have an interest in the work of the American Bar Association.
Student Associates. Individuals enrolled in college or university level post-secondary educational studies and have an interest in the work of the American Bar Association. The privileges and dues of associates shall be prescribed by the Board. However, they have no interest in the property of the Association and they may not vote, except as authorized by the House of Delegates.

§30.5 Officers and Council.

A section shall have a chair. It may also have a chair-elect and such other officers as its bylaws may provide. It shall also have a council consisting of the officers and such other members as its bylaws may provide. Notwithstanding any provisions of this section, non-members may serve on the Council of the Section of Legal Education and Admissions to the Bar as its bylaws may provide; non-U.S. lawyers (whether members or not) may serve on the Council and in the leadership of the Section of International Law, the Section of Business Law, and the Section of Litigation; such respective bylaws may provide; and non-U.S. lawyers (whether members or not) may serve on the Council of the Law Practice Division; such respective bylaws may provide. International Lawyer Members may serve as an officer or council member of a Section, Division, or Forum as permitted by the bylaws of the applicable entity.

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

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

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

(d) Each forum committee shall have a governing committee selected in accordance with that committee's bylaws. Non-U.S. lawyer members may serve on the governing committee of the Forum on the Construction Industry or its bylaws may provide.
The Standing Committee on Membership (SCOM) respectfully requests that the existing category of non-U.S. Lawyer Associates be replaced by a new lawyer member category, International Lawyer Members.

American lawyers in all aspects of the legal profession are increasingly participating in a global market for legal services. As businesses began their expansion internationally, the ABA and American lawyers partnered with highly capable non-U.S. law firms and non-U.S. lawyers to lead the way.

Since 2006, international lawyer associate membership has increased by more than 15% while total ABA membership has fallen by nearly 5%. It is clear the Association is highly regarded internationally, and lawyers and firms outside the country are eager to join. Today, approximately 4,000 lawyers from other countries participate in the ABA in a limited manner as non-U.S. Lawyer Associates.

Competition in the global market is transforming the legal industry. The ABA must take a leading role in identifying the opportunities and the challenges in our changing profession. And, as a leader, the ABA must facilitate cooperation among lawyers both here and abroad. By allowing non-U.S. lawyers a voice in the Association, the ABA positions itself as an authority amongst global organizations.

In an effort to remain competitive, U.S.-based attorneys and firms are focused on new market opportunities. Most recognize that the needs of clients are increasingly global and that they must enter that market in order to increase profits and continue to grow. By introducing the new International Lawyer Member category, the Association would be opening doors between domestic and foreign attorneys, increasing business opportunities for our membership, and acknowledging the growing interest in international law issues among U.S. general practitioners.

Taking this step is similar to the alliances and relationship building the American Bar Association has engaged in with several international groups and bar associations. Memoranda of Understanding and Cooperation have been shared with groups such as the Canadian Bar Association and the Association International Des Jeunes Avocats (AIJA) to name just two. These relationships strengthen the Association’s reputation as a global authority on legal services and increase the influence of the ABA in international law.

In addition to the various formal relationships the ABA has developed with other international organizations, the Association’s own entities reflect our strong global presence. Examples are the ABA Section of International Law, Section of Antitrust Law, the Center for Human Rights, and the Rule of Law Initiative. The ABA’s Section of International Law has several local chapters outside of the United States and hosts numerous events, meetings and seminars worldwide. A substantial percentage of the ABA Section of Antitrust Law’s membership consists of lawyers licensed in jurisdictions outside the United States. The ABA Rule of Law Initiative (ROLI) has projects in 60 countries.
jurisdictions and partners with governmental and non-governmental entities to provide technical legal assistance around the globe. These groups work to establish the ABA’s presence on a global scale.

Implementation of the International Lawyer Member category will expand on the ABA’s current international work. Internationally-focused ABA entities like ROLL, the Center for Human Rights, the Section of Antitrust Law, and the Section of International Law have long been recognized as the international voices of the ABA. But, there are at least 22 other ABA Sections, Divisions and Forums that have internationally-focused committees, covering a wide range of legal interests.

The ABA Business Law Section has more than 25 committees that concentrate on issues that range from international dispute resolution to international mergers and acquisitions to international trade laws. The Criminal Justice Section over the last two years has conducted an overseas version of its popular White Collar Crime National Institute – with the summer meeting occurring in Amsterdam.

The ABA Section of Intellectual Property is at the forefront of global concerns/issues in IP law. Through blanket authority, it has regularly commented on non-U.S. matters, such as the Comments to the European Union Draft Procedures of Unified Patent Court, and reports routinely on international developments in its leading periodicals. Not only is the ABA and its entities hosting more events overseas but our US-based programs are increasingly popular with overseas audiences. The ABA Business Law Section Spring meeting in New York City had 1550 participants from more than 55 countries and literally hundreds of lawyers licensed in jurisdictions outside the United States attend the Antitrust Section’s Spring Meeting in Washington DC each year.

In addition to the increasing international exposure of ABA entities is the work completed by the ABA Publishing Department. Books that address international, cross-border issues are on rise. Some examples are International Family Law Desk Book (FLS 2012), Guide to International Estate Planning (RIPTE 2012), International Construction Law: A Guide for Cross Border Transactions and Legal Dispute Resolution (Construction Forum 2009), and the Antitrust Issues in International Intellectual Property Licensing Transactions (Antitrust 2012).

The ABA’s increasing international activity and presence is in alignment with other US-based associations. The American Institute of CPAs (AICPA) and the American Dental Association (ADA) are amongst the many other associations that have begun to strengthen the benefits available to and focus on international membership. Each of these associations offers a special dues rate for international members, and many offer special benefits for non-U.S. members.

The AICPA has members in more than 128 countries and close ties with other international groups. The AICPA further strengthens its international presence by affiliating with other global organizations such as the International Federation of Accountants and the Global Accounting Alliance.

The American Dental Association considers itself the “network to the global dental community”. The Association has a Division dedicated to communicating information and skills in global oral health matters. The ADA also focuses on increasing involvement of its members in international global
health initiatives through opportunities in volunteerism, and developing international business opportunities for the Association and its US-based membership.

In furtherance of the goal of being the international voice of the American legal profession, it is in the best interest of the ABA to recognize international lawyers as lawyer members, and not as associates.

Therefore, SCOM requests that the category Non-U.S. Lawyer Associates, be replaced by a new lawyer member category, International Lawyer Members.
SPONSORS: Danny Van Horn (Principal Sponsor), Mark D. Agrust

PROPOSAL: Amends §21.6 to eliminate paragraph (b), thus removing the disability waiver program.

Amend §21.6 to eliminate paragraph (b)

§21.6 Special Members, (a) (1) If a person who has reached age 75 and has been a member of the Association for at least 25 years so requests, that person shall retain the privileges of membership but need only pay 50% of the highest dues rate.

(2) Provided, however, that (i) if a person who has reached age 70 prior to September 1, 2004, and has been a member of the Association for 25 years so requests, that person shall retain the privileges of membership but not pay any Association dues; or (ii) if a person who has reached age 70 prior to September 1, 2006, but after August 31, 2004, and has been a member of the Association for 25 years so requests, that person shall retain the privileges of membership but need only pay 50% of the highest dues rate.

(b) if requested by the member and approved by the Board of Governors, a member of the Association who has become disabled shall for the term of the disability, retain the privileges of membership but need not pay Association dues.

REPORT

The Standing Committee on Membership requests the consolidation of the Special Dues for Persons with Disabilities and the Financial Hardship Dues programs to provide a financial hardship rate to those unable to afford Association dues, regardless of the reason.

Background

The disability discount, established in 1971, has seen few changes since it was first instituted. Members desiring a disability dues waiver must submit a formal request, including the nature of their disability. These requests are compiled into a list, which is given quarterly to the ABA Secretary. The Operations Committee approves the requests and grants two-year waivers that are renewable. Currently, the ABA has about 1,000 members with dues waived because of disabilities.

Reason for the Change

Last spring, SCOM reviewed the Financial Hardship and Disability programs and identified an opportunity to change. It was clear that members seeking disability waivers are most likely experiencing financial hardship. Thus, it seems reasonable to move the Disability waiver program under the Financial Hardship umbrella.

The Commission on Disability Rights was consulted and concurs with the Membership Committee’s recommendation. The Commission believes that a disability waiver is unnecessary and unintentionally reinforces misperceptions that lawyers with disabilities are less successful and thus less able to pay their way than their colleagues.

As such, SCOM respectfully requests that we amend bylaw §21.6 Special Member (b) to eliminate the disability dues waiver.

SPONSORS: Danny Van Horn (Principal Sponsor), Mark D. Agrust

PROPOSAL: Amends §21.6 to eliminate paragraph (b), thus removing the disability waiver program.

Amend §21.6 to eliminate paragraph (b)

§21.6 Special Members, (a) (1) If a person who has reached age 75 and has been a member of the Association for at least 25 years so requests, that person shall retain the privileges of membership but need only pay 50% of the highest dues rate.

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(b) if requested by the member and approved by the Board of Governors, a member of the Association who has become disabled shall for the term of the disability, retain the privileges of membership but need not pay Association dues.

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As such, SCOM respectfully requests that we amend bylaw §21.6 Special Member (b) to eliminate the disability dues waiver.
SPONSORS: Christopher B. Hockett (Principal Sponsor), Howard M. Feller, Roxann E. Henry, Deborah A. Garza, Pamela Jones Harbour, Brian R. Henry, Jonathan M. Jacobson, William C. MacLeod, Bernard A. Nigro, Mark S. Popofsky, Douglas C. Ross, Theodore Voorhees, Jr., and Gary Zanfagna

PROPOSAL: Amends §30.5 of the Bylaws to allow non-U.S. lawyer associates to serve on Council and in the leadership of the Section of Antitrust Law in accordance with their respective bylaws.

Amends §30.5 of the Bylaws to read as follows:

§30.5 Officers and Council. A section shall have a chair. It may also have a chair-elect and such other officers as its bylaws may provide. It shall also have a council consisting of the officers and such other members as its bylaws may provide. Notwithstanding any provisions of this section, non-members may serve on the Council of the Section of Legal Education and Admissions to the Bar as its bylaws may provide, non-U.S. lawyer associate members may serve on the Council and in the leadership of the Section of International Law, the Section of Business Law, the Section of Litigation, and the Section of Antitrust Law as their respective bylaws may provide, and non-U.S. lawyer associate members may serve on the Council of the Section of Law Practice Management as its bylaws may provide.

(Legislative Draft – Deletions Struck Through; Additions Underlined)

§30.5 Officers and Council. A section shall have a chair. It may also have a chair-elect and such other officers as its bylaws may provide. It shall also have a council consisting of the officers and such other members as its bylaws may provide. Notwithstanding any provisions of this section, non-members may serve on the Council of the Section Legal Education and Admissions to the Bar as its bylaws may provide, non-U.S. lawyer associates may serve on the Council and in the leadership of the Section of International Law, the Section of Business Law, and the Section of Litigation, and the Section of Antitrust Law as their respective bylaws may provide, and non-U.S. lawyer associates may serve on the Council of the Section of Law Practice Management as its bylaws may provide.

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The Section of Antitrust Law requests an amendment to Section 30.5 of the Association’s Bylaws allowing non-U.S. lawyer associates to serve on the Section of Antitrust Law Council and in leadership.

The practice of antitrust law has become increasingly global. The Section has seen substantial growth in the membership and participation of non-U.S. lawyers in the past ten years. The Section of Antitrust Law’s associate membership has nearly doubled since 2003 and currently represents 18% of the total Section membership. This is a higher percentage than any other Section in the ABA.

The active involvement of non-U.S. lawyers in Section of Antitrust Law programming and activities also continue to increase. For example, the 2013 Section of Antitrust Law Spring Meeting, the largest gathering of antitrust and consumer protection lawyers in the world (nearly 2,800 lawyers), attracted about 600 lawyers and government officials from 57 countries outside the U.S.

We believe that providing leadership opportunities for our non-U.S. lawyer associates will increase ABA visibility and influence, and enhance the Section’s membership recruitment and retention efforts.

The Section of Antitrust Law Council endorses this bylaws amendment, and has already amended the Section’s own bylaws to reflect the amendment, which was approved by the Board of Governors in November 2013. A similar amendment was previously proposed by the Section of Business Law, the Section of International Law, and the Section of Litigation, and previously passed by the House of Delegates.

On behalf of the Section of Antitrust Law, we look forward to acceptance of this amendment and the continued active involvement of non-U.S. lawyers in Section activities. If you have any questions please let us know. Thank you for your consideration.

Respectfully submitted,

Christopher B. Hockett
Chair, Section of Antitrust Law

Howard M. Feller
Chair-Elect, Section of Antitrust Law

Roxann E. Henry
Vice Chair, Section of Antitrust Law
PROPOSAL: Amends §30.5 of the Bylaws to allow non-U.S. lawyer associates to serve on Council and in the leadership of the Section of Environment, Energy, and Resources in accordance with their respective bylaws.

Amends §30.5 of the Bylaws to read as follows:

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

(Legislative Draft – Deletions Struck Through; Additions Underlined)
The Section of Environment, Energy, and Resources would like to request an amendment to Section 30.5 of the Association’s Bylaws allowing non-U.S. lawyer associates to serve on the Section of Environment, Energy, and Resources Council.

With the increasing environmental challenges facing the world it is important that approaches to international problems be cooperative and interdisciplinary, the Section Council has endorsed this enabling bylaw amendment. It is the same enabling language previously proposed by the Section of Litigation, Section of Business Law and the Section of International Law and previously passed by the House of Delegates.

The Section of Environment, Energy, and Resources will then be able to debate and decide what amendments to make to their Section bylaws. This amendment will allow that process to occur. Any Section of Environment, Energy, and Resources bylaw changes will thereafter have to be approved by the ABA Board of Governors.

Further, the reason for the amendment is to allow the potential for non-U.S. lawyer leadership in the Section of Environment, Energy, and Resources for non-U.S. lawyers who have participated in the Section of Environment, Energy, and Resources activities and meetings. An ancillary reason is to increase membership of both member and non-U.S. lawyers who are involved in cross-border issues and in environmental, energy, and resource law involving non-U.S. nationals and companies or U.S. Companies involved in those areas of law outside the U.S.

On behalf of the Section of Environment, Energy, and Resources, we look forward to acceptance of this amendment and the continued involvement of non-U.S. lawyers in Section activities and in its leadership. Please let me know if you have any questions. Bill Penny may be reached at (615) 782-2308 or bill.penny@stites.com, Lee DeHihns may be reached at (404) 881-7151 or lee.dehihns@alston.com, and Sheila Hollis may be reached at (202) 778-7810 or sshollis@duanemorris.com. Thank you for your consideration.

Respectfully submitted,

William L. Penny
Chair, Section of Environment, Energy, and Resources

Lee A. DeHihns III
ABA House of Delegates

Sheila Slocum Hollis
ABA House of Delegates

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Respectfully submitted,

William L. Penny
Chair, Section of Environment, Energy, and Resources

Lee A. DeHihns III
ABA House of Delegates

Sheila Slocum Hollis
ABA House of Delegates
SPONSORS: Donald D. Slesnick (Principal Sponsor), Cynthia Nance and Keith Frazier

PROPOSAL: Amends §30.5 of the Bylaws to allow non-U.S. lawyer associates to serve on Council and in the leadership of the Section of Labor and Employment Law in accordance with their respective bylaws.

Amends §30.5 of the Bylaws to read as follows:

§30.5 Officers and Council. A section shall have a chair. It may also have a chair-elect and such other officers as its bylaws may provide. It shall also have a council consisting of the officers and such other members as its bylaws may provide. Notwithstanding any provisions of this section, non-members may serve on the Council of the Section of Legal Education and Admissions to the Bar as its bylaws may provide, non-U.S. lawyer associates may serve on the Council and in the leadership of the Section of International Law, the Section of Business Law, the Section of Litigation and the Section of Labor and Employment Law as their respective bylaws may provide, and non-U.S. lawyer associates may serve on the Council of the Section of Law Practice Management as its bylaws may provide.

(Legislative Draft – Deletions Struck Through; Additions Underlined)

§30.5 Officers and Council. A section shall have a chair. It may also have a chair-elect and such other officers as its bylaws may provide. It shall also have a council consisting of the officers and such other members as its bylaws may provide. Notwithstanding any provisions of this section, non-members may serve on the Council of the Section of Legal Education and Admissions to the Bar as its bylaws may provide, non-U.S. lawyer associates may serve on the Council and in the leadership of the Section of International Law, the Section of Business Law, the Section of Litigation and the Section of Labor and Employment Law as their respective bylaws may provide, and non-U.S. lawyer associates may serve on the Council of the Section of Law Practice Management as its bylaws may provide.
The Section of Labor and Employment Law requests an amendment to Section 30.5 of the Association’s Bylaws allowing non-U.S. lawyer associates to serve on the Council and in the leadership of the Section of Labor and Employment Law.

With the increased globalization of labor and employment law issues, the Section Council has endorsed this enabling bylaw amendment. It is the same enabling language previously proposed by the Section of Business Law, the Section of International Law and the Section of Litigation and previously passed by the House of Delegates.

The Section of Labor and Employment Law will then be able to debate and decide what amendments to make to their Section bylaws. This amendment will allow that process to occur. Any Section of Labor and Employment Law bylaw changes will thereafter have to be approved by the ABA Board of Governors.

Further, the reason for the amendment is to allow the potential for non-U.S. lawyer leadership in the Section of Labor and Employment Law for non-U.S. lawyers who have participated in the Section of Labor and Employment Law activities and meetings. An ancillary reason is to increase membership of both member and non-U.S. lawyers who are involved in cross-border labor and employment law issues and in litigation involving non-U.S. nationals and companies or U.S. Companies involved in litigation outside the U.S.

On behalf of the Section of Labor and Employment Law, we look forward to acceptance of this amendment and the continued involvement of non-U.S. lawyers in Section activities and in its leadership. Please let us know if you have any questions: Don Slesnick (305.448.5672 or donalesnick@sculp.com), Cynthia Nance (479.575.2403 or cnance@uark.edu) and Keith Frazier (615.687.2231 or keith.frazier@ogletreedeakins.com).

Thank you for your consideration of this request.

Respectfully submitted,

Don Slesnick
Section of Labor and Employment Law Delegate – Union & Employee to the ABA House of Delegates

Cynthia Nance
Section of Labor and Employment Law Delegate At-Large to the ABA House of Delegates

Keith Frazier
Section of Labor and Employment Law Delegate – Employer to the ABA House of Delegates
SPONSORS: Peter Bennett, Chair, Standing Committee on Judicial Independence; Michael H. Reed, Chair, Standing Committee on Federal Judicial Improvements; Hon. Norma L. Shapiro, Immediate Past Chair, Standing Committee on Federal Judicial Improvements; Wm. T. (Bill) Robinson III and Stephen N. Zack, Co-Chairs, Task Force on Preservation of the Justice System; Dick Smerdjian, Chair, Commission on the American Jury Project.

PROPOSAL: Amends the Bylaws to eliminate the Standing Committee on Federal Judicial Improvements and the Standing Committee on Judicial Independence as separate standing committees, and to combine them to create the Standing Committee on the American Judicial System, which shall include a Subcommittee on State Courts and a Subcommittee on Federal Courts.

Amends § 31.7 of the Bylaws to read as follows:

**Federal Judicial Improvements.** The Standing Committee on Federal Judicial Improvements, which consists of not more than eleven members, shall:

(a) coordinate activities within the Association relating to improvements in the federal judicial system;

(b) maintain effective liaison with other institutions working on judicial reform and with the federal judiciary and other appropriate government officials; and

(c) study and make recommendations for improving the federal judicial system.

**Judicial Independence.** The Standing Committee on Judicial Independence shall have eleven members and shall:

(a) assist courts, administrative judiciaries and state, local and territorial bar associations in considering and effectuating responses to infringements of judicial independence;

(b) encourage public awareness and appreciation of the importance of judicial independence and merit selection to the American judicial system and the evils of political selection;

(c) make recommendations on ways to improve and enhance the institutional independence and efficiency of state, territorial and local judiciaries and encourage appropriate accountability to enhance judicial independence and the efficient administration of justice; and

(d) serve as clearinghouse for the Association's activities dealing with the judicial independence of state, local and administrative judiciaries.

**Standing Committee on the American Judicial System.** The Standing Committee on the American Judicial System shall consist of twenty-one members as described in paragraph (a) and Additional sponsors include Erika E. Anderson, Vincent T. Chang, Hon. Rosalyn Woodson Frierson, Cristina Hogan, Diane H. Kutko, Hon. Steve Smith, Members, Standing Committee on Judicial Independence; Alan T. Dimond, Special Advisor, Standing Committee on Judicial Independence; Michael St. Patrick Baxter, Fern C. Borochill, Helen H. Kim, Patrick McGlone, James M. Pearl, Robert O. Saunooke, Hon. Elizabeth S. Stong, Paul R.Q. Wolfson, Hon. James A. Wynn, Jr., Members, Standing Committee on Federal Judicial Improvements; Rudy A. England, Liaison to Standing Committee on Judicial Independence; Sidney Butcher, Liaison to Standing Committee on Federal Judicial Improvements.

SPONSORS: Peter Bennett, Chair, Standing Committee on Judicial Independence; Michael H. Reed, Chair, Standing Committee on Federal Judicial Improvements; Hon. Norma L. Shapiro, Immediate Past Chair, Standing Committee on Federal Judicial Improvements; Wm. T. (Bill) Robinson III and Stephen N. Zack, Co-Chairs, Task Force on Preservation of the Justice System; Dick Smerdjian, Chair, Commission on the American Jury Project.

PROPOSAL: Amends the Bylaws to eliminate the Standing Committee on Federal Judicial Improvements and the Standing Committee on Judicial Independence as separate standing committees, and to combine them to create the Standing Committee on the American Judicial System, which shall include a Subcommittee on State Courts and a Subcommittee on Federal Courts.

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(b) maintain effective liaison with other institutions working on judicial reform and with the federal judiciary and other appropriate government officials; and

(c) study and make recommendations for improving the federal judicial system.

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(a) assist courts, administrative judiciaries and state, local and territorial bar associations in considering and effectuating responses to infringements of judicial independence;

(b) encourage public awareness and appreciation of the importance of judicial independence and merit selection to the American judicial system and the evils of political selection;

(c) make recommendations on ways to improve and enhance the institutional independence and efficiency of state, territorial and local judiciaries and encourage appropriate accountability to enhance judicial independence and the efficient administration of justice; and

(d) serve as clearinghouse for the Association's activities dealing with the judicial independence of state, local and administrative judiciaries.

**Standing Committee on the American Judicial System.** The Standing Committee on the American Judicial System shall consist of twenty-one members as described in paragraph (a) and

shall be composed of the Subcommittee on State Courts and the Subcommittee on Federal Courts, as described in paragraphs (c)(d).

(a) The Standing Committee on the American Judicial System shall have twenty-one members appointed by the President. The members shall consist of a chair of the Standing Committee, who shall not be a currently serving judge, plus ten members designated as appointees to the Subcommittee on State Courts and ten members designated as appointees to the Subcommittee on Federal Courts. A majority of the members of each Subcommittee shall be non-judges. Annually, one non-judge member of each Subcommittee shall be designated by the President to serve as chair of that Subcommittee. The two chairs of the Subcommittees shall serve as vice-chairs of the Standing Committee. The chair of the Standing Committee and the two Subcommittee chairs shall comprise the executive committee of the Standing Committee.

(b) The Standing Committee on the American Judicial System shall:

1. Coordinate activities within the Association and act as a clearinghouse for the Association's activities relating to preservation and improvement of the judicial system, judicial independence and the preservation of fair and impartial courts, preservation of the American jury system, and methods of judicial selection and retention, including support of and coordination with the Task Force on Preservation of the Justice System and the Commission on the American Jury Project;

2. Assist courts, administrative judiciaries, and bar associations to prepare for and respond to attacks on judicial independence, the ability of the courts to remain fair and impartial, and any other threats to the fair, impartial and efficient administration of justice;

3. Support efforts to increase public understanding of the importance of fair and impartial courts, the role of the judicial branch, and other matters related to the fair and efficient administration of justice within American judicial systems;

4. Make recommendations to improve and enhance the American judicial system, support and protect fair and impartial courts, and ensure adequate funding of the American judicial system; and

5. Maintain liaison with other persons and organizations concerned with judicial reform, with the judiciary, and with other appropriate government officials and court-related entities.

(c) The Subcommittee on State Courts shall:

1. Carry out the mission of the Standing Committee with regard to state, local, and other non-federal American judicial systems;

2. Support efforts to increase public understanding of judicial selection and retention methods and to increase informed citizen participation in states where judges are subject to election of any kind;

3. Make recommendations regarding appropriate compensation for state and local judges, creation and filling of needed judgeships, and adequate funding of state and local judicial systems; and

4. Work with state and local courts and bar associations and maintain liaison with other persons and organizations concerned with judicial reform related to state courts and judicial selection, with the Conference of Chief Justices, the National Conference of State Judges, and the National Conference of Bar Presidents.

(b) The Standing Committee on the American Judicial System shall:

1. Coordinate activities within the Association and act as a clearinghouse for the Association's activities relating to preservation and improvement of the judicial system, judicial independence and the preservation of fair and impartial courts, preservation of the American jury system, and methods of judicial selection and retention, including support of and coordination with the Task Force on Preservation of the Justice System and the Commission on the American Jury Project;

2. Assist courts, administrative judiciaries, and bar associations to prepare for and respond to attacks on judicial independence, the ability of the courts to remain fair and impartial, and any other threats to the fair, impartial and efficient administration of justice;

3. Support efforts to increase public understanding of the importance of fair and impartial courts, the role of the judicial branch, and other matters related to the fair and efficient administration of justice within American judicial systems;

4. Make recommendations to improve and enhance the American judicial system, support and protect fair and impartial courts, and ensure adequate funding of the American judicial system; and

5. Maintain liaison with other persons and organizations concerned with judicial reform, with the judiciary, and with other appropriate government officials and court-related entities.

(c) The Subcommittee on State Courts shall:

1. Carry out the mission of the Standing Committee with regard to state, local, and other non-federal American judicial systems;

2. Support efforts to increase public understanding of judicial selection and retention methods and to increase informed citizen participation in states where judges are subject to election of any kind;

3. Make recommendations regarding appropriate compensation for state and local judges, creation and filling of needed judgeships, and adequate funding of state and local judicial systems; and

4. Work with state and local courts and bar associations and maintain liaison with other persons and organizations concerned with judicial reform related to state courts and judicial selection, with the Conference of Chief Justices, the National Conference of State Judges, and the National Conference of Bar Presidents.
Center for State Courts, and with other appropriate government officials and
court-related entities.

(d) The Subcommittee on Federal Courts shall:

1. carry out the mission of the Standing Committee with regard to the federal judicial system;

2. study, monitor, and make recommendations regarding (i) the appropriate compensation for federal judges, (ii) the adequacy of the number of federal judgeships, including authorization of additional judgeships and filling judicial vacancies, and (iii) the adequacy of the funding of the federal judicial system;

3. work and maintain liaison with the federal judiciary and other appropriate government officials and court-related entities to support and improve the fair and effective administration of justice in the federal judicial system; and

4. work with the ABA Governmental Affairs Office and maintain liaison with the Administrative Office of the United States Courts, the Judicial Conference of the United States, the Federal Judicial Center, and other persons and organizations concerned with judicial reform related to the federal judicial system.

(e) Ex-Officio Members. The chair of the Standing Committee may designate the chair of any other ABA entity as an ex-officio member of the Standing Committee if the jurisdiction of the other entity closely aligns with that of the Standing Committee and if participation by the chair of the other entity as an ex-officio member will advance the mission of the Standing Committee.

(f) Honorary Co-Chairs. Two Honorary Co-Chairs of the Standing Committee shall be invited by the executive committee of the Standing Committee to serve one-year renewable terms. One shall be a recently retired state Supreme Court Justice or Judge of a state’s highest court of appeals. One shall be a retired federal court judge. The Honorary Co-Chairs shall have such duties as determined by the Chair.
I. Introduction

The Standing Committee on Federal Judicial Improvements ("SCFJI") was established in 1971 at the suggestion of the Chief Justice of the United States, Warren E. Burger. For over four decades, SCFJI has filled a unique role within the Association by studying and making recommendations for improving the federal judicial system, maintaining close liaison with the Judicial Conference of the United States, the Federal Judicial Center, the Administrative Office of the United States Courts, and the Senate and House Judiciary Committees, working closely with the Governmental Affairs Office in relation to all federal legislation which pertains to the federal judicial system, serving as a resource within the Association and to the officers of the Association on matters pertaining to the federal judiciary, representing the Association before legislative bodies on matters pertaining to the federal judicial system, and otherwise acting as the only entity within the Association that is exclusively devoted to preserving and improving the administration of justice in the federal courts.

SCFJI was created at the suggestion of the Chief Justice because other Association entities, including the Judicial Division, were constrained by ethical rules and other limitations in their ability to affirmatively advocate certain policy positions concerning the federal courts and the administration of justice within the federal system. Because of SCFJI's composition, it is able to be an advocate on certain matters when other ABA entities comprised solely or predominately of judges are limited in their ability to speak. SCFJI's members are presidentially appointed and possess the necessary expertise and experience to fulfill SCFJI's mission.

Since its creation, SCFJI has been the leading voice within the Association on issues related to federal judicial compensation, the authorization and filling of judgeships by Congress, all federal legislation impacting federal courts including jurisdiction, funding, impeachment of federal judges, procedural rules, separation of powers, issues impacting those who work and practice in federal courts, and more. Although the Judicial Division, its National Conference of Federal Trial Judges, and many other entities within the Association are committed to supporting the federal courts, only SCFJI is able to be an affirmative advocate on certain important policy positions that impact the federal judiciary.

The Standing Committee on Judicial Independence ("SCJI") plays a similarly unique and important role within the Association. The Commission on Separation of Powers and Judicial Independence, which was created in 1996, laid the groundwork for what would ultimately become the Standing Committee on Judicial Independence. The Commission recommended that state, local, and territorial bar associations should develop mechanisms for responding to unfair attacks on judges, that research should continue into the causes of eroding confidence in the judicial systems throughout the country, that long-term educational programs should be developed and implemented, both in schools, and for the public generally, with strategies.
focused upon improving public understanding of the judicial system and the concept of an independent judiciary. Based upon these recommendations, SCJI was formed and its mission encompasses those recommendations and more. For nearly two decades, SCJI has strived to carry out its mission and serve as a resource to state and local courts and bar associations as they seek to preserve fair and impartial courts in their states.

SCJI and SCFJI share many common values and priorities, and often support the work of each other, formally or informally. However, the missions of the two Standing Committees are very different as are the means of achieving their very different goals. In order to improve the administration of justice in the federal judicial system, SCFJI primarily focuses on federal legislation and rulemaking and Association policy directed towards Congress. SCFJl's mission includes making policy recommendations to improve judicial independence and the administration of justice in state, local, and territorial courts. Some of these policy recommendations are aimed at state lawmakers, but many are not. Far more than its focus being on improving state courts rather than federal courts, SCJI's mission is unique and wholly separate from SCFJI's because SCJI's mission is focused on specific courts, bar associations, and the public. In addition to making policy recommendations, SCJI assists courts, administrative adjudications, and state, local, and territorial bar associations in developing plans for responding to unfair attacks on judges and infringement upon judicial independence, encourages public awareness and appreciation of the importance of judicial independence and merit selection, and acts as a clearinghouse for the Association's activities dealing with judicial independence. SCJI has been the leading voice within the Association on issues related to judicial selection, the development of state-specific rules regarding judicial disqualification and disclosure, introductory judicial education, and other issues impacting the fair and impartial administration of justice in state courts, as well as the public perception of courts. Although there are many other entities within the Association that are concerned about threats to judicial independence, like SCFJI, SCJI is composed of individuals who are presidentially appointed and possess the expertise and experience to carry out SCJI's mission without the limitations that exist within sections and divisions.

This Proposal amends the Bylaws to effectuate the combination of the Standing Committee on Judicial Independence and the Standing Committee on Federal Judicial Improvements into a single Standing Committee on the American Judicial System ("Standing Committee") and the Commission on the American Jury Project ("Jury Project"), because the jurisdiction of each of those entities is closely aligned with the jurisdiction and mission of the Standing Committee and will remain so. This proposal is in response to the recommendation of the Committee on Scope and Correlation of Work ("Scope") that SCFJI be eliminated and that its work be subsumed by SCJI. Scope's recommendation was submitted as Proposal 11-5 for Consideration by the House of Delegates ("HOD") at the 2013 Annual Meeting, but was withdrawn subject to the agreement by SCJI and SCFJI to "work together to recommend a plan to create a new single entity, with appropriate structure and subcommittees to address the issues that confront the state and federal judiciaries." This Proposal sets forth a letter from Scope to Stephen J. Curley, Chair, Standing Committee on Constitution and Bylaws (June 5, 2013), withdrawing proposal to eliminate SCFJI.

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structure for the combination of SCJI and SCFJI in a way that preserves their core missions and will allow their important work to continue. This Proposal also seeks to set forth the mission of the proposed Standing Committee in a way that will provide effective guidance as it strives to carry out the purposes and goals of the ABA as the coordinator and clearinghouse for Association activities related to preserving and enhancing the judicial system now and in the future.

II. The Purposes and Goals of the ABA

The missions of SCJI and SCFJI go to the heart of the purposes and goals of the Association.

The purposes of the Association are to uphold and defend the Constitution of the United States . . . to promote throughout the nation the administration of justice . . . to uphold the honor of the profession of law . . . to apply the knowledge and experience of the profession to the promotion of the public good . . . and to correlate and promote the activities of the bar organizations in the nation within those purposes and in the interests of the profession and of the public.

The ABA achieves its mission by working towards the objectives set forth in its four goals. Although SCJI and SCFJI aim to achieve the objectives of Goals I-III, SCJI and SCFJI offer unique value to the Association as two of the few entities within the Association with missions aimed directly at Goal IV.

Goal IV: Advance the Rule of Law.
Objectives:
1. Increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world.
2. Hold governments accountable under law.
3. Work for just laws, including human rights, and a fair legal process.
4. Assure meaningful access to justice for all persons.
5. Preserve the independence of the legal profession and the judiciary.

The missions of SCJI and SCFJI are of critical importance to carrying out the purposes of the Association and the objectives of Goal IV. This Proposal recognizes the importance of the missions of both SCJI and SCFJI, and aims to create a single, unified Standing Committee with a comprehensive mission. The combined jurisdictional statement sets forth the mission of the Subcommittee on State Courts, which will continue to carry out the work of SCJI, and the Subcommittee on Federal Courts, which will continue to carry out the work of SCFJI. In order to provide support of and coordination with the Task Force and the Jury Project, it is anticipated that the chairs of the Task Force and the Jury Project be included as ex-officio members of the Standing Committee, because the missions of the Task Force and the Jury Project are intimately connected to, interdependent on, and supportive of the missions of SCJI and SCFJI. By

4 ABA Constitution § 1.2.
5 ABA Policies and Procedures, Chapter 1, Section A. The current version of the Association goals was adopted by the House of Delegates at the 2008 Annual Meeting.

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including the chairs of the Task Force and the Jury Project as ex-officio members, it reflects that the Standing Committee is intended to engage in coordinated efforts to preserve and improve the judicial system within the context of a cohesive Standing Committee with an overarching mission statement.

The creation of a single Standing Committee with a comprehensive jurisdictional statement will ensure that the ABA is equipped to be the national voice on issues impacting fair and impartial courts. Those issues include, but are not limited to: court funding, unfair attacks on judges and the role of the judicial branch, institutional threats to constitutional rights such as legal representation, jury trials, and Due Process, methods of judicial selection, judicial elections, judicial compensation, creation and filling of judgeships, ethical issues affecting the judicial branch, limitations on access to courts, judicial administration, and public perception and understanding of the courts. In addition, the unified Standing Committee will be well positioned to act as a clearinghouse and coordinator within the Association of activities dealing with fair and impartial courts and protection of judicial independence. The increased coordination of efforts will allow the Standing Committee, and the Association, to have the most significant impact and advance initiatives most beneficial to the rule of law and the administration of justice.

III. Historical Foundation of the Standing Committee

The first iteration of the Standing Committee on Federal Judicial Improvements was created in 1971, and the first iteration of the Standing Committee on Judicial Independence was created in 1996. SCFJI and SCJI have existed as Standing Committees since 1983 and 1999 respectively. Their longstanding status as standing committees reflects the Association's long history of prioritizing the protection of the independence of the judiciary, including judicial compensation, judicial review, and other related issues. Based upon the recommendations of the Governmental Affairs Office and the Special Committee on Governmental Affairs concerning ABA Legislative and Governmental Priorities, the Board of Governors approved the inclusion of "Independence of the Judiciary" as one of the ABA's Legislative and Governmental Priorities from 1991-2013. From 1985-1990, priorities were more specific and included such things as "Federal Judicial Compensation," "Judicial Immunity," and "Judicial Review." SCFJI and SCJI have been integral to carrying out these ABA priorities over the last four decades.

A. Standing Committee on Federal Judicial Improvements

In 1971, the Board of Governors created the Special Committee on Coordination of Judicial Improvements "to study proposals for improving the federal judicial system." Then ABA


President Leon Jaworski explained that "Chief Justice [Burger] had convinced him . . . that a special committee was needed." The resolution recommending the creation of the Special Committee provided that:

Resolved, That a Special Committee for Coordination of Judicial Improvements be created to study proposals for improving the federal judicial system. . . . The Special Committee will provide a coordinating body within the Association on improvements in the federal judicial system and will maintain close liaison with the Judicial Conference, the Federal Judicial Center, the Administrative Office of the United States Courts, the Senate and House Judiciary Committees, and other institutions working in the field of judicial reform. It will work closely with the Association's Washington Office staff in relation to congressional proposals pertaining to the federal judiciary. The Committee will serve as a conduit to facilitate informal exchanges between the Association and its officers on the one hand and the federal judiciary and government officials on the other.

Further Resolved, That the Special Committee is authorized, within its discretion, to represent the Association before legislative bodies or other tribunals to present the views of the Association on matters pertaining to improvements in the federal judicial system after the Association's position has been determined. 8

In 1973, its jurisdiction was amended to provide that, "The Special Committee on Coordination of Judicial Improvements will work closely with the Association's Washington staff in relation to Congressional proposals pertaining to the federal judiciary considering all federal legislation which pertains to the entire federal justice system." When this revision was proposed, the Chairman reminded the Board that the Committee on Coordination of Judicial Improvements is relatively new although it is nevertheless one of the most important committees of the Association. Its jurisdiction, as spelled out in the resolution creating it, was necessarily broad and all-encompassing. At the time, other entities existed with similar areas of focus, such as the Standing Committee on Judicial Selection, Tenure and Compensation. Therefore, part of the reason for emphasizing the broad scope of the Special Committee's jurisdiction was to reflect that the Special Committee was supposed to coordinate the Association's efforts to bring about improvements in judicial administration through congressional legislation.

The Special Committee's name was changed in 1977 to the "Special Committee on Coordination of Federal Judicial Improvements" to better reflect the work of the committee, which focused on committee terminates upon the adjournment of the first annual meeting after its creation." ABA Bylaws § 31.4.

8 Board of Governors Minutes, October 1971. 9 Id.
9 Id.
10 Id.
12 Id.
13 Board of Governors Minutes, August 1973.
the federal judiciary. The ABA's Bylaws were amended in August 1983 to create the Standing Committee on Federal Judicial Improvements. SCFJI's jurisdictional statement remained unchanged from that established for the Special Committee in 1977.

B. Standing Committee on Judicial Independence

The Commission on Separation of Powers and Judicial Independence was created in 1996. The Commission prepared a report entitled An Independent Judiciary, which was released July 4, 1997, and distributed at the 1997 Annual Meeting. The Commission's recommendations, as well as much of its underlying research, formed the basis for the creation of SCJI. Its recommendations included:

2. State, local and territorial bar associations should develop effective mechanisms for evaluating and, when appropriate, promptly responding to misleading criticism involving judges and judicial decisions;

FURTHER RESOLVED, That the American Bar Association should take the lead in the formation of a consortium of organizations dedicated to an independent judiciary and impartial system of equal justice to (a) continue research into the causes of eroding confidence in the judicial and justice systems throughout the country; and (b) develop and implement long-term educational programs, both in the schools, as well as for the public generally, with defined goals and strategies focused upon improving public understanding of our system of justice and within it the vital concept of an independent judiciary.

After the release of the report, the Commission was dissolved and replaced by the Special Committee on Judicial Independence, Selection, Tenure, and Compensation. This Special Committee was designed to focus on issues impacting state courts, because the Commission had found state courts were where many of the threats to judicial independence were most acute. During the drafting of the jurisdictional statement for the Special Committee, SCFJI offered revisions to ensure that the Special Committee's jurisdiction would not overlap with the mandate of the Standing Committee on Judicial Independence, Selection, Tenure, and Compensation. 3

1 At the time, a Standing Committee on Judicial Selection, Tenure, and Compensation existed in the Bylaws, but it was not active and did not receive funding as of the 1996 Annual Meeting. To avoid confusion, it was formally eliminated at the 1998 Annual Meeting in anticipation of the Special Committee on Judicial Independence seeking standing committee status in 1999, 1998 AM 11-13.

3 Board of Governors Minutes, February 1977.

Standing Committees "shall investigate and study continuing or recurring matters related to the purposes or business of the Association."

Commissions "shall investigate and study specific matters relating to the purposes or business of the Association. Unless it is continued by the House, a commission terminates upon the adjournment of the first annual meeting after its creation." ABA Bylaws § 31.6.

1 1998 MY 112.

1998 MY 112.

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of SCFJI with respect to the study and evaluation of the federal judiciary. SCFJI also recommended that the Special Committee and SCFJI coordinate their judicial independence activities. The jurisdictional statement approved by the Board of Governors for the Special Committee on Judicial Independence provided that:

The Committee shall:
assist courts, administrative judiciaries and state, local and territorial bar associations in considering and effectuating responses to infringement of judicial independence;
encourage public awareness and appreciation of the importance of judicial independence and merit selection to the American judicial system and the rule of law;
make recommendations on ways to improve and enhance the institutional independence and efficiency of state, territorial and local judiciaries and encourage appropriate accountability to enhance judicial independence and the efficient administration of justice; and
act as a clearinghouse for the Association's activities dealing with the judicial independence of state, local and administrative judiciaries.

In 1999, the Board of Governors recommended to the House of Delegates that the Special Committee be sunset, subject to approval of a proposal to create the Standing Committee on Judicial Independence. At the 1999 Annual Meeting, the Standing Committee on Judicial Independence was created by amendment to Section 31.7 of the ABA Bylaws. The report that accompanied the proposal to create SCJI noted that, "Amendment of the Association's Bylaws to designate a Standing Committee on Judicial Independence is consistent with Association Goal XI and will demonstrate the Association's ongoing commitment to an independent judiciary." Except for the addition of a Special Advisor in 2002, the jurisdictional statement of SCJI has remained the same since 1997.

C. Commission on the American Jury Project

The Commission on the American Jury was created by the Board of Governors in 2003 "to provide leadership and strategic direction to the ABA in advocating, promoting, and improving the jury system in America." The Board of Governors also created the Special Working Group on Jury Standards to "examine and recommend a single set of ABA standards and report to the Commission." In 2004, the name of the Special Working Group on Jury Standards was changed to the American Jury Project. At that time, the Board of Governors also created the Advisory Committee to the American Jury Project, which was comprised of appointees from outside organizations involved in jury-related matters, to "provide comment on draft standards to
the American Jury Project during the jury symposium scheduled for October 2004.\textsuperscript{25} The first National Symposium on the American Jury System was held at Washington & Lee University in October 2004 to address the draft jury standards, after which the American Jury Project prepared and recommended jury standards for consideration by the House of Delegates.\textsuperscript{2} In February 2005, the House of Delegates adopted the ABA Principles for Juries and Jury Trials.\textsuperscript{27}

Following the adoption of the Principles, the American Jury Project began developing a trial innovation pilot project in the Seventh Federal Circuit. The Seventh Circuit Jury Project Commission was formed in the summer of 2005, and from October 2005 through April 2008, the Seventh Circuit Bar Association took the lead in testing the usefulness and benefits, if any, of putting the Principles into action.\textsuperscript{29} The Seventh Circuit American Jury Project issued its final report in September 2008.

At the request of then ABA President Robert J. Grey Jr., in August 2005, the Board of Governors created the Commission on the American Jury Project\textsuperscript{30} as the successor entity to the Commission on the American Jury and the American Jury Project. “The new entity would promote and expand upon the policy work of the American Jury Project by advancing, refining, and updating the ABA Principles for Juries and Jury Trials and reach out to the public, interest groups, the legal profession, and others regarding the importance of jury service and jury improvement.”\textsuperscript{31} Since that time, the Jury Project has been comprised of thirteen members including the chair. The chair is appointed by the ABA President-Elect, and the Criminal Justice Section, Judicial Division, Section of Litigation, and the Tort Trial & Insurance Practice Section appoint three members each. Its mission is to:

(1) promote and expand upon the policy work of the American Jury Project by advancing, refining, and updating the ABA Principles Relating to Juries and Jury Trials to courts, rulemaking bodies, state legislatures, and the organized bar, and further refining the principles as warranted; and (2) reach out to the public, third party interest groups, government officials, national media, and the legal profession as a whole regarding the importance of jury service and jury improvement.

Reviewing, updating, and promoting the Principles has remained a central purpose of the Jury Project. Most recently, amendments to the Principles were adopted at the 2013 Midyear Meeting.\textsuperscript{33}

\textsuperscript{25} id
\textsuperscript{26} Board of Governors Minutes, November 2004, Status Report of H. Thomas Wells, Jr., liaison to the Commission on the American Jury.
\textsuperscript{25} id
\textsuperscript{27} Board of Governors Minutes, February 2006.
\textsuperscript{29} Seventh Circuit American Jury Project, Final Report, September 2008.
\textsuperscript{29} Board of Governors Minutes, August 2005.
\textsuperscript{30} id
\textsuperscript{31} ABA Policies and Procedures, Chapter 4, Section II(C).
\textsuperscript{33} 2013 MY 106.
In October 2006, the National Symposium on the American Jury System was held at the Southern Methodist University Dedman School of Law in Dallas, Texas. The United States Postal Service unveiled its Jury Duty Stamp on October 27, 2006 during the Symposium to be made available to the public in September 2007. In February 2007, the Board of Governors approved the establishment of the annual Jury Innovation Award to honor an individual or group that has made significant contributions to the preservation and strengthening of the American jury system. In October 2008, the National Symposium on the American Jury System was held at Fordham University in New York, New York, and in 2010, it was held at George Washington University School of Law in Washington, DC. In 2012, the Symposium was held at Northwestern University School of Law, in Chicago, Illinois, and focused on challenges faced by the modern jury and how the jury trial can be enhanced with modern jury procedures. Planning is currently underway for the 2014 National Symposium on the American Jury System, which will be held at the University of San Diego Joan B. Kroc Institute for Peace and Justice in San Diego, California.

To the extent the mission of the Jury Project involves public outreach and working with governmental officials, courts, and other persons and organizations concerned with the preservation and improvement of the jury system, coordination with the work of the Standing Committee will enhance the ability of both entities to carry out their missions effectively and best allow the ABA to be the national voice on issues relating to jury service and the jury system. Not only are the public outreach and liaison functions of the Standing Committee and the Jury Project interrelated and complementary, but the underlying basis for the existence of the Jury Project goes to the mission of the Standing Committee. The jury system is fundamental to the American judicial system. However, fewer and fewer cases go to trial each year, members of the public routinely seek to avoid jury service, the integrity of trials is increasingly threatened by juror misconduct, the venire in many jurisdictions continues to be unrepresentative of the community, courts lack resources to improve juror utilization, and, even when jury instructions are clear, jurors often lack understanding of the judicial system as a whole.

D. Task Force on Preservation of the Justice System

The Task Force on Preservation of the Justice System was created by then ABA President Stephen N. Zack as one of his four core initiatives for the 2010-2011 year, with the mission and intent to develop recommendations and strategies to address the underfunding of the justice system. The following year, President Wm. T. (Bill) Robinson III continued the Task Force as one of his presidential initiatives. During its first two years, the bipartisan Task Force was co-chaired by Theodore B. Olson and David Boies. William K. Weisenberg, 2008-2011 SCJI Chair, and Mary McQueen, President of the National Center for State Courts (“NCSC”), served as Vice Chairs of the Task Force. The creation of the Task Force followed the creation of the Justice is the Business of Government Task Force (“JBiz”) by the executive committee of the Board of Governors in September 2009 at the request of SCJI. SCJI made this request following the ABA Presidential Summit in May 2009 that was sponsored by the ABA Commission on Fair and Impartial State Courts and the National Center for State Courts. The Task Force and JBiz

54 Board of Governors Minutes, February 2007.
55 ABA Policies and Procedures, Chapter 4, Section II(C).
worked together closely, and the membership of both entities overlapped significantly. Since 2012-2013, the work of the Task Force has continued as an independently functioning and separately funded subcommittee of SCJI, co-chaired by recent ABA Presidents Stephen N. Zack and Wm. T. (Bill) Robinson III. Current ABA President James R. Silkenat has made court funding one of his primary areas of focus for 2013-2014.

Between February 2011 and August 2012, the Task Force held several hearings and forums and members offered testimony in other venues. In the fall of 2012, the Task Force issued its Proposed Next Steps, which it sought to implement beginning in 2012-2013. Pursuant to the Proposed Next Steps report, in 2012-2013, the Task Force focused its efforts at the state bar level. The Task Force worked with Kentucky to institute an ABA Day-type event in February 2013, which led to the legislature approving $28.1 million in bond funding for a long-needed electronic case and docket management system. The Kentucky initiative is likely to be expanded in 2014, and the Task Force continues to seek opportunities to assist other states in developing similar initiatives. As part of implementation, members of the Task Force have continued to speak to bar associations throughout the country about the court funding crisis. More recently, in October 2013, Wm. T. (Bill) Robinson III presented "Supporting Our Courts!" to the Southern Conference of Bar Presidents and "Partnering for the Preservation of the Justice System" to the New England Bar Association. The Task Force hopes to participate in the Western States Bar Conference in March 2014. The Task Force is also working with the National Center for State Courts, and expects to participate in regional meetings of the Conference of Chief Justices and the Conferences of State Court Administrators during the coming year. The Task Force recently unveiled an electronic Toolkit for State Court Funding, which can be accessed through the ABA Office of the President's webpage. The Toolkit provides some of the latest information on strategies to use as courts and bar associations seek improved court funding in their state or locality, as well as some of the best practices nationally, and helpful principles for judicial administration.

In addition to raising awareness about the underfunding of the judicial system and providing resources to courts and bar associations, the Task Force has been active in developing ABA policy related to court funding. At the 2011 Annual Meeting, the House of Delegates adopted Resolution 302, which calls upon state, territorial, and local bar associations to document and publicize the impact of funding cutbacks to the justice systems in their jurisdictions and to create coalitions to respond to the ramifications of court funding shortages. It also calls upon state, territorial, and local governments to recognize their constitutional responsibilities to adequately fund their justice systems, to develop principles to provide for stable levels of funding, and to identify and engage in best practices related to court administration. Finally, Resolution 302 urges courts and bar associations to develop strategies to communicate the value of adequate court funding to public officials. At the 2013 Annual Meeting, the Task Force sponsored Resolution 10C, which urges all federal, state, territorial, and local legislative bodies and governmental agencies to adopt laws and policies that ensure full and adequate court funding. Resolution 10C also adopts the Principles for Judicial Administration, and recommends it as appropriate guidance for those states desiring to establish principles for judicial administration in their efforts to restructure court services and secure adequate court funding.

worked together closely, and the membership of both entities overlapped significantly. Since 2012-2013, the work of the Task Force has continued as an independently functioning and separately funded subcommittee of SCJI, co-chaired by recent ABA Presidents Stephen N. Zack and Wm. T. (Bill) Robinson III. Current ABA President James R. Silkenat has made court funding one of his primary areas of focus for 2013-2014.

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In addition to raising awareness about the underfunding of the judicial system and providing resources to courts and bar associations, the Task Force has been active in developing ABA policy related to court funding. At the 2011 Annual Meeting, the House of Delegates adopted Resolution 302, which calls upon state, territorial, and local bar associations to document and publicize the impact of funding cutbacks to the justice systems in their jurisdictions and to create coalitions to respond to the ramifications of court funding shortages. It also calls upon state, territorial, and local governments to recognize their constitutional responsibilities to adequately fund their justice systems, to develop principles to provide for stable levels of funding, and to identify and engage in best practices related to court administration. Finally, Resolution 302 urges courts and bar associations to develop strategies to communicate the value of adequate court funding to public officials. At the 2013 Annual Meeting, the Task Force sponsored Resolution 10C, which urges all federal, state, territorial, and local legislative bodies and governmental agencies to adopt laws and policies that ensure full and adequate court funding. Resolution 10C also adopts the Principles for Judicial Administration, and recommends it as appropriate guidance for those states desiring to establish principles for judicial administration in their efforts to restructure court services and secure adequate court funding.
The important work of the Task Force must remain a priority of the Association, because adequate court funding is fundamental to the preservation of fair and impartial courts, the administration of justice, access to justice, and advancing and protecting the rule of law. Whether the Task Force continues as a presidential initiative, and independent entity, or a subcommittee of the Standing Committee, its work is inextricably linked to that of the Standing Committee, which is why including the chair of the Task Force as an ex-officio member of the Standing Committee will help advance the goals of both entities, ensure coordination of activities, and assist the Association in being a meaningful voice on behalf of the American judicial system.

E. The proposed structure of the Standing Committee will allow it to continue to build upon the important legacies of SCFJ and SCJI

Since their inception, SCFJ and SCJI have both been valuable entities within the Association. SCFJ and SCJI have strong records of proposing policy that goes to the core purposes and goals of the ABA, studying issues that are central to the preservation of fair and impartial courts, instituting projects designed to increase public understanding and respect for the role of the judicial branch, and ensuring that the Association has the ability to be a national voice on key issues impacting the judiciary. Each entity relies on the specialized knowledge of its members and the unique relationships those members have with the stakeholders most relevant to the missions of their respective committees. The members of SCFJ and SCJI necessarily possess different qualifications, despite the commonalities. Therefore, it is important that the combined Standing Committee consist of a Subcommittee on State Courts and a Subcommittee on Federal Courts, with members specially designated to serve on each. It is also essential that a chair be designated for each Subcommittee so someone with specialized expertise can guide the work of each Subcommittee, subject to the coordination and oversight of the chair of the Standing Committee. The Jury Project and the Task Force have equally vital, if more narrow, goals that are essential to the preservation of the American judicial system. Including the chairs of the Jury Project and the Task Force as ex-officio members of the Standing Committee will ensure coordination of efforts, facilitate development of projects, programs, and policy that is comprehensive in scope, and increase the ability of each entity to achieve its mission. The proposed structure and membership is consistent with Scope's recommendations that precipitated this proposal.

IV. 2013 Recommendations of the Committee on Scope and Correlation of Work

The impetus for this proposal was the recommendation of the Committee on Scope and Correlation of Work in February 2013. Prior to that time, SCJI and SCFFJ each had a long history of supporting the work of the other, and seeking opportunities to collaborate, but each functioned independently. Although the substantive work of SCJI and SCFFJ is distinct, each recognizes the interdependence of state and federal courts and the importance of supporting and improving courts at all levels. SCJI and SCFFJ have routinely co-sponsored the programs of the other to reach larger audiences. SCJI and SCFFJ have also occasionally presented programming jointly, because the subject matter was relevant to the mission of both. Similarly, SCJI and SCFFJ have often co-sponsored resolutions of the other, when appropriate. Although SCJI and SCFFJ have often found opportunities to collaborate on programs and policy initiatives, they

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have rarely undertaken joint projects, because the projects are specifically designed to carry out the discrete missions of each committee.

It was against this backdrop of long-standing mutual support that SCFJII was scheduled for review by Scope in May 2012. In addition, the Coordinating Council of the Justice Center was also scheduled for review at that time. Following its initial review, Scope deferred making final recommendations until its December 2012 meeting, at which time it decided to do a comprehensive review of SCJI, SCFJII, the Coordinating Council of the Justice Center, and the Judicial Division, including all of the conferences of the Judicial Division. Following its review, on February 1, 2013, Scope advised SCJI, SCFJII, and the Coordinating Council of the Justice Center of its conclusions and recommendations.

With regard to its review of SCJI, the conclusion was that, “Scope commends the SCJI for its good work.”

With regard to its review of SCFJII, the conclusion was:

Scope concluded that although the SCFJII oversees worthy programs and projects, the majority of their projects and programs are cosponsored with conferences of the Judicial Division or the Standing Committee on Judicial Independence (“SCJI”). Therefore, Scope agreed most of the SCFJII’s work could be subsumed by other ABA entities and falls within the jurisdiction of other entities such as the SCJI and the Division for Public Education.

In addition to the substantive changes recommended by Scope, it also recommended increasing the size of SCJI to account for the inclusion of the Task Force and “to allow the SCJI to handle all of the issues pertaining to state or federal issues that the Judicial Division cannot handle.” Scope recommended that the size be increased to “16 members, plus a chair (plus the members of the Task Force),” which would currently equal 24 total members. With that recommendation as a starting point, this Proposal sets forth the exact membership of the Standing Committee to ensure that members with appropriate expertise are appointed so that each Subcommittee will be equally situated and capable of carrying out its mission.

With regard to its review of the Coordinating Council of the Justice Center, the conclusion was:

After much deliberation and discussion, Scope agreed that there is little to distinguish the Justice Center from the Judicial Division, except to the extent that the Standing Committees on Judicial Independence, and Federal Judicial Improvements are housed within the Justice Center.

Scope understands the Coordinating Council is charged to ensure coordination of the activities of the entities within the Justice Center. Nonetheless, Scope also understands: 1) staff works within all of the entities; 2) the members of the entities have an excellent working relationship, communicating to each other often, and coordinating and cooperating on all projects and programs. Therefore,
Scope has concluded that the need for a stand alone Coordinating Council is minimal.

Consistent with its recommendation that the Coordinating Council of the Justice Center be eliminated, Scope recommended that, "SCJI serve as an oversight committee that houses a subcommittee on federal judicial funding and improvement, a subcommittee (the Task Force) on adequate funding for state courts, as well as the current subcommittees." Scope also suggested that "the Judicial Division or the SCJL examine ways to create a mechanism for coordination of judicial related projects and programs across ABA Sections, Divisions and Committees." There was no appeal of the recommendation to eliminate the Coordinating Council of the Justice Center, and it was sunset at the conclusion of the 2013 Annual Meeting. Nevertheless, there is no doubt that coordination of efforts is essential, as is reflected in this Proposal.

SCFJI and SCJI both submitted appeals of the recommendation to eliminate SCFJI and have its work subsumed by SCJI. Following those appeals, in May, 2013, a meeting took place at which it was unanimously agreed that the Standing Committees on Federal Judicial Improvements and Judicial Independence would continue as separate entities until the conclusion of the 2014 Annual Meeting, with the understanding that . . . the two committees would work together to recommend a plan to create a new single entity, with appropriate structure and subcommittees to address the issues that confront the state and federal judiciaries. This Proposal is the plan that has been jointly developed in response to Scope's original recommendations and the subsequent agreement to create a new single entity, with appropriate structure and subcommittees.

V. Structure and Support Required for the Standing Committee to Fulfill its Mission

A. Standing Committee and Subcommittee Membership

A combined Standing Committee with appropriate structure and subcommittees requires appropriate and adequate operational support. To ensure that the Standing Committee receives the requisite operational support, it is important to consider its membership, and how those members will carry out their duties. The proposed Standing Committee will consist of 21 members, plus at least two ex-officio members, and will be composed of two Subcommittees, each of which will be responsible for implementation of discrete policies, projects, and programs. It is suggested that the existing members of SCJI and SCFJI whose terms on those committees would not have expired in 2014 continue as members of the appropriate Subcommittee, so that the Standing Committee can benefit from their institutional knowledge as well as their substantive expertise. New members should be appointed as appropriate so that approximately the same number of members complete their terms on the Standing Committee each year. The current Chairs of SCJI and SCFJI will both complete their terms at the conclusion of the 2014 Annual Meeting. Therefore, it is recommended that when the President-Elect appoints the Chairs of each Subcommittee, as well as the Chair of the Standing Committee, appointments be made with the expectation that one will serve a 1-year term, one will serve a 2-year term, and one will serve a 3-year term, so that a staggered three-year rotation will be

36 Letter from Scope to Stephen J. Curley, Chair, Standing Committee on Constitution and Bylaws (June 5, 2013), withdrawing proposal to eliminate SCFJI.
In 2014, the appointment of the Chair of the Standing Committee, as well as the Chairs of the Subcommittees, should be done with careful attention to leadership ability and familiarity with the substantive mission of the Standing Committee and the Subcommittees. In particular, the Chair of the Standing Committee should be well-qualified to coordinate the work of the two Subcommittees, as well as ensure coordination with the Task Force and the Jury Project. For continuity, and to ensure that ongoing initiatives do not lose momentum during the transitional period, it may be advisable to appoint one of the current chairs to a one-year term as chair of the new Standing Committee. In subsequent years, the chairs of the Standing Committee and the Subcommittees should be appointed to 1-year terms, with the expectation that they will be renewed for a total of three years, so that one chair completes his or her third one-year term each year. It is recommended that the chair of the Standing Committee be appointed from among those with demonstrated service to one of the two Subcommittees. It is also recommended that a presumption exist that when a chair of the Standing Committee completes his or her term, the new chair shall be appointed from among those with demonstrated service to the Subcommittee to which the outgoing chair did not have a history of service. This Proposal does not suggest any changes to the manner in which the chair or members are appointed to the Jury Project or the Task Force.

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It is anticipated that the two Subcommittees would continue to have a need to meet four times per year to continue to carry out their separate missions. It is possible that the Subcommittees could meet at the same location over the same dates, depending upon member availability, but it would not be feasible for the business meetings to overlap because of the need for staff support at each meeting and the need for several members and liaisons to attend both meetings in different capacities. It also would not be feasible to have joint business meetings, with the members of both Subcommittees present and conducting business during a single meeting, because the substantive work of each Subcommittee is distinct. Each Subcommittee will continue to need sufficient opportunity to discuss recent developments related to its mission, plan programs and projects that support its mission, and develop policy to advance its mission. If the Subcommittees meet separately, they will continue to be able to engage in this process in a productive and efficient manner, drawing upon the unique expertise of their members. If the Subcommittees meet jointly, it will diminish efficiency, because half of those present will lack the requisite expertise and interest. This will require that additional time be spent educating members, members are likely to offer input that is not based upon sufficient experience and knowledge, and members may feel that they do not have ample opportunity to offer input or that their attendance is unnecessary. Any benefits that could be gained from meeting jointly, such as

B. Standing Committee and Subcommittee Meetings

Currently, SCFJI and SCJI each meet four times per year: at the ABA Annual Meeting, ABA Midyear Meeting, and at a stand-alone Fall Planning Meeting and Spring Planning Meeting. It is anticipated that the two Subcommittees would continue to have a need to meet four times per year to continue to carry out their separate missions. It is possible that the Subcommittees could meet at the same location over the same dates, depending upon member availability, but it would not be feasible for the business meetings to overlap because of the need for staff support at each meeting and the need for several members and liaisons to attend both meetings in different capacities. It also would not be feasible to have joint business meetings, with the members of both Subcommittees present and conducting business during a single meeting, because the substantive work of each Subcommittee is distinct. Each Subcommittee will continue to need sufficient opportunity to discuss recent developments related to its mission, plan programs and projects that support its mission, and develop policy to advance its mission. If the Subcommittees meet separately, they will continue to be able to engage in this process in a productive and efficient manner, drawing upon the unique expertise of their members. If the Subcommittees meet jointly, it will diminish efficiency, because half of those present will lack the requisite expertise and interest. This will require that additional time be spent educating members, members are likely to offer input that is not based upon sufficient experience and knowledge, and members may feel that they do not have ample opportunity to offer input or that their attendance is unnecessary. Any benefits that could be gained from meeting jointly, such as

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exploring opportunities for collaboration or gaining insight from additional perspectives, can also be gained by the attendance of the executive committee at the meetings of the Subcommittees.

C. General Revenue Funding: Operating Expenses

It is essential that the Standing Committee receive adequate general revenue support to carry out its current projects, plan and execute future projects, and function as the coordinator and clearinghouse for activities of the Association within its jurisdiction. For general revenue support to be adequate, it must include sufficient funds for: printing, postage, supplies, member/volunteer travel, staff travel, group functions, and other costs reasonably expected to be incurred by the Standing Committee. General revenue funds must also be allocated for basic expenses, such as phones, computers, and conference calls. Finally, general revenue must be provided for staff salaries, and all associated expenses, as explained in more detail below.

Additional sources of funding, such as grants and sponsorships will be sought by the Standing Committee to support its projects, but its basic expenses must be provided for in the general revenue budget.

With regard to the basic operating expenses of the Standing Committee, the general revenue budgets of SCJI and SCFJI can act as a useful guide, because the full amount currently allocated to each will continue to be needed by the Standing Committee to carry out the separate projects of each Subcommittee. Due to the fact that the Subcommittee on State Courts, the Subcommittee on Federal Courts, and the Task Force are, and will continue to be, engaging in separate and distinct projects, it is recommended that general revenue funds be separately allocated to each.37 In addition, it is suggested that general revenue funds be separately allocated to the Standing Committee as a whole to cover expenses related to the expansion of the scope of the Standing Committee, efforts focused on coordination, member and staff travel that is not project-specific, and staff salaries.

D. General Revenue Funding: Staffing

Additional general revenue funds will be necessary, beyond what is currently provided in the SCJI and SCFJI general revenue budgets, in order to appropriately staff the Standing Committee. Currently, the salary of a Staff Attorney 1 is paid from the general revenue budget of SCFJI, and the salary of a Staff Attorney 2 is paid from grant funds that support specific projects of SCJI. The grant is subject to renewal in April 2014. If the grant is renewed at that time, it is anticipated that the grant funds will only be sufficient to pay a portion of the salary of the Staff Attorney 2 going forward because any award will be based upon the actual budget for projects included in the grant proposal, not upon salary requirements. Not only will additional funds be required to maintain current staffing levels, but additional general revenue funds will be necessary to meet the staffing needs of the proposed Standing Committee as set forth below.

General revenue funds that are adequate to pay all salary-related expenses, including salary, 37 For FY2014, the general revenue budget is $77,691 for SCJI and $131,633 for SCFJI.
38 The general revenue budget for SCFJI includes the salary for a Staff Attorney 1. No portion of the SCJI budget is currently allocated to salary-related expenses.

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General revenue funds that are adequate to pay all salary-related expenses, including salary,
taxes, fringe benefits, space and equipment allocations, and all other related expenses will be required for the following positions:

To be appropriately staffed, the Standing Committee should be staffed by the following:

• **Senior Attorney/Chief Counsel:** An attorney capable of undertaking high level substantive legal work, providing substantive expertise to the Standing Committee, conducting high level legal research and analysis, developing and managing multiple projects, creating and planning CLE programs, engaging in grant development, speaking and writing about the substantive areas of focus of the Standing Committee, engaging in external outreach on behalf of the Standing Committee, acting as a liaison to other ABA entities, professional organizations, and outside partners, supervising other attorneys and staff, managing the Standing Committee's budget, and otherwise overseeing and coordinating all activities of the Standing Committee.

• **Staff Attorney I:** An attorney capable of undertaking substantive legal work, providing substantive support to the Standing Committee, conducting legal research and analysis, assisting in the developing and execution of specific projects, planning CLE programs, assisting with basic management of the Standing Committee.

• **Program Associate:** One or more individuals capable of providing substantial assistance planning and implementing the projects of the Standing Committee, providing high level administrative support as well as performing basic clerical functions, and communicating clearly and appropriately with members, ABA staff, and outside entities.

• One or more individuals with expertise in meeting planning, communications, and technology capable of planning all aspects of the meetings of the Standing Committee, assisting with logistics regarding program planning, developing and disseminating promotional materials, creating content and updating the Standing Committee's webpage, and assisting with other technology and communications needs.

In addition to staff working directly for the Standing Committee, the Standing Committee will require staff support from the Division for Communications and Media Relations ("Media Relations") and from the Governmental Affairs Office ("GAO"). The issues within the jurisdiction of the Standing Committee are central to the purposes and goals of the Association, so it is essential that the work of the Standing Committee is a priority of Media Relations and that a person within Media Relations is designated as a liaison available to provide support to the Standing Committee and its initiatives. Media Relations is uniquely situated to provide the type of support necessary to ensure that the Association is able to be the national voice regarding matters impacting fair and impartial courts by responding to issues in a timely and effective manner. Similarly, the GAO has the unique expertise that the Standing Committee will need to serve as a resource regarding political initiatives impacting the courts. The GAO currently provides informal support to SCFJI, consistent with the relationship that has been encouraged since SCFJI was first created as a Special Committee in 1971. That relationship must continue. Finally, because the jurisdiction of the Standing Committee is so central to the purposes and goals of the Association, the Office of the President should designate a staff liaison to the Standing Committee. This will allow the Office of the President to remain well informed about the issues within the jurisdiction of the Standing Committee and facilitate the President being an effective spokesperson for the courts. As the voice of the Association, the President is the individual most capable of ensuring that the Association is the national voice on issues impacting
the courts. The formal designation of a staff liaison will demonstrate that the courts are a priority now and that they will remain a priority for future administrations.

The Jury Project is currently funded by its member entities, with staff support provided by the Judicial Division. No change is proposed to the existing method of funding and staffing of the Jury Project. The only incidental change with respect to staffing is that the Jury Project will have the benefit of limited access to the expertise and counsel of the Standing Committee’s staff attorneys.

This Proposal creates a Standing Committee that will be well positioned to carry out the purposes and goals of the ABA. The creation of this Standing Committee in the ABA Bylaws will reflect the priorities of the Association and its commitment to preserving and improving a fair and impartial judiciary. However, for the creation of the Standing Committee to be meaningful, the Association must also demonstrate its priorities and commitment by allocating its resources in a way that ensures the Standing Committee has appropriate operational support.

VI. Conclusion

Judicial independence and the preservation and improvement of fair and impartial courts at every level must remain among the highest priorities of the Association to ensure that courts remain fair and open now and in the future, and to maintain the Association’s relevance as the voice of the profession. This Proposal creates a Standing Committee that reflects the Association’s core priorities, purposes, and goals.

Respectfully submitted,

Peter Bennett
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PROPOSAL: Amends §31.7 of the Bylaws to create a Standing Committee on Disaster Response and Preparedness

Amends §31.7 of the Bylaws to read as follows:

**Designation, Jurisdiction and Special Tenures of Standing Committees.** The designation, jurisdiction and special tenures of Standing Committees are as follows:

**Disaster Response and Preparedness.** The Standing Committee on Disaster Response and Preparedness, which consists of up to nine members, shall:

1. **a)** endeavor to ensure that lawyers, law-related organizations, the judicial system and the public have the resources, legal services and information to prepare for, respond to and recover from major disasters;
2. **b)** provide technical assistance and planning advice to a wide range of constituents in the field, including bar associations, pro bono programs, legal services offices, bar leaders, law schools, corporate counsel, judges and government attorneys;
3. **c)** produce publications, maintain an on-line library of materials on a wide range of emergency management topics, and present seminars, webinars and workshops on relevant topics;
4. **d)** foster the development of disaster planning and recovery programs and activities by law firms, bar associations, corporate legal departments, law schools, government attorney offices and others;
5. **e)** analyze the scope and function of law-related emergency management programs;
6. **f)** propose and review policy related to legal aspects of disaster response and preparedness, including the delivery of disaster legal services;
7. **g)** coordinate among ABA entities and other entities in the legal and emergency management communities the Association’s response to major disasters; and
8. **h)** endeavor to ensure that the ABA’s business continuity plans are up to date and periodically tested.
This proposed amendment to the Bylaws would reconstitute the Special Committee on Disaster Response and Preparedness as the Standing Committee on Disaster Response and Preparedness and update its jurisdictional statement. The proposal is consistent with the recommendation of the House of Delegates Standing Committee on Scope and Correlation of Work (Scope), prior resolutions of the House of Delegates, and the growing challenges to the Association, profession and public posed by major disasters.

Scope Review and Special Committee Activity

Scope last reviewed the Special Committee on Disaster Response and Preparedness at its Spring 2013 meeting. At that time, Scope concluded that “the Special Committee is active and not engaging in a function that unnecessarily overlaps with or duplicates the activities of other ABA entities.” Furthermore, Scope suggested that “the Special Committee may want to give some consideration to becoming a Standing Committee.” Letter of May 15, 2013, from Sharon Stern Gerstman, Chair, Scope to then Committee Chair David Bienvenu.

Over the last few years the Committee’s activities, reviewed by Scope, have addressed the Committee’s original jurisdiction statement: “to develop policy recommendations, best practices and action items to ensure that the ABA and the legal profession are positioned to respond, and prepared to withstand, both natural and manmade disasters.” Toward this end the Committee has, for example, created a comprehensive website that offers disaster preparedness information for lawyers/firms, bar associations, and the public; sponsored policy resolutions aimed at promoting disaster preparedness by lawyers and increasing disaster legal services funding and pro bono assistance to disaster survivors; coordinated the ABA response to Superstorm Sandy and created a webpage with resources for lawyers specific to the Gulf oil spill; conducted educational seminars, workshops and webinars for lawyers/firms on disaster planning (based on the Committee’s manual “Surviving a Disaster: A Lawyer’s Guide to Disaster Planning”); developed materials and educational programs for state and local bar leaders and staff on disaster planning, including a companion guide on disaster planning for bar associations and webinars; studied the teaching of disaster law; collaborated with ABA Young Lawyers Division on its Disaster Legal Services program; produced an award winning video, “Surviving a Disaster: Are you Prepared?”; facilitated a new ABA member advantage benefit providing disaster recovery services; and worked with the ABA to improve its own business continuity plans, including organizing and conducting two table top exercises involving all ABA senior staff. Currently the committee is developing three webinars that will be offered under ABAction.

Related House of Delegates Action

In 2011, the House of Delegates adopted a resolution urging “state, territorial, local, tribal, and specialty bar associations to create committees dedicated to emergency management planning and response.” [A2011, 116] The resolution did not specifically refer to these as “standing committees;” however the report refers to these as “permanent committees” and addresses...
the critical and timeless roles for such a body: to protect the bar from the debilitating effects of a disaster so that its staff is safe, important assets and records protected and key activities restored in a timely manner. Additionally, bar associations have special responsibilities to have plans and programs that assist both its members impacted by a disaster and the general public.

Increased and Recurring Threats Posed by Disasters

By definition, a standing committee addresses "recurring matters related to the purposes or business of the Association." §31.3 of the Bylaws. Few things are more "recurring," albeit unpredictable, than disasters. To many, the era of disasters began with Hurricane Katrina (August 2005) and much the same can be said for the ABA. Following Katrina then President Michael Greco convened a Task Force on Hurricane Katrina to coordinate what proved to be an impressive response throughout the ABA to assist victims of this horrendous storm. Chaired by former ABA President N. Lee Cooper, the ABA's efforts were captured in the Task Force's Final Report, "In the Wake of the Storm: the ABA Responds to Hurricane Katrina." http://www.americanbar.org/content/dam/aba/migrated/leadership/executivedirector/accounts/aba_katrinareport.authcheckdam.pdf

Six months later, President Karen Mathis successfully sought Board of Governor's approval to create the Special Committee, to continue and expand upon the Task Force's work. The Committee was honored in its first year to have two future presidents of the ABA, Carolyn Lamm and Thomas Wells, serve as co-chairs. For FY2010-11, Steven Zack designated disaster preparedness as one of his presidential initiatives, continuing the support of ABA leadership over the years to this important work.

Events since Hurricane Katrina have only underscored the ABA's need to take steps to ensure its own resilience, assist its members, and serve the public when disaster strikes. Superstorm Sandy, Colorado wildfires, and a DC earthquake, while front page worthy calamities, only underscore the full impact of disasters. If the ABA or any business is hit by an area wide or even office confined disaster such as a fire, sudden and sustained loss of power, or cyber attack, than the functioning of the enterprise can be seriously disrupted. Businesses that don't prepare often do not survive a major disaster. For these reasons, the Committee worked with the ABA to review and totally revamp the ABA's business continuity plan. As a result of this intensive effort, the ABA in October 2011 became the first not-for-profit entity in the United States to be certified under the Voluntary Private Sector Preparedness Program, or PS-PREP, approved by the Department of Homeland Security.

The Association's commitment to preparedness, to assisting its members, and to serving the public are essential to its own long term survival and to upholding the finest traditions of the profession. This is not a one time commitment but an ongoing process as new threats emerge, such as cyber attacks, violent acts of nature statistically are more frequent, government emergency management resources are challenged – as evident in the Congressional debates...
over funding after Superstorm Sandy, and vulnerable populations remain disparately affected. House adoption of this recommended amendment to the Bylaws will be recognition of the value a permanent entity brings to this critical work.

The sponsors respectfully request the House of Delegates to support this resolution.

PROPOSAL: Amends §32.1(c) of the Bylaws to eliminate the requirement that to become a member of a Forum requires membership in at least one Section. Specifically, the amendment would delete the words “of a section” in the sentence: “Any member of a section of the Association may be a member [of a forum].”

Amends §32.1(c) of the Bylaws to read as follows:

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

(Legislative Draft – deletions struck through)

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This proposed Amendment is supported by the Governing Committees of the six ABA Forums, and is co-sponsored by current and former officers of all six Forums. The amendment is proposed for consideration by the House of Delegates at the 2014 Annual Meeting. A brief description of the proposed Amendment and the reasons behind it follows.

The proposed Amendment is to address a significant impediment to the recruitment of new members of the Forums, in that new members must not only be ABA Members (a requirement common to all Sections/Divisions/Forums), but then must also join at least one Section or Division, before being eligible to join a Forum. This effectively and unfairly disadvantages the Forums in new member recruitment as it establishes an additional financial and procedural barrier to adding new members. Not only must they pay ABA dues (not an insubstantial financial commitment), and be willing to incur an additional $40 to $60 for Forum annual dues, but then must additionally incur another $50 to $70 to join a Section or Division, whether or not they otherwise have any interest in joining a Section or Division.

When the ABA Forums were authorized in 1976, they were intended to be gathering places within ABA for lawyers with an interest in a particular major industry, typically with its own specialized body of law just then emerging, and not effectively addressed by the Sections or Divisions organized along the lines of traditional legal subject areas. Whatever the original reason for making Section or Division membership a prerequisite for Forum membership, however, it has long since become obsolete. The Forums today rival or exceed the smaller Sections in membership numbers, and address areas of the law that have long since become well recognized as specialty areas in their own right, such as Construction law, Communications law, and Sports and Entertainment law. There is no reason why the Forums should labor under the financial impediment, and implied “second class” status, of requiring Section membership as a precondition to Forum membership. The Forums accordingly are uniformly supportive of the proposed Amendment to remove this impediment to their recruiting efforts going forward.

By allowing ABA Members the ability to join the interest group having the greatest attraction to them, without an artificial requirement to join an additional group at added cost when that is not desired, the proposed Amendment enhances the Forums’ ability to deliver maximum value to its Members and prospective Members more effectively. The proposed Amendment simply puts the Forums on equal footing with Sections and Divisions.

This Amendment will not negatively affect ABA membership numbers (it may increase them) and should not have any significant negative effect on current Section membership numbers. ABA statistics on the overlap of Section and Forum membership substantiate that the average Forum member today belongs to 2.76 Sections – meaning the average Forum member already is free to drop any one of her Section memberships at any time, but elects not to. Existing Forum members, all but the very newest of them, have necessarily been exposed to the benefits of their Section memberships for some time, even if one assumes they felt “forced” to join a Section at the outset. Accordingly, the Sections have had an ample opportunity to demonstrate their value, and the numbers support the conclusion that they have effectively done so, such that no broad movement to drop Section memberships in the wake of this Amendment is

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anticipated. Concurring, many Sections have been consulted about this proposed Amendment and indicated no opposition to it.

This proposed Amendment was discussed at the open hearing held by the Standing Committee on the Constitution and Bylaws on February 8, 2014 at the Mid-Year Meeting.

The sponsors of this proposal thank the members of the House your consideration of this proposal.
Amends §2.1 and §6.3 of the Association’s Constitution to define “accredited” and to clarify that the person elected as State Delegate must be accredited to the state for which elected.

Amends §2.1 and §6.3 of the Association’s Constitution to read as follows:

Article 2. Definitions and General Provisions

§2.1 Definitions. In this Constitution, the Bylaws, and any rules of the House of Delegates the term:

(a) “Accredited” with respect to Association membership and for the purpose of a member being a candidate and/or voting in Association elections means the state for which a lawyer member self-identifies in his/her ABA membership record.

§6.3 State Delegates. (a) To be eligible for election as State Delegate, a person must be accredited to the state for which elected. The members of the Association whose membership is accredited to a state shall elect by a plurality of the votes cast the State Delegate for that state in the House of Delegates. If there is a tie, the Board of Elections shall select the delegate by lot. If only one valid nominating petition is filed, the Board of Elections shall certify to the House of Delegates that the sole nominee is elected. The term of a State Delegate is three Association years, beginning with the adjournment of the annual meeting next following that delegate’s election. A State Delegate may not serve for more than three consecutive full terms. A State Delegate elected as an officer or member of the Board of Governors ceases to be a State Delegate at the beginning of the term as officer or governor.

REPORT

This housekeeping amendment is being submitted in order to provide clarity to members who want to vote in a State Delegate Election because they have an office or work affiliation in that particular state, but whose member record address is accredited to a different state. The Board of Elections recommended that the current language outlined in Association’s Constitution and all related notices regarding State Delegate Elections be revised to better define “accredited.” The Board of Elections agreed that the accreditation of state is self-identified by the member according to the address the member provides for his/her ABA membership record.
Amends §4.1 of the Constitution to read as follows:

1 Article 4. Association Meetings
2
3 §4.1 Annual Meeting. The annual meeting of the Association shall be held once
during each calendar year at a time and place, within or without the State of Illinois,
prescribed by the Board of Governors. It shall include a meeting of the House of
Delegates and may include such meetings of the Board, sections and committees as
the Board may authorize. Notice of the meeting shall be given to members of the
Association at least six-months five but no more than sixty days in advance.

REPORT
This housekeeping amendment is to amend the notice requirement of meetings from six
months to at least five but no more than sixty days in advance of the meeting. The
amendment will bring the ABA into compliance with the Illinois Not For Profit Act which
requires notice regarding meetings of membership to be given at least five but no more
than sixty days in advance of the meeting rather than the current six months. The
notice will continue to be printed in the ABA Journal and run through sixty days prior to
the meeting of membership which will occur during the ABA Annual Meeting.
SPONSORS: Mary L. Smith (Principal Sponsor), Roula Allouch, Michael G. Bergmann, Lajuana Davis, David R. Gienapp, Lee S. Kolczun, Robert D. Öster, Hon. Cara Lee T. Neville, and Mary T. Torres

PROPOSAL: Amends various sections of the Constitution and Bylaws as housekeeping amendments.

Amends the following sections to read as follows:

Article 10. Sections, Divisions, Committees

§10.1 Sections and Divisions. (b) Each section or division shall adopt bylaws not inconsistent with the Constitution and the Bylaws. The jurisdiction of each section shall be described in its bylaws. Section and division bylaws become effective when approved by the House of Delegates Board of Governors.

Article 30. Sections

§30.6 Dues. With the approval of the House of Delegates, section members may be required to pay dues. Section dues and any requests to increase section dues must be approved by the Board of Governors.

§30.7 Meetings. A section shall meet immediately before or during the annual meeting, as provided by the Board of Governors. The times and places of other meetings must be approved by the Board.
The Board is authorized to take action between meetings of the House of Delegates. Often section and division bylaws are requested to be approved between meetings of the House of Delegates which necessitates action by the Board of Governors.

The House of Delegates considers requests to amend the ABA membership dues structure. As many sections and divisions include information regarding their dues structure in their bylaws, the Board has considered requests to increase or modify the dues of sections and divisions. This housekeeping amendment officially delegates to the Board of Governors the authorization to consider requests of sections and divisions regarding bylaw amendments and to modify their dues structure.

This housekeeping amendment also clarifies that the Board no longer approves the times and places of meetings of sections and divisions. Given the proliferation of meetings and programs of sections and divisions, it was no longer practical for the Board of Governors to consider and approve the times and locations of these meetings.
The Standing Committee on Constitution and Bylaws is directed by the Bylaws to study and make appropriate recommendations on all proposals to amend the Constitution and Bylaws, except for certain specified proposals that are submitted by the Committee on Scope and Correlation of Work.

Since its last report at the 2013 Annual Meeting, the Committee has received twelve (12) proposals to amend the Association’s Constitution and Bylaws. The Committee also is proposing three (3) housekeeping amendments. The Committee met during the Midyear Meeting on February 8, 2014, in Chicago, Illinois, and on April 24, 2014, via telephone conference call, and herewith makes its recommendations on the proposed amendments as follows:

Proposal 1
The Committee considered a proposal to amend §1.2 of the Constitution to include the following language as one of the purposes of the Association: “to defend the right to life of all innocent human beings, including all those conceived but not yet born.” The Committee voted to recommend to the House that the proposal is out of order in that it is inconsistent with the purposes of the Association’s Constitution and that it not be approved.

Proposal 2
The Committee voted to recommend that the proposal to amend §10.3 of the Constitution and §32.1(d) of the Bylaws to change the name of the Forum Committee on the Construction Industry to the Forum on Construction Law, be approved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 3
The Committee voted to recommend that the proposal to amend §10.3 and §13.1(c) of the Constitution and Article 21 of the Bylaws to change all references from “forum committee(s)” to “forum(s)” and to amend the names of each of the six ABA Forums by deleting the word “Committee” therefrom, be approved as to form. However, the Committee took no position on the substance of the proposal.
Proposal 4
The Committee voted to recommend that the proposal to amend §3.1 and §3.3 of the Constitution to include individuals in good standing of a tribal court of any federally recognized tribe as members of the Association, be approved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 5
The Committee voted to recommend that the proposal to amend Article 3 and §6.6 of the Constitution and Article 21 and §30.5 of the Bylaws to create a new lawyer member category for international lawyers, be approved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 6
The Committee voted to recommend that the proposal to amend §21.6 of the Bylaws to eliminate paragraph (b), thus removing the Disability Waiver Program, be approved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 7
The Committee voted to recommend that the proposal to amend §30.5 of the Bylaws to allow non-U.S. lawyers associates to serve on the Council and in the leadership of the Section of Antitrust Law be approved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 8
The Committee voted to recommend that the proposal to amend §30.5 of the Bylaws to allow non-U.S. lawyers associates to serve on the Council and in the leadership of the Section of Environment, Energy and Resources be approved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 9
The Committee voted to recommend that the proposal to amend §30.5 of the Bylaws to allow non-U.S. lawyers associates to serve on the Council and in the leadership of the Section of Labor and Employment Law be approved as to form. However, the Committee took no position on the substance of the proposal.

* Mary Smith abstained from the discussion and voting with respect to this proposal.
Proposal 10
The Committee voted to recommend that the proposal to amend §31.7 of the Bylaws to eliminate the Standing Committee on Federal Judicial Improvements and the Standing Committee on Judicial Independence and create one entity, the Standing Committee on the American Judicial System be approved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 11
The Committee voted to recommend that the proposal to amend §31.7 of the Bylaws to reconstitute the Special Committee on Disaster Response and Preparedness to the Standing Committee on Disaster Response and Preparedness, be approved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 12
The Committee voted to recommend that the proposal to amend §32.1(c) of the Bylaws to eliminate the requirement that to become a member of a forum requires membership in at least one Section, be approved as to form. However, the Committee took no position on the substance of the proposal.

Housekeeping Amendments
The Committee voted to recommend that the following housekeeping amendments be approved:

a) Proposal amending §2.1 and §6.3 of the Constitution to define “accredited” and to clarify that the person elected as State Delegate must be accredited to the State for which elected;

b) Proposal amending §4.1 of the Constitution to require that notice of the Annual Meeting shall be given to members of the Association at least five but no more than sixty days in advance as opposed to six months;

c) Proposals amending: i) §10.1(b) of the Constitution to authorize the Board of Governors to consider any requests regarding bylaw amendments of Sections and Divisions; ii) §30.6 of the Bylaws to authorize the Board of Governors to consider requests of Sections and Divisions to modify their dues structure; and iii) §30.7 of the Bylaws to clarify that the Board of Governors no longer considers and approves the times and locations of meetings of Sections and Divisions.

Respectfully submitted,

Mary L. Smith, Chair
Roula Allouch
Michael G. Bergmann
Lajuana Davis
David R. Gienapp

Lee S. Kolczun
Robert D. Oster
Hon. Cara Lee Neville, Board Liaison
Mary T. Torres, Board Liaison

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Lee S. Kolczun
Robert D. Oster
Hon. Cara Lee Neville, Board Liaison
Mary T. Torres, Board Liaison
RESOLVED, That the American Bar Association supports prompt ratification, by the
United States and other nations, of the Marrakesh Treaty to Facilitate Access to
Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-
Disabled.
I. Introduction

The Resolution expresses the support of the American Bar Association for prompt ratification, by the United States and other nations, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled (the Treaty). U.S. leadership was critical in the framing and adoption of the Treaty, which the U.S. signed on October 2, 2013, and prompt action by the U.S. will help ensure that the Treaty achieves its objectives.

The Treaty is designed to address a problem that has become known as the “book famine.” Over 300 million visually-impaired and other print-disabled persons, the majority of them in developing countries, are excluded from accessing over 95 percent of all published works. The Treaty provides a legal framework for addressing that problem in a manner that respects the architecture of the international copyright system. In so doing, it achieves a balance that advocates on all sides have recognized as fair and just.

On June 27, 2013, a diplomatic conference convened by the World Intellectual Property Organization (WIPO) in Marrakesh, Morocco, adopted the Treaty after extensive deliberations. The U.S. delegation to the WIPO championed the Treaty throughout the negotiations, as did advocates for print-disabled persons from around the world. Associations of U.S. companies that engage in the exploitation of copyrighted content have expressed general satisfaction with the result achieved in Marrakesh. Fifty-one countries signed the Treaty on June 28, 2013 and the U.S. did so on October 2, 2013. There are currently 60 signatories. No countries have as yet completed the ratification process. The Treaty will enter into force once 20 countries have deposited their instruments of ratification or accession.

Once in effect, the Treaty will require Contracting Parties to adopt exceptions to their domestic copyright laws to permit the making of copies in accessible formats, as well as the distribution of those copies, both domestically and internationally. Because the U.S. has already incorporated appropriate exceptions into its copyright laws, no further modifications to U.S. laws will be required to bring the U.S. into compliance with the requirements of the Treaty. As other countries adopt similar exceptions, the Treaty will benefit print-disabled individuals in the U.S. and throughout the world.

3 The State Department has not yet submitted the treaty to the Senate for its advice and consent.
II. Goals of the Treaty

Under the copyright laws in many countries, making copies of works in formats accessible to the print-disabled, such as Braille, without the authorization of the rights-holder, could constitute an infringement of the reproduction right. Similarly, the unauthorized distribution of such copies could constitute an infringement of the distribution or making available to the public right. In addition, the export or import of accessible format copies could trigger infringement liability.

For these reasons, over 50 countries, primarily in the developed world (including the U.S.), have adopted exceptions that allow the making and distribution of accessible format copies. However, over 130 WIPO countries, in which the majority of print-disabled people live, do not have such exceptions. Moreover, the existing exceptions do not always explicitly permit the import or export of accessible format copies. Because of the high cost of producing accessible format copies and the relatively low demand for many individual titles, the ability to share accessible format copies across borders would benefit the print disabled in both developed and developing countries. Among other things, it will enable countries that speak the same language to import and export accessible copies of a given text, rather than having to create their own. It will make available to print-disabled persons in the U.S. a vast library of both English and foreign language works that are not currently available here, and will enable those in other countries to acquire U.S. editions that are not now available in their home countries.

The Marrakesh Treaty addresses these problems by requiring Contracting Parties to adopt copyright exceptions that allow, under certain conditions:

1) the making of accessible format copies;
2) the domestic distribution of accessible format copies;
3) the export of accessible format copies; and
4) the import of accessible format copies.

The Treaty provides Contracting Parties with great flexibility in implementing these obligations. As Article 10(3) provides, “Contracting Parties may fulfill their rights and obligations under this treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof.”

At the same time, the Treaty does set forth one approach for meeting its obligation to permit the making and distribution of accessible format copies domestically. Likewise, the Treaty sets forth one way a Contracting Party may meet its obligation to permit the cross-border exchange of accessible format copies. The Treaty should be understood as creating minimum standards for exceptions, subject to existing limitations under the so-called “Three-Step Test” of the Berne Convention for the Protection of Literary and Artistic Works. 4

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4 Article 9(2), Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as amended Sept. 28, 1979, 828 U.N.T.S. 221, available at

5 Article 9(2), Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as amended Sept. 28, 1979, 828 U.N.T.S. 221, available at
Many aspects of the Treaty (e.g., the focus on actions by "authorized entities") are similar to the specific exception for the print disabled in the U.S. Copyright Act, 17 U.S.C. § 121, known as the Chafee Amendment (named for its author, Senator John H. Chafee). This similarity is not an accident: significant elements of the Treaty are based on proposals originally submitted by the U.S. delegation, and are modeled directly on U.S. law.

III. The Marrakesh Treaty and U.S. law

A. Definitions

Articles 2 and 3 of the Treaty set forth definitions that determine the persons to whom the Treaty applies and the works and formats it is intended to govern.

1. Beneficiaries of the Treaty. The most basic term is "beneficiary person," which Article 3 defines as a person who is: (a) blind; (b) "has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works;" or (c) "is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading." Any disabling visual impairment that cannot be improved by the use of corrective lenses should be understood to qualify, as are persons with learning disabilities, spinal cord injuries, etc. The reach of this definition is coextensive with the population already served under existing accessibility exceptions to U.S. law.

2. Works to which the Treaty applies. The Treaty also defines the types of works to which it applies. For purposes of the Treaty, "works" means published literary and artistic works in the form of text, notation, and/or illustrations, regardless of media. Although this definition is somewhat broader than the range of "non-dramatic" literary works explicitly covered by the Chafee Amendment, the "fair use" doctrine codified in § 107 of the Copyright Act provides an independent, alternative basis on which accessible versions of dramatic literary works, as well as visual illustrations to texts, can be produced and made available to print-disabled persons. The agreed statement concerning Article 2(a) adds that this definition includes works in audio form, such as audiobooks (although audiovisual works such as films do not fall within the definition of works).

http://www.wipo.int/export/sites/www/treaties/en/l.asp?doc=tr2001.pdf Article 11 of the Treaty incorporates the Three-Step Test as follows: "(a) in accordance with Article 9(2) of the Berne Convention, a Contracting Party may permit the reproduction of works in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." This international copyright requirement should not pose a major impediment to good faith implementation of the treaty. Indeed, the existing exception for the print disabled in the U.S. Copyright Act, 17 U.S.C. § 121, which was enacted in 1996, has never faced any challenge in or out of court on this basis.

Marrakesh Treaty, supra note 1, art. 2(a). A second sentence adds: "[t]he accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible...."

Article 10(3) of the Treaty states that provisions for accessibility under national copyright laws may take a variety of forms, including "judicial, administrative, or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses...."
3. Accessible formats. The Treaty then defines the formats into which these works can be converted. “Accessible format copy” means a copy of a work in a form “which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability.” The wording of the Treaty avoids any suggestion that an accessible format copy is a format usable only by a print-disabled person: its language—“the accessible format copy is used exclusively by beneficiary persons”—clearly refers to who is actually using the copy, not who is capable of using it. Again, this provision is fully consistent with current U.S. law.

4. Authorized entities. Finally, the Treaty defines the organizations that will be making and distributing the accessible format copies, known as “authorized entities.” An authorized entity is “an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis.” Article 2(c) provides that the term authorized entity “also includes a government institution or a non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations,” even if the organization is not specifically authorized or recognized by the government to do so. This definition is consistent with the Chafee Amendment’s definition of “authorized entity.” Thus, for example, both a specialized agency providing services to the blind and a general-service library with an institutional program to promote accessibility would constitute authorized entities.

B. Treaty obligations

Article 4(1) requires Contracting Parties to provide in their national law an exception to the right of reproduction, distribution, and making available to the public “to facilitate the availability of works in accessible format copies for beneficiary persons.” As has been noted, Contracting Parties have significant flexibility in how they meet this obligation.

The system of compliance set forth under Article 4(2) is based on the framework established under current U.S. law. It has two subparts. First, an authorized entity is permitted to make an accessible format copy, or obtain an accessible format copy from another authorized entity, and supply the copy to a beneficiary person by any means, including electronic communication. To qualify, an authorized entity must: (i) have lawful access to the work; (ii) avoid making changes other than those needed to make the work accessible; (iii) supply copies for use by beneficiary persons; and (iv) undertake the activity on a non-profit basis. Second, a beneficiary person or someone acting on his or her behalf may make an accessible format copy for his or her own use. Again, these conditions are derived from limitations that are routinely observed by U.S. providers of accessible texts, including the National Library Service for the Blind and Physically Handicapped of the Library of Congress, and non-profits such as Bookshare.

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Additional flexibilities

Article 4(3) provides that a Contracting Party may fulfill its obligations under Article 4(1) by providing other exceptions and limitations, rather than pursuant to Article 4(2). However, these other exceptions must be consistent with Articles 10 and 11, discussed above.

Article 4(4) provides that a Contracting Party may choose to confine exceptions under Article 4 to works “which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market.” Under this provision, a country implementing the treaty could choose to limit the scope of its exception accordingly. That is, to situations where a print-disabled person could not readily purchase or license an accessible copy in a particular format. This provision is price-sensitive and format specific: if, for example, an appropriate (and appropriately priced) electronic text of a work were available, a Contracting Party that opts for this restriction on the exception on accessibility could still be required to permit reproduction and distribution in Braille format. U.S. law contains no such restriction, and because this language is permissive rather than mandatory, the U.S. would not be required to adopt such a restriction if it ratifies the Treaty. Thus, U.S. law in its present form is fully compliant with the Treaty.

Article 4(5) provides that “[i]t shall be a matter for national law to determine whether limitations or exceptions under this Article are subject to remuneration.” This provision allows a Contracting Party to condition an exception on the payment of a royalty to the rights-holder. In other words, a Contracting Party could adopt a statutory license rather than an absolute exception. However, the language of Article 4(4) suggests that the amount of remuneration provided by such a license would necessarily have to be appropriate to local market conditions. U.S. law currently contains no provision with respect to remuneration, nor would the U.S. be required to adopt such a provision if it ratifies the Treaty.

Article 5(1) provides that a Contracting Party must permit an authorized entity to export an accessible format copy to a beneficiary person or an authorized entity in another Contracting Party. As with Article 4, Article 5 provides Contracting Parties with flexibility on how to implement this obligation. This provision is fully in accord with existing U.S. law. Although the Copyright Act provides that the exportation of “infringing” copies is an act of infringement in its own right, accessible copies made in compliance with defined exceptions in the Copyright Act are, by definition, not infringing.

Also as in Article 4, Article 5 sets forth one approach for a Contracting Party to fulfill its Article 5(1) obligation. Under Article 5(2), a Contracting Party may adopt an exception in its national copyright law that permits an authorized entity to distribute an accessible format copy to an authorized entity or a beneficiary person in another Contracting Party.

C. Additional flexibilities

Article 4(3) provides that a Contracting Party may fulfill its obligations under Article 4(1) by providing other exceptions and limitations, rather than pursuant to Article 4(2). However, these other exceptions must be consistent with Articles 10 and 11, discussed above.

Article 4(4) provides that a Contracting Party may choose to confine exceptions under Article 4 to works “which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market.” Under this provision, a country implementing the treaty could choose to limit the scope of its exception accordingly. That is, to situations where a print-disabled person could not readily purchase or license an accessible copy in a particular format. This provision is price-sensitive and format specific: if, for example, an appropriate (and appropriately priced) electronic text of a work were available, a Contracting Party that opts for this restriction on the exception on accessibility could still be required to permit reproduction and distribution in Braille format. U.S. law contains no such restriction, and because this language is permissive rather than mandatory, the U.S. would not be required to adopt such a restriction if it ratifies the Treaty. Thus, U.S. law in its present form is fully compliant with the Treaty.

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4 See Marrakesh Treaty, supra note 1, art. 5(3).
provided that prior to the distribution “the originating authorized entity did not know or have reasonable grounds to know that the accessible format copy would be used for other than beneficiary persons.” Again, this provision is fully consistent with U.S. law. Although making accessible copies available with knowledge that they would not be used for the intended purpose might constitute either direct or secondary infringement of copyright, in violation of 17 U.S.C. § 106, doing so within the framework of exceptions provided by §§ 107 and 121 would (by definition) not constitute infringement.

Article 6 is the counterpart to Article 5, obligating Contracting Parties to allow authorized entities or beneficiary persons to import accessible format copies from other Contracting Parties. This importation obligation applies only to the extent that the national law of a Contracting Party would permit an authorized entity or a beneficiary person to make an accessible format copy. This activity clearly falls within the scope of fair use as defined in 17 U.S.C. § 107. In addition, as explained below, it falls within the scope of the “first sale” doctrine and the “personal use” exception to 17 U.S.C. § 602.

Article 7 provides that when a Contracting Party prohibits the circumvention of technological protection measures in its general copyright legislation, it “shall take appropriate measures, as necessary, to ensure that … this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.” U.S. law includes such anti-circumvention prohibitions under 17 U.S.C. § 1201(a)(1), which provides that “persons [who] are, or are likely to be … adversely affected by virtue of [the prohibition on circumvention] in their ability to make non-infringing uses” can apply for and receive exemptions from that prohibition on a triennial basis. Clearly, both print-disabled persons and authorized entities would be in a position to seek such exemptions were their legitimate interests in accessibility affected.10

D. Other provisions

Article 8 provides that in the implementation of the Treaty, Contracting Parties “shall endeavor to protect the privacy of beneficiary persons on an equal basis with others.” This should be viewed as a floor and not a ceiling, designed to encourage countries with weak privacy laws to protect the privacy of beneficiaries. In countries such as the United States, with well-developed systems for privacy protection, this requirement would clearly be met under current law.

Article 9 contains additional provisions designed to facilitate cross-border exchanges. Article 9(1) directs Contracting Parties to “foster the cross-border exchange of accessible format copies by encouraging the voluntary sharing of information to assist authorized entities in identifying one another.” The agreed statement concerning this article states that “[i]t is understood that Article 9 does not impose mandatory registration for authorized entities nor does it constitute a precondition for authorized entities to engage in activities recognized under this Treaty; but it provides for a possibility for sharing information to


facilitate the cross-border exchange of accessible format copies.” Thus, no change would be required to bring U.S. law into conformity with this provision.

The Treaty also includes several saving clauses limiting the impact of the Treaty on other matters. Article 5(4)(c) states that nothing in Article 5 “affects the determination of what constitutes an act of distribution or an act of making available to the public.” Article 5(5) provides that “[n]othing in this Treaty shall be used to address the issue of exhaustion of rights.”

Finally, Article 12(2) provides that the exceptions provided under the Treaty are “without prejudice to other limitations and exceptions for persons with disabilities provided by national law.”

IV. U.S. compliance with the Treaty


As discussed above, Article 4(1) obligates a Contracting Party to provide an exception to the right of reproduction and distribution to facilitate the domestic availability of works in accessible format copies for beneficiary persons. The Chafee Amendment permits authorized entities “to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work ... in specialized formats exclusively for use by blind or other persons with disabilities.” The Chafee Amendment appears narrower than Article 4(1) in that it excludes dramatic literary works (e.g., the script of a play) from the scope of the exception. However, the courts likely would consider the making of an accessible format copy of a play to be permissible under the fair use doctrine (Section 107).

The Chafee Amendment also does not go as far as Article 4(2), which authorizes an exception directly for beneficiary persons, as well as one for authorized entities that serve them. Again, it seems clear that the fair use doctrine would apply in this situation where a beneficiary person in the United States, or someone acting on his or her behalf, wished to create an accessible copy of a text for personal use.

Article 5(1) obligates a Contracting Party to permit an authorized entity to export an accessible format copy to an authorized entity or a beneficiary person in another Contracting Party. The U.S. Copyright Act only prohibits the export of infringing copies.11 Because the accessible format copies being exported by the authorized entity would be made pursuant to Section 121 or Section 107, they would not infringe and thus

Importation, addressed by Article 6, is treated under Section 602(a) as a form of distribution. As such, the Chafee Amendment’s exception to the distribution right would provide an authorized entity with an exception to the importation right. Additionally, fair use, first sale, and the personal use exception to the importation right would permit the importation by a beneficiary person. In short, the Copyright Act easily meets the obligations of Article 6.

Article 7 provides that when a Contracting Party prohibits the circumvention of technological protection measures, it must take appropriate measures to ensure that this legal protection does not prevent beneficiary persons from enjoying the exceptions provided for in the Treaty. This requirement is met, as already explained, by the provisions of the Digital Millennium Copyright Act.

V. Conclusion

Because the U.S. has already incorporated appropriate exceptions into its domestic laws to permit the making and distribution of copies in accessible formats, U.S. ratification of the Marrakesh Treaty would not require changes to the Copyright Act. Nonetheless, continued U.S. leadership in support of the Treaty is critical. By requiring Contracting Parties to adopt exceptions similar to those codified in U.S. law, the Treaty would provide substantial benefits to print-disabled persons in the U.S. and throughout the world.

Respectfully submitted,

Mark D. Agrast
Chair
Commission on Disability Rights

Robert O. Lindefjeld
Chair
Section of Intellectual Property Law

Gabrielle M. Buckley
Chair
Section of International Law

August 2014

1. **Summary of Resolution(s).** This resolution expresses the support of the ABA for prompt ratification, by the United States and other nations, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled (the Treaty). The Treaty is designed to address a problem that has become known as the “book famine.” Over 300 million visually-impaired and other print-disabled persons, the majority of them in developing countries, are excluded from accessing over 95 percent of all published works. The Treaty provides a legal framework for addressing that problem in a manner that is fair and just, and respects the architecture of the international copyright system.

2. **Approval by Submitting Entity.** The Commission on Disability Rights approved the resolution at its spring meeting in Los Angeles, California, on April 10, 2014. The Section of Intellectual Property Law approved the resolution at its spring council meeting in Arlington, Virginia, on April 1, 2014. The Section of International Law approved the resolution at its spring council meeting in New York, New York, on April 5, 2014.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The ABA has adopted many policies supporting U.S. ratification of treaties, policies that support the rights of persons with disabilities and intellectual property rights. This resolution would not directly impact those policies, but is consistent with and would supplement them.

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

6. **Status of Legislation.** (If applicable) On June 27, 2013, a diplomatic conference convened by the World Intellectual Property Organization (WIPO) in Marrakesh, Morocco, adopted the Treaty after extensive deliberations. Fifty-one countries signed the Treaty on June 28, 2013 and the U.S. did so on October 2, 2013. There are currently 60 signatories. No countries have as yet completed the ratification
process. The Treaty will enter into force once 20 countries have deposited their instruments of ratification or accession. The Department of State has not yet submitted the Treaty to the Senate for its advice and consent.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Adoption of the resolution will enable the Association to urge the U.S. government and other governments to take all steps that are necessary and appropriate to ratify the Treaty.

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

9. Disclosure of Interest. (If applicable) N/A.

10. Referrals:
Section of Administrative Law and Regulatory Practice
Section of Antitrust Law
Section of Business Law
Section of Individual Rights and Responsibilities
Section of Litigation, Section of Science & Technology Law
Law Student Division
Senior Lawyers Division
Young Lawyers Division
Standing Committee on the Law Library of Congress
Standing Committee on Publishing Oversight
Rule of Law Initiative
Center for Human Rights

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

I. Summary of the Resolution

This resolution expresses the support of the ABA for prompt ratification, by the United States and other nations, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print-Disabled (the Treaty). The Treaty is designed to address a problem that has become known as the “book famine.” Over 300 million visually-impaired and other print-disabled persons, the majority of them in developing countries, are excluded from accessing over 95 percent of all published works. The Treaty provides a legal framework for addressing that problem in a manner that is fair and just, and respects the architecture of the international copyright system.

II. Summary of the Issue that the Resolution Addresses

Hundreds of millions of visually-impaired and other print-disabled persons are currently excluded from access to over 95 percent of all published works. By ratifying the Treaty, the U.S. and other countries will take a major step toward remedying this problem.

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

Once in effect, the Treaty will require Contracting Parties to adopt exceptions to their domestic copyright laws to permit the making of copies in accessible formats, as well as the distribution of those copies, both domestically and internationally. The copyright exceptions called for by the Treaty are largely based on and consistent with the exceptions that are already provided under U.S. copyright laws, and the U.S. will not need to make changes to its laws to comply with the Treaty. However, U.S. ratification will encourage other nations to ratify the Treaty and to adopt similar exceptions. This will benefit many millions of print-disabled individuals in the U.S. and throughout the world.

IV. Summary of Minority Views

We are unaware of any opposition to the resolution.
RESOLVED, That the American Bar Association amends ¶ 4.06(C) of the Standards for Accreditation of Specialty Certification Programs for Lawyers as follows (additions marked in underline):

"4.06 Certification Requirements -- An Applicant shall require for certification of lawyers as specialists, at a minimum, the following:

* * *

(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)."
At the 1993 Midyear Meeting, the House adopted Standards for Accreditation of Specialty Certification Programs For Lawyers and delegated to the Standing Committee on Specialization the task of evaluating programs sponsored by organizations that apply to the ABA for accreditation.

The Standards include provisions (in §4.06) setting minimum standards of experience and expertise for lawyers to be certified as specialists by any program seeking accreditation by the ABA. In addition to requirements for practice experience in the specialist area (§4.06(A)), attestation of expertise through peer review (§4.06(B)), and ongoing formal education in the specialist area (§4.06(D)), the Standards also require each certified lawyer to pass an examination “of suitable length and complexity” before certification is first granted (§4.06(C)).

A recurring problem for such programs, however, and the initial set of specialist lawyers who would seek ABA-accredited certification from them, is that the examinations required of the program by the Standards must be extant before accreditation is granted, and those examinations have invariably been created by some of the specialist lawyers in that initial set qualified to seek certification. Yet by their participation in creating those examinations those lawyers disqualify themselves from taking and passing the examinations, and so must either delay their own certifications (until new examinations are created by others), or forgo certification altogether if they continue to participate in drafting examinations for the accredited programs.

To deal with this problem the Standing Committee on Specialization has adopted provisions in its Governing Rules that have allowed the Standing Committee to accept certain lawyers’ participation in “designing, writing, administering and grading [a program’s] first written examination” to satisfy the examination requirement of §4.06(C) of the Standards.

That resolution of the problem has proven satisfactory, but the Standing Committee on Specialization believes that the formal device addressing this problem properly belongs in the Standards adopted by the House of Delegates, rather than in the Standing Committee’s own Governing Rules, and that it should be expressly circumscribed by a limitation on the number of such lawyers who may be granted certification through that device, and by an explicit requirement that all such lawyers have met all other requirements for certification set out in the Standards. That is what this Resolution attempts to accomplish.

Paragraph 6-4.2(h) of the Governing Rules of the Standing Committee on Specialization says:

“If the Applicant [program] has certified lawyers in the specialty area prior to applying to the Association for accreditation, the Applicant may submit a written request that those certified lawyers who were directly involved in designing, writing, administering and grading the first written examination given by Applicant in the specialty area, be deemed to have passed a written examination as required by Standard 4.06(C). A list of any such lawyers shall accompany the request.”
The Text of the Proposed Amendment to §4.06(C)

The Standing Committee proposes to amend §4.06(C) of the Standards as follows (the amendatory additional language is underlined):

4.06 Certification Requirements -- An Applicant shall require for certification of lawyers as specialists, at a minimum, the following:

* * *

(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)."

The amendment will preserve the opportunity -- now existing by operation of Standing Committee Governing Rules §6.4.2(h) -- for lawyers involved in the creation of a new specialist certification program, and specifically involved in the creation of the program's initial examination, to avoid delaying or forgoing certification themselves. At business meetings held on February 8, 2014, and April 28, 2014, the Standing Committee firmly determined that the number of lawyers who could avail of that opportunity should be limited and should be explicit in ABA policy. With input from representatives of several existing ABA-accredited specialist certification programs, it was determined that twelve lawyers would be enough to create an effective examination, but would not be so great a number to create the appearance that the policy allowed circumvention of the Standards' examination requirement.

If the proposed amendment to §4.06(C) is adopted by the House of Delegates, the Standing Committee proposes to delete §6.4.2(h) from its Governing Rules.

Respectfully submitted,

Alice Neece Mine, Chair
Standing Committee on Specialization
August 2014
Appendix – ABA Standards for Accreditation

Of Specialist Certification Programs for Lawyer, ¶4.06

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 an 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 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), (F), 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.
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Standing Committee on Specialization
Submitted By: Alice Neece Mine, Chair

1. Summary of Resolution(s)

The resolution requests that the American Bar Association amend §4.06(C) of the Standards for Accreditation of Specialist Certification Programs for Lawyers.

2. Approval by Submitting Entity

At its meetings on February 8, 2014, and April 28, 2014, the Standing Committee on Specialization considered the amendments and unanimously agreed to propose them to the House of Delegates at the August, 2014, Annual Meeting.

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

No.

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

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, and to periodically review accreditation after its initial grant.

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

Not Applicable.

6. Status of Legislation. (If applicable)

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

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

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

There are no unreimbursed costs associated with the reaccreditation of specialty certification programs as proposed in the recommendation.

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

Litigation, Business Law, Tort Trial and Insurance Practice

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

Alice Neece Mine  
Chair, Standing Committee on Specialization  
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Martin Whittaker  
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Email: Martin.Whittaker@AmericanBar.org

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The recommendation requests that the American Bar Association amend 54.06(C) of the existing Standards for Accreditation of Specialty Certification Programs for Lawyers.

2. Summary of the Issue that the Resolution Addresses

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

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

The recommendation addresses the issue by diminishing the effect of a known impediment to the creation of new specialty certification programs, while simultaneously preserving the rigor and effectiveness of the existing Standards.

4. Summary of Minority Views

The Standing Committee on Specialization approved the proposed recommendation unanimously. No opposition has been identified.
RESOLVED, That the American Bar Association reaccredits for an additional five-year term the following designated specialty certification programs for lawyers:

- the Business Bankruptcy program of the American Board of Certification;
- the Consumer Bankruptcy program of the American Board of Certification;
- the Creditors' Rights program of the American Board of Certification;
- the Estate Planning Law program of the National Association of Estate Planners' and Councils' Estate Law Specialist Board;
- the Juvenile Law–Child Welfare program of the National Association of Counsel for Children; and
- the DUI Defense program of the National College for DUI Defense;

FURTHER RESOLVED, That the American Bar Association extends the period of accreditation of the Civil Trial Advocacy program of the National Board of Trial Advocates, a division of the National Board of Legal Specialty Certification, until the adjournment of the next meeting of the American Bar Association's House of Delegates in February, 2015.
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 seven programs: (1) the Business Bankruptcy, (2) Consumer Bankruptcy, and (3) Creditors’ Rights programs of the American Board of Certification (“ABC”); (4) the Estate Planning Law program of the National Association of Estate Planners’ and Councils’ Estate Law Specialist Board; (5) the Juvenile Law-Child Welfare program of the National Association of Counsel for Children (“NACC”); (6) the DUI Defense program of the National College for DUI Defense (“NCDD”); and (7) the Civil Trial Advocacy program of the National Board of Trial Advocacy (“NBTA”), a division of the National Board of Legal Specialty Certification.

The Standing Committee has fully reviewed the applications for the three programs of ABC, the application from the National Association of Estate Planners’ and Councils’ Estate Planning Law Board, from the NACC, and from the NCDD, and is here recommending the reaccreditation of those six programs.

The Standing Committee’s review of the Civil Trial Advocacy program of the NBTA is ongoing. Because the five-year anniversary of the NBTA’s Civil Trial Advocacy program’s last reaccreditation will occur in August, 2014, during the Annual Meeting, the Standing Committee is here recommending an extension of that program’s period of accreditation until the House of Delegates next convenes at the 2015 Midyear Meeting.

Re-accreditation Requirements; Description of Applicants

Sections 5.01 and 5.02 of the Standards require that “a certifying organization shall be required to apply for re-accreditation prior to the end of the fifth year of its initial accreditation...”
period and every five years thereafter,” and that re-accreditation “shall be granted” if the certifying organization shows that the program continues to comply with the Standards’ detailed accreditation requirements. (Those accreditation requirements are set out in an endnote to this Report.) The programs of the American Board of Certification, the National Association of Estate Planners’ and Councils’ Estate Planning Law Board, the National Association of Counsel for Children, and the National College for DUI Defense meet those Standards and should be reaccredited.

1. Applicant Organization: American Board of Certification
   Programs: Business Bankruptcy
   Consumer Bankruptcy
   Creditors’ Rights

   The American Board of Certification is a non-profit organization dedicated to serving the public and improving the quality of the bankruptcy and creditors’ rights law bars. ABC has certified nearly 1,000 attorneys in consumer and business bankruptcy and creditors’ rights law nationwide. Its certification serves the public by allowing potential clients to make an informed decision in choosing bankruptcy and creditors’ rights counsel.

2. Applicant Organization: National Association of Estate Planners’ and Councils’ Estate Law Specialist Board
   Program: Estate Planning Law

   The Estate Law Specialist Board is a subsidiary of the National Association of Estate Planners and Councils in Cleveland, Ohio. One of the principal purposes of the National Association of Estate Planners and Councils is to increase public awareness of the importance of estate planning by a team of professional advisors. Lawyers certified under this program demonstrate a high level of professionalism and commitment to the concept of specialization.

3. Applicant Organization: National Association of Counsel for Children
   Program: Juvenile Law – Child Welfare

   The mission of the National Association of Counsel for Children is to improve the lives of American children and families by ensuring that proceedings involving children as victims of abuse and neglect, as juvenile offenders, as subjects of custody, visitation and adoption proceedings, and as participants in civil damages litigation produce just results. The NACC specialist certification program in Child Welfare Law was created and sponsored by a grant from the U.S. Department of Health and Human Services Children’s Bureau and was first accredited by the Association in 2004. The program has also been endorsed by the National Council of Juvenile and Family Court Judges and the Conference of Chief Justices/Conference of State Court Administrators.

period and every five years thereafter,” and that re-accreditation “shall be granted” if the certifying organization shows that the program continues to comply with the Standards’ detailed accreditation requirements. (Those accreditation requirements are set out in an endnote to this Report.) The programs of the American Board of Certification, the National Association of Estate Planners’ and Councils’ Estate Planning Law Board, the National Association of Counsel for Children, and the National College for DUI Defense meet those Standards and should be reaccredited.

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   Programs: Business Bankruptcy
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   The Estate Law Specialist Board is a subsidiary of the National Association of Estate Planners and Councils in Cleveland, Ohio. One of the principal purposes of the National Association of Estate Planners and Councils is to increase public awareness of the importance of estate planning by a team of professional advisors. Lawyers certified under this program demonstrate a high level of professionalism and commitment to the concept of specialization.

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The National College for DUI Defense is a professional, non-profit corporation dedicated to the improvement of the criminal defense bar—and particularly those who defend clients charged with DUI—and to the dissemination of information to the public about DUI Defense Law as a specialty area of law practice. NCDD members represent the most experienced DUI defense attorneys in the country. Since its founding, the NCDD has continued to recognize, as Sustaining Members, defense lawyers who have demonstrated the skill and experience of the original Founding Members, as well as the generosity to financially sustain the growth of the NCDD. General Members are the backbone of the NCDD—capable, experienced attorneys who dedicate a portion of their practice to the defense of DUI cases throughout the country.

Reaccreditation and Evaluation Procedures

In evaluating the applications, the Standing Committee followed the Governing Rules it adopted on March 2, 1993, as amended from time to time since. All of the applications currently pending were filed in the winter of 2013-2014. The applications were accompanied by payment of a reaccreditation fee for the specialty certification programs for which the applicants sought reaccreditation.

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

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

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

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

iv. A copy of the recent examinations given to applicants for specialty certification, along with a description of how the exam was developed, conducted and reviewed; a description of the grading standards; and the names of persons responsible for determining pass/fail standards.
Furthermore, as to the application of the NBTA, in addition to passage of the examinations it administers itself in its Civil Trial Advocacy program, the NBTA accepts applicants’ passage of examinations administered by the New Jersey Supreme Court’s Board on Attorney Certification and the Texas Board of Legal Specialty Certification. Recent examinations from all of these programs were made available, on a confidential basis, for review by examination reviewers appointed by the Standing Committee to review the NBTA Civil Trial program. The volume of exams to be reviewed for that program has required extra time for the Standing Committee’s application review for this program. That is the principal reason that the Standing Committee is here recommending an extension of the accreditation period for the NBTA’s Civil Trial Advocacy program.

Accreditation Application and Examination Review Panelists

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

**American Board of Certification applications:**

Kim Jessum (Langhorne, Pennsylvania), Chair, American Board of Certification Review Panel. Ms. Jessum is a member of the Standing Committee on Specialization and of the Association’s Section of Intellectual Property Law. She is an Associate General Counsel at Heraeus, Inc.

Steven Oberman (Knoxville, Tennessee), American Board of Certification Review Panel. Mr. Oberman is a founding partner of the firm Oberman & Rice in Knoxville. He is a founding member of the National College of DUI Defense, and Chair of the National Association of Criminal Defense Lawyers’ DUI Committee.

Melissa Sternbach (Wrentham, Massachusetts), American Board of Certification Review Panel. Ms. Sternbach is the Executive Director of the National Board of Legal Specialty Certification.

Exam reviewers: Louis Esbin (Business Bankruptcy, Consumer Bankruptcy). Mr. Esbin is a specialist in Bankruptcy Law certified by the California Board of Legal Specialization. He practices in Valencia, California.

One member of the Standing Committee on Specialization, Wesley Avery, is a bankruptcy specialist certified by ABC. Mr. Avery recused himself from the consideration of the ABC applications and from the Standing Committee’s vote on ABC reaccreditation.

National Association of Estate Planners’ and Councils’ Estate Law Specialist Board application:

Wesley Avery (Valencia, California), Chair, National Association of Estate Planners’ and Councils’ Estate Law Review Panel. Mr. Avery is a member of the Standing Committee on Specialization, and a specialist in Bankruptcy Law certified by both the California Board of Legal Specialization and ABC.

Dian Gilmore (Cedar Rapids, Iowa), National Association of Estate Planners’ and Councils’ Estate Law Review Panel. Ms. Gilmore is the Executive Director of the American Board of Certification.

The Hon. Melissa May (Indianapolis, Indiana), National Association of Estate Planners’ and Councils’ Estate Law Review Panel. Judge May is the Special Adviser to the Standing Committee on Specialization. She serves on the Indiana Court of Appeals for the Fourth District.

Exam reviewer: Lawrence Cebowsky. Mr. Cebowsky is certified in Estate Planning, Trust and Probate Law by the California Board of Legal Specialization. He practices in Los Angeles, California.

National Association of Counsel for Children application:

Shontrai Devauhn Irving (Crown Point, Indiana), Chair, National Association of Counsel for Children Review Panel. Mr. Irving is a member of the Standing Committee on Specialization. He practices as a Litigation Counsel for State Farm Mutual Insurance in Crown Point, Indiana.

Susan Austin Carney (Cleveland, Ohio), National Association of Counsel for Children Review Panel. Ms. Carney is the Administrative Director of the Estate Law Specialist Board of the National Association of Estate Planners and Councils.

Reeve McNamara (Atlanta, Georgia), National Association of Counsel for Children Review Panel. Mr. McNamara is the Executive Director of the American Board of Professional Liability Attorneys, an ABA-accredited legal specialist certification organization.

Exam reviewer: Roy Westfall. Mr. Westfall is certified in Family Law by the California Board of Legal Specialization. He practices at Parent Advocates of Sacramento, California.

One member of the Standing Committee on Specialization, Wesley Avery, is a bankruptcy specialist certified by ABC. Mr. Avery recused himself from the consideration of the ABC applications and from the Standing Committee’s vote on ABC reaccreditation.

National Association of Estate Planners’ and Councils’ Estate Law Specialist Board application:

Wesley Avery (Valencia, California), Chair, National Association of Estate Planners’ and Councils’ Estate Law Review Panel. Mr. Avery is a member of the Standing Committee on Specialization, and a specialist in Bankruptcy Law certified by both the California Board of Legal Specialization and ABC.

Dian Gilmore (Cedar Rapids, Iowa), National Association of Estate Planners’ and Councils’ Estate Law Review Panel. Ms. Gilmore is the Executive Director of the American Board of Certification.

The Hon. Melissa May (Indianapolis, Indiana), National Association of Estate Planners’ and Councils’ Estate Law Review Panel. Judge May is the Special Adviser to the Standing Committee on Specialization. She serves on the Indiana Court of Appeals for the Fourth District.

Exam reviewer: Lawrence Cebowsky. Mr. Cebowsky is certified in Estate Planning, Trust and Probate Law by the California Board of Legal Specialization. He practices in Los Angeles, California.

National Association of Counsel for Children application:

Shontrai Devauhn Irving (Crown Point, Indiana), Chair, National Association of Counsel for Children Review Panel. Mr. Irving is a member of the Standing Committee on Specialization. He practices as a Litigation Counsel for State Farm Mutual Insurance in Crown Point, Indiana.

Susan Austin Carney (Cleveland, Ohio), National Association of Counsel for Children Review Panel. Ms. Carney is the Administrative Director of the Estate Law Specialist Board of the National Association of Estate Planners and Councils.

Reeve McNamara (Atlanta, Georgia), National Association of Counsel for Children Review Panel. Mr. McNamara is the Executive Director of the American Board of Professional Liability Attorneys, an ABA-accredited legal specialist certification organization.

Exam reviewer: Roy Westfall. Mr. Westfall is certified in Family Law by the California Board of Legal Specialization. He practices at Parent Advocates of Sacramento, California.
National College for DUI Defense application:

Alice Neece Mine (Raleigh, North Carolina), Chair, National College for DUI Defense Review Panel. Ms. Mine is Chair of the Standing Committee on Specialization. Ms. Mine is the Assistant Executive Director and Ethics Counsel to the North Carolina State Bar, and the Executive Director of the North Carolina State Bar’s Board of Legal Specialization.

Cynthia Orr (San Antonio, Texas), National College for DUI Defense Review Panel. Ms. Orr is a member of the Standing Committee on Specialization. She is also the current Chair of the Association’s Criminal Justice Section and a past President of the National Association of Criminal Defense Lawyers. Ms. Orr is board certified in criminal law and criminal appeals by the Texas Board of Legal Specialization.

Daniel Trujillo (Denver, Colorado), National College for DUI Defense Review Panel. Mr. Trujillo is the Certification Director for the National Association of Counsel for Children.

Exam reviewer: Ronald Smith. Prof. Smith teaches Criminal Law and Criminal Procedure at the John Marshall Law School of Chicago. He is a Fellow of the American Bar Foundation and a former Chair of the Association’s Criminal Justice Section.

Pending Application of the National Board of Trial Advocacy Civil Trial Program and Need for Extension

The NBTA timely submitted its application for re-accreditation of its Civil Trial Advocacy program under Section 5 of the Standards in the winter of 2013. The Standing Committee has not yet completed its review and assessment of the NBTA’s full complement of examinations, however.

The five-year anniversary of the last re-accreditation of NBTA’s Civil Trial Advocacy program by the Association occurs in August, 2014, however. So, in order to avoid a formal lapse in that accreditation under the Standing Committee’s Governing Rules, 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 Midyear Meeting in February, 2015, before which meeting the Standing Committee will have completed its review of the pending NACC application.

Respectfully submitted,

Alice Neece Mine, Chair
Standing Committee on Specialization
August 2014

The accreditation requirements appear in Section 4 of the Standards and are as follows:
4.01 Purpose of Organization -- The Applicant shall demonstrate that the organization is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise, and to the development and improvement of the professional competence of lawyers.

4.02 Organizational Capabilities -- The Applicant shall demonstrate that it possesses the organizational and financial resources to carry out its certification program on a continuing basis, and that key personnel have by experience, education and professional background the ability to direct and carry out such programs in a manner consistent with these Standards.

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

4.04 Uniform Applicability of Certification Requirements and Nondiscrimination (A) The Applicant's requirements for certifying lawyers shall not be arbitrary and shall be clearly understood and easily applied. The organization may only certify those lawyers who have demonstrably met each standard. The requirements shall be uniform in all jurisdictions in which the Applicant certifies lawyers, except to the extent state or local law or regulation imposes a higher requirement.

(B) Membership in any organization or completion of educational programs offered by any specific organization shall not be required for certification, except that this paragraph shall not apply to requirements relating to the practice of law which are set out in statutes, rules and regulations promulgated by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

4.05 Definition and Number of Specialties -- An Applicant shall specifically define the specialty area or areas in which it proposes to certify lawyers as specialists.

(A) Each specialty area in which certification is offered must be an area in which significant numbers of lawyers regularly practice. Specialty areas shall be named and described in terms which are understandable to the potential users of such legal services, and in terms which will not lead to confusion with other specialty areas.

(B) An Applicant may seek accreditation to certify lawyers in more than one specialty area, but in such event, the organization shall be evaluated separately with respect to each specialty program.

4.06 Certification Requirements -- An Applicant shall require for certification of lawyers as specialists, at a minimum, the following:

(A) Substantial Involvement -- Substantial involvement in the specialty area throughout the three-year period immediately preceding application to the certifying organization. Substantial involvement is measured by the type and number of matters handled and the amount of time spent practicing in the specialty area, and require that the time spent in practicing the specialty be no less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice.

(B) Peer Review -- A minimum of five references, a majority of which are from attorneys or judges who are knowledgeable regarding the practice area and are familiar with the competence of the lawyer, and none of which are from persons related to or engaged in legal practice with the lawyer.

(1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.
(2) Content of Reference Forms — The reference forms shall inquire into the respondent's areas of practice, the respondent's familiarity with both the specialty area and with the lawyer seeking certification, and the length of time that the respondent has been practicing law and has known the applicant. The form shall inquire about the qualifications of the lawyer seeking certification in various aspects of the practice and, as appropriate, the lawyer's dealings with judges and opposing counsel.

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

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

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

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

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

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

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

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

The Resolution grants reaccreditation to six legal specialist certification programs administered by four organizations, and extends the period of accreditation of one program, the Civil Trial Advocacy program of the National Board of Trial Advocacy, until the 2015 Midyear Meeting in February, 2015.

2. Approval by Submitting Entity.

At its meeting on April 28, 2014, the Standing Committee on Specialization considered the applications and voted unanimously that it submit these recommendations to the House of Delegates for consideration at the 2014 Annual Meeting.

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

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

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

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

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

Not Applicable

6. Status of Legislation. (If applicable)

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

Implementation will be self-executing if the programs are reaccredited by the House of Delegates, or the period of current accreditation extended.

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

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

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

None

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

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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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2. Summary of the Issue that the Resolution Addresses

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

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

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

4. Summary of Minority Views

The Standing Committee on Specialization approved the proposed recommendation unanimously. No opposition has been identified.
RESOLVED, That the American Bar Association approve the following programs: National American University, Paralegal Studies Program, Minneapolis/St. Paul, MN (Bloomington, Brooklyn Center, Burnsville, Roseville, and Minnetonka), and Wharton County Junior College, Paralegal Studies Program, Richmond, Wharton, and Sugar Land, TX.

FURTHER RESOLVED, That the American Bar Association reapprove the following paralegal education programs: Gadsden State Community College, Paralegal Program, Gadsden, AL; Phoenix College, Paralegal Studies Program, Phoenix, AZ; Fullerton College, Paralegal Studies Program, Fullerton, CA; University of North Georgia, Etta Gainesville State College, Paralegal Studies Program, Gainesville, GA; Elgin Community College, Paralegal Program, Elgin, IL; Harford Community College, Paralegal Studies Program, Bel Air, MD; Davenport University, Paralegal Studies Program, Grand Rapids and Lansing, MI; Carteret Community College, Paralegal Technology Program, Morehead City, NC; Clarion University of Pennsylvania, Venango campus, Paralegal Studies Program, Oil City, PA; Duquesne University, Paralegal Institute, Pittsburgh, PA; Gannon University, Legal Assistant Program, Erie, PA; Manor College, Department of Legal Studies, Jenkintown, PA; Pennsylvania College of Technology, Legal Assistant/Paralegal Studies Program, Williamsport, PA; Villanova University, Paralegal Program, Villanova, PA; Roger Williams University, Paralegal Program, Providence, Bristol, and Newport, RI; National American University, Paralegal Studies Program, Rapid City, SD; and Amarillo College, Paralegal Studies Program, Amarillo, TX.

FURTHER RESOLVED, That the American Bar Association withdraw the approval of Cumberland County College, Paralegal Studies Program, Vineland, NJ; Berkeley College New York, Paralegal Studies Program, NY; Lake Erie College, Legal Studies Program, Painesville, OH; and University of Memphis, Paralegal Studies Program, Memphis, TN, at the request of the institutions.

FURTHER RESOLVED, That the American Bar Association extend the terms of approval until the February 2015 Midyear Meeting of the House of Delegates for the following programs: Community College of the Air Force, Paralegal Program, Maxwell AFB, AL; Samford University, Division of Paralegal Studies, Birmingham, AL; University of Arkansas Fort Smith, Legal Assistance/Paralegal Program, Fort Smith, AR; Everest College Phoenix, Paralegal Program, Phoenix, AZ; California State University East Bay, Paralegal Studies Program, Hayward, CA; Coastline Community College, Paralegal Studies Program, Fountain Valley, CA; El Camino Community College, Paralegal Studies Program, Torrance, CA; Fremont College,
Paralegal Studies Program, Arlington, VA; Tacoma Community College, Paralegal Program,
Tacoma, WA; Spokane Community College, Paralegal Program, Spokane, WA; Northeast
Wisconsin Technical College, Paralegal Program, Green Bay, WI; Mountwest Community and
Technical College, f/k/a Marshall Community and Technical College, Legal Assistant Program,
Huntington, WV; and Casper College, Paralegal Studies Program, Casper, WY.
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 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.

National American University, Paralegal Studies Program, Minneapolis/St. Paul, MN, Bloomington, Brooklyn Center, Burnsville, Roseville, and Minnetonka
National American University in Minneapolis/St. Paul (Bloomington, Brooklyn Center, Burnsville, Roseville, and Minnetonka) is a four-year university accredited by the North Central
Association of Colleges and Schools. The university offers a Bachelor of Science degree and an Associate of Applied Science degree in Paralegal Studies.

Wharton County Junior College, Paralegal Studies Program, Richmond, Wharton, and Sugar Land, TX
Wharton County Junior College is a two-year college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science degree in Paralegal Studies.

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

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

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

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

University of North Georgia, f/k/a Gainesville State College, Paralegal Studies Program, Gainesville, GA
University of North Georgia is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers a Bachelor of Applied Science degree, an Associate of Applied Science degree, and a Certificate in Paralegal Studies.

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

Harford Community College, Paralegal Studies Program, Bel Air, MD
Harford Community College is a two-year community college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.

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Association of Colleges and Schools. The university offers a Bachelor of Science degree and an Associate of Applied Science degree in Paralegal Studies.

Wharton County Junior College, Paralegal Studies Program, Richmond, Wharton, and Sugar Land, TX
Wharton County Junior College is a two-year college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science degree in Paralegal Studies.

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

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

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

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

University of North Georgia, f/k/a Gainesville State College, Paralegal Studies Program, Gainesville, GA
University of North Georgia is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers a Bachelor of Applied Science degree, an Associate of Applied Science degree, and a Certificate in Paralegal Studies.

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

Harford Community College, Paralegal Studies Program, Bel Air, MD
Harford Community College is a two-year community college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.
Davenport University, Paralegal Studies Program, Grand Rapids and Lansing, MI
Davenport University is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers a Bachelor of Science degree, an Associate of Science degree, and a Certificate in Paralegal Studies.

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

Clarion University of Pennsylvania, Venango campus, Paralegal Studies Program, Oil City, PA
Clarion University of Pennsylvania is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers an Associate of Science degree in Paralegal Studies and a Bachelor of Science degree in Rehabilitative Science, Courts, and Community Services.

Duquesne University, Paralegal Institute, Pittsburgh, PA
Duquesne University is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers a General Certificate in Paralegal Studies, and Certificates with Concentrations in Civil Litigation, Corporate/Business, Estates Practice, or Litigation Technology.

Gannon University, Legal Assistant Program, Erie, PA
Gannon University is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers a Bachelor of Arts degree, an Associate of Arts degree, and a Certificate in Paralegal Studies.

Manor College, Department of Legal Studies, Jenkintown, PA
Manor College is a two-year college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Science degree, a Certificate in Paralegal Studies and a Certificate in Legal Nurse Consulting.

Pennsylvania College of Technology, Legal Assistant/Paralegal Studies Program, Williamsport, PA
Pennsylvania College of Technology is a four-year college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Bachelor of Science degree in Paralegal Studies, and a Certificate in Nurse - Health Care Paralegal Studies.

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

Roger Williams University, Paralegal Studies Program, Providence, Bristol, and Newport, RI
Roger Williams University is a four-year university accredited by the New England Association of Colleges and Schools. The university offers an Associate of Science degree, a Bachelor of Science degree, and a Certificate in Paralegal Studies.
Science degree, a Certificate in Paralegal Studies, a Nurse Paralegal Certificate, and a Navy Legalman Accession Program.

National American University, Paralegal Studies Program, Rapid City, SD
National American University is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers an Associate of Applied Science degree and a Bachelor of Science degree in Paralegal Studies.

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

Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2015 Midyear Meeting of the American Bar Association House of Delegates.

- Community College of the Air Force, Paralegal Program, Maxwell AFB, AL
- Samford University, Division of Paralegal Studies, Birmingham, AL
- University of Arkansas Fort Smith, Legal Assistance/Paralegal Program, Fort Smith, AR
- Everet College Phoenix, Paralegal Program, Phoenix, AZ
- California State University East Bay, Paralegal Studies Program, Hayward, CA
- Coastline Community College, Paralegal Studies Program, Fountain Valley, CA
- El Camino Community College, Paralegal Studies Program, Torrance, CA
- Fremont College, Paralegal Studies Program, Cerritos, CA
- Pasadena City College, Paralegal Studies Program, Pasadena, CA
- Santa Ana College, Paralegal Studies Program, Santa Ana, CA
- University of California UCLA Ext, Paralegal Training Program, Los Angeles, CA
- University of California Irvine Extension, Paralegal Certificate Program, Irvine, CA
- University of California San Diego, Legal Assistant Training Program, La Jolla, CA
- University of California Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA
- Nova Southeastern University, Paralegal Studies Program, Fort Lauderdale, FL
- Clayton State University, Legal Studies Program, Morrow, GA
- Northwestern College, Institute of Legal Studies, Bridgeview, IL
- Robert Morris University, Chicago, Paralegal Studies Program, Chicago, IL
- Robert Morris University, Springfield, Paralegal Studies Program, Springfield, IL
- Vincennes University, Paralegal Program, Vincennes, IN
- Johnson County Community College, Legal Studies Program, Overland Park, KS
- Eastern Kentucky University, Paralegal Studies Program, Richmond, KY
- Sullivan University, Louisville, Institute for Legal Studies, Louisville, KY
- University of Louisville, Paralegal Studies Program, Louisville, KY
- Suffolk University, Paralegal Studies Program, Boston, MA
- Stevenson University, Paralegal Program, Owings Mills, MD
- Henry Ford Community College, Paralegal Studies Program, Dearborn, MI

Science degree, a Certificate in Paralegal Studies, a Nurse Paralegal Certificate, and a Navy Legalman Accession Program.

National American University, Paralegal Studies Program, Rapid City, SD
National American University is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers an Associate of Applied Science degree and a Bachelor of Science degree in Paralegal Studies.

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

Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2015 Midyear Meeting of the American Bar Association House of Delegates.

- Community College of the Air Force, Paralegal Program, Maxwell AFB, AL
- Samford University, Division of Paralegal Studies, Birmingham, AL
- University of Arkansas Fort Smith, Legal Assistance/Paralegal Program, Fort Smith, AR
- Everet College Phoenix, Paralegal Program, Phoenix, AZ
- California State University East Bay, Paralegal Studies Program, Hayward, CA
- Coastline Community College, Paralegal Studies Program, Fountain Valley, CA
- El Camino Community College, Paralegal Studies Program, Torrance, CA
- Fremont College, Paralegal Studies Program, Cerritos, CA
- Pasadena City College, Paralegal Studies Program, Pasadena, CA
- Santa Ana College, Paralegal Studies Program, Santa Ana, CA
- University of California UCLA Ext, Paralegal Training Program, Los Angeles, CA
- University of California Irvine Extension, Paralegal Certificate Program, Irvine, CA
- University of California San Diego, Legal Assistant Training Program, La Jolla, CA
- University of California Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA
- Nova Southeastern University, Paralegal Studies Program, Fort Lauderdale, FL
- Clayton State University, Legal Studies Program, Morrow, GA
- Northwestern College, Institute of Legal Studies, Bridgeview, IL
- Robert Morris University, Chicago, Paralegal Studies Program, Chicago, IL
- Robert Morris University, Springfield, Paralegal Studies Program, Springfield, IL
- Vincennes University, Paralegal Program, Vincennes, IN
- Johnson County Community College, Legal Studies Program, Overland Park, KS
- Eastern Kentucky University, Paralegal Studies Program, Richmond, KY
- Sullivan University, Louisville, Institute for Legal Studies, Louisville, KY
- University of Louisville, Paralegal Studies Program, Louisville, KY
- Suffolk University, Paralegal Studies Program, Boston, MA
- Stevenson University, Paralegal Program, Owings Mills, MD
- Henry Ford Community College, Paralegal Studies Program, Dearborn, MI
Madonna University, Paralegal Studies Program, Livonia, MI
Minnesota State University Moorhead, Paralegal Program, Moorhead, MN
North Hennepin Community College, Paralegal Program, Brooklyn Park, MN;
Webster University, Legal Studies Program, St. Louis, MO;
University of Southern Mississippi, Paralegal Studies Program, Hattiesburg, MS;
University of Great Falls, Paralegal Studies Program, Great Falls, MT;
University of Montana—Missoula, Paralegal Studies Program, Missoula, MT;
Pitt Community College, Paralegal Technology Program, Greeneville, NC;
College of Saint Mary, Paralegal Studies Program, Omaha, NE;
Metropolitan Community College, Legal Assistant Program, Omaha, NE;
Brookdale Community College, Paralegal Studies Program, Lincroft, NJ;
Fairleigh Dickinson University, Paralegal Studies Program, Madison, NJ;
Mercer County Community College, Paralegal Program, Trenton, NJ;
Middlesex County College, Legal Studies Department, Edison, NJ;
Long Island University Brooklyn, Paralegal Studies Program, Brooklyn, NY;
Bronx Community College, Paralegal Studies Program, Bronx, NY;
Mercy College, Legal Studies Program, Dobbs Ferry, NY;
Nassau Community College, Paralegal Program, Garden City, NY;
New York City College of Technology, Paralegal Program, Brooklyn, NY;
Queen's College, Paralegal Studies Program, Flushing, NY;
St. John's University, Paralegal Studies Program, Jamaica, NY;
Capital University Law School, Paralegal Program, Columbus, OH;
Cuyahoga Community College, Paralegal Studies/Legal Nurse Consulting Program, Parma, OH;
Kent State University, Paralegal Studies Program, Kent, OH;
Rhodes State College, Paralegal/Legal Studies Program, Lima, OH;
University of Cincinnati, Paralegal Program, Cincinnati, OH;
Ursuline College, Legal Studies Program, Pepper Pike, OH;
East Central University, Legal Studies Program, Ada, OK;
University of Tulsa, Paralegal Studies Program, Tulsa, OK;
Central Pennsylvania College, Paralegal Program, Sunnyside, PA;
Delaware County Community College, Paralegal Studies Program, Media, PA;
Harrisburg Area Community College, Paralegal Studies Program, Harrisburg, PA;
Lehigh Carbon Community College, Paralegal Studies Program, Schnecksville, PA;
Horry-Georgetown Technical College, Legal Assistant/Paralegal Program, Conway, SC;
Orangeburg-Calhoun Technical College, Paralegal Program, Orangeburg, SC;
Western Dakota Technical Institute, Paralegal Program, Rapid City, SD;
Volunteer State Community College, Paralegal Studies Program, Gallatin, TN;
Walters State Community College, Paralegal Studies Program, Morristown, TN;
Kaplan College, General Practice Paralegal Program, Dallas, TX;
Lamar State College, Legal Assistant Program, Port Arthur, TX;
Marymount University, Paralegal Studies Program, Arlington, VA;
Tacoma Community College, Paralegal Program, Tacoma, WA;
Spokane Community College, Paralegal Program, Spokane, WA;
Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI.
Mountwest Community and Technical College f/k/a Marshall Community and Technical College, Legal Assistant Program, Huntington, WV; and Casper College, Paralegal Studies Program, Casper, WY.

Respectfully submitted,
Deborah Winfrey Keene, Chair
Standing Committee on Paralegals
August 2014
Resolves that the House of Delegates grants approval to two programs, grants reapproval to seventeen paralegal education programs, withdraws the approval of four programs at the request of the institutions, and extends the term of approval to seventy-three paralegal education programs.

2. Approval by Submitting Entity.
   April, 2014

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

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

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

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

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

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

10. Referrals.
    None

11. Contact Person. (Prior to the meeting.)
    Peggy C. Wallace, Staff Counsel
    Standing Committee on Paralegals
    American Bar Association
    321 North Clark Street
    Chicago, IL 60654
    (312) 988-5618

12. Contact Person. (Who will present the report to the House.)
    Deborah Winfrey Keene, Chair
    Director, Paralegal Program, Lansing Community College
    3500 W. Public Service Careers
    P.O. Box 40010
    Lansing, MI 48901-7210
    (517) 483-1503
    Cell: (517) 485-3232
    E-Mail: keene@lcc.edu

9. Disclosure of Interest. (If applicable.)
   N/A

10. Referrals.
    None

11. Contact Person. (Prior to the meeting.)
    Peggy C. Wallace, Staff Counsel
    Standing Committee on Paralegals
    American Bar Association
    321 North Clark Street
    Chicago, IL 60654
    (312) 988-5618

12. Contact Person. (Who will present the report to the House.)
    Deborah Winfrey Keene, Chair
    Director, Paralegal Program, Lansing Community College
    3500 W. Public Service Careers
    P.O. Box 40010
    Lansing, MI 48901-7210
    (517) 483-1503
    Cell: (517) 485-3232
    E-Mail: keene@lcc.edu
1. Summary of the Resolution

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

2. Summary of the issue which the Resolution Addresses

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

3. An explanation of 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. A summary of any minority views or opposition which have been identified

No other positions on this resolution have been taken by other Association entities, affiliated organizations or other interested groups.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2014 to the ABA Standards for Approval of Law Schools.
As used in the Standards, and Interpretations and Rules of Procedure:

(1) “Accreditation Committee” or “Committee” means the Accreditation Committee of the Section.

(2) “Approved law school” means a fully approved law school that the Council or Accreditation Committee has determined meets the requirements of Standard 103 or a provisionally approved law school that the Council or the Accreditation Committee has determined meets the requirements of Standard 102, a law school that appears on the list of law schools approved by the Council of the Section of Legal Education and Admissions to the Bar.

(3) “Association” means the American Bar Association.

(4) “Branch campus” means a type of separate location at which a student may earn more than two-thirds of the credit hours that the law school requires for the award of a J.D. “Branch campus” means a separate location at which the law school offers sufficient courses that a student could earn at the separate location all of the credit hours that the law school requires for the J.D. degree.

(5) “Consultant” means the Consultant on Legal Education to the American Bar Association.

(6) “Council” means the Council of the Section.

(7) “Dean” means the chief administrative officer of a law school and includes an acting or interim dean.

(8) “Full-time faculty member” means an individual whose primary professional employment is with the law school, who is designated by the law school as a full-time faculty member, who devotes substantially all working time during the academic year to responsibilities described in Standard 404(a), and whose outside professional activities, other than those described in Standard 404(a), if any, do not unduly interfere with his or her responsibilities as a full-time faculty member.
(8) “Governing board” means a board of trustees, board of regents, or comparable body that has ultimate policy making authority for a law school or the university of which the law school is a part.


(10) “Interpretations” mean the Interpretations of the Standards for Approval of Law Schools.

(11) “J.D. degree” means the first professional degree in law granted by a law school upon completion of a program of legal education that is governed by the Standards.

(12) “Managing Director” means the Managing Director of the Section of Legal Education and Admissions to the Bar of the American Bar Association.

(13) “President” includes the chief executive officer of a university or, if the university has more than one administratively independent unit, the unit of which the law school is a part of the independent unit. If a law school is not part of a university, “president” refers to the chief executive officer of any entity that owns the law school, if there is such a person, or else the Chair of the Board of Directors of the law school.

(14) “Probation” is a public status indicating that a law school is not being operated in compliance with the Standards and is at risk of being removed from the list of approved law schools having its approval withdrawn.


(16) “Section” means the Section of Legal Education and Admissions to the Bar of the American Bar Association.

(17) “Separate location” means a location within the United States at which the law school offers more than sixteen credit hours of the program of legal education and that is not in reasonable proximity to the law school’s main location.

(18) “Standards” mean the Standards for the Approval of Law Schools.

(19) “University” means a post-secondary educational institution, whether referred to as a university, college, or by any other name, that confers a baccalaureate degree, and may grant other degrees, whether it is called a university, college or by another name.
Chapter 1 - GENERAL PURPOSES AND PRACTICES: DEFINITIONS

Standard 101. BASIC REQUIREMENTS FOR APPROVAL

(a) A law school approved by the Association or seeking approval by the Association Council shall demonstrate that its program is consistent with sound legal education principles. It does so by establishing that it is being operated in compliance with the Standards.

(b) Interpretation 101-1

Accreditation or approval of a law school by the Council American Bar Association is not transferable. A transfer of all, or substantially all, of the academic programs or assets of (1) a law school or (2) a university or college of which the law school is a part does not include the transfer of the law school’s approval/accreditation status.

Interpretation 101-2

To enable the Accreditation Committee and Council to determine whether a law school has demonstrated that its program of legal education is consistent with sound legal education principles and is being operated in compliance with the Standards, a law school shall furnish an annual questionnaire, self-study, site evaluation questionnaire, and such other information as the Accreditation Committee and Council may require. These documents must be complete and accurate and submitted timely in the form specified.

The information provided by these means not only informs the Council about the status of each law school but also enables the Council in meeting its obligations with respect to legal education as a whole to ascertain national norms of legal education, areas in which improvements are being made, and those where further attention is needed.

Interpretation 101-3

Accreditation or approval of a law school by the American Bar Association is not transferable. A transfer of all, or substantially all, of the academic programs or assets of (1) a law school or (2) a university or college of which the law school is a part does not include the transfer of the law school’s accreditation status.

Standard 102. PROVISIONAL APPROVAL

(a) A law school shall be granted provisional approval only if it establishes The Council shall grant provisional approval to a law school if at the time the school seeks such approval it demonstrates that it is has achieved substantial compliance with each of the Standards and presents a reliable plan for bringing the law school into full compliance with each of the Standards within three years after receiving provisional approval. In order to demonstrate that it has a reliable plan to come into full compliance with the Standards within three years after receiving provisional approval, a law school must clearly state the specific actions that it plans to take to bring the school into full compliance and demonstrate that there is a reasonable probability that such actions will be successful. A provisionally approved law school may apply for full approval no earlier than two years after provisional approval.

(b) Interpretation 102-1

Accreditation or approval of a law school by the Council American Bar Association is not transferable. A transfer of all, or substantially all, of the academic programs or assets of (1) a law school or (2) a university or college of which the law school is a part does not include the transfer of the law school’s approval/accreditation status.
after receiving provisional approval and must obtain full approval within five years after receiving provisional approval.

(b) A law school that is provisionally approved may have its approval withdrawn if it is determined The Council may withdraw provisional approval if the Council determines that the law school is no longer in substantial compliance with the Standards, or that the law school is not making adequate progress toward coming into achieving full compliance with each of the Standards, or is no longer able to demonstrate that there is a reasonable probability that the school will achieve full compliance with each of the Standards within the allotted time frame.

(c) If five years have elapsed since the law school was provisionally approved and it has not qualified the Council has not granted for full approval, provisional approval shall lapse, and the law school shall automatically be removed from the list of approved law schools unless, prior to Before the end of the five-year period, in an extraordinary case and for good cause shown, the Council may extend extends the time within which the law school must obtain full approval.

(d) A provisionally approved law school shall not offer a post-J.D. degree program or other non-J.D. degree program, offer a program in a country outside the United States, or seek to establish a separate location.

(e) A provisionally approved law school shall state that it is provisionally approved in all of its printed and electronic materials describing the law school and its program and in any other publication that references the law school’s approval by the Council.

(f) A law school seeking provisional approval shall make its status clear in any printed and electronic materials describing the law school and its program and in any other publication that references the law school’s approval status. At a minimum, the law school shall state the following in all such communications:

The law school is not currently approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association and makes no representation to any applicant that it will receive approval from the Council before the graduation of any matriculating student.

(g) A law school seeking provisional approval shall not delay conferring a J.D. upon a student in anticipation of obtaining approval. An approved law school may not retroactively grant a J.D. degree as an approved school to a student who graduated from the law school before its approval.

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after receiving provisional approval and must obtain full approval within five years after receiving provisional approval.

(b) A law school that is provisionally approved may have its approval withdrawn if it is determined The Council may withdraw provisional approval if the Council determines that the law school is no longer in substantial compliance with the Standards, or that the law school is not making adequate progress toward coming into achieving full compliance with each of the Standards, or is no longer able to demonstrate that there is a reasonable probability that the school will achieve full compliance with each of the Standards within the allotted time frame.

(c) If five years have elapsed since the law school was provisionally approved and it has not qualified the Council has not granted for full approval, provisional approval shall lapse, and the law school shall automatically be removed from the list of approved law schools unless, prior to Before the end of the five-year period, in an extraordinary case and for good cause shown, the Council may extend extends the time within which the law school must obtain full approval.

(d) A provisionally approved law school shall not offer a post-J.D. degree program or other non-J.D. degree program, offer a program in a country outside the United States, or seek to establish a separate location.

(e) A provisionally approved law school shall state that it is provisionally approved in all of its printed and electronic materials describing the law school and its program and in any other publication that references the law school’s approval by the Council.

(f) A law school seeking provisional approval shall make its status clear in any printed and electronic materials describing the law school and its program and in any other publication that references the law school’s approval status. At a minimum, the law school shall state the following in all such communications:

The law school is not currently approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association and makes no representation to any applicant that it will receive approval from the Council before the graduation of any matriculating student.

(g) A law school seeking provisional approval shall not delay conferring a J.D. upon a student in anticipation of obtaining approval. An approved law school may not retroactively grant a J.D. degree as an approved school to a student who graduated from the law school before its approval.
Interpretation 102-1

Plans to achieve substantial compliance with any of the Standards are not sufficient to demonstrate substantial compliance.

Interpretation 102-1

Substantial compliance must be achieved as to each of the Standards. Substantial compliance with each Standard is measured at the time a law school seeks provisional approval. Plans for construction, financing, library improvement, and recruitment of faculty which are presented by a law school seeking provisional approval do not, in themselves, constitute evidence of substantial compliance.

Interpretation 102-2

In order to establish that it has a reliable plan to come into full compliance with the Standards within three years after receiving provisional approval, a law school must clearly state the specific steps that it plans to take to bring itself into full compliance and must show that there is a reasonable probability that such steps will be successful.

Interpretation 102-3

A law school seeking provisional approval may not offer a post-J.D. degree program. The primary focus of a school seeking provisional approval should be to do everything necessary to comply with the Standards for the J.D. degree program.

Interpretation 102-4

A student at a provisionally approved law school and an individual who graduates while the school is provisionally approved are to be entitled to the same recognition given to students and graduates of fully approved law schools.

Interpretation 102-5

An approved law school may not retroactively grant a J.D. degree to a graduate of its predecessor unapproved institution.

Interpretation 102-6

A provisionally approved law school shall state in all of its printed and electronic materials generally describing the law school and its program and in any printed and electronic materials specifically targeted at prospective students that it is a provisionally approved law school. Similarly, when it refers to its approval status in publicity releases and communications with all students, applicants or other interested parties, it shall state that it is a provisionally approved law school.

Interpretation 102-7

An unapproved law school seeking provisional approval must include the following language in all of its printed and electronic materials generally describing the law school and its program and in any printed and electronic materials specifically targeted at prospective students:

- "The Dean is fully informed as to the Standards and Rules of Procedure for the Approval of Law Schools by the American Bar Association. The Administration and the Dean are determined to devote all necessary resources and in other respects to take all necessary action to bring the law school into full compliance with the Standards."
steps to present a program of legal education that will qualify for approval by the American Bar Association. The Law School makes no representation to any applicant that it will be approved by the American Bar Association prior to the graduation of any matriculating student.

Interpretation 103-8
103.2 In most jurisdictions an individual cannot sit for the bar examination unless he or she has graduated from a law school fully- or provisionally-approved by the American Bar Association. However, the determination of qualifications and fitness to sit for the bar examination is made by the jurisdiction’s bar admission authorities.

Interpretation 103-9
103.3 A law school seeking provisional approval shall not delay conferring a J.D. degree upon a student in anticipation of obtaining American Bar Association approval.

Interpretation 103-10
103.4 An individual who matriculates at a law school that is provisionally-approved or who is a student enrolled in a law school at the time it receives provisional approval and who completes the course of study and graduates from that school within a typical and reasonable period of time is deemed by the Council to be a graduate of an approved law school, even though the school loses its provisional approval status while the individual is enrolled in the school.

Standard 103. FULL APPROVAL

(a) A law school is granted full approval if it establishes The Council shall grant full approval to a provisionally approved law school if at the time the school seeks such approval it demonstrates that it is in full compliance with each of the Standards, and it has been provisionally approved for not fewer than two years. Plans to achieve full compliance with any Standard are not sufficient to demonstrate full compliance.

(b) A law school granted approval under this Standard remains approved unless the Council withdraws that approval.

Sanctions, including probation and removal from the list of law schools approved by the Association, may be imposed upon a law school as provided in Rules 16 and 17 of the Rules.

Interpretation 103-1
103.1 An individual who matriculates at a law school that is then approved and who completes the course of study and graduates in the normal period of time required therefore is deemed to be a graduate of an approved school, even though the school’s approval was withdrawn while the individual was enrolled therein.
Standard 104. [Reserved] PROVISION OF INFORMATION BY LAW SCHOOLS TO ACCREDITATION COMMITTEE AND COUNCIL

Interpretation 104-1

To enable the Accreditation Committee and Council to determine whether a law school has demonstrated that its program of legal education is consistent with sound legal education principles and is being operated in compliance with the Standards, a law school shall furnish an annual questionnaire, self-study, site evaluation questionnaire, and such other information as the Accreditation Committee and/or Council may require. These documents must be complete, accurate, and not misleading, and must be submitted timely in the form, manner, and time frame in the form specified by the Council.

Standard 105. ACQUIESCENCE FOR MAJOR CHANGE IN PROGRAM OR STRUCTURE

(a) Before a law school makes a major change in its program of legal education or organizational structure, it shall obtain the acquiescence of the Council for the change. A major change in program or structure requires application for acquiescence includes:

Interpretation 105-1 Major changes in the program of legal education or the organizational structure of a law school includes:

(1) (10) Acquiring another law school, program, or educational institution;
(2) (44) Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;
(3) (42) Transferring all, or substantially all, of the academic program of legal education or assets of the approved law school to another law school or university;
(4) (7) Merging or affiliating with one or more approved or unapproved law schools;
(5) (8) Merging or affiliating with one or more universities;
(6) (9) Materially modifying the law school's legal status or institutional relationship with a parent institution;
(7) (44) A change in control of the school resulting from a change in ownership of the school or a contractual arrangement;
(8) (45) A change in the location of the school that could result in substantial changes in the faculty, administration, student body, or management of the school;
(9) (A) Operating a separate location; Establishing a branch campus (i.e., a separate location at which a student may earn more than two thirds of the credit hours that the law school requires for the award of a J.D.);

(10) Offering more than 16 units of the program of legal education at a separate location that is not within reasonable proximity of the main campus; Establishing a separate location;

(11) (A) A significant change in the mission or objectives of the law school; and

(12) (19) The addition of courses or programs since the most recent AC period, such as that represent a significant departure from existing offerings or method of delivery since the last most recent accreditation period including combined undergraduate and J.D. programs, such as 2/4, 4/2 programs, and programs leading to a J.D. and a first-degree program at foreign institution; (4) instituting a new full-time or part-time division; or (3) changing from a full-time to a part-time program or from a part-time to a full-time program;

(3) Establishing a two-year undergraduate/four-year law school or similar program;

(13) (17) The addition of a permanent location at which the law school is conducting a teach-out for students at another law school that has ceased operating before all students have completed their program of study;

(14) (16) Contracting with an educational entity that is not certified to participate in Title IV, HEA programs, that would permit a student to earn 25 percent or more of the course credits required for graduation from the approved law school;

(15) (4) Establishing a new or different program leading to a degree other than the J.D. degree;

(16) (8) A change in program length measurement from clock hours to credit hours; and

(17) (6) A substantial increase in the number of clock or credit hours that are required for graduation.

(b) Subject to the additional requirements of subsections (1) and (2), acquiescence shall be granted. The Council shall grant acquiescence only if the law school establishes and demonstrates that the change will not detract from the law school's ability to remain in compliance with the Standards.

(1) If the proposed major change is the establishment of a degree program other than the J.D. degree, the law school must also establish that it meets the requirements of Standard 308.
(2) If the proposed major change involves instituting a new full-time or part-time division, merging or affiliating with one or more approved or unapproved law schools, acquiring another law school or educational institution, or opening a branch or Satellite campus, the law school must also establish that the law school is in compliance with the Standards or that the proposed major change will substantially enhance the law school’s ability to comply with the Standards.

Interpretation 105-2
The establishment of a Branch campus of an approved law school constitutes the creation of a different law school. Consequently, a Branch campus must have a permanent full-time faculty; an adequate working library, academic support and administrative staff; and adequate physical facilities and technological capacities. A Branch campus shall apply for provisional approval under the provisions of Standard 102 and Rule 4.

Interpretation 105-3
The establishment of a Satellite campus at which a law school offers no more than the first-year of its full-time program, or the first three semesters (or equivalent) of its part-time program, requires at least:
1) Full-time faculty of the law school who teach substantially all of the curriculum offered at the Satellite campus and who are reasonably available at the Satellite campus for consultation with students; and
2) Library resources and staff at the Satellite campus that are adequate to support the curriculum offered at the Satellite campus and that are reasonably accessible to students at the Satellite campus.
3) Academic advising, career services and other student support services that are adequate to support the program offered at the Satellite campus that are reasonably equivalent to such services offered to similarly situated students at the law school’s main campus and that are offered in-person at the Satellite campus or otherwise are reasonably accessible to students at the Satellite campus.
4) That students attending the Satellite campus have access to the school’s co-curricular activities and other educational benefits on a roughly proportional basis; and
5) Physical facilities and technological capacities at the Satellite campus that are adequate to support the curriculum offered at and the students attending the Satellite campus.

Interpretation 105-4
A law school that seeks to establish a Satellite campus at which it will offer courses beyond its first-year program must show that it can adequately support its program at the Satellite campus:
1) That students attending the Satellite campus have reasonable access to full-time faculty, library resources and staff, and academic advising, career services and other support services that are adequate to support the program that the law school offers at the Satellite campus and that are reasonably equivalent to those to which students attending the school’s main campus are entitled;
2) That students attending the Satellite campus have access to the school’s co-curricular activities and other educational benefits on a roughly proportional basis; and
3) That the Satellite campus, in addition to the law school’s main campus, substantially enhances the law school’s ability to comply with the Standards.

Interpretation 105-5
The establishment of a Satellite campus at which a law school offers no more than the first-year of its full-time program, or the first three semesters (or equivalent) of its part-time program, requires at least:
1) Full-time faculty of the law school who teach substantially all of the curriculum offered at the Satellite campus and who are reasonably available at the Satellite campus for consultation with students; and
2) Library resources and staff at the Satellite campus that are adequate to support the curriculum offered at the Satellite campus and that are reasonably accessible to students at the Satellite campus.
3) Academic advising, career services and other student support services that are adequate to support the program offered at the Satellite campus that are reasonably equivalent to such services offered to similarly situated students at the law school’s main campus and that are offered in-person at the Satellite campus or otherwise are reasonably accessible to students at the Satellite campus.
4) That students attending the Satellite campus have access to the school’s co-curricular activities and other educational benefits on a roughly proportional basis; and
5) Physical facilities and technological capacities at the Satellite campus that are adequate to support the curriculum offered at and the students attending the Satellite campus.

Interpretation 105-6
A law school that seeks to establish a Satellite campus at which it will offer courses beyond its first-year program must show that it can adequately support its program at the Satellite campus:
1) That students attending the Satellite campus have reasonable access to full-time faculty, library resources and staff, and academic advising, career services and other support services that are adequate to support the program that the law school offers at the Satellite campus and that are reasonably equivalent to those to which students attending the school’s main campus are entitled;
2) That students attending the Satellite campus have access to the school’s co-curricular activities and other educational benefits on a roughly proportional basis; and
3) That the Satellite campus, in addition to the law school’s main campus, substantially enhances the law school’s ability to comply with the Standards.
The physical facilities and technological capacities at the Satellite campus are adequate to support the curriculum offered at and the students attending the Satellite campus.

Interpretation 105-5
If a student would be able to take at a Satellite campus the equivalent of two-thirds or more of the credit hours that a law school requires for the award of the J.D. degree, all of the requirements set forth in Interpretation 105-2 apply to the establishment of such a Satellite campus except the requirement concerning provisional approval.

Interpretation 105-6
The Council has delegated to the Accreditation Committee the authority to grant acquiescence in the types of major changes listed in Interpretations 105-1(4), (5), and (6).

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; and

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 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 22;

2. Comply with instructional requirements and responsibilities as required by Standard 403(a) and Standard 404(a); and
103A

(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

"Separate location" and "branch campus" as used in this Standard are defined terms that apply only to locations at which a law school offers more than sixteen credits of the program of legal education.

Interpretation 106-2

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

Standard 107. VARIANCES

(a) A law school proposing to make any change that is or may be inconsistent with one or more of the Standards may apply to the Council for a variance only on one of the following bases:

(1) A law school may apply for a variance in response to extraordinary circumstances in which compliance with the relevant Standard or Standards would create or constitute extreme hardship for the law school and/or its students. In such cases, the law school must demonstrate that: i) the proposed variance is consistent with the general purposes and objectives of the overall Standards, and ii) the anticipated benefits of granting the variance outweigh any anticipated harms to the law school's program or its students. The variance, if granted, will be for a term certain and limited to the expected duration of the extraordinary circumstances on the basis of which it was granted. It may be extended once for a further term certain, but only if the extraordinary circumstances persist and are beyond the control of the law school. The decision granting a variance on this basis may require the law school to report to the Managing Director, the Accreditation Committee, or the Council regularly as specified in the decision.

(2) In all variance applications that do not fall within subsection (a)(1), the law school must demonstrate that: i) the proposed variance is consistent with the general purposes and objectives of the overall Standards, ii) the proposed changes or actions that are the basis for the requested variance are experimental or innovative and have the potential to improve or advance the state of legal education, and iii) the anticipated benefits of granting the variance outweigh any anticipated harms to the law school's program or its students.

(b) A law school with more than one location may have one dean for all locations.

Standard 107. VARIANCES

(a) A law school proposing to make any change that is or may be inconsistent with one or more of the Standards may apply to the Council for a variance only on one of the following bases:

(1) A law school may apply for a variance in response to extraordinary circumstances in which compliance with the relevant Standard or Standards would create or constitute extreme hardship for the law school and/or its students. In such cases, the law school must demonstrate that: i) the proposed variance is consistent with the general purposes and objectives of the overall Standards, and ii) the anticipated benefits of granting the variance outweigh any anticipated harms to the law school's program or its students. The variance, if granted, will be for a term certain and limited to the expected duration of the extraordinary circumstances on the basis of which it was granted. It may be extended once for a further term certain, but only if the extraordinary circumstances persist and are beyond the control of the law school. The decision granting a variance on this basis may require the law school to report to the Managing Director, the Accreditation Committee, or the Council regularly as specified in the decision.

(2) In all variance applications that do not fall within subsection (a)(1), the law school must demonstrate that: i) the proposed variance is consistent with the general purposes and objectives of the overall Standards, ii) the proposed changes or actions that are the basis for the requested variance are experimental or innovative and have the potential to improve or advance the state of legal education, and iii) the anticipated benefits of granting the variance outweigh any anticipated harms to the law school's program or its students.
The variance, if granted, shall be for a term certain and can be extended once, with the extension being for either a further term certain or indefinite, but subject to revocation on the basis of either a change in the showing made by the law school when the variance was granted or a change in circumstances.

The decision granting a variance on this basis may require the law school to report to the Managing Director, the Accreditation Committee or the Council regularly as specified in the decision.

(b) If the changes that are the subject of the application for a variance constitute or come to constitute a major change in programs or structure under Standard 105 or 106, then the law school shall seek acquiescence by the Council in order to initiate or continue the changes.

(c) A variance, when granted, is school specific and shall be based on and limited to the facts and circumstances that existed at the law school at the time it applied for the variance.

Standard 802. VARIANCE

A law school proposing to offer a program of legal education a portion of which is inconsistent with a Standard may apply for a variance. If the Council finds that the proposal is nevertheless consistent with the general purposes of the Standards, the Council may grant the variance, may impose conditions, and shall impose time-limits it considers appropriate. Council may terminate a variance prior to the end of the stated time-limit if the school fails to comply with any conditions imposed by the Council. As a general rule, the duration of a variance should not exceed three years.

Interpretation 802-1

Variances are generally limited to proposals based on one or more of the following:

(a) a response to extraordinary circumstances that would create extreme hardship for students or for an approved law school; or

(b) an experimental program based on all of the following:

(1) good reason to believe that there is a likelihood of success;  
(2) high-quality experimental design;  
(3) clear and measurable criteria for assessing the success of the experimental program;  
(4) strong reason to believe that the benefits of the experiment will be greater than its risks; and

(5) adequately informed participation by students involved in the experiment.

Interpretation 802-2

A school applying for a variance has the burden of demonstrating that the variance should be granted. The application should include, at a minimum, the following:

(a) a precise statement of the variance sought;  
(b) an explanation of the bases and reasons for the variance; and

(c) additional information needed to support the application.
Interpretation 802-3
The Chair of the Accreditation Committee or the Consultant may appoint one or more fact
finders to elicit facts relevant to consideration of the application for a variance. Thus an
application for a variance must be filed well in advance of consideration of the application by
the Accreditation Committee and the Council.

Interpretation 802-4
The Consultant, the Accreditation Committee or the Council may from time to time request
written reports from the school concerning the variance.

Interpretation 802-5
Variances are school-specific and based on the circumstances existing at the law school filing
the request.
Chapter 2 - ORGANIZATION AND ADMINISTRATION

Standard 201. GOVERNING BOARD AND LAW SCHOOL AUTHORITY

LAW SCHOOL GOVERNANCE

(a) A governing board may establish general policies that are applicable to a law school if they are consistent with the Standards.

(g) The dean and the faculty shall have the primary responsibility and authority for planning, implementing, and administering formulating and administering the program of legal education program of the law school, including curriculum, methods of instruction and evaluation, admissions policies and procedures, and academic standards, for retention, advancement, and graduation of students; and shall

(b) The dean and the faculty shall recommend the selection, retention, promotion, and tenure (or granting of security of position) of members of the faculty.

(c) The dean and the faculty shall each have a significant role in determining educational policy.

(d) The policies of a university that are applicable to a law school shall be consistent with the Standards. The law school shall have separate policies where necessary to ensure compliance with the Standards.

(e) A law school that is not part of a university shall be governed by a board with responsibility and authority for ensuring operation of the law school in compliance with the Standards.

Interpretation 205-1

An action of a university committee may violate the standards if it deprives the dean and faculty of a law school of their appropriate roles in recommending faculty promotion and tenure or security of position.

Interpretation 205-2

Admission of a student to a law school without the approval of the dean and faculty of the law school violates the Standard.

Standard 202. RESOURCES FOR PROGRAM

(a) The present current and anticipated financial resources available to the law school of a law school shall be sufficient for it to operate in compliance with the Standards and to carry out its program of legal education adequate to sustain a sound program of legal education and accomplish its mission.
A law school shall be so organized and administered that its resources are used to provide a sound program of legal education and to accomplish its mission.

A law school that is part of a university shall obtain at least annually from its university an accounting and explanation for all charges and costs assessed against resources generated by the law school and for any use of resources generated by the law school to support non-law school activities and central university services.

Interpretation 201-1

(c) A law school does not comply with the Standards if its current financial condition resources are so inadequate as to have a negative and material effect on the education students receive school's ability to operate in compliance with the Standards; or to carry out its program of legal education.

(d) A law school is not in compliance with the Standards if its anticipated financial condition is reasonably expected to have a negative and material effect on the school's ability to operate in compliance with the Standards; or to carry out its program of legal education.

(e) A law school shall be given the opportunity to present its recommendations on budgetary matters to the university administration before the budget for the law school is submitted to the governing board for adoption.

Interpretation 202-1

"Resources generated" includes law school tuition and fees, appropriated support, endowment restricted to the law school, gifts to the law school, and revenue from grants, contracts, and property of the law school.

Interpretation 201-2

A law school may not base the compensation paid any person for service to the law school (other than compensation paid a student or associate for reading and correcting papers or similar activity) on the number of persons enrolled in the law school or in any class or on the number of persons applying for admission to or registering in the law school.

Standard 203 206. DEAN

(a) A law school shall have a full-time dean, selected by the governing board or its designee, to whom the dean shall be responsible. (b) A law school shall provide the dean with the authority and support needed necessary to discharge the responsibilities of the position and those contemplated by the Standards.

(c) Except in extraordinary circumstances, a dean shall also hold appointment as a member of the faculty with tenure.

(d) The dean shall be selected by the university or the governing board of the law school, as appropriate, which shall have and follow a procedure for decanal appointment or
reappointment that assures meaningful involvement by the faculty or a representative body of the faculty, it shall advise, consult, and make recommendations to the appointing authority in the selection of a dean.

Interpretation 203-1 206-1
The faculty or a representative body of it should have substantial involvement in the selection of a dean. Except in circumstances demonstrating good cause, a dean should not be appointed or reappointed to a new term over the stated objection of a substantial majority of the faculty.

Interpretation 203-2
In the appointment of an interim or acting dean, the university or the governing board of the law school, as appropriate, should follow a procedure that assures meaningful consultation with the faculty or a representative body of the faculty.

Interpretation 203-3
The extension or an interim or acting dean’s service beyond two years is a regular decanal appointment or reappointment for the purposes of Standard 203(c).

Standard 202. SELF STUDY
Before each site evaluation visit the dean and faculty of a law school shall develop a written self-study, which shall include a mission statement. The self-study shall describe the program of legal education, evaluate the strengths and weaknesses of the program in light of the school’s mission, set goals to improve the program, and identify the means to accomplish the law school’s unrealized goals.

Interpretation 202-1
A current self-study shall be submitted by a law school seeking provisional approval: a provisionally-approved law school before its annual site evaluation; and a fully-approved law school before any regular or special site evaluation.

Standard 203. STRATEGIC PLANNING AND ASSESSMENT
In addition to the self study described in Standard 202, a law school shall demonstrate that it regularly identifies specific goals for improving the law school’s program, identifies means to achieve the established goals, assesses its success in realizing the established goals and periodically re-examines and appropriately revises its established goals.

Standard 204. SELF STUDY
Before each site evaluation visit the law school shall prepare a self-study comprised of (a) a completed site evaluation questionnaire, (b) a statement of the law school’s mission and of its educational objectives in support of that mission, (c) an assessment of the educational quality of the law school’s program, (d) an assessment of the school’s continuing efforts to improve educational quality, (e) an evaluation of the school’s effectiveness in achieving its stated educational objectives, and (f) a description of the strengths and weaknesses of the law school’s program of legal education.
The evaluation of the school's effectiveness and description of its strengths and weaknesses should include a statement of the availability of sufficient resources to achieve the school's mission and its educational objectives.

Standard 204. GOVERNING BOARD OF AN INDEPENDENT LAW SCHOOL

A law school that is not a part of a university shall be governed by a governing board composed of individuals dedicated to the maintenance of a sound program of legal education.

Interpretation 204-I

The governing board of a law school that is not a part of a university should authorize the dean to serve as chief executive or chief academic officer of the law school or both, and shall define the scope of the dean's authority in compliance with the Standards. The dean shall be responsible to the governing board. The dean may be a member of the board but should not serve as chairman of the board.

Standard 207. ALLOCATION OF AUTHORITY BETWEEN DEAN AND FACULTY

The allocation of authority between the dean and the law faculty is a matter for determination by each institution as long as both the dean and the faculty have a significant role in determining educational policy.

Standard 208. INVOLVEMENT OF ALUMNI, STUDENTS AND OTHERS

A law school may involve alumni, students, and others in a participatory or advisory capacity, but the dean and faculty shall retain control over matters affecting the educational program of the law school.

Standard 209. NON-UNIVERSITY AFFILIATED LAW SCHOOLS

If a law school is not part of a university or, although a part, is physically remote from the rest of the university, the law school should seek to provide its students and faculty with the benefits that usually result from a university connection, such as by enlarging its library collection to include materials generally found only in a university library and by developing working relationships with other educational institutions in the community.

Standard 210. LAW SCHOOL-UNIVERSITY RELATIONSHIP

(a) If a law school is part of a university, that relationship shall serve to enhance the law school's program.
(b) If a university’s general policies do not adequately facilitate the recruitment and retention of competent law faculty, appropriate separate policies should be established for the law school.

(c) The resources generated by a law school that is part of a university should be made available to the law school to maintain and enhance its program of legal education.

(d) A law school shall be given the opportunity to present its recommendations on budgetary matters to the university administration before the budget for the law school is submitted to the governing board for adoption.

(e) The resources generated by a law school that is part of a university should be made available to the law school to maintain and enhance its program of legal education.

(f) If a law school’s general policies do not adequately facilitate the recruitment and retention of competent law faculty, appropriate separate policies should be established for the law school.

(g) The interpretation of “resources generated” includes law school tuition and fees, endowment restricted to the law school, gifts to the law school, and income from grants, contracts, and property of the law school. The university should provide the law school with a satisfactory explanation for any use of resources generated by the law school to support non-law school activities and central university services. In turn, the law school should benefit on a reasonable basis in the allocation of university resources.

Standard 205-24. NON-DISCRIMINATION AND EQUALITY OF OPPORTUNITY

(a) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability.

(b) A law school shall foster and maintain equality of opportunity for students, faculty, and staff in legal education, including employment of faculty and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability.

(c) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (ii) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (iii) the religious affiliation, purpose, or policies do not contravene any other Standard, including Standard 405(b) concerning academic freedom.

These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability.
Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application.

(d) Non-discrimination and equality of opportunity in legal education includes equal employment opportunity to obtain employment. A law school shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions services the school's firm expectation that the employer will observe the principles of non-discrimination and equality of opportunity on the basis of race, color, religion, national origin, gender, sexual orientation, age and disability in regard to hiring, promotion, retention and conditions of employment.

Interpretation 205-1
Schools A law school may not require applicants, students, faculty or employees to disclose their sexual orientation, although they may provide opportunities for them to do so voluntarily.

Interpretation 205-2
A law school may not require applicants, students, faculty or employees to disclose their sexual orientation, although they may provide opportunities for them to do so voluntarily.

Interpretation 205-3
As long as a school complies with the requirements of Standard 205(c) 211(e), the prohibition concerning sexual orientation does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs. For example, it does not require a school to recognize or fund support organizations whose purposes or objectives with respect to sexual orientation conflict with the essential elements of the religious values and beliefs held by the school.

Interpretation 205-4
Standard 205(d) 211(e) applies to all employers, including government agencies, to which a school furnishes assistance and facilities for interviewing and other placement services. However, this Standard does not require a law school to implement its terms by excluding any employer unless that employer discriminates unlawfully.

Interpretation 205-5
The denial by a law school of admission to a qualified applicant is treated as made upon the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability if the basis of denial relied upon is an admissions admission qualification of the school that is intended to prevent the admission of applicants on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability though not purporting to do so.

Interpretation 205-6
The denial by a law school of employment to a qualified individual is treated as made upon the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability if the basis of denial relied upon is an employment policy of the school that is intended to prevent the employment of individuals on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability though not purporting to do so.

Interpretation 205-7
The denial by a law school of admission to a qualified applicant is treated as made upon the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability if the basis of denial relied upon is an admission qualification of the school that is intended to prevent the admission of applicants on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability though not purporting to do so.

Interpretation 205-8
The denial by a law school of employment to a qualified individual is treated as made upon the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability if the basis of denial relied upon is an employment policy of the school that is intended to prevent the employment of individuals on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability though not purporting to do so.
Standard 206.242. EQUAL OPPORTUNITY AND DIVERSITY AND INCLUSION

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession of members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.

Interpretation 206-1

The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions is not a justification for a school’s non-compliance with Standard 206-242. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 206-242 by means other than those prohibited by the applicable constitutional or statutory provisions.

Interpretation 206-2

Consistent with the U.S. Supreme Court’s decision in Grutter v. Bollinger, 529 U.S. 362 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body. In addition to providing full opportunities for the study of law and the entry into the legal profession by members of underrepresented groups, the enrollment of a diverse student body promotes cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different races, ethnic groups, and backgrounds. Interpretation 206-2: This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The forms of concrete action required by a law school to satisfy the obligations of this Standard are not specified. If consistent with applicable law, a law school may use race and ethnicity in its admissions process to promote diversity and inclusion. The determination of a law school’s satisfaction of such obligations is based on the totality of the law school’s actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.
Standard 207. Reasonable accommodation for qualified individuals with disabilities

(a) Assuring equality of opportunity for qualified individuals with disabilities, as required by Standard 205-241, may require a law school to provide such students, faculty and staff with reasonable accommodations consistent with applicable law.

(b) A law school shall adopt, publish, and adhere to written policies and procedures for assessing and handling requests for reasonable accommodations made by qualified individuals with disabilities.

Interpretation 213-1
For the purpose of this Standard and Standard 211, disability is defined as in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, as further defined by the regulations on post secondary education, 34 C.F.R. Section 305.3(k)(3) and by the Americans with Disabilities Act, 42 U.S.C. Sections 12101 et seq.

Interpretation 213-2
As to those matters covered by Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act; neither this Standard nor Standard 211 imposes obligations upon law schools beyond those provided by Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act those statutes.

Interpretation 213-3
Applicants and students shall be individually evaluated to determine whether they meet the academic standards requisite to admission and participation in the law school program. The use of the term “qualified” in the Standard requires a careful and thorough consideration of each applicant and each student’s qualifications in light of reasonable accommodations. Reasonable accommodations are those that are consistent with the fundamental nature of the school’s program of legal education, that can be provided without undue financial or administrative burden, and that can be provided while maintaining academic and other essential performance standards.
Chapter 3 - PROGRAM OF LEGAL EDUCATION

Standard 301. OBJECTIVES OF PROGRAM OF LEGAL EDUCATION

(a) A law school shall maintain a rigorous educational program of legal education that prepares its students, upon graduation, for admission to the bar, and for effective, ethical, and responsible participation as members of the legal profession.

(b) A law school shall establish and publish learning outcomes designed to achieve these objectives.

Interpretation 301-1
A law school shall maintain an educational program that prepares its students to address current and anticipated legal problems.

Interpretation 301-2
A law school may offer an education program designed to emphasize certain aspects of the law or the legal profession.

Interpretation 301-3
Among the factors to be considered in assessing the extent to which a law school complies with this Standard are the rigor of its academic program, including its assessment of student performance, and the bar passage rates of its graduates.

Interpretation 301-4
Among the factors to be considered in assessing compliance with Standard 301(b) are whether students have reasonably comparable opportunities to benefit from regular interaction with full-time faculty and other students from such co-curricular programs as journals and competition teams, and from special events such as lecture series and short-time visitors.

Interpretation 301-5
For schools providing more than one enrollment or scheduling option, the opportunities to take advantage of the school’s educational program, co-curricular activities, and other educational benefits for students enrolled under one option shall be deemed reasonably comparable to the opportunities of students enrolled under other options if the opportunities are roughly proportional based upon the relative number of students enrolled in various options.

(a) A law school shall require that each student receive substantial instruction in:

(1) the substantive law generally regarded as necessary to effective and
(2) legal analysis and reasoning, legal research, problem solving, and oral communication;

(3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;

(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession;

(5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.

(b) A law school shall offer substantial opportunities for:

(1) live client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;

(2) student participation in pro-bono activities; and

(3) small group work, through seminars, directed research, small classes, or collaborative work.

Standard 302. LEARNING OUTCOMES

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

(a) Knowledge and understanding of substantive and procedural law;

(b) Legal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context;

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

Interpretation 302-1

For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and
Standard 303. CURRICULUM

(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:

1. one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members;
2. one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and
3. one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must:
   (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;
   (ii) develop the concepts underlying the professional skills being taught;
   (iii) provide multiple opportunities for performance; and
   (iv) provide opportunities for self-evaluation.

(b) A law school shall provide substantial opportunities to students for:

1. law clinics or field placements; and
2. student participation in pro bono legal services, including law-related public service activities.

Interpretation 303-1

A law school may not permit a student to use a course to satisfy more than one requirement under this Standard. For example, a course that includes a writing experience used to satisfy the upper-class writing requirement [see 303(a)(2)] cannot be counted as one of the experiential courses required in Standard 303(a)(3).
Interpretation 302-1 302-2
Factors to be considered in evaluating the rigor of a writing instruction experience include the number and nature of writing projects assigned to students, the opportunities a student has to meet with a writing instructor for purposes of form and extent of individualized assessment of the student’s written products, and the number of drafts that a student must produce for any writing experience, project, and the form of assessment used by the writing instructor.

Interpretation 302-4 302-3
Each law school is encouraged to be creative in developing substantial opportunities for student participation in pro bono activities. Pro bono opportunities should at a minimum involve the rendering of meaningful law-related service to persons of limited means or to organizations that serve such persons; however, volunteer programs that involve meaningful services that are not law-related also may be included within the law school’s overall program. Law-related pro bono opportunities need not be structured to accomplish any of the professional skills training required by Standard 302(a)(4). While most existing law school pro bono programs include only activities for which students do not receive academic credit, Standard 302(b)(2) does not preclude the inclusion of credit-granting activities within a law school’s overall program of pro bono opportunities so long as law-related non-credit-bearing initiatives are also part of that program.

Rule 6.1 of the ABA Model Rules of Professional Conduct encourages lawyers to provide pro bono legal services primarily to persons of limited means or to organizations that serve such persons. In addition, lawyers are encouraged to provide pro bono law-related public service. In meeting the requirement of Standard 302(b)(2), law schools are encouraged to promote opportunities for law student pro bono service that incorporate the priorities established in Model Rule 6.1. In addition, law schools are encouraged to promote opportunities for law students to provide over their law school career at least 50 hours of pro bono service that complies with Standard 302(b)(2). Pro bono and public service opportunities need not be structured to accomplish any of the outcomes required by Standard 302. Standard 302(b)(2) does not preclude the inclusion of credit-granting activities within a law school’s overall program of law-related pro bono opportunities so long as law-related non-credit-bearing initiatives are also part of that program.

Interpretation 303-1
Law-related public service activities include (i) helping groups or organizations seeking to secure or protect civil rights, civil liberties, or public rights; (ii) helping charitable, religious, civic, community, governmental, and educational organizations not able to afford legal representation; (iii) participating in activities providing information about justice, the law or the legal system to those who might not otherwise have such information; and (iv) engaging in activities to enhance the capacity of the law and legal institutions to do justice.

Interpretation 302-2
Each law school is encouraged to be creative in developing programs of instruction in the various skills responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem-solving.
### Interpretation 302-3

A school may satisfy the requirement for substantial instruction in professional skills in various ways, including, for example, requiring students to take one or more courses having substantial professional skills components. To be "substantial," instruction in professional skills must engage each student in skill performances that are assessed by the instructor.

### Interpretation 302-4

A law school need not accommodate every student requesting enrollment in a particular professional skills course.

### Interpretation 302-5

The offering of live-client or real-life experience may be accomplished through clinics or field placements. A law school need not offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life practice experience.

### Interpretation 302-6

A law school should involve members of the bench and bar in the instruction required by Standard 302(a)(2).

### Interpretation 302-7

Reserved

### Interpretation 302-8

A law school shall engage in periodic review of its curriculum to ensure that it prepares the school’s graduates to participate effectively and responsibly in the legal profession.

### Interpretation 302-9

The substantial instruction in the history, structure, values, rules, and responsibilities of the legal profession and its members required by Standard 302(a)(2) includes instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association.

### Standard 304. SIMULATION COURSES AND LAW CLINICS

#### (a) A simulation course provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and (2) includes the following:

- (i) direct supervision of the student’s performance by the faculty member;
- (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and
- (iii) a classroom instructional component.
A law clinic provides substantial lawyering experience that (1) involves one or more actual clients, and (2) includes the following:

(i) advising or representing a client;
(ii) direct supervision of the student's performance by a faculty member;
(iii) opportunities for performance, feedback from a faculty member, and self-evaluation; and
(iv) a classroom instructional component.

Standard 305. FIELD PLACEMENTS AND OTHER STUDY OUTSIDE THE CLASSROOM

(a) A law school may grant credit toward the J.D. degree for courses or a program that permits or requires student participation in studies or activities away from or outside the law school or in a format that does not involve attendance at regularly scheduled class sessions, including courses approved as part of a field placement program, moot court, law review, and directed research.

(b) Credit granted for such a course shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.

(c) Each student's academic achievement in such a course shall be evaluated by a faculty member. For purposes of Standard 305 and its Interpretations, the term "faculty member" means a member of the full-time or part-time faculty. When appropriate a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program.

(d) The studies or activities shall be approved in advance and periodically reviewed following the school's established procedures for approval of the curriculum.

(e) A field placement program shall include:

(1) a clear statement of the its goals and methods, and a demonstrated relationship between those goals and methods to the program in operation;
(2) adequate instructional resources, including faculty teaching in and supervising the program who devote the requisite time and attention to satisfy program goals and are sufficiently available to students;
(3) a clearly articulated method of evaluating each student's academic performance involving both a faculty member and the field placement site supervisor;
(4) a method for selecting, training, evaluating, and communicating with field placement site supervisors;
(5) periodic on-site visits or their equivalent by a faculty member if the field placement program awards four or more academic credit (or equivalent) for field
work in any academic term or if on-site visits or their equivalent are otherwise necessary and appropriate; for field placements that award three or more credit hours, regular contact between the faculty supervisor or law school administrator and the site supervisor to assure the quality of the student educational experience, including the appropriateness of the supervision and the student work;

(6) a requirement that each student has successfully completed instruction equivalent to 28 credit hours toward the J.D. degree one academic year of study prior to before participation in the field placement program; and

(7) opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can may earn four three or more academic credit hours (or equivalent) in the program for fieldwork a field placement program, the opportunity for student reflection, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.

(f) A law school that has a field placement program shall develop, publish, and communicate to students and site supervisors a statement that describes the educational objectives of the program.

Interpretation 305-1
Regular contact may be achieved through in-person visits or other methods of communication that will assure the quality of the student educational experience.

Interpretation 305-2 305-3
A law school may not grant credit to a student for participation in a field placement program for which the student receives compensation. This Interpretation does not preclude reimbursement of reasonable out-of-pocket expenses related to the field placement.

Interpretation 305-1
Activities covered by Standard 305(a) include field placements, moot court, law review, and directed research programs or courses for which credit toward the J.D. degree is granted, as well as courses taken in parts of the college or university outside the law school for which credit toward the J.D. degree is granted.

Interpretation 305-2
A law school that has a field placement program shall develop, publish, and communicate to students and field instructors a statement that describes the educational objectives of the program.
Interpretation—305.5

Standard 305 by its own force does not allow credit for distance education courses.

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Standard 305 by its own force does not allow credit for distance education courses.
(d)(c) A law school shall not grant a student more than a total of 15 credit hours four-credit hours in any term, nor more than a total of 12 credit hours, toward the J.D. degree for courses qualifying under this Standard.

(e)(f) A law school shall not enroll a student in courses qualifying for credit under this Standard until that student has completed instruction equivalent to 28 credit hours toward the J.D. degree.

(f) No credit otherwise may be given toward the J.D. degree for any distance education course.

(g) A law school shall establish a process that is an effective process for verifying the identity of students taking distance education courses and that also protects student privacy. If any additional student charges are associated with verification of student identity, students must be notified at the time of registration or enrollment.

Interpretation 306-1
Technology used to support a distance education course may include, for example:

(a) The Internet;

(b) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(c) Audio and video conferencing; or

(d) Video cassettes, DVDs, and CD-ROMs, if the cassettes, DVDs, or CD-ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (a) through (c).

Interpretation 306-2
Methods to verify student identity as required in Standard 306(g) include, but are not limited to:

(i) a secure login and pass code;

(ii) proctored examinations;

and (iii) new or other technologies and practices that are effective in verifying student identity. As part of the verification process, a law school shall verify that the student who registers for a class is the same student that participates and takes the exam any examinations for the class.

Interpretation 306-1
To allow the Council and the Standards Review Committee to review and adjust this Standard, law schools shall report each year on the distance education courses that they offer.

Interpretation 306-2
Distance education presents special opportunities and unique challenges for the maintenance of educational quality. Distance education accordingly requires particular attention from the law school and by-site visit teams and the Accreditation Committee.
Courses in which two-thirds or more of the course instruction consists of regular-classroom instruction shall not be treated as "distance education" for purposes of 306(d) and (e) even though they also include substantial on-line interaction or other common components of "distance education" courses so long as such instruction complies with the provisions of subsections (1) and (2) of Standard 306(c).

Law schools shall take steps to provide students in distance education courses opportunities to interact with instructors that equal or exceed the opportunities for such interaction with instructors in a traditional-classroom setting.

Law schools shall have the technological capacity, staff, information resources, and facilities required to provide the support needed for instructors and students involved in distance education at the school.

Law schools shall establish mechanisms to assure that faculty who teach distance education courses and students who enroll in them have the skills and access to the technology necessary to enable them to participate effectively.

Faculty approval of credit for a distance education course shall include a specific explanation of how the course credit was determined. Credit shall be awarded in a manner consistent with the requirements of Interpretation 304-4 that requires 700 minutes of instruction for each credit awarded.

A law school that offers more than an incidental amount of credit for distance education shall adopt a written plan for distance education at the law school and shall periodically review the educational effectiveness of its distance education courses and programs.

"Credits" in this Standard means semester-hour credits as provided in Interpretation 304-4. Law schools that use quarter-hours of credit shall convert these credits in a manner that is consistent with the provisions of Interpretation 304-4.

Standard 307. PARTICIPATION IN STUDIES, OR ACTIVITIES, AND FIELD PLACEMENTS IN A FOREIGN COUNTRY OUTSIDE THE UNITED STATES

(g) A law school may grant credit for student participation in studies or activities in a foreign country (1) only if the studies or activities outside the United States that are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council and (2) field placements outside the United States that meet the requirements of Standard 307.
Standard 305 and are not held in conjunction with studies or activities that are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council.

(b) The total credits for student participation in such studies or activities may not exceed one-third of the credits required for the J.D. degree.

Interpretation 307-1
The three Criteria adopted by the Council are the Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools, the Criteria for Approval of Foreign Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools, and the Criteria for Student Study at a Foreign Institution.

Interpretation 307-2
In addition to studies or activities covered by Criteria adopted by the Council, a law school may grant credit for individual studies or activities in a foreign country that meet the requirements of Standard 305 and the brief visits to a foreign country that are part of a law school course.

For purposes of Standard 307, a brief visit to a country outside the United States that is part of a course offered and based primarily at the law school and approved through the school’s regular curriculum approval process is not considered to be studies outside the United States.

Standard 308. ACADEMIC STANDARDS AND ACHIEVEMENTS

(a) A law school shall have adopted, publish, and adhere to sound academic standards, including those clearly defined standards for good standing, academic integrity, and graduation, and dismissal.

(b) A law school shall monitor students’ academic progress and achievement from the beginning of and periodically throughout their studies.

(c) A law school shall not continue the enrollment of a student whose inability to do satisfactory work is sufficiently manifest so that the student’s continuation in school would inculcate false hopes, constitute economic exploitation, or detrimentally affect the education of other students.

(b) A law school shall adopt, publish, and adhere to written due process policies with regard to taking any action that adversely affects the good standing or graduation of a student.

Standard 309. ACADEMIC ADVISING AND SUPPORT

(a) A law school shall provide academic advising for students that communicates effectively the school’s academic standards and graduation requirements, and that provides guidance on course selection.
(b) A law school shall provide academic support designed to afford students a reasonable
time to complete the program of legal education, graduate, and become members of
the legal profession.

Interpretation 301-1
Scholastic achievement of students shall be evaluated by examinations of suitable length and
complexity, papers, projects, or by assessment of performances of students in the role of lawyers.

Interpretation 301-2
A law school shall provide academic advising to students to communicate effectively to them the
school’s academic standards and graduation requirements, and guidance regarding course
selection and sequencing. Academic advising should include assisting each student with
planning a program of study consistent with that student’s goals.

Interpretation 301-3
A law school shall provide the academic support necessary to assist each student to satisfactorily
opportunity to complete the program, graduate, and become a member of the legal profession.
This obligation may require a school to create and maintain a formal academic support
program.

Standard 310. DETERMINATION OF CREDIT HOURS FOR COURSEWORK
(a) A law school shall adopt, publish, and adhere to written policies and procedures for
determining the credit hours that it awards for coursework.
(b) A “credit hour” is an amount of work that reasonably approximates:
(1) not less than one hour of classroom or direct faculty instruction and two hours of
out-of-class student work per week for fifteen weeks, or the equivalent amount of work
over a different amount of time; or
(2) at least an equivalent amount of work as required in subparagraph (1) of this
definition for other academic activities as established by the institution, including
simulation, field placement, clinical, co-curricular, and other academic work leading to
the award of credit hours.

Interpretation 310-1
For purposes of this Standard, fifty minutes suffices for one hour of classroom or direct faculty
instruction. An “hour” for out-of-class student work is sixty minutes. The fifteen-week period
may include one week for a final examination.

Interpretation 310-2
A school may award credit hours for coursework that extends over any period of time, if the
coursework entails no less than the minimum total amounts of classroom or direct faculty
instruction and of out-of-class student work specified in Standard 310(h).
A law school shall have an academic year of not fewer than 130 days on which classes and examinations are regularly scheduled in the law school, extending into not fewer than eight calendar months. The law school shall provide adequate time for reading periods, examinations, and breaks, but such time does not count toward the 130-day academic year requirement.

(b) A law school shall require, as a condition for graduation, successful completion of a course of study in residence of not fewer than 83 credit hours. Fifty thousand minutes of instruction time, except as otherwise provided. At least 45,000 of these minutes credit hours shall be by courses that require attendance in regularly scheduled class, classroom sessions or direct faculty instruction at the law school.

(c) A law school shall require that the course of study for the J.D. degree be completed no earlier than 24 months and, except in extraordinary circumstances, no later than 84 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.

(e) Credit for a J.D. degree shall only be given for course work taken after the student has matriculated in a law school. A law school may not grant credit toward the J.D. degree for work taken in a pre-admission program.

(f) A law school shall adopt, publish, and adhere to a require regular and punctual written policy requiring regular class attendance.

(f) A student may not be employed more than 20 hours per week in any week in which the student is enrolled in more than twelve class hours.

Interpretation 311-1
This Standard establishes a minimum period of academic instruction as a condition for graduation. While the academic year is typically divided into two equal terms of at least thirteen weeks, that equal division is not required. The Standard accommodates deviations from a conventional semester system, including quarter systems, trimesters, and mini-terms.

Interpretation 311-2
A law school may not count more than five class days each week toward the 140-day requirement.

Interpretation 311-3
This Standard establishes a minimum period of academic instruction as a condition for graduation. While the academic year is typically divided into two equal terms of at least thirteen weeks, that equal division is not required. The Standard accommodates deviations from a conventional semester system, including quarter systems, trimesters, and mini-terms.

Interpretation 311-4
A law school may not count more than five class days each week toward the 140-day requirement.
In calculating the 45,000 minutes of “regularly scheduled class sessions” for the purpose of
Standard 304-3(b), the time may include:

(a) coursework at a law school for which a student receives credit toward the J.D. degree by the
law school: so long as that work itself meets the requirements of Standard 304;

(b) coursework for which a student receives credit toward the J.D. degree that is work done in a
foreign study program that qualifies under Standard 307;

(c) law school coursework that meets the requirements of Standard 306(c);

(d) in a seminar or other upper-level course other than an independent research course, the
minutes allocated for preparation of a substantial paper or project of the time and effort required
and anticipated educational benefit are commensurate with the credit awarded; and

(e) in a law school clinical course, the minutes allocated for clinical work so long as (i) the
coursework includes a classroom instructional component; (ii) the clinical work is done under
the direct supervision of a member of the law school faculty or instructional staff whose primary
professional employment is with the law school; and (iii) the time and effort required and
anticipated educational benefit are commensurate with the credit awarded.

A law school shall not include in the 45,000 minutes required by Standard 304(b) to be by
attendance in regularly scheduled class sessions at the law school any other coursework
including but not limited to (i) work qualifying for credit under Standard 305(a) coursework
completed in another department, school or college of the university with which the law school is
affiliated or at another institution of higher learning; and (ii) co-curricular activities such as
law review, moot court, and trial competitions.

(a) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty
instruction for the purpose of Standard 311(b), the credit hours may include:

(1) Credit hours earned by attendance in regularly scheduled classroom sessions or direct
faculty instruction;

(2) Credit hours earned by participation in a simulation course or law clinic in compliance
with Standard 304;

(3) Credit hours earned through distance education in compliance with Standard 306; and

(4) Credit hours earned by participation in law-related studies or activities in a country
outside the United States in compliance with Standard 307.

(b) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty
instruction for the purpose of Standard 311(b), the credit hours shall not include any other
coursework, including, but not limited to:

(1) Credit hours earned through field placements and other study outside of the classroom in
compliance with Standard 305;

(2) Credit hours earned in another department, school, or college of the university with
which the law school is affiliated, or at another institution of higher learning;

(3) Credit hours earned for participation in co-curricular activities such as law review.

Interpretation 311-2 304-3

In calculating the 45,000 minutes of “regularly scheduled class sessions” for the purpose of
Standard 304-3(b), the time may include:

(a) coursework at a law school for which a student receives credit toward the J.D. degree by the
law school: so long as that work itself meets the requirements of Standard 304;

(b) coursework for which a student receives credit toward the J.D. degree that is work done in a
foreign study program that qualifies under Standard 307;

(c) law school coursework that meets the requirements of Standard 306(c);

(d) in a seminar or other upper-level course other than an independent research course, the
minutes allocated for preparation of a substantial paper or project of the time and effort required
and anticipated educational benefit are commensurate with the credit awarded; and

(e) in a law school clinical course, the minutes allocated for clinical work so long as (i) the
coursework includes a classroom instructional component; (ii) the clinical work is done under
the direct supervision of a member of the law school faculty or instructional staff whose primary
professional employment is with the law school; and (iii) the time and effort required and
anticipated educational benefit are commensurate with the credit awarded.

A law school shall not include in the 45,000 minutes required by Standard 304(b) to be by
attendance in regularly scheduled class sessions at the law school any other coursework
including but not limited to (i) work qualifying for credit under Standard 305(a) coursework
completed in another department, school or college of the university with which the law school is
affiliated or at another institution of higher learning; and (ii) co-curricular activities such as
law review, moot court, and trial competitions.

(a) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty
instruction for the purpose of Standard 311(b), the credit hours may include:

(1) Credit hours earned by attendance in regularly scheduled classroom sessions or direct
faculty instruction;

(2) Credit hours earned by participation in a simulation course or law clinic in compliance
with Standard 304;

(3) Credit hours earned through distance education in compliance with Standard 306; and

(4) Credit hours earned by participation in law-related studies or activities in a country
outside the United States in compliance with Standard 307.

(b) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty
instruction for the purpose of Standard 311(b), the credit hours shall not include any other
coursework, including, but not limited to:

(1) Credit hours earned through field placements and other study outside of the classroom in
compliance with Standard 305;

(2) Credit hours earned in another department, school, or college of the university with
which the law school is affiliated, or at another institution of higher learning;

(3) Credit hours earned for participation in co-curricular activities such as law review.
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moot court, and trial competition; and
(4) Credit hours earned by participation in studies or activities in a country outside the United States in compliance with Standard 307 for studies or activities that are not law-related.

Interpretation 304-4
Law schools may find the following examples useful. Law schools on a conventional semester system typically require 200 minutes of instruction time per credit—exclusive of time for an examination. A quarter hour of credit requires 450 minutes of instruction time—exclusive of time for an examination. To achieve the required total of 38,000 minutes of instruction time, a law school must require at least 82 semester hours of credit, or 129 quarter hours of credit. If a law school on a semester system offers classes in units of 30 minutes per credit, it can provide 700 minutes of instruction in 14 classes. If such a law school offers classes in units of 55 minutes per class, it can provide 700 minutes of instruction in 13 classes. If such a law school offers classes in units of 75 minutes per class, it can provide 700 minutes of instruction in 12 classes. If such a law school offers classes in units of 100 minutes per class, it can provide 700 minutes of instruction in 11 classes. If such a law school offers classes in units of 125 minutes per class, it can provide 700 minutes of instruction in 10 classes. If such a law school offers classes in units of 150 minutes per class, it can provide 700 minutes of instruction in 9 classes. If such a law school offers classes in units of 175 minutes per class, it can provide 700 minutes of instruction in 8 classes. If such a law school offers classes in units of 200 minutes per class, it can provide 700 minutes of instruction in 7 classes. If such a law school offers classes in units of 225 minutes per class, it can provide 700 minutes of instruction in 6 classes. If such a law school offers classes in units of 250 minutes per class, it can provide 700 minutes of instruction in 5 classes. If such a law school offers classes in units of 275 minutes per class, it can provide 700 minutes of instruction in 4 classes. If such a law school offers classes in units of 300 minutes per class, it can provide 700 minutes of instruction in 3 classes. If such a law school offers classes in units of 325 minutes per class, it can provide 700 minutes of instruction in 2 classes. If such a law school offers classes in units of 350 minutes per class, it can provide 700 minutes of instruction in 1 class.

In all events, the 130 day requirement of Standard 304(a) and the 58,000 minute requirement of Standard 304(b) should be understood as separate and independent requirements.

Interpretation 304-5
Credit for a J.D. degree shall only be given for course work taken after the student has matriculated in a law school. A law school may not grant credit toward the J.D. degree for work taken in a pre-admission program.

Interpretation 304-6
A law school shall demonstrate that it has adopted and enforces policies ensuring that individual students satisfy the requirements of this Standard, including the implementation of policies relating to class scheduling and attendance, and limitation on employment.

Interpretation 304-7
Subject to the provisions of this Interpretation, a law school shall require a student who has completed work in an LLM or other post J.D. program to complete all of the work for which it will award the J.D. degree following the student’s regular enrollment in the school’s J.D. program. A law school may accept transfer credit as otherwise allowed by the Standards.

A law school may award credit toward a J.D. degree for work undertaken in a J.D.-or other post J.D.-program offered by it or another law school if:
(a) that work was the successful completion of a J.D.-course while the student was enrolled in a post-J.D.-law-program;
(b) the law school at which the course was taken has a grading system for LLM-students.

Interpretation 304-8
A law school shall demonstrate that it has adopted and enforces policies ensuring that individual students satisfy the requirements of this Standard, including the implementation of policies relating to class scheduling and attendance, and limitation on employment.

Interpretation 304-9
Subject to the provisions of this Interpretation, a law school shall require a student who has completed work in an LLM or other post J.D. program to complete all of the work for which it will award the J.D. degree following the student’s regular enrollment in the school’s J.D. program. A law school may accept transfer credit as otherwise allowed by the Standards.

A law school may award credit toward a J.D. degree for work undertaken in a J.D.-or other post J.D.-program offered by it or another law school if:
(a) that work was the successful completion of a J.D.-course while the student was enrolled in a post-J.D.-law-program;
(b) the law school at which the course was taken has a grading system for LLM-students.

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in J.D.-courses that is comparable to the grading system for J.D.-students in the course; and

c) the law school accepting the transfer credit will require that the student successfully complete a course of study that satisfies the requirements of Standards 302(a)-(b) and that meets all of the school’s requirement for the awarding of the J.D. degree.

Interpretation 311-3
Whenever a student is permitted on the basis of extraordinary circumstances to exceed the 84-month program limitation in Standard 311(c), the law school shall place in the student’s file a statement signed by an appropriate law school official explaining the extraordinary circumstances leading the law school to permit an exception to this limitation. Such extraordinary circumstances, for example, might include an interruption of a student’s legal education because of an illness, family exigency, or military service.

Interpretation 311-4
For purposes of Standard 311(c), the time for determining the commencement of law study is ordinarily the time when a student commences law study at any institution. For example, if a law school accepts transfer credit from another institution, the time begins when the student commenced study at the law school from which the transfer credit is accepted. If a law school accepts a student who has completed law studies at a law school outside the United States or permitted under Standard 505, only the time commensurate with the amount of credit given counts toward the length of study requirements of Standard 310(c).

Standard 312. REASONABLY COMPARABLE OPPORTUNITIES

301(b) A law school providing more than one enrollment or scheduling option shall ensure that all students have reasonably comparable opportunities to take advantage of the access to the law school’s educational program of legal education, courses taught by full-time faculty, student services, co-curricular programs, and other educational benefits. Identical opportunities are not required.

Standard 313. DEGREE PROGRAMS IN ADDITION TO J.D.

A law school may offer a degree program other than its J.D. degree program unless:

a) the law school is fully approved;

b) the Council has granted acquiescence in the program; and

c) the degree program will not interfere with the ability of the law school to operate in compliance with the Standards and to carry out its program of legal education.

A law school may not establish a degree program other than its J.D. degree program without obtaining the Council’s prior acquiescence. A law school may not establish a
degree program in addition to its J.D. degree program unless the school is fully approved.

The additional degree program may not detract from a law school's ability to maintain a
J.D.-degree program that meets the requirements of the Standards.

Interpretation 313-1, 368-2
Acquiescence in a degree program other than the first J.D. degree in-law is not an approval of
the program itself; and, therefore, a school may not announce that the program is approved by
the Council-American Bar Association.

Interpretation 308-1
Reasons for withholding acquiescence in an advanced degree program include:

(1) Lack of sufficient full-time faculty to conduct the J.D. degree program;

(2) Lack of adequate physical facilities, which has a negative and material effect on the
    education students receive;

(3) Lack of an adequate law library to support both a J.D. and an advanced degree
    program; and

(4) A J.D. degree curriculum lacking sufficient diversity and richness in course offerings.

Standard 314, ASSESSMENT OF STUDENT LEARNING

A law school shall utilize both formative and summative assessment methods in its
curriculum to measure and improve student learning and provide meaningful feedback to
students.

Interpretation 314-1
Formative assessment methods are measurements at different points during a particular course
or at different points over the span of a student’s education that provide meaningful feedback to
improve student learning. Summative assessment methods are measurements at the culmination
of a particular course or at the culmination of any part of a student’s legal education that
measure the degree of student learning.

Interpretation 314-2
A law school need not apply multiple assessment methods in any particular course. Assessment
methods are likely to be different from school to school. Law schools are not required by
Standard 314 to use any particular assessment method.

Standard 315, EVALUATION OF PROGRAM OF LEGAL EDUCATION, LEARNING
OUTCOMES, AND ASSESSMENT METHODS

The dean and the faculty of a law school shall conduct ongoing evaluation of the law
school’s program of legal education, learning outcomes, and assessment methods; and shall
use the results of this evaluation to determine the degree of student attainment of
competency in the learning outcomes and to make appropriate changes to improve the curriculum.

Interpretation 315-1

Examples of methods that may be used to measure the degree to which students have attained competency in the school’s student learning outcomes include review of the records the law school maintains to measure individual student achievement pursuant to Standard 314; evaluation of student learning portfolios; student evaluation of the sufficiency of their education; student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge; bar exam passage rates; placement rates; surveys of attorneys, judges, and alumni; and assessment of student performance by judges, attorneys, or law professors from other schools. The methods used to measure the degree of student achievement of learning outcomes are likely to differ from school to school and law schools are not required by this standard to use any particular methods.

Standard 316. BAR PASSAGE Interpretation 301-6

(a) A law school’s bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:

(1) That for students who graduated from the law school within the five most recently completed calendar years:

(i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or

(ii) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.

In demonstrating compliance under sections (1)(i) and (ii), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.

(2) That in three or more of the five most recently completed calendar years, the school’s annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.

In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of
frequency. When more than one jurisdiction is reported, the weighted average of the
effects in each of the reported jurisdictions shall be used to determine compliance.

(b) A school shall be out of compliance with this Standard if it is unable to demonstrate
that it meets the requirements of paragraph (a)(1) or (2).

c) A school found out of compliance under paragraph (b) and that has not been able to
come into compliance within the two-year period specified in Rule 13(b) of the Rules of
Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending
the period the law school has to demonstrate compliance by submitting evidence of:

1. The law school’s trend in bar passage rates for both first-time and subsequent
takers: a clear trend of improvement will be considered in the school’s favor, a
declining or flat trend against it.

2. The length of time the law school’s bar passage rates have been below the first-
time and ultimate rates established in paragraph A: a shorter time period will be
considered in the school’s favor, a longer period against it.

3. Actions by the law school to address bar passage, particularly the law school’s
academic rigor and the demonstrated value and effectiveness of its academic
support and bar preparation programs: value-added, effective, sustained and
pervasive actions to address bar passage problems will be considered in the law
school’s favor; ineffective or only marginally effective programs or limited action by
the law school against it.

4. Efforts by the law school to facilitate bar passage for its graduates who did not
pass the bar on prior attempts: effective and sustained efforts by the law school will
be considered in the school’s favor; ineffective or limited efforts by the law school
against it.

5. Efforts by the law school to provide broader access to legal education while
maintaining academic rigor: sustained meaningful efforts will be viewed in the law
school’s favor; intermittent or limited efforts by the law school against it.

6. The demonstrated likelihood that the law school’s students who transfer to other
ABA-approved schools will pass the bar examination: transfers by students with a
strong likelihood of passing the bar will be considered in the school’s favor,
providing the law school has undertaken counseling and other appropriate efforts to
retain its well-performing students.

7. Temporary circumstances beyond the control of the law school, but which the
law school is addressing: for example, a natural disaster that disrupts operations or
a significant increase in the standard for passing the relevant bar examination(s).

8. Other factors, consistent with a law school’s demonstrated and sustained
mission, which the school considers relevant in explaining its deficient bar passage results and in explaining the school’s efforts to improve them.
Chapter 4 - THE FACULTY

Standard 401. QUALIFICATIONS

A law school shall have a faculty whose qualifications and experience are appropriate to the stated mission of the law school enable the law school to operate in compliance with the Standards and carry out its plan to maintain a program of legal education consistent with the requirements of Standards 301 and 302. The faculty shall possess a high degree of competence, as demonstrated by its education academic qualification, experience in teaching or practice, teaching effectiveness, and scholarly research and writing scholarship.

Standard 402. SIZE OF FULL-TIME FACULTY

(a) A law school shall have a sufficient number of full-time faculty to enable the law school to operate in compliance with the Standards and carry out its program of legal education and fulfill the requirements of the Standards and meet the goals of its educational program. The number of full-time faculty necessary depends on (1) the size of the student body and the opportunity for students to meet individually with and consult full-time faculty members; (b) the nature and scope of the educational program of legal education; and (3) the opportunities for the full-time faculty to adequately fulfill its teaching obligations, conduct scholarly research, and participate effectively in the governance of the law school, and in provide service to the legal profession and the public.

A full-time faculty member is one whose primary professional employment is with the law school and who devotes substantially all working time during the academic year to the responsibilities described in Standard 404(a), and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member’s capacity as a scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one’s responsibility as a faculty member.

Interpretation 402-1

In determining whether a law school complies with the Standards, the ratio of the number of full-time equivalent students to the number of full-time equivalent faculty members is considered.

(1) In computing the student/faculty ratio, full-time equivalent teachers are those who are employed as full-time teachers on tenure track or its equivalent who shall be counted as one each plus those who constitute additional teaching resources as defined below. No limit is imposed on the total number of teachers that a school may employ as additional teaching resources, but these additional teaching resources shall be counted at a fraction of less than 1 and may constitute in the aggregate up to 25 percent of the full-time faculty for purposes of calculating the student/faculty ratio.

(2) Additional teaching resources and the proportional weight assigned to each category include:

(a) teachers on tenure track or its equivalent who have administrative duties beyond those normally performed by full-time faculty members—0.5;

(b) A full-time faculty member is one whose primary professional employment is with the law school and who devotes substantially all working time during the academic year to the responsibilities described in Standard 404(a), and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member’s capacity as a scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one’s responsibility as a faculty member.

Interpretation 402-1

In determining whether a law school complies with the Standards, the ratio of the number of full-time equivalent students to the number of full-time equivalent faculty members is considered.

(1) In computing the student/faculty ratio, full-time equivalent teachers are those who are employed as full-time teachers on tenure track or its equivalent who shall be counted as one each plus those who constitute additional teaching resources as defined below. No limit is imposed on the total number of teachers that a school may employ as additional teaching resources, but these additional teaching resources shall be counted at a fraction of less than 1 and may constitute in the aggregate up to 25 percent of the full-time faculty for purposes of calculating the student/faculty ratio.

(2) Additional teaching resources and the proportional weight assigned to each category include:

(a) teachers on tenure track or its equivalent who have administrative duties beyond those normally performed by full-time faculty members—0.5;
(ii) clinicians and legal writing instructors not on tenure track or its equivalent who teach a full load—0.7—and

(iii) adjuncts: emeriti faculty who teach, non-tenure track administrators who

(i) These norms have been selected to provide a workable framework to recognize the
effective contributions of additional teaching resources. To the extent a law school has

types or categories of teachers not specifically described above, they shall be counted as

appropriate in accordance with the weights specified above. It is recognized that the
designated proportional weights may not in all cases reflect the contributions to the law
school of particular teachers. In exceptional cases, a school may seek to demonstrate to

site evaluation teams and the Accreditation Committee that these proportional weights

should be changed to weigh contributions of individual teachers.

(2) For the purpose of computing the student/faculty ratio, a student is considered full-time or

part-time as determined by the school, provided that no student who is enrolled in fewer than ten

credit hours in a term shall be considered a full-time student, and no student enrolled in more

than 15 credit hours shall be considered a part-time student. A part-time student is counted as a

two-thirds equivalent student.

(3) If there are graduate or non-degree students whose presence might result in a dilution of J.D.

program resources, the circumstances of the individual school are considered to determine the

adequacy of the teaching resources available for the J.D. program.

Interpretation 492-2

Student/faculty ratios are considered in determining a law school’s compliance with the

Standards.

(1) A ratio of 20:1 or less presumptively indicates that a law school complies with the Standards.

However, the educational effects shall be examined to determine whether the size and duties of

the full-time faculty meet the Standards.

(2) A ratio of 30:1 or more presumptively indicates that a law school does not comply with the

Standards.

(3) A ratio of between 20:1 and 30:1 and to rebut the presumption created by a ratio of 30:1

or greater, the examination will take into account the effects of all teaching resources on the

school’s educational program, including such matters as quality of teaching, class size,

availability of small group classes and seminars, student/faculty contact, examinations and

grading, scholarly contributions, public service, discharge of governance responsibilities, and

the ability of the law school to carry out its announced mission.

Interpretation 492-3 492-1

A full-time faculty member who is teaching an additional full-time load at another law school

may not be considered as a full-time faculty member at either institution.
Interpretation 402-2 402-2
Regularly engaging in law practice or having an ongoing relationship with a law firm or other business creates a presumption that a faculty member is not a full-time faculty member under this Standard. This presumption may be rebutted if the law school is able to demonstrate that the individual has a full-time commitment to teaching, research, and public service, is available to students, and is able to participate in the governance of the institution law school to the same extent expected of full-time faculty.

Standard 403. INSTRUCTIONAL ROLE OF FACULTY

(a) The full-time faculty shall teach the major portion of the law school's curriculum including substantially all of the first one-third of each student's coursework. The full-time faculty shall also teach during the academic year either (1) more than half of all of the credit hours actually offered by the law school, or (2) two-thirds of the student contact hours generated by student enrollment at the law school.

(b) A law school shall ensure effective teaching by all persons providing instruction to its students.

(e) A law school should include experienced practicing lawyers and judges as teaching resources to enrich the educational program. Appropriate use of practicing lawyers and judges as faculty requires that a law school shall provide them with orientation, guidance, monitoring, and evaluation.

Interpretation 403-1
The full-time faculty's teaching responsibility will usually be determined by the proportion of student credit hours taught by full-time faculty in each of the law school's programs or divisions (such as full-time, part-time evening study, and part-time weekend study). For purposes of Standard 403(a), a faculty member is considered full-time if that person's primary professional employment is with the law school.

Interpretation 403-2 403-1
Efforts to ensure teaching effectiveness may include: orientation, guidance and mentoring for new faculty members; a faculty committee on effective teaching; class visits; videotaped teaching; institutional review of student course evaluations; evaluation of teaching; colloquia on effective teaching; and recognition and use of creative scholarship in law school teaching methodology. A law school shall provide all new faculty members with orientation, guidance, mentoring, and periodic evaluation.

Standard 404. RESPONSIBILITIES OF FULL-TIME FACULTY

(a) A law school shall establish, adopt, publish, and adhere to written policies with respect to a full-time faculty members' responsibilities. The policies shall require that the full-time faculty, as a collective body, fulfill these core responsibilities: in teaching, scholarship, service to the law school community, and professional activities outside the law school. The policies need not seek uniformity among faculty members, but should address...
(1) Faculty Teaching, responsibilities, including carrying a fair share of the law school's course offerings preparing for classes, being available for student consultation about those classes, assessing student performance in those classes, and remaining current in the subjects being taught;

(2) Participating in academic advising, and creating an atmosphere in which students and faculty may voice opinions and exchange ideas, and assessing student learning at the law school;

(3) Engaging in scholarship, as defined by the law school; Research and scholarship, and integrity in the conduct of scholarship, including appropriate use of student research assistants, acknowledgment of the contributions of others, and responsibility of faculty members to keep abreast of developments in their specialties;

(4) Obligations to the law school and university community, including participation in the governance of the law school, curriculum development, and other institutional responsibilities described in the Standards;

(5) Obligations to the profession, including working with the practicing bar and judiciary judges and practicing lawyers to improve the profession; and

(6) Obligations to the public, including participation in pro bono activities.

(b) The A-law school shall periodically evaluate periodically the extent to which each the faculty member discharges his or her core responsibilities under the law school's policies and the contributions of each full-time faculty member to meeting the core responsibilities of the faculty, adopted pursuant to Standard 404(a).

Standard 405. PROFESSIONAL ENVIRONMENT

(a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty.

(b) A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory.

(c) A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

(b) The A-law school shall periodically evaluate periodically the extent to which each the faculty member discharges his or her core responsibilities under the law school's policies and the contributions of each full-time faculty member to meeting the core responsibilities of the faculty, adopted pursuant to Standard 404(a).

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(d) A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(3), and (2) safeguard academic freedom.

Interpretation 405-1
A fixed limit on the percent of a law faculty that may hold tenure under any circumstances violates the Standards.

Interpretation 405-2
A law faculty as professionals should not be required to be a part of the general university bargaining unit.

Interpretation 405-3
A law school shall have a comprehensive system for evaluating candidates for promotion and tenure or other forms of security of position, including written criteria and procedures that are made available to the faculty.

Interpretation 405-4
A law school not a part of a university in considering and deciding on appointment, termination, promotion, and tenure of faculty members should have procedures that contain the same principles of fairness and due process that should be employed by a law school that is part of a university. If the dean and faculty have made a recommendation that is unfavorable to a candidate, the candidate should be given an opportunity to appeal to the president, chairman, or governing board.

Interpretation 405-5
If the dean and faculty have determined the question of responsibility for examination schedules and the schedule has been announced by the authority responsible for it, it is not a violation of academic freedom for a member of the law faculty to be required to adhere to the schedule.

Interpretation 405-6
A form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts. Under a separate tenure track, a full-time clinical faculty member, after a probationary period reasonably similar to that for other full-time faculty, may be granted tenure. After tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the entire clinical program. A program of renewable long-term contracts shall provide that, after a probationary period reasonably similar to that for other full-time faculty, during which the clinical faculty member may be employed on short-term contracts, the services of a faculty member in a clinical program may be either terminated or continued by the granting of a long-term renewable contract. For the purposes of this Interpretation, “long-term contract” means at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom. During the initial long-term contract or any renewal period, the contract may be terminated for good cause, including termination or material modification of the entire clinical program.
Interpretation 405-7
2002 In determining if the members of the full-time clinical faculty meet standards and obligations reasonably similar to those provided for other full-time faculty, competence in the areas of teaching and scholarly research and writing should be judged in terms of the responsibilities of clinical faculty. A law school should develop criteria for retention, promotion, and security of employment of full-time clinical faculty.

Interpretation 405-8
2003 A law school shall afford to full-time clinical faculty members participation in faculty meetings, committees, and other aspects of law school governance in a manner reasonably similar to other full-time faculty members. This Interpretation does not apply to those persons referred to in the last sentence of Standard 405(c).

Interpretation 405-9
2004 Subsection (d) of this Standard does not preclude the use of short-term contracts for legal writing teachers, nor does it preclude law schools from offering fellowship programs designed to produce candidates for full-time teaching by offering individuals supervised teaching experience.
Chapter 5 - ADMISSIONS AND STUDENT SERVICES

Standard 501. ADMISSIONS

(a) A law school shall maintain sound admission policies and practices, consistent with the Standards, its mission, and the objectives of its educational program of legal education and the resources available for implementing those objectives.

(b) A law school shall not admit an applicant who does not appear capable of satisfactorily completing its educational program of legal education and being admitted to the bar.

(c) Standard 505-P. Previously Disqualified Applicant. A law school may not admit or readmit a student who has been disqualified previously for academic reasons without an affirmative showing that the student possesses the requisite ability and that the prior disqualification does not indicate a lack of capacity to complete the course of study at the admitting school's program of legal education and be admitted to the bar. In the case of admission to a law school other than the disqualifying school, this showing shall be made either by a letter from the disqualifying school or, if two or more years have elapsed since that disqualification, by the nature of interim work, activity, or studies indicating a stronger potential for law study. For every admission or readmission of a previously disqualified individual, a statement of the considerations that led to the decision shall be placed in the admittee's file.

Interpretation 501-2

A law school's admission policies shall be consistent with Standards 211 and 212.

Interpretation 501-3

Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school's entering students, the academic and retention policies and their administration. A law school may face a conflict of interest whenever the exercise of sound judgment in the application of admission policies or academic standards and retention policies might reduce enrollment below the level necessary to support the program.

Interpretation 501-4

A law school may not permit financial considerations detrimentally to affect its admission and retention policies and their administration. A law school may face a conflict of interest whenever the exercise of sound judgment in the application of admission policies or academic standards and retention policies might reduce enrollment below the level necessary to support the program.
Standard 502. EDUCATIONAL REQUIREMENTS

(a) A law school shall require for admission to its J.D. degree program a bachelor’s degree, or successful completion of three-fourths of the work acceptable for a bachelor’s degree, from that has been awarded by an institution that is accredited by an accrediting agency recognized by the United States Department of Education.

(b) Notwithstanding subsection (a), a law school may also admit to its J.D. degree program:

1. an applicant who has completed three-fourths of the credits leading to a bachelor’s degree as part of a bachelor’s degree/J.D. degree program if the institution is accredited by an accrediting agency recognized by the United States Department of Education; and

2. a graduate of an institution outside the United States if the law school assures that the quality of the program of legal education of that institution is equivalent to that of institutions accredited by an accrediting agency recognized by the United States Department of Education.

(big) In an extraordinary case, a law school may admit to its J.D. degree program an applicant who does not satisfy the educational requirements of subsections (a) or (b) if the applicant’s experience, ability, and other qualifications clearly demonstrate an aptitude for the study of law. The admitting office shall place in the admittee’s file a statement of the considerations that led to the decision to admit the applicant. For every such admission, a statement of the considerations that led to the decision shall be placed in the admittee’s file.

(d) Within a reasonable time after a student registers, a law school shall have on file the student’s official transcripts verifying all academic credits undertaken and degree(s) conferred.

Interpretation 502-1

Before an admitted student registers, or within a reasonable time thereafter, a law school shall have on file the student’s official transcripts showing receipt of a bachelor’s degree, if any, and all academic work undertaken. “Official transcript” means a transcript certified by the issuing school to the admitting school or delivered to the admitting school in a sealed envelope with seal intact. A copy supplied by the Law School Data Assembly Service is not an official transcript, even though it is adequate for preliminary determination of admission.

Interpretation 502-1

Official transcript means: 1) a paper or electronic transcript certified by the issuing institution and delivered directly to the law school; or 2) a paper or electronic transcript verified by a third-party credential assembly service and delivered directly to the law school. With respect to electronic copies, it is sufficient for transcripts to be maintained at the law school or off-site by a third-party provider as long as the law school has access to the documents on demand.
The official transcripts for any student admitted as a transfer student shall include verification of any academic credits undertaken at any other law school attended.

Standard 503. ADMISSION TEST
A law school shall require each applicant for admission as a first-year J.D. degree student to take a valid and reliable admission test to assist the school and the applicant in assessing the applicant's capability of satisfactorily completing the school's educational program of legal education. In making admissions decisions, a law school shall use the test results in a manner that is consistent with the current guidelines regarding proper use of the test results provided by the agency that developed the test.

Interpretation 503-1
A law school that uses an admission test other than the Law School Admission Test sponsored by the Law School Admission Council shall establish demonstrate that such other test is a valid and reliable test to assist the school in assessing an applicant's capability to satisfactorily complete the school's educational program of legal education.

Interpretation 503-2
This Standard does not prescribe the particular weight that a law school should give to an applicant's admission test score in deciding whether to admit or deny admission to the applicant.

Interpretation 503-3
(a) It is not a violation of this Standard for a law school to admit no more than 10% of an entering class without requiring the LSAT from:
(1) Students in an undergraduate program of the same institution as the J.D. program, and/or
(2) Students seeking the J.D. degree in combination with a degree in a different discipline.
(b) Applicants admitted under subsection (a) must meet the following conditions:
(1) Scored at or above the 85th percentile on the ACT or SAT for purposes of subsection (a)(1), or scored at or above the 85th percentile on the GRE or GMAT, and
(2) Ranked in the top 10% of their undergraduate class through six semesters of academic work, or achieved a cumulative GPA of 3.5 or above through six semesters of academic work.

Interpretation 503-3
A pre-admission program of coursework taught by members of the law school's full-time faculty and culminating in an examination or examinations, offered to some or all applicants prior to a decision to admit to the J.D. program, also may be useful in assessing the capability of an applicant to satisfactorily complete the school's educational program, to be admitted to the bar, and to become a competent professional.
Standard 504. CHARACTER-AND-FITNESS QUALIFICATIONS FOR ADMISSION TO THE BAR

(a) A law school shall advise each applicant that there are character, fitness and other qualifications for admission to the bar and encourage the applicant, prior to matriculation, to determine what those requirements are in the state(s) in which the applicant intends to practice.

(b) A law school shall include the following statement in its application for admission and on its website:

In addition to a bar examination, there are character, fitness, and other qualifications for admission to the bar in every U.S. jurisdiction. Applicants are encouraged to determine the requirements for any jurisdiction in which they intend to seek admission by contacting the jurisdiction. Addresses for all relevant agencies are available through the National Conference of Bar Examiners.

(c) If a law school considers an applicant’s character, fitness or other qualifications, it shall exercise care that the consideration is not used as a reason to deny admission to a qualified applicant because of political, social, or economic views that might be considered unorthodox.

Standard 505. PREVIOUSLY DISQUALIFIED APPLICANT

A law school may admit or readmit a student who has been disqualified previously for academic reasons upon an affirmative showing that the student possesses the requisite ability and that the prior disqualification does not indicate a lack of capacity to complete the course of study at the admitting school. In the case of admission to a law school other than the disqualifying school, this showing shall be made either by a letter from the disqualifying school or, if two or more years have elapsed since that disqualification, by the nature of interim work, activity, or studies indicating a stronger potential for law study. For every admission or readmission of a previously disqualified individual, a statement of
the considerations that led to the decision shall be placed in the admittee’s file. [Moved to 501 (c)]

Interpretation 505-1

The two-year period begins on the date of the original determination to disqualify the student for academic reasons.

Interpretation 505-2

A student who was enrolled in a pre-admission program but was not granted admission is not a student who was disqualified for academic reasons under this Standard.

Standard 506. APPLICANTS FROM LAW SCHOOLS NOT APPROVED BY THE ABA

(a) A law school may admit a student with advanced standing and allow credit for studies at a law school in the United States that is not approved by the American Bar Association ("non-ABA approved law school") if:

(1) the non-ABA approved law school has been granted the power to confer the J.D. degree by the appropriate governmental authority in the unapproved law school’s jurisdiction, or graduates of the non-ABA approved law school are permitted to sit for the bar examination in the jurisdiction in which the school is located;

(2) the studies were "in residence" as provided in Standard 304(b), or qualify for credit under Standard 305 or Standard 306; and (3) the content of the studies was such that credit therefore would have been granted towards satisfaction of degree requirements at the admitting school.

(b) Advanced standing and credit hours granted for study at a non-ABA approved law school may not exceed one-third of the total required by an admitting school for its J.D. degree.

Standard 507. APPLICANTS FROM FOREIGN LAW SCHOOLS

(a) A law school may admit a student with advanced standing and allow credit for studies at a law school outside the United States if:

(1) the studies were "in residence" as provided in Standard 304, or qualify for credit under Standard 305;

(2) the content of the studies was such that credit therefore would have been granted towards satisfaction of degree requirements at the admitting school; and

(3) the admitting school is satisfied that the quality of the educational program at the foreign law school was at least equal to that required by an approved school.

(b) Advanced standing and credit hours granted for foreign study may not exceed one-third of the total required by an admitting school for its J.D. degree.
This Standard applies only to graduates of foreign law schools or students enrolled in a first degree-granting law program in a foreign educational institution.

Standard 505. GRANTING OF J.D. DEGREE CREDIT FOR PRIOR LAW STUDY

(a) A law school may admit a student and grant credit for courses completed at another law school approved by the Council if the courses were undertaken as a J.D. degree student.

(b) A law school may admit a student and grant credit for courses completed at a law school in the United States that is not approved by the Council if graduates of the law school are permitted to sit for the bar examination in the jurisdiction in which the school is located, provided that:

(1) the courses were undertaken as a J.D. degree student; and

(2) the law school would have granted credit toward satisfaction of J.D. degree requirements if earned at the admitting school.

(c) A law school may admit a student and grant credit for courses completed at a law school outside the United States if the admitting law school would have granted credit towards satisfaction of J.D. degree requirements if earned at the admitting school.

(d) A law school may grant credit toward a J.D. degree to a graduate of a law school in a country outside the United States for credit hours earned in an LL.M. or other post-J.D. program it offers if:

(1) that study led to successful completion of a J.D. degree course or courses while the student was enrolled in a post-J.D. degree law program; and

(2) the law school has a grading system for LL.M. students in J.D. courses that is comparable to the grading system for J.D. degree students in the course.

(e) A law school that grants credit as provided in Standard 505(a) through (d) may award a J.D. degree to a student who successfully completes a course of study that satisfies the requirements of Standard 311 and that meets all of the school's requirements for the awarding of the J.D. degree.

(f) Credit hours granted pursuant to subsection (b) through (d) shall not, individually or in combination, exceed one-third of the total required by the admitting school for its J.D. degree.

Standard 508. ENROLLMENT OF NON-DEGREE CANDIDATES

Without requiring compliance with its admission standards and procedures, a law school may enroll individuals in a particular course or limited number of courses, as auditors, non-degree candidates, or candidates for a degree other than a law degree, provided that
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only if such enrollment does not adversely affect the quality of the course or the law school program interfere with the ability of the law school to operate in compliance with the Standards and to carry out its program of legal education.

Standard 507 §40. STUDENT LOAN PROGRAMS

A law school shall take reasonable steps to minimize student loan defaults, including provision of debt counseling at the inception of a student’s loan obligations and prior to again before graduation.

Interpretation 507-1
The student loan default rates of a law school’s graduates, including any results of financial or compliance audits and reviews, shall be considered relevant in assessing the extent to which a law school complies with this Standard.

Interpretation 507-2
For law schools a law school not affiliated with a university, the school’s student loan cohort default rate shall be sufficient for purposes of Standard 507 if it is not greater than 10% for any of the three most recently published annual cohort default rates. If the school’s student loan cohort default rate is not sufficient under this Interpretation, the school must submit a plan for approval by the Accreditation Committee for coming into compliance with this requirement.

Failure to comply with title Title IV of the Higher Education Act of 1965, as amended, or having a student loan cohort default rate greater than the rate permitted by title Title IV is cause for review of a law school’s overall compliance with the Standards. A school’s schools shall demonstrate that they have it has resolved all areas of deficiency identified in financial or compliance audits, program reviews, or other information provided by the United States Department of Education.

Interpretation 507-3
The law school’s obligation shall be satisfied by compliance with this Standard if the university, of which the law school is a part, provides to law students takes the reasonable steps described in this Standard.

Standard 508 §41. STUDENT SUPPORT SERVICES

A law school shall provide all its students, regardless of enrollment or scheduling option, with basic student services, including maintenance of accurate student records, academic advising and counseling, financial aid and debt counseling, and an active career counseling service to assist students in making sound career choices and obtaining employment. If a law school does not provide these types of student services directly, it must shall demonstrate that its students have reasonable access to such services from the university of which it is a part or from other sources.
Standard 509. REQUIRED DISCLOSURES—CONSUMER INFORMATION

(a) All consumer information that a law school reports, publicizes, or distributes shall be complete, accurate and not misleading to a reasonable law school student or applicant. Schools A law school shall use due diligence in obtaining and verifying such consumer information. Violations of these obligations may result in sanctions under Rule 16 of the Rules of Procedure for Approval of Law Schools.

(b) A law school shall publicly disclose on its website, in the form and manner and for the time frame designated by the Council, the following information:

(1) admissions data;
(2) tuition and fees, living costs, and financial aid;
(3) conditional scholarships;
(4) enrollment data, including academic, transfer, and other attrition;
(5) numbers of full-time and part-time faculty, professional librarians, and administrators;
(6) class sizes for first-year and upper-class courses; number of seminar, clinical and co-curricular offerings;
(7) employment outcomes; and
(8) bar passage data.

(c) A law school shall publicly disclose on its website, in a readable and comprehensive manner, the following information on a current basis:

(1) refund policies;
(2) curricular offerings, academic calendar, and academic requirements; and
(3) policies regarding the transfer of credit earned at another institution of higher education. The law school's transfer of credit policies must include, at a minimum:

(i) A statement of the criteria established by the law school regarding the transfer of credit earned at another institution; and
(ii) A list of institutions, if any, with which the law school has established an articulation agreement.
(d) A law school shall distribute the data required under Standard 509(b)(3) to all applicants being offered conditional scholarships at the time the scholarship offer is extended.

(e) If a law school elects to make a public disclosure of its status as a law school approved by the Council, it shall do so accurately and shall include the name and contact information of the Council.

Interpretation 509-1
Current curricular offerings, for the purposes of Standard 509(c), are only those courses offered in the current and past two academic years.

Interpretation 509-2
A law school may publicize or distribute information in addition to that required by this Standard, including, without limitation, but not limited to, the employment outcomes of its graduates, as long as such information complies with the requirements of subsection (a).

Interpretation 509-3
A conditional scholarship is any financial aid award, the retention of which is dependent upon the student maintaining a minimum grade point average or class standing, other than that ordinarily required to remain in good academic standing.

Interpretation 509-4
Articulation agreement means a formal written agreement between a law school and another accredited university or institution providing for the transfer of defined academic credits between the parties to the agreement.

Standard 510 SY. STUDENT COMPLAINTS IMPLICATING COMPLIANCE WITH THE STANDARDS
(a) A law school shall establish, publish, and comply with policies with respect to addressing student complaints.
(b) A law school shall maintain a record of student complaints submitted during the most recent accreditation period. The record shall include the resolution of the complaints.

(e) Interpretation 510-1
A “complaint” is a communication in writing that seeks to bring to the attention of the law school a significant problem that directly implicates the school’s program of legal education and its compliance with the Standards.

Interpretation 510-2 542-1
A law school’s policies on student complaints must address, at a minimum, procedures for filing and addressing complaints, appeal rights, if any, and timelines.
Chapter 6 - LIBRARY AND INFORMATION RESOURCES

Standard 601. GENERAL PROVISIONS

(a) A law school shall maintain a law library that:

(1) provides support through expertise, resources, and services adequate to enable the law school to carry out its program of legal education, accomplish its mission, and support scholarship and research;

(2) develops and maintains a direct, informed, and responsive relationship with the faculty, students, and administration of the law school;

(3) working with the dean and faculty, engages in a regular planning and assessment process, including written assessment of the effectiveness of the library in achieving its mission and realizing its established goals; and

(4) remains informed on and implements, as appropriate, technological and other developments affecting the library’s support for the law school’s program of legal education.

(b) A law school shall provide on a consistent basis sufficient financial resources to the law library to enable it to fulfill its responsibilities of support to the law school and realize its established goals.

(c) A law school shall maintain a law library that is an active and responsive force in the educational life of the law school. A law library’s effective support of the school’s teaching, scholarship, research, and service programs requires a direct, continuing, and informed relationship with the faculty, students, and administration of the law school.

(d) A law library shall have sufficient financial resources to support the law school’s teaching, scholarship, research, and service programs. These resources shall be supplied on a consistent basis.

(e) A law school shall keep its library abreast of contemporary technology and adopt it when appropriate.

Interpretation 601-J

Cooperative agreements may be considered when determining whether faculty and students have efficient and effective access to the resources necessary to meet the law school’s educational needs. Standard 601 is not satisfied solely by arranging for students and faculty to have access to other law libraries within the region, or by providing electronic access.

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(3) working with the dean and faculty, engages in a regular planning and assessment process, including written assessment of the effectiveness of the library in achieving its mission and realizing its established goals; and

(4) remains informed on and implements, as appropriate, technological and other developments affecting the library’s support for the law school’s program of legal education.

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Standard 602. ADMINISTRATION

(a) A law school shall have sufficient administrative autonomy to direct the growth and development of the law library and to control the use of its resources.

(b) The dean and the director of the law library and the dean, in consultation with the faculty of the law school, shall determine library policy.

(c) The director of the law library and the dean are responsible for the selection and retention of personnel, the provision of library services, and collection development and maintenance.

(d) The budget for the law library shall be determined as part of, and administered in the same manner as, the law school budget.

Interpretation 602-1

This Standard recognizes that substantial operating autonomy rests with the dean, the director of the law library, and the faculty of the law school with regard to the operation of the law school library. The Standards require that decisions that materially affect the law library be enlightened by the needs of the law school's educational program. This includes library participation in university library decisions that may affect the law library. While the preferred structure for administration of a law school library is one of law school administration, it is preferred that the law school administer the law library. A law school library may be administered as part of a general university library system if the dean, the director of the law library, and the faculty of the law school are responsible for the determination of basic law library policies, priorities, and funding levels.

Standard 603. DIRECTOR OF THE LAW LIBRARY

(a) A law library shall be administered by a law school shall have a full-time director of the law library whose principal responsibility is the management of the law library and providing information resources in appropriate formats to faculty and students.

(b) The selection and retention of the director of the law library shall be determined by the law school.

(c) A director of a law library should have a law degree and a degree in library or information science and have appropriate academic qualifications and shall have a sound knowledge of and experience in law library administration sufficient to support the program of legal education and to enable the law school to operate in compliance with the Standards.

(d) Except in extraordinary circumstances, a law library director shall hold a law faculty appointment with security of faculty position.
Having a director of a law library with a law degree and a degree in library or information science is an effective method of assuring that the individual has appropriate qualifications and knowledge of and experience in library administration sufficient to support the program of legal education and to enable the law school to operate in compliance with the Standards. A law school not having a director with these credentials bears the burden of demonstrating that it is in compliance with Standard 603(c).

The director of the law library is responsible for all aspects of the management of the law library including budgeting, staff, collections, services and facilities.

The dean and faculty of the law school shall select the director of the law library.

The granting of faculty appointment to the director of the law library under this Standard normally is a tenure or tenure-track appointment. If a director is granted tenure, this tenure is not in the administrative position of director.

It is not a violation of Standard 603(c) for the director of the law library also to have other administrative or teaching responsibilities, provided sufficient resources and staff support are available to ensure effective management of library operations.

The law library shall have a competent staff, sufficient in expertise and number to provide the appropriate library and informational information resources services to the school.

Factors relevant to the number and expertise of librarians and informational information resource staff needed to meet this Standard include the following: the number of faculty and students, research programs of faculty and students, whether there is a dual division program in the school, any graduate programs of the school, size and growth rate of the collection, range of services offered by the staff, formal teaching assignments of staff members, and responsibilities for providing informational information resource services.

A law library shall provide the appropriate range and depth of reference, instructional, bibliographic, and other services to meet the needs of the law school’s teaching, scholarship, research, and service programs.
Interpretation 605-1
Appropriate services include having adequate reference services; providing access (such as indexing, cataloging, and development of search terms and methodologies) to the library's collection and other information resources, offering interlibrary loan and other forms of document delivery; enhancing the research and bibliographic-skills of students; producing library publications; and creating other services to further the law school's mission. Factors relevant to determining whether services are appropriate under Standard 605 include the extent to which services enhance the research and bibliographic and information literacy skills of students, provide access (such as indexing, cataloging, and development of search terms and methodologies) to the library's collection and other information resources, offer interlibrary loan and other forms of document delivery, produce library publications and manage the library's web site, and create other services to enable the law school to carry out its program of legal education and accomplish its mission.

Standard 606. COLLECTION

(a) The law library shall provide a core collection of essential materials accessible in the law library through ownership in the law library or reliable access. The choice of format and ownership in the library or a particular means of reliable access for any type of material in the collection, including the core collection, shall effectively support the law school's curricular, scholarly, and service programs and objectives, and the role of the library in preparing students for effective, ethical, and responsible participation in the legal profession.

(b) Interpretation 606-5. A law library core collection shall include the following:

1. all reported federal court decisions and reported decisions of the highest appellate court of each state and U.S. territory;
2. all federal codes and session laws, and at least one current annotated code for each state and U.S. territory;
3. all current published treaties and international agreements of the United States;
4. all current published regulations (codified and uncodified) of the federal government and the codified regulations of the state or U.S. territory in which the law school is located;
5. those federal and state administrative decisions appropriate to the programs of the law school;
6. U.S. Congressional materials appropriate to the programs of the law school;
7. significant secondary works necessary to support the programs of the law school; and
(8) those tools, such as citators and periodical indexes, necessary to identify primary and secondary legal information and update primary legal information.

(9) In addition to the core collection of essential materials, a law library shall also provide a collection that, through ownership or reliable access,

(1) meets the research needs of the law school’s students, satisfies the demands of the law school curriculum, and facilitates the education of its students;

(2) supports the teaching, scholarship, research, and service interests of the faculty;

(3) serves the law school’s special teaching, scholarship, research, and service objectives and

(4) is complete, current, and in sufficient quantity or with sufficient continuing access to meet faculty and student needs.

The law library shall formulate and periodically update a written plan for development of the collection.

The law library shall provide suitable space and adequate equipment to access and use all information in whatever formats are represented in the collection.

Interpretation 606-1
All materials necessary to the programs of the law school shall be complete and current and in sufficient quantity or with sufficient access to meet faculty and student needs. The library shall ensure continuing access to all information necessary to the law school’s programs.

Interpretation 606-2
The appropriate mixture of collection formats depends on the needs of the library and the law school clientele. A collection that consists of a single format may violate Standard 606.

Interpretation 606-2
Reliable access to information resources may be provided through:

(a) databases to which the library or the parent institution subscribe or own and are likely to continue to subscribe and provide access;

(b) authenticated and credible databases that are available to the public at no charge or likely to continue to be available to the public at no charge; and

(c) participation in a formal resource-sharing arrangement through which materials are made available, via electronic or physical delivery, to users within a reasonable time.
Interpretation 606-3
Agreements for the sharing of information resources, except for the core collection, satisfy Standard 606 if:

(1) The agreements are in writing; and

(2) The agreements provide faculty and students with the ease of access and availability necessary to support the programs of the law school.

Interpretation 606-4
Off-site storage for non-essential material does not violate the Standards so long as the material is organized and readily accessible in a timely manner.

Interpretation 606-4 601-1
Cooperative agreements may be considered when determining whether faculty and students have efficient and effective access to the resources necessary to enable the law school's educational needs school to carry out its program of legal education and accomplish its mission. Standard 606 is not satisfied solely by arranging for students and faculty to have access to other law libraries within the region, or by providing electronic access.

Interpretation 606-6
The dean, faculty, and director of the law library should cooperate in formulation of the collection development plan.

Interpretation 606-7
This Standard requires the law library to furnish the equipment to print microforms and electronic documents and to view and listen to audio-visual materials in the collection.

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Chapter 7 - FACILITIES, EQUIPMENT, AND TECHNOLOGY

Standard 701. GENERAL REQUIREMENTS

(a) A law school shall have physical facilities, equipment, technology, and technology support that enable it to operate in compliance with the Standards and carry out its current program of legal education, and for growth anticipated in the immediate future.

(b) A law school is not in compliance with the Standards if its facilities, equipment, technology, or technology support have a negative and material effect on the school's ability to operate in compliance with the Standards; or to carry out its program of legal education.

Interpretation 701-1

Inadequate physical facilities are those that have a negative and material effect on the education students receive or fail to provide reasonable access for persons with disabilities. If equal access for persons with disabilities is not readily achievable, the law school shall provide reasonable accommodation to such persons.

Interpretation 701-2

Interpretation 701-3

Interpretation 701-4

Interpretation 701-5

Interpretation 701-704-2

In determining whether technology and technology support comply with this Standard, among the factors to be considered are: Adequate technological capacity shall include:

1. sufficient and up-to-date the hardware and software resources and infrastructure available to support the teaching, scholarship, research, service, and administrative needs of students, faculty, and staff of the law school;

2. sufficient staff support and space for staff operations; and

3. the law school’s sufficient financial resources and overall ability to maintain and, as appropriate, adopt and maintain new technology, as appropriate.

Standard 702. FACILITIES

Interpretation 702-1. Adequate physical (a) A law school's facilities shall include:
suitable class and seminar rooms in sufficient number and size to permit reasonable scheduling of all classes, skills offerings, and seminars;

2) suitable space for conducting its professional skills courses and programs, including clinical, pretrial, trial, and appellate programs;

(2) a law library that is suitable and sufficient in size, location, and design in relation to the law school's programs and enrollment to accommodate the needs of the law school's students and faculty and the law library's services, collections, staff, operations, and equipment;

(3) suitable and sufficient space for staff providing support services, including student support services, to the program of legal education;

(4) office space for each full-time faculty members that is suitable and sufficient adequate for faculty research, class preparation, study and for faculty-student conferences; and suitable and sufficient office space for part-time faculty members adequate for to conduct faculty-student conferences;

(5) facilities and equipment that meet all applicable health and safety codes; and

(6) suitable space for all staff; and

(7) suitable and sufficient space for conducting any in-house clinical programs in a manner that assures competent and ethical representation of clients and meaningful instruction and supervision of students, including confidential space for (i) client interviewing, (ii) working on and discussing client cases, and (iii) security for client files;

(8) suitable and sufficient space for its students and faculty for quiet study and research; and

(9) suitable and sufficient space for group study and other forms of collaborative work.

(b) A law school shall provide reasonable access and accommodations to persons with disabilities, consistent with applicable law.
Interpretation 702.2 701-4

A law school must demonstrate that it is and will be housed in facilities that are adequate to carry out its program of legal education. If all or part of the facilities are leased or financed, the factors relevant to whether the law school is or will be housed in facilities that are adequate to carry out its program of legal education include determining whether the law school is in compliance with the Standards includes a determination of the law school’s right to occupy and continue to occupy the premises, including its financial and overall ability to comply with the overall lease or financing terms, and the duration, lease renewal terms, and conditions; and termination or foreclosure provisions, and the security of the school’s interest.

Interpretation 702.2 701-5

A law school’s physical facilities should be under the exclusive control and reserved for the exclusive use of the law school. If the facilities are not under the exclusive control of the law school or are not reserved for its exclusive use, the arrangements must shall-permit proper scheduling of all law classes and other law school activities.

Interpretation 702.3

In determining whether class and seminar rooms comply with this Standard, among the factors to be considered are: acoustics, sight lines, seating, lighting, temperature, ventilation, and available educational technology.

Standard 702. LAW LIBRARY

The physical facilities for the law library shall be sufficient in size, location, and design in relation to the law school’s programs and enrollment to accommodate the law school’s students and faculty and the law library’s services, collections, staff, operations, and equipment.

Interpretation 702.4

A law library shall have sufficient seating to meet the needs of the law school’s students and faculty.

Standard 703. RESEARCH AND STUDY SPACE

A law school shall provide, on site, sufficient quiet study and research seating for its students and faculty. A law school should provide space that is suitable for group study and other forms of collaborative work.

Standard 704. TECHNOLOGICAL CAPACITIES

A law school shall have the technological capacities that are adequate for both its current program of legal education and for program changes anticipated in the immediate future.

Interpretation 704.1

Inadequate technological capacities are those that have a negative and material effect on the education students receive.
The Council shall have the authority to adopt, revise, amend or repeal the Standards, Interpretations and Rules. A decision of the Council to adopt, revise, amend or repeal the Standards, Interpretations or Rules shall not become effective until it has been reviewed by the House. Review of such decisions by the House shall be conducted pursuant to the procedures set forth in Standard 803 and the Rules of Procedure of the House.

Standard 802. VARIANCE [See Standard 107]

Standard 803. AMENDMENT OF STANDARDS, INTERPRETATIONS AND RULES

(a) A decision by the Council to adopt, revise, amend or repeal the Standards, Interpretations or Rules does not become effective until it has been reviewed by the House. After the meeting of the Council at which it decides to adopt, revise, amend or repeal the Standards, Interpretations or Rules, the Chairperson of the Council shall furnish a written statement of the Council action to the House.

(b) Once the action of the Council is placed on the calendar of a meeting of the House, the House shall at that meeting either agree with the Council’s decision or refer the decision back to the Council for further consideration. If the House refers a decision back to the Council, the House shall provide the Council with a statement setting forth the reasons for its referral.

(c) A decision by the Council to adopt, revise, amend or repeal the Standards, Interpretations or Rules is subject to a maximum of two referrals back to the Council by the House. If the House refers a Council decision back to the Council twice, then the decision of the Council following the second referral will be final and will not be subject to further review by the House.

(d) Proposals for amendments to the Standards, Interpretations or Rules may be submitted to the Consultant, who shall refer the proposal to the Standards Review Committee or other appropriate committee. The committee to which any such proposal is referred shall report its recommendation concerning that proposal to the Council within twelve months after the proposal had been referred to the Committee.
Introduction

On behalf of the Council of the Section of Legal Education and Admissions to the Bar, I respectfully submit to the House of Delegates for its concurrence, the attached changes to the ABA Standards and Rules of Procedure for Approval of Law Schools.

In August 2008, the Council of the Section of Legal Education and Admissions to the Bar directed its Standards Review Committee (Committee) to conduct a comprehensive review of the Standards and Rules of Procedure for Approval of Law Schools. Such a review is required of all accrediting agencies recognized by the U.S. Department of Education. The Council and its Accreditation Committee are recognized by the U.S. Department of Education as the national accrediting agency for programs leading to the J.D. degree.

The Committee was charged with reviewing the recommendations of the 2007 report of the Accreditation Task Force as well as the recommendations of the 2008 reports of the special committees on Transparency, Security of Position, and Outcome Measures. These reports encouraged the Committee to include in its review the following:

- Consider whether the Standards and Interpretations are appropriately focused to accomplish the goals of accreditation as required by the U.S. Department of Education and whether they avoid unnecessarily micromanaging individual schools.
- Review the Standards to ensure that they are consistent with a conception of the Standards as a set of minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education.
- Re-examine the current Standards and reframe them to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures.
- Consider increased transparency regarding availability of documents, self-studies and strategic plans, and expanding consumer information.
- Consider whether the alternative set of Standards and Interpretation regarding academic freedom, faculty governance, and the ability to attract and retain competent faculty developed by the Special Committee on Security of Position would better serve the interests underlying the existing Standards.

In August 2008, a memorandum was sent to deans, university presidents, state supreme court chief justices, ABA entities, and others interested in legal education advising them that a comprehensive review of the Standards would commence in September 2008. The memorandum welcomed and encouraged comments, observations and suggestions about the efficacy and appropriateness of any of the Standards or Rules.

A website was created for the comprehensive review, with links to the Special Committee Reports:
At the outset of the review, the Committee created a Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education. The principles addressed educational quality, the core mission of legal education, accountability of accredited institutions, clarity and precision in the Standards, and assessment of program quality and student learning. Drafts of the Principles Statement were posted on the Section website and circulated broadly. The Committee requested comments on accreditation practices and principles and on the values advanced and goals served by contemporary legal education. In May 2009, the Committee posted the final adopted Statement on the website.

During the Comprehensive Review, the Committee held 23 meetings, all open to the public, from November 2008 to April 2014. The Chair, Committee members, and the Managing Director (formerly the Consultant) met with various interest groups and participated in numerous conferences, including those held by the Association of American Law Schools, Law School Admission Council, National Conference of Bar Examiners, National Conference on Professional Responsibility, State Bar of California’s Council on Access and Fairness, Southeastern Association of Law Schools, Special Committee on the Professional Education Continuum, and multiple groups of law school deans and faculty.

Information pertaining to the Comprehensive Review process was published in Syllabus (the e-newsletter of the Section), posted to the Section’s website, and widely distributed to affiliated organizations, law school deans and associate deans, the judiciary, directors of state bar admission authorities, presidents of universities affiliated with ABA-approved law schools, and other organizations concerned with legal education.

In addition to the review of the comments received during the Comprehensive Review, the Committee held two open forum meetings for interested parties to provide oral comments to the Committee.

During 2013 and 2014, the Committee forwarded its recommendations for changes to the Standards and Rules to the Council, which distributed them for comment from interested constituencies. All comments received were posted on the Section’s website and reviewed by the Committee and the Council. In addition, four hearings were held on matters distributed for comment. Transcripts of the testimony received were also posted on the website.

At its meeting in March 2014, the Council approved the vast majority of the recommendations that had been circulated for Notice and Comment. In addition, the Council approved several additional matters for Notice and Comment, including revised Rules of Procedure. After reviewing the comments received on the matters circulated for comment in March 2014, the Council made final determinations on the recommendations, at its meeting on June 6, 2014.

The changes achieved the following results:

At the outset of the review, the Committee created a Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education. The principles addressed educational quality, the core mission of legal education, accountability of accredited institutions, clarity and precision in the Standards, and assessment of program quality and student learning. Drafts of the Principles Statement were posted on the Section website and circulated broadly. The Committee requested comments on accreditation practices and principles and on the values advanced and goals served by contemporary legal education. In May 2009, the Committee posted the final adopted Statement on the website.

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The changes achieved the following results:
• Modified Standards to be more objective rather than subjective
• Highlighted reporting requirements
• Incorporated student learning outcomes into the Standards
• Clarified strengthened curricular requirements
• Acknowledged the three competencies from the MacCrane Report – knowledge, skills, and values
• Modified existing rules to provide greater clarity regarding requirements of Standards
• Provided increased guidance in Standards
• Streamlined the sabbatical review process
• Implemented directions of the Council to review the three special committee reports
• Responded to changes and requirements in Department of Education regulations
• Addressed changes in legal education
• Provided schools with increased flexibility
• Increased consumer information
• Improved structure of Standards
• Moved Interpretations into Standards where substance of the Interpretation belonged in the Standards
• Moved Standards that provided guidance into Interpretations
• Eliminated Standards and Interpretations that are unenforceable, unnecessary, unclear, or repetitive

A clean copy of the revised Standards for Approval of Law Schools can be found here:
http://www.americanbar.org/content/jamlaba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_clean_copy.pdf

Explanation of Changes

Definitions Section
A new Definitions Section applies to both the Standards and the Rules of Procedure. In the current Standards, definitions are found in Standard 106, and under the current Rules, definitions are found in Rule 1. Almost all of the changes are clarifying amendments.

“Approved law school” is no longer defined as a school that appears on the list of law schools approved by the Council. An approved law school under the revised definitions is one that the Council has determined meets the requirements of the Standards.

Under the current definitions, a “Branch campus” is a separate location at which the law school offers sufficient courses to allow a student to earn at the separate location all of the credits required for the J.D. degree. Under the revised definitions, a branch campus is a type of separate location at which a student may earn more than two-thirds of the credit hours required for the J.D. degree. Under the revised definitions, the term “Satellite campus” is no longer used. The term “Separate location” in the revised definitions means any location

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within the United States at which the law school offers more than sixteen credit hours of the program of legal education and that is not in reasonable proximity to the law school’s main campus. A branch campus is a type of separate location.

The revised definition of “Full-time faculty member” has been moved from current Standard 402 to the new Definitions section. The definition adds a reference to faculty members who are designated by the law school as full-time faculty members and deletes the limitation that outside professional activities must be limited to those that relate to major academic interests, enrich the faculty member’s capacity as a scholar and teacher, or are of service to the legal profession and the public generally.

Under the revised definitions, “J.D. degree” is no longer defined as the first professional degree in law. The new definition states that the J.D. degree means the professional degree in law granted upon completion of a program of legal education that is governed by the Standards.

The revised definition of “President” includes a reference to law schools that are not part of a university.

Chapter 1 - General Purposes and Practices

Standard 101. BASIC REQUIREMENTS FOR APPROVAL
Revised Standard 101 clarifies the basic requirements for approval of a law school, focusing on the ability of a law school to operate in compliance with the Standards. The Standard clarifies that the approving entity is the Council of the Section of Legal Education and Admissions to the Bar.

Current Interpretation 101-2, which states that approval of a law school by the Council is not transferable, has been moved into the Standards as revised Standard 101(b).

Current Interpretation 101-1, covering information that must be furnished to the Accreditation Committee and the Council, has been moved into revised Standard 104.

Standard 102. PROVISIONAL APPROVAL
The requirements for provisional approval are clarified and a number of restrictions are refocused on what a provisionally approved school can undertake prior to achieving full approval. All of the current Interpretations have been removed or moved into the Standard.

Standard 103. FULL APPROVAL
Revised Standard 103(a) clarifies that a law school must be in full compliance with each of the Standards in order to achieve full approval.

Revised Standard 103(b) provides that a law school retains approval unless approval is withdrawn by the Council.
Standard 104. PROVISION OF INFORMATION BY LAW SCHOOLS TO ACCREDITATION COMMITTEE AND COUNCIL
Current Interpretation 101-1, covering information that must be furnished to the Accreditation Committee and the Council, has been moved into revised Standard 104. Revised Standard 104 clearly states the requirement that the information furnished by a law school must be complete, accurate, and not misleading, and must be submitted in the form, manner, and time frame specified by the Council.

Standard 105. ACQUIESCENCE FOR MAJOR CHANGE IN PROGRAM OR STRUCTURE
The major change provision has been re-worked and divided into a Standard dealing with major changes in general, and a separate Standard, revised Standard 106, covering separate locations opened by a law school.

Current Interpretation 105-1, which lists the types of changes that require Council acquiescence, has been moved into Standard 105(a).

Standard 106. SEPARATE LOCATIONS AND BRANCH CAMPUSES
Revised Standard 106 is a new Standard on separate locations. It clarifies and expands upon several Interpretations that are in current Standard 105. A separate location at which more than 16 credits, but less than two-thirds of the credits required for graduation, are offered must provide certain full-time faculty and other resources on site. A separate location at which a student may earn more than two-thirds of the credits required for graduation is designated a branch campus and must provide additional resources and services.

Definitions of “Separate location” and “Branch campus” have been added to the Definitions section of the Standards. The term “Satellite campus” is no longer used.

Standard 107. VARIANCES
The variances provision has been moved from Chapter 8 into Chapter 1. The Standard has been re-written to distinguish clearly between variances in an emergency or other exigent circumstances, and those sought to experiment with a new or innovative program or concept.

DEFINITIONS
The definitions in the Standards are being moved from current Standard 106 to a separate Definitions Section.

Chapter 2 - ORGANIZATION AND ADMINISTRATION
Revised Standard 201. LAW SCHOOL GOVERNANCE
This is a reworking and consolidation of current Standard 204 (Governing Board of an Independent Law School), Standard 205 (Governing Board and Law School Authority), Standard 207 (Allocation of Authority between Dean and Faculty), and parts of Standard 210 (Law School-University Relationship).
The current language in Standard 205(b), that the dean and faculty “shall formulate and administer the educational program of the law school,” has been replaced with the requirement in revised Standard 201(a) that the dean and faculty “shall have primary responsibility and authority for planning, implementing and administering the program of legal education.”

The current language in Standard 205(b) that the dean and faculty “shall formulate and administer the educational program of the law school,” has been replaced with the requirement in revised Standard 201(a) that the dean and faculty “shall have primary responsibility and authority for planning, implementing and administering the program of legal education.”

The current language in Standard 205(b) that the dean and faculty “shall recommend the selection, retention, promotion, and tenure (or granting of security of position) of the faculty” is retained in revised Standard 201(b).

Current Standard 207 has been replaced by revised Standard 201(c), which requires that the dean and faculty shall each have “a significant role in determining educational policy.”

Revised Standard 201(d) replaces current Standard 210(b) and makes clear that where the law school is part of a university, either the policies applicable to the law school “shall be consistent with the Standards,” or the law school will need to promulgate separate policies “where necessary to ensure compliance with the Standards.”

Revised Standard 201(c) replaces current Standard 204 and makes clear that a law school that is not part of a university must be governed by a board with “responsibility and authority for ensuring operation of the law school in compliance with the Standards.”

Revised Standard 202, RESOURCES FOR PROGRAMS
This Standard is a reworking and consolidation of current Standard 201 (Resources for Program) and parts of Standard 210 (Law School-University Relationship). Revised Standard 202(a) requires that the “current and anticipated financial resources available to the law school” be sufficient for it to operate in compliance with the Standards and carry out its program of legal education.

Revised Standard 202(c) makes clear that a law school is not in compliance with the Standards if either its current financial condition has, or its anticipated financial condition is reasonably expected to have, “a negative and material effect on the school’s ability to operate in compliance with the Standards or carry out its program of legal education.”

Revised Standard 202(b) provides that a law school that is part of a university must obtain from its university (at least annually) an accounting for all charges and costs assessed against the “resources generated by the law school” and for any such resources used to “support non-law school activities and central university services.”

Revised Standard 202(e) retains the requirement in current Standard 210(d), which requires that the law school be given the opportunity to present its recommendations on budgetary matters to the university administration before the budget for the law school is submitted to the governing board for adoption. Current Interpretations 210-1 and 210-2 are essentially incorporated into revised Standard 202 in an appropriate and less intrusive manner.

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Revised Interpretation 202-1 defines “resources generated” by the law school for purposes of the revised Standards. Current Interpretation 201-2 regarding compensation based on a number of persons enrolled in a law school has been eliminated.

Revised Standard 203. DEAN
This revised Standard is a reworking of current Standard 206 (Dean), the majority of which is retained in the proposal. It provides that a law school shall have a full-time dean, selected by the appropriate governing body, with the authority and support necessary to discharge the responsibilities of the position (explicated elsewhere in the Standards).

The Standards Review Committee had recommended that the language of current Standard 206(c), which states that “a dean shall also hold appointment as a member of the faculty with tenure,” be replaced in revised Standard 203(b) with the requirement that the dean “shall hold appointment as a member of the law faculty with the rights and protections accorded to other members of the full-time faculty under Standard 405.” Based on the Council’s decision to make no change to current Standard 405, this proposed change was also not approved.

Revised Standard 203(c) adds new language (reflected in part in current Interpretation 206-1) regarding the decanal appointment procedure “assure meaningful involvement by the faculty or a representative body of the faculty.”

This Standard is buttressed by three revised Interpretations: 203-1 providing (as does current Interpretation 206-1) that in the absence of “good cause,” a dean “should not be appointed or reappointed for a new term over the stated objection of a substantial majority of the faculty”; 203-2 regarding the procedures for the appointment of an interim or acting dean that assures “meaningful consultation with the faculty or a representative body”; and 203-3 which defines the extension of the service of an interim or acting dean beyond two years as a regular decanal appointment or reappointment.

Revised Standard 204. SELF-STUDY
This revised Standard is a broadened delineation of the self-study required by current Standard 202. This broadened delineation is deemed necessary to make the product of the self-study more meaningful to the site evaluation process and the Accreditation Committee. The self-study now incorporates the sabbatical questionnaire, eliminating some of the duplication in the two prior requirements.

Current Standard 203 (Strategic Planning and Assessment) has been eliminated in light of revised Standard 315, which requires a law school to conduct ongoing evaluations of its program of legal education, learning outcomes, and assessment methods, and accordingly, to make changes necessary to the improvement of its curriculum.

Revised Standard 205. NON-DISCRIMINATION AND EQUAL OPPORTUNITY
Revised Standard 205 replaces current Standard 211. No significant changes are recommended. The change in revised Standard 205(b) clarifies that the Standard applies to students, faculty, and staff.

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Revised Standard 205. NON-DISCRIMINATION AND EQUAL OPPORTUNITY
Revised Standard 205 replaces current Standard 211. No significant changes are recommended. The change in revised Standard 205(b) clarifies that the Standard applies to students, faculty, and staff.
A suggestion to include “gender identity” in the list of non-discrimination categories was not adopted by the Council.

Revised Standard 206. DIVERSITY AND INCLUSION
Revised Standard 206 replaces current Standard 212. The title of the revised Standard has been changed from “Equal Opportunity and Diversity” in current Standard 212 to “Diversity and Inclusion” to emphasize the purpose of the Standard. The words “diversity and inclusion” have been added to revised Standards 206(a) and 206(b).

Revised Interpretation 206-2 deletes a specific reference to Grutter v. Bollinger and states that a law school may use race and ethnicity in its admissions process to promote diversity and inclusion “if consistent with applicable law.”

A suggestion to include “gender identity, sexual orientation, age, and disability” in the list of specifically identified underrepresented groups was not adopted by the Council.

Revised Standard 207. REASONABLE ACCOMMODATIONS FOR QUALIFIED INDIVIDUALS WITH DISABILITIES
Revised Standard 207 replaces current Standard 213. The word “may” has been deleted in revised 207(a) and the words “consistent with applicable law” have been added to the Standard to clarify that schools must provide accommodations for qualified individuals with disabilities consistent with applicable law.

Revised Standard 207(b) is new and requires law schools to adopt, publish, and adhere to written policies and procedures for assessing and handling requests for reasonable accommodations made by qualified individuals with disabilities.

As a result of this change in Revised Standard 207(a), current Interpretations 213-1 and 213-2 have been deleted.

Current Standard 208. INVOLVEMENT OF ALUMNI, STUDENTS AND OTHERS
This Standard has been deleted as extraneous and unnecessary in light of the inherent authority of law schools to involve others in its affairs, and the clearly delineated authority of the dean and faculty over the program of legal education of the law school in Revised Standard 201.

Current Standard 209. NON-UNIVERSITY AFFILIATED LAW SCHOOLS
This Standard has been deleted as redundant and adequately covered by the general requirement that all law schools must satisfy each of the Standards.

Chapter 3 – PROGRAM OF LEGAL EDUCATION

Background
In 2007, the Council appointed an Outcome Measures Committee. This committee recommended changes in the current Standards to effect a reduction in reliance on input
measures and to “adopt a greater and more overt reliance on outcome measures.” This
shift was viewed as consistent with best practices in legal education and encouraged by
the U.S. Department of Education guidelines.

The Outcome Measures Committee emphasized that outcome Standards should have the
following characteristics:

1. Aside from the traditional curricular requirements found in the current Standards,
   the outcome Standards should provide law schools substantial flexibility in identifying
   outcomes that are consistent with their missions.

2. The outcomes Standards should not impose unnecessary costs on law schools. In
   particular, burdensome assessment regimes of individual student achievement for each
   learning outcome should not be required.

3. Law schools should have flexibility in determining what assessment methods to
   use across the curriculum.

4. A phase-in period for development of learning outcomes and assessment methods
   by law schools should be provided.

Revised Standard 301. OBJECTIVES OF PROGRAM OF LEGAL EDUCATION
The requirement of a rigorous program of legal education is moved from current
Interpretation 301-3 to revised Standard 301(a). The requirement of preparation for
ethical participation in the legal profession, while found in various Standards and
Interpretations, is placed upfront in Standard 301(a) pertaining to objectives of the
program of legal education.

Revised Standard 301(b) is a new provision that introduces the requirement that law
schools establish and publish learning outcomes to achieve the objectives of the program
of legal education.

Current Standard 301(b), pertaining to comparable opportunities, is moved to Standard
312.

Current Interpretations 301-4 and 301-5 that address comparable opportunities have been
deleted.

Current Interpretations 301-1 and 301-2 have been deleted as unnecessary.

Current Interpretation 301-6 on bar passage has been moved to become Standard 316.

Revised Standard 302. LEARNING OUTCOMES
Current Standard 302 [Curriculum] has been replaced with revised Standard 302
[Learning Outcomes] and revised Standard 303 [Curriculum].
Revised Standard 302 is a new Standard that outlines the minimum learning outcomes that must be established by a law school. The responsibility of a law school to assess student learning and to evaluate its program of legal education is found in revised Standards 314 and 315. The learning outcomes are broadly stated to give law schools maximum flexibility.

Interpretation 302-1 provides a non-exclusive listing of “other professional skills.”

Interpretation 302-2 provides that a law school “may also identify any additional learning outcomes pertinent to its program of legal education.”
Current Standard 302(a) has a list of mandatory requirements for the law school curriculum. The current Standard does not prescribe any credit hour requirements for specific areas. Revised Standard 303 includes a requirement of two credit hours in professional responsibility.

In September 2013, the Council circulated for Notice and Comment revised Standard 303(a)(3), which included a new requirement of six credits of instruction in an experiential course or courses. To qualify, the experiential course or courses must be a simulation, law clinic, or field placement, all as defined in subsequent Standards. Four requirements for a qualifying experiential course are set out.

In December 2013, the Council circulated an alternative proposal for Standard 303(a)(3), which increases the new requirement from six to 15 credits of instruction in an experiential course or courses.

At its meeting on March 14 – 15, 2014, the Council approved the first alternative, requiring six credits of instruction in an experiential course or courses.

Revised Standard 303(b) is a revision of current Standard 302(b), which requires law schools to provide “substantial opportunities” for live-client or other real-life practice experiences; student participation in pro bono activities; and small group work. The proposal changes “live-client or other real-life practice experiences” to “law clinics or field placements” and eliminates “small group work” from the Standard. It also changes “pro bono activities” to “pro bono legal services or law-related public service.” Current Interpretation 302-10 has been replaced by revised Interpretations 303-2 and 303-3, which reference pro bono activities as defined in the ABA Model Rules of Professional Conduct and provide a description of law-related public service activities. The Council also added language to Interpretation 303-2 encouraging law schools to promote opportunities for law students to provide at least 50 hours of pro bono service during law school.

Revised Standard 304, SIMULATION COURSES AND LAW CLINICS
This is a new Standard that defines and sets out the requirements for two of the three experiential courses that qualify for the new experiential course requirement in revised Standard 303(a).

Revised Standard 305, FIELD PLACEMENTS AND OTHER STUDY OUTSIDE THE CLASSROOM
This is a largely a restatement of current Standard 305. The title of the Standard has been changed from “Study Outside the Classroom” to “Field Placements and Other Study Outside the Classroom.”

The revised change in 305(a) is designed to clarify what is included in study outside the classroom. Interpretation 305-1 has been deleted and the explanation of what constitutes study outside the classroom has been moved to the text of 305(a). The reference that was
in 305-1 regarding courses taken in parts of a college or university has been deleted as this subject is covered in Standard 311.

Revised Standard 305(e), which is largely the same as the current Standard, outlines the requirements for field placement courses, which are the third of the types of courses that will satisfy the new experiential course requirement of revised Standard 303.

Revised Standard 305(e)(5) reflects a strengthening of the current provision pertaining to supervision of the student experience. In revised Standards 305(e)(5) and 305(e)(7), the number of credits that require increased oversight by the law school has been decreased from four to three.

Current Interpretation 305-4(a) has been moved into the Standard as 305(f).

Unnecessary Interpretations have been eliminated.

Interpretation 305-2
Current Interpretation 305-2 is unchanged and renumbered in the revised Standards as Interpretation 305-2. The Standards Review Committee recommended the deletion of current Interpretation 305-3. The Committee was not unanimous but a sizable majority of the members felt that the Standards should not have a blanket prohibition against receiving credit for a field placement where a student receives compensation. They felt that a blanket prohibition puts significant limits on the available field placement opportunities. While there was some concern about the pedagogical difficulties when students are paid and receive credit, the Committee noted that whether or not students are paid, schools must meet all of the requirements of Standard 305. The Council circulated the proposed deletion for Notice and Comment. After reviewing the comments, which were largely opposed to the change, the Council decided not to delete the Interpretation.

Revised Standard 306, DISTANCE EDUCATION
A clearer and updated definition of a distance education course is provided in revised Standard 306(a). The definition clarifies that only courses in which more than one-third of the instruction consists of distance education are treated as distance education course. Current Interpretation 306-3, which addresses that issue, has been deleted.

The examples of technology found in current Standard 306(a) have been placed in new Interpretation 306-1. Current Interpretation 306-5, which uses mandatory language and pertains to a law school’s capacity to provide distance education, has been moved to revised Standard 306(c). A new provision requiring that the learning outcomes for a distance education course must be consistent with Standard 302 is added as revised Standard 306(d)(3).

More generally, the language of the revised Standard is improved and updated and unnecessary Interpretations are eliminated.
Revised Standard 307. PARTICIPATION IN STUDIES OR ACTIVITIES IN A FOREIGN COUNTRY
The portion of current Interpretation 307-1 that relates to field placements in foreign countries has been moved into revised Standard 307(a)(2). This does not represent a change in substance.

Revised Standard 307(b) provides that the total credits permitted for activities and studies abroad is limited to one-third of the credits required for the J.D. degree. This limitation was previously found in the Criteria relating to foreign study.

Revised Standard 308. ACADEMIC STANDARDS
The revised Standard replaces current Standard 303 (Academic Standards and Achievements) and focuses on academic standards. Revised Standard 308(b) is a new provision pertaining to due process policies.

Current Standard 308(b) is deleted because the topic is covered by revised Standards 314 and 315.

Current Standard 309(c) is deleted due to the creation of revised Standard 309.

Revised Standard 309. ACADEMIC ADVISING AND SUPPORT
This is a new Standard that replaces current Interpretations 303-3 and 303-4 on academic advising and support.

Revised Standard 310. DETERMINATION OF CREDIT HOURS FOR COURSEWORK
This is a new Standard that utilizes the U.S. Department of Education definition of credit hours. More generally, this provision involves a shift from the use of minutes to the use of the concept of credit hours to describe the various requirements of the Standards.

Revised Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR
The revised Standard, which replaces current Standard 304, incorporates the new concept of a credit hour and defines the minimum academic year to include examination periods.

Revised Standard 311(a) clarifies that with the new definition of credit hours, examination periods can be included in the academic year.

Revised Standard 311(b) replaces “58,000 minutes of instruction time” found in current Standard 304(a) with “83 credit hours,” 64 of which must be in courses that require attendance in regularly scheduled classroom sessions or “direct faculty instruction.”

Revised Standard 311(c) retains the language of current Standard 304(c) and adds an “extraordinary circumstances” exception.

The 20 hour limit on student employment, contained in the current Standard 304(f), is eliminated on the ground that is has been unenforceable.
Revised Interpretation 311-2 is a restructuring of current Interpretation 304-3. It provides a complete list of credit hours that do qualify and do not qualify for the 311(b) requirement of 64 credits of regularly scheduled classroom sessions or direct faculty instruction. This clarification will eliminate current ambiguities and uncertainties.

Current Interpretation 304-5 is moved to revised Standard 311(e).

Revised Interpretation 311-3 provides guidance regarding the "extraordinary circumstances" exception in revised Standard 311(c).

Revised Interpretations 311-4 and 311-5 provide guidance to law schools regarding the operation of revised Standard 311(c) in certain circumstances.

Current Interpretation 304-7 has been moved to Standard 505(b).

Unnecessary Interpretations have been deleted.

Revised Standard 312. REASONABLY COMPARABLE OPPORTUNITIES
This revised Standard is taken from current Standard 301(b) and it is redrafted to provide greater clarity.

Revised Standard 313. DEGREE PROGRAMS IN ADDITION TO J.D.
This is a redrafting of current Standard 308. There is no change in substance.

Current Interpretation 308-2 is eliminated as unnecessary.

Revised Standard 314. ASSESSMENT OF STUDENT LEARNING
This is a new Standard that introduces the obligation of law schools to use assessment methods in the curriculum to measure and improve student learning and to provide feedback to students.

Both formative and summative assessments are described in revised Interpretation 313-1.

Revised Interpretation 314-2 makes it clear that law schools have flexibility in implementing the assessment requirement.

Revised Standard 315. EVALUATION OF PROGRAM OF LEGAL EDUCATION, LEARNING OUTCOMES, AND ASSESSMENT METHODS
This is a new Standard. It requires the dean and faculty of the law school to engage in an ongoing evaluation of the program of legal education, learning outcomes, and assessment methods. It also requires that the results of the evaluations be used to make appropriate changes.

The Interpretation offers examples of methods that may be used in these evaluations.
Revised Standard 316. BAR PASSAGE
Current Interpretation 301-6 on bar passage has been moved to become Standard 316.

Chapter 4 - THE FACULTY

Standard 401. QUALIFICATIONS
Consistent with other changes in the Standards, revised Standard 401 clarifies that the law school must have a faculty whose qualifications and experience “enable the law school to operate in compliance with the Standards and carry out its program of legal education.”

As a factor in demonstrating whether the faculty possesses a high degree of competence, “scholarly research and writing” has been replaced by “scholarship.” A similar change is made in Standard 404.

Standard 402. SIZE OF FULL-TIME FACULTY
Revised Standard 402 is largely unchanged from current Standard 402(a).

Current Standard 402(b), which defines “full-time faculty member,” has been moved to the Definitions section of the Standards.

Current Interpretations 402-1 and 402-2 on student-faculty ratio have been removed from the Standards. In 2008, the same recommendation was made by the Standards Review Committee and was sent out for Notice and Comment by the Council. When the Comprehensive Review of the Standards began, the matter was postponed for later review.

In approving this change, the Council agreed with the explanation provided by the Standards Review Committee:

The Standards Review Committee concluded that the student-faculty ratio as derived under the current Interpretations to Standard 402 should be discontinued because the ratio does not account for all students enrolled in a law school and because it does not appropriately account for size of the faculty given the important changes in law school curriculum, teaching methodologies, and administrative structures in law schools since adoption of these Interpretations many years ago. Furthermore, the Standards Review Committee concluded that the present student-faculty ratio is misleading because it does not provide a useful measure of the adequacy of the full-time faculty’s size to address the totality of the faculty’s obligations under Standard 404.

The Standard Review Committee concluded that the difficulties in developing a ratio that would fully and fairly measure the adequacy of the size of the full-time faculty to address all of the responsibilities of the full-time faculty under Standard 404 made calculation of a ratio practically unfeasible.
The Accreditation Committee, in determining whether a law school's faculty is large enough, looks at a number of factors including what portions of the first-year curriculum and upper-level curriculum in the day and evening divisions are taught by full-time and part-time faculty, what core subjects beyond the first-year courses are taught by full-time and part-time faculty, and the extent to which faculty members are meeting all of their obligations under Standard 404.

Law schools are required to report annually useful consumer information regarding teaching resources. Much of the data reports on full- and part-time faculty and students and provides other data such as the typical size of first-year classes, whether there are small section first-year classes beyond legal writing, the typical size of those other small section classes, number of courses offered beyond the first year of law school, the numbers of upper-level classes offered in various size ranges, number of seminars, and number of positions available and filled in seminars, simulation courses, and clinical courses. The student-faculty ratio, however, has not proven to be a useful or accurate indicator of what ranges of class size prospective students will experience in law school. The Standards Review Committee believes that Standard 509 ought to require disclosure of additional data on faculty, such as number of courses taught by adjuncts and full-time faculty, as a matter of consumer information related to the adequacy of the faculty to satisfy its core teaching responsibilities under 402(a)(1).

**Standard 403. INSTRUCTIONAL ROLE OF FACULTY**
Revised Standard 403(a) clarifies the current requirement by stating that full-time faculty shall teach “more than half of all of the credit hours actually offered by the school or two-thirds of the student contact hours generated by student enrollment at the school” rather than “the major portion of law school’s curriculum.” The revised Standard retains the direction that full-time faculty shall teach substantially all of the first one-third of each student’s coursework.

Current Standard 403(c), regarding the use of practicing lawyers and judges, has been deleted. Law schools may, of course, use practicing lawyers and judges to deliver instruction, but are not obligated under the Standards to do so.

Current Interpretation 403-1 is also deleted because it is unnecessary and is addressed in the Standard itself.

Revised Interpretation 403-1 is a redraft of current Interpretation 403-2.

**Standard 404. RESPONSIBILITIES OF FULL-TIME FACULTY**
Revised Standard 404(a) clarifies that a law school must provide written policies with respect to the responsibilities of the full-time faculty as a whole. The areas of responsibility addressed in the revised Standard are generally the same as those in the current Standard with some clarifications. The responsibility of teaching in 404(a)(1) also addresses the responsibility to assess student performance and to remain current in the subjects being taught. Revised Standard 404(a)(3) clarifies that scholarship is defined by
the law school. Revised Standard 404(a)(4) clarifies that the faculty are responsible for
governance as well as curriculum development and other institutional responsibilities
described in the Standards.

Revised Standard 404(b) requires a law school to periodically evaluate the extent to
which the faculty discharges its core responsibilities as well as the contributions of each
faculty member in meeting those responsibilities.

Standard 405. PROFESSIONAL ENVIRONMENT
One of the important goals of the Comprehensive Review of the Standards is to ensure that
accreditation requirements are clear to law schools and can readily be interpreted by the
Accreditation Committee. Therefore, interests of greater clarity and transparency require
that the revised Standards explicitly state whether or not schools must provide tenure rights
and, if so, for whom on the law faculty.

The Council distributed two alternatives for comment: Alternative 1 includes a requirement
that law schools provide full-time faculty members with a form of security of position
sufficient to ensure academic freedom and to attract and retain a competent full-time
faculty; Alternative 2 does not include a provision regarding security of position.

The Council reviewed two other alternatives that had been prepared by the Standards
Review Committee. One was intended to be a clarification of the current Standard and the
other would have required all full-time faculty to have the same form of security of position.
The Council determined that it would not send out the other two alternatives for Notice and
Comment.

In four respects – on the issues of attracting and retaining a competent faculty, academic
freedom, participation in governance, and due process – the alternatives are very similar.
The main difference in the alternatives is the treatment of security of position.

Protection of academic freedom
Both alternatives explicitly articulate the obligation that schools have processes or programs
that protect the academic freedom of their faculty members and possess the ability to attract
and retain a qualified faculty. This is a significant change from the current language that
requires only that approved schools have an “announced policy” concerning academic
freedom protections. Moreover, the proposed Interpretations create a clearer statement of
presumptions and burdens of proof in the accreditation process.

Law school governance
Both alternatives require law schools to provide for the meaningful participation of all full-
time faculty members in the governance of the law school.

Conditions to attract and retain a competent full-time faculty
Both alternatives retain the current requirement that law schools must establish and maintain
conditions that are adequate to attract and retain a competent full-time faculty.
Due process
Both alternatives add into the Standard a due process provision similar to one that is currently found in Interpretation 405-3.

Security of Position
Alternative I requires, in 405(d), that all full-time faculty have a form of security of position sufficient to ensure academic freedom and to attract and retain a competent full-time faculty. It does not require that all full-time faculty have the same form of security of position, and it does not require tenure.

Proposed Interpretations 405-1 and 405-2 provide that a tenure system is a safe harbor for satisfying the security of position required in Standard 405(d). For full-time faculty positions not covered by tenure, the law school must establish that its policies establish conditions sufficient to attract and retain a competent full-time faculty and protect academic freedom.

Alternative 2 requires a law school to maintain conditions adequate to attract and retain a competent full-time faculty sufficient to permit the law school to comply with the Standards. It requires policies to protect academic freedom of its faculty and provide for meaningful participation of full-time faculty in the governance of the school. Alternative 2 does not require tenure or security of position for any full-time faculty.

Proposed Interpretations 405-1 and 405-2 provide that a tenure system is a safe harbor for satisfying the attract and retain provision and the academic freedom provision of Alternative 2. For full-time faculty positions not covered by tenure, the law school must establish that its policies establish conditions sufficient to attract and retain a competent full-time faculty and protect academic freedom.

The proposed alternatives generated significant public comment. A majority of the Council expressed dissatisfaction with current Standard 405. However, neither of the alternative proposals that the Council had circulated for Notice and Comment were acceptable to a majority of the Council. Both of those proposals were loudly criticized by law school faculty during the comment period. Because no proposal for change garnered a majority of the Council, current Standard 405 was not amended.

Chapter 5 - ADMISSIONS AND STUDENT SERVICES
Revised Standard 501, ADMISSIONS
Revised Standards 501(a) and (b) are essentially reworkings of current language.

Revised Standard 501(c) is drawn from current Standard 505 (Previously Disqualified Applicant) and now speaks to both admission and readmission. The documentation requirement assigned to the law school has been simplified and clarified, and it is stated straightforwardly.
Current Interpretations 501-1 and 501-3 have been retained and are now numbered 501-2 and 501-1, respectively.

Interpretation 501-2 has been eliminated because it simply admonishes the law school to follow certain Standards.

Interpretation 501-4 has been eliminated because it is unnecessary. The underlying concept in the first sentence is addressed more pertinently in other Chapters, and the second sentence is a statement of the obvious.

Revised Standard 502. EDUCATIONAL REQUIREMENTS
Revised Standard 502 sets forth with greater clarity the educational routes by which law schools may admit individual applicants. By splitting current Standard 502(a) into two parts—now 502(a) and (b)(1)—the language now avoids the collision of two concepts embodied in the current rule (that the school “shall require” a bachelor’s degree followed immediately by the lesser requirement of a percentage of credits toward such a degree). Further, revised Standard 502(b)(2) now addresses the issue of foreign law school graduates under the appropriate Standard.

Revised Standard 502(c) retains the substance of Standard 502(b).

Interpretation 502(1) has been retained and simplified.

Revised Standard 502. ADMISSION TEST
The Standards Review Committee presented the Council with two alternatives for Standard 503. One alternative was to eliminate the Standard and the other was to make minor changes to the Standard.

The Council chose to circulate for comment only the alternative that retained the Standard. That proposal retains the language of the current Standard with a small stylistic change. Current Interpretation 503-1 has been retained because it is well settled that the LSAT has been validated as a predictor of first-year law school grades, and generally accepted that first-year grades are predictive of the student’s ultimate capability of completing the program. Current Interpretations 503-3 and 503-4 have been eliminated.

The memorandum from the Standards Review Committee to the Council explaining the two alternatives stated:

The Council is presented with the opportunity to resolve an issue that has divided the Committee over several years, with each of two positions prevailing at different times on straw votes.

The question presented is whether compelling law schools to use an admission test is appropriately an accreditation requirement.

One alternative is to eliminate Standard 503. The other alternative is to retain it as modified in revised Standard 503.

Current Interpretations 501-1 and 501-3 have been retained and are now numbered 501-2 and 501-1, respectively.

Interpretation 501-2 has been eliminated because it simply admonishes the law school to follow certain Standards.

Interpretation 501-4 has been eliminated because it is unnecessary. The underlying concept in the first sentence is addressed more pertinently in other Chapters, and the second sentence is a statement of the obvious.

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One alternative is to eliminate Standard 503. The other alternative is to retain it as modified in revised Standard 503.
It is important that the Council understand that a decision to delete what, for shorthand purposes, will be termed the LSAT requirement, does not suggest, and indeed should not be taken to express a lack of confidence in that instrument or in the wisdom of using a fair and valid objective test as one key measure in winnowing a class of entering students from each school's applicant pool. The LSAT can and does provide a fair measure of first-year law school performance and correlates well with the final law school grade-point average, rank in class, and performance on bar examinations. It helps a law school identify promising performers. It also helps schools avoid the admission of those who are not capable of satisfactorily completing the law school program. Given the enormous investment of resources that individuals make in securing a legal education, the LSAT offers would-be students some predictability when they make such an important investment. In the future the LSAT probably will continue to be viewed by most law schools as an essential factor in the admissions equation since an LSAT score has consistent meaning across the applicant pool.

The issue here is not the wisdom of employing the LSAT as a valuable tool in calculating admissions decisions; rather, it is whether, as a matter of judging institutional quality, law school accrediting authorities should require the use of a valid and reliable test. It is our understanding that accreditation standards governing other professions are not so specific. It is also true that such entrance tests are still used in the admission process in other professional schools because they provide helpful evidence as well as added efficiency in the admissions context. Note that revised Interpretation 501-2 specifically cites "admission test scores" when describing "sound admission policies."

The removal of Standard 503 will heighten the importance of adding rigorous requirements about disclosure of admission criteria in both Standard 509 and in the questionnaires that law schools complete. Removal will also require effective sanctions for schools that are not accurate or transparent in disclosing their admission criteria, which should include the percentage of the entering class producing an LSAT score (as opposed to selective reporting of the number of students for whom an LSAT score was taken into consideration at the point of the admissions decision).

To the extent that Standard 503 is retained, the basis for substituting tests other than the LSAT should be well-documented and public, the burden for establishing the validity of any test should be properly documented using accepted methods of measurement, and all departures from use of the LSAT should be disclosed in Standard 509.

If Standard 503 is retained, the revised language of the Standard has been shortened to eliminate the final sentence of the current Standard for two reasons. First, current Interpretation 503-2 already grants permission to law schools to assign any weight it chooses to an admission test score for any applicant. Second,
since it is understood that some variances from use of law school admission test scores have been granted, thereby permitting the use of other tests to serve as surrogates, this sentence should be eliminated.

Current Interpretation 503-1 has been retained because it is well settled that the LSAT has been validated as a predictor of first-year law school grades, and generally accepted that first-year grades are predictive of the student’s ultimate capability of completing the program.

Revised Interpretation 503-3.
At its March 2014 meeting, the Council reviewed a report and recommendation from the Accreditation Committee on 503 Variances. The new Interpretation is based on the recommendations in that report.

Revised Interpretation 503-3 describes a particular admissions program that meets the requirements of Standard 503. Such programs have been proposed by a number of law schools, and the Council has granted variances when the proposals have satisfied the criteria for a variance. The interpretation provides a safe harbor and clear guidance to schools on when and how such programs comply with Standard 503.

The Interpretation provides that a law school may admit no more than 10 percent of an entering class without requiring the LSAT from students in an undergraduate program of the same institution as the J.D. program; and/or students seeking the J.D. degree in combination with a degree in a different discipline. Applicants admitted must have scored at the 85th percentile nationally, or above, on a standardized college or graduate admissions test, specifically the ACT, SAT, GRE, or GMAT; and must have ranked in the top 10 percent of their undergraduate class through six semesters of academic work, or achieved a cumulative GPA of 3.5 or above through six semesters of academic work.

Outside these specific criteria Standard 503 continues to apply to the law school admissions process. The variance process is available to clarify when any other alternative test admissions programs may be employed on an experimental basis.

Schools that follow the admission process outlined in Interpretation 503-3 will be required to report annually on their admission programs and to follow the guidelines developed by the Council and the Managing Director’s Office.

Background
Current Standard 503 Admission Test, prescribes that “a law school shall require each applicant for admission as a first-year J.D. student to take a valid and reliable admission test to assist the school and the applicant in assessing the applicant’s capability of satisfactorily completing the school’s educational program.” Interpretation 503-1 specifies that “a law school that uses an admission test other than the Law School Admission Test sponsored by the Law School Admission Council shall establish that such other test is a valid and reliable test to assist the school in assessing an applicant’s capability to satisfactorily complete the school’s education program.”
Current Standard 802 (Variance) states that "a law school proposing to offer a program of legal education, a portion of which is inconsistent with a Standard, may apply for a variance." The authority to grant such a variance is reserved for the Council, which may impose conditions and shall impose time limits it considers appropriate. As provided in Interpretation 802-1, variances are generally limited to proposals based on a response to extraordinary circumstances that would create extreme hardship for students or a law school, or an experimental program that meets the requirements of the Standard. The Council may terminate a variance prior to the end of the stated time limit if the school fails to comply with any conditions imposed by the Council.

While a reading of Standard 503 could be that schools did not need a variance to operate an alternative-test admissions process, so long as they could subsequently prove to the satisfaction of the Accreditation Committee and the Council that its admissions process meets the requirement of the Standard that a school must require each beginning student to take a "valid and reliable" law school admissions test, in practice law schools have requested variances in advance of commencing such programs to assure themselves and the Council that their programs will meet the requirements of Standard 503.

In accordance with Standard 802, approximately 15 ABA-approved law schools have sought and been granted variances from Standard 503 by the Council in order to use other admission tests as alternatives to the LSAT. Generally, variances have been granted for two distinctly different purposes and types of alternative tests: (1) programs that aim primarily to recruit honors undergraduates from the law school's own universities by excusing them from taking the LSAT and that use undergraduate admission tests such as the ACT or SAT; and (2) programs that use alternative tests for joint degree programs with business or other disciplines and that use graduate-level tests such as the GMAT or GRE. In these cases, excusing applicants from submitting LSAT scores relieves those applicants from taking two separate graduate-level admissions tests. In each case the Accreditation Committee and the Council had determined that the law school's request for a variance was in accordance with Interpretation 802-1(b) of the Standards, which classifies the proposed admission programs as experimental.

For programs that have been in existence long enough for results to be known, special admission students have performed as well or better than regularly admitted students in graduating on time and passing the bar examination. It is important to recognize that the purpose of Standard 503 is "to assist the school and the applicant in assessing the applicant's capability of satisfactorily completing the school's education program." From the data presented to the Accreditation Committee thus far, the alternative tests have been valid in terms of predicting academic success in law school.

Revised Standard 504. QUALIFICATIONS FOR ADMISSION TO THE BAR
Revised Standard 504(a) treats the matter of the notification that law schools provide to prospective applicants by setting forth explicit language of such notification to avoid uncertainty or ambiguity.

Current Standard 802 (Variance) states that "a law school proposing to offer a program of legal education, a portion of which is inconsistent with a Standard, may apply for a variance." The authority to grant such a variance is reserved for the Council, which may impose conditions and shall impose time limits it considers appropriate. As provided in Interpretation 802-1, variances are generally limited to proposals based on a response to extraordinary circumstances that would create extreme hardship for students or a law school, or an experimental program that meets the requirements of the Standard. The Council may terminate a variance prior to the end of the stated time limit if the school fails to comply with any conditions imposed by the Council.

While a reading of Standard 503 could be that schools did not need a variance to operate an alternative-test admissions process, so long as they could subsequently prove to the satisfaction of the Accreditation Committee and the Council that its admissions process meets the requirement of the Standard that a school must require each beginning student to take a "valid and reliable" law school admissions test, in practice law schools have requested variances in advance of commencing such programs to assure themselves and the Council that their programs will meet the requirements of Standard 503.

In accordance with Standard 802, approximately 15 ABA-approved law schools have sought and been granted variances from Standard 503 by the Council in order to use other admission tests as alternatives to the LSAT. Generally, variances have been granted for two distinctly different purposes and types of alternative tests: (1) programs that aim primarily to recruit honors undergraduates from the law school's own universities by excusing them from taking the LSAT and that use undergraduate admission tests such as the ACT or SAT; and (2) programs that use alternative tests for joint degree programs with business or other disciplines and that use graduate-level tests such as the GMAT or GRE. In these cases, excusing applicants from submitting LSAT scores relieves those applicants from taking two separate graduate-level admissions tests. In each case the Accreditation Committee and the Council had determined that the law school's request for a variance was in accordance with Interpretation 802-1(b) of the Standards, which classifies the proposed admission programs as experimental.

For programs that have been in existence long enough for results to be known, special admission students have performed as well or better than regularly admitted students in graduating on time and passing the bar examination. It is important to recognize that the purpose of Standard 503 is "to assist the school and the applicant in assessing the applicant's capability of satisfactorily completing the school's education program." From the data presented to the Accreditation Committee thus far, the alternative tests have been valid in terms of predicting academic success in law school.

Revised Standard 504. QUALIFICATIONS FOR ADMISSION TO THE BAR
Revised Standard 504(a) treats the matter of the notification that law schools provide to prospective applicants by setting forth explicit language of such notification to avoid uncertainty or ambiguity.
The balance of current Standard 504(a) is covered in revised Standard 504(b), which treats the matter of the law school’s obligation to students who have matriculated.

Current Standards 504(b) and (c) have been eliminated. The language of (b) is not a Standard; it is merely instructive, as an Interpretation might be. However, the processes and value judgments that bar examiners in different jurisdictions apply to bar admission applications renders current (b) of negligible value. As to (c), this too, appears to exist more as an admonishment than as a Standard.

Revised Standard 505. GRANTING OF J.D. CREDIT FOR PRIOR LAW STUDY
Revised Standard 505 seeks to consolidate in one Standard all the circumstances that lead to the granting of a J.D. degree credit for prior study. Thus, it incorporates and simplifies material appearing in current Standards 506 (Applicants from Law Schools not Approved by the ABA) and 507 (Applicants from Foreign Law Schools), and Interpretation 304-7 regarding transfer of credits earned in an LL.M. program (generally by a graduate of a law school outside of the United States) into a J.D. program. For the first time, the Standard also encompasses the student who transfers from another ABA-approved school.

This significantly streamlined Standard concludes with 505(e), which establishes a cap of one-third on credits that may be allowed by the admitting school on prior law study unless the study was undertaken as a J.D. degree student at another law school approved by the Council.

Under current practice, some law schools will allow a student who transfers into a J.D. program from an LL.M. program to receive up to one-third of the credits required for graduation from the law school outside the United States and to receive additional credits from the LL.M. program under current Interpretation 304-7. The Standard limits the total number of credits in such a situation to one-third of the credits required for graduation.

Revised Standard 506. ENROLLMENT OF NON-DEGREE CANDIDATES
Revised Standard 506 represents a rewording of current Standard 508 chiefly to parallel other language in the Standards.

Revised Standard 507. STUDENT LOAN PROGRAMS
Revised Standard 507 is a renumbering of current Standard 510. Language is intended to meet U.S. Department of Education requirements.

Revised Standard 508. STUDENT SUPPORT SERVICES
Revised Standard 508 is a renumbering of current Standard 511 and contains only minor edits. The only substantive change is the addition of debt counseling to the list of support services that a law school must provide.

Revised Standard 509. CONSUMER INFORMATION
Revised Standard 509 represents a reworking of a Standard that has received Council action recently. Given the work undertaken by the Committee to look deeply and
thoroughly at the Standards, it was perhaps inevitable that additional articulations of what consumer information should be required would result.

The revised Standard 509 divides the information that the Standard requires a law school to publish on its website into two categories: (1) that for which the Council prescribes a particular form and manner of publication; and (2) that which the school must disclose in a readable and comprehensive manner. The revised Standard covers these two categories in 509(b) and 509(c), respectively. There are prescribed charts for employment and conditional scholarship information [509(b)(3) and (b)(7)], and the other items in 509(b) are included in a table that is generated by schools within the Annual Questionnaire. The items in 509(c) are not susceptible to a uniform format, and so are governed by the “readable and comprehensible” requirement. The revised Standard deletes “library resources” and “facilities” as consumer information items. The provisions in current Standard 509(d)(1), (2) and (4) are redundant and unnecessary once “form and manner designated by the Council” is added to 509(b).

Revised Standard 510. STUDENTS COMPLAINTS IMPLICATING COMPLIANCE WITH THE STANDARDS
Revised Standard 510 is a renumbering of current Standard 512. Language is intended to meet U.S. Department of Education requirements.

Chapter 6 - LIBRARY AND INFORMATION RESOURCES
Revised Standard 601. GENERAL PROVISIONS
The opaque requirement that a law library be “an active and responsive force,” in the life of the law school has been replaced by the more specific requirement that the library provide support adequate to enable a law school to carry out its program of legal education. The only significant addition to the current Standard is that the library is required to engage in planning and assessment. While all other requirements remain the same, the revised Standard has been rewritten to eliminate Interpretations by moving the information into the Standard. The revised Standard now clearly states four basic requirements for the library (provide support, develop a responsive relationship with users, engage in planning and assessment, and implement technology when appropriate) and one requirement for the law school (provide sufficient financial resources for the library to fulfill its responsibilities).

Revised Standard 602. ADMINISTRATION
No significant changes are recommended. The revised Standard has been rewritten for greater clarity.

Current Standard 603. DIRECTOR OF THE LAW LIBRARY
Revised Standard 603(a) adds “providing information resources in appropriate formats to faculty and students” as one of the overall management responsibilities of the law library director.

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Current Standard 603. DIRECTOR OF THE LAW LIBRARY
Revised Standard 603(a) adds “providing information resources in appropriate formats to faculty and students” as one of the overall management responsibilities of the law library director.
In revised Standard 603(c), the requirement that the law library director must have specific degrees for the position has been replaced with a requirement that the director must have “appropriate academic qualifications.” As in other provisions in the revised Standards, the Committee added the requirement that the director’s knowledge and experience must be “sufficient to support the program of legal education and to enable the law school to operate in compliance with the Standards.”

Revised Interpretation 603-1 provides guidance for the Accreditation Committee by elaborating on how a law school could meet the Standard.

The Standards Review Committee had recommended that the language of current Standard 603(d), which states that “a law library director shall hold a law faculty appointment with security of faculty position,” be replaced in revised Standard 603(d) with the requirement that the law library director “shall hold appointment as a member of the law faculty with the rights and protections accorded to other members of the full-time faculty under Standard 405.” Based on the Council’s decision to make no change to current Standard 405, this revised change was also not approved.
Revised Standard 604. PERSONNEL
The current Standard has been changed slightly to require a staff with expertise that will support the goals of the library and law school.

Revised Standard 605. SERVICES
No changes are recommended to the current Standard. The current Interpretation has been rewritten to better state how those services can be provided.

Revised Standard 606. COLLECTION
The revisions to current Standard 606 reflect the change from an emphasis on ownership of materials to providing reliable access to legal information. The revised Standard also links the choices of format and means of access to the needs of the institution. Revised Interpretation 606-2 elaborates on the definition of “reliable access” by providing ways to meet the Standard through ongoing access to databases or participation in a formal resource-sharing arrangement with other libraries.

Chapter 7 - FACILITIES, EQUIPMENT, AND TECHNOLOGY

Revised Standard 701. GENERAL REQUIREMENTS
Current Standard 701 is now revised Standard 701(a) and has been expanded to include equipment, technology, and technology support. The language of current Standard 701, that a law school must have “physical facilities” that are “adequate for both its current program of legal education and for growth anticipated in the immediate future,” and of current Interpretation 704-1, that “inadequate technological capacities are those that have a negative and material effect on the education students receive,” have been replaced with the requirement that a law school shall have “facilities, equipment, technology, and technology support” that “enable it to operate in compliance with the Standards and carry out its program of legal education.” This new language is used throughout the revised Standards to make the Standards more objective and provide greater clarity.

Current Standard 704 and current Interpretations 701-1 and 704-1 have been incorporated into revised Standard 701(b), explaining that in order to violate the requirements of the Standards, the facilities, equipment, technology, or technology support must “have a negative and material effect on the school’s ability . . . to operate in compliance with the Standards; or . . . carry out its program of legal education.” The purpose is to highlight the mandatory nature of this requirement.

This language is parallel to revised Standard 202 on resources. During its work, the Standards Review Committee heard from the Accreditation Committee that the current Standard regarding the adequacy or inadequacy of facilities presented interpretation problems. This change should facilitate interpretation of this requirement.

In light of the rapid changes in technology and technology support, Revised Interpretation 701-1 (current Interpretation 704-2 on adequate technological capacity), has been rewritten to highlight factors to be considered rather than requirements to be met.
Revised Standard 702. FACILITIES
Revised Standard 702 is a new Standard and is based on a number of provisions that are in current Interpretation 701-2. It also incorporates current Standards 702 (Library) and 703 (Research and Study Space). Again, the purpose of this change is to highlight the mandatory nature of the facilities required.

As in revised Standard 701, the term “physical” has been deleted from the current Standard as redundant.

The word “adequate” is deleted throughout the revised chapter. The terms “suitable” or “suitable and sufficient” are used to make the revised Standards more objective.

Current Interpretations 701-2(1) and (2) have been combined by adding “skills offerings” in revised Standard 702(a)(1).

Current Standard 702 (Law Library) has been incorporated into revised Standard 702(a)(2) on facilities and has been rewritten for greater clarity.

Current Interpretation 701-2(5) had been replaced with the new language in revised Standard 702(a)(3).

Current Interpretation 701-2(3) regarding faculty offices was amended and rewritten as revised Standard 702(a)(4) to incorporate the new language of “suitable and sufficient” space.

Revised Standard 702(a)(5) requires that the facilities and equipment meet all applicable health and safety codes.

Revised Standard 702(a)(6) replaces current Interpretation 701-2(6). Consistent with language elsewhere, the concept of sufficiency has been added for greater clarity.

Revised Standard 702(a)(7) replaces current Interpretation 701-2(2) and is more specific in identifying the facilities required for any “in-house clinical programs” as well as identifying the purposes that those facilities should serve, such as assuring the ability to allow a clinical program to be conducted for the “competent and ethical representation of clients and meaningful instruction and supervision of students.” Clinical facilities, then, must allow for confidential client interviewing, work and meeting space, and security for client files.

Current Standard 703 has been moved into revised Standard 702(a)(8) and (9), and has been redrafted to conform in style with revised Standard 702. The recommended language links research and study space to fulfilling the requirements of the Standards and to carrying out the school’s educational program.

The second sentence of current Interpretation 701-1 has been moved into revised Standard 702(b) to make clear its mandatory nature and also to clarify the nature of the

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mandate; that is, that the law school must meet this requirement “consistent with applicable law.”

Current Interpretation 701-4 is now revised Interpretation 702-1 and has been rewritten to clarify the requirement and to address leasing, financing, renewal, termination, and foreclosure.

Current Interpretation 701-5 is now revised Interpretation 702-2. The change is made to clarify law school control of a law school’s facilities.

Revised Interpretation 702-3 is new and was added to clarify the requirements for class and seminar rooms.

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Chapter 8 has been deleted and the provisions in Chapter 8 have been relocated to other sections in the Standards, Rules, Interpretations, or Internal Operating Practices.

Current Standard 801, COUNCIL AUTHORITY
Current Standard 801, which describes the process for Council approval of amendments to Standards, Interpretations, and Rules, has been moved to Rule 56 in the revised Rules.

Current Standard 802, VARIANCE
Current Standard 802 and Interpretation 802-1 have been moved to Standard 107 in the revised Standards.

Current Interpretations 802-2 to 802-4 have been moved to Rule 25 in the revised Rules.

Current Standard 803, AMENDMENT OF STANDARDS, INTERPRETATIONS AND RULES
Current Standards 803(a), (b), and (c), which describes the process for review of proposed amendments by the ABA House of Delegates, have been moved to Rule 57 in the revised Rules.

Current Standard 803(d), which describes a process for submitting proposals for amendments to the Managing Director, has been moved to Rule 11 of the Internal Operating Practices (IOP). The revised IOP requires the Standards Review Committee to report its recommendations on any proposal to the Council but does not impose a time limit on its report.

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Conclusion

This regular review of the Standards and Rules of Procedure came at a time of change and stress for the legal profession and higher education. Changes in higher education, including a greater focus on outcomes rather than inputs, the increased importance of experiential learning, and the impact of technology on teaching and learning informed many of the revisions.

In the profession, the economic downturn had profound impacts on the practice of law and the availability of legal services to all those who need them. At a time when law school enrollments and graduates were at all-time highs, the job market contracted substantially. The combination of the cost of law school (most often financed with student loans) and declining job opportunities created a difficult environment for students, graduates, and law schools.

These forces and factors presented challenging issues for resolution as the Comprehensive Review progressed. As a result, the process took much longer than had been anticipated.

The end result is a set of Standards and Rules that are much improved over the current set. However, the process also made clear that, while it was time to bring the Comprehensive Review to conclusion, there is still work to do.

Respectfully submitted,

Hon. Solomon Oliver, Jr., Chair
Council of the Section of Legal Education and Admissions to the Bar
August 2014
Following a comprehensive review of the ABA Standards for Approval of Law Schools, the Council of the Section of Legal Education and Admissions to the Bar approved a complete set of revisions to the Standards.

In summary, the revisions achieved the following:

- Modified Standards to be more objective rather than subjective
- an objective standard requiring schools to operate (or remain) in compliance with the Standards is now used in the following Standards:
  - 101(a): basic requirements for approval
  - 105(b): acquiescence for major changes
  - 201(d): university policies
  - 201(e): responsibility of governing board
  - 202(a), (c), (d): sufficiency of resources
  - 313(c): degree programs in addition to the J.D.
  - 401: qualifications of faculty
  - 402: size of full-time faculty
  - 506: enrollment of non-degree candidates
  - 603(c): qualifications of library director
  - 701(a) and (b): facilities, equipment, and technology; general requirements
- Standard 601: general provisions – library
- Standard 604: library personnel
- in Standards where schools are required to have policies there is a new requirement that schools must adopt, publish, and adhere to those policies:
  - 207(b): accommodations
  - 308(a): sound academic standards, including those for good standing, academic integrity, graduation, and dismissal
  - 308(b): due process policies with regard to taking any action that adversely affects the good standing or graduation of a student.
  - 310(a): policies and procedures for determining the credit hours that it awards for coursework
  - 311(i): attendance policy
  - 404(a): responsibilities of full-time faculty
  - 510: student complaints
Highlighted reporting requirements
- Standard 104: moved current Interpretation 101-1, covering information that must be furnished to the Accreditation Committee and the Council, into a new Standard that provides that information must be complete, accurate and not be misleading
- Standard 509: strengthened reporting requirements regarding consumer information

Incorporated Student Learning Outcomes into the Standards
- Introduced student learning outcomes as output measures for the program of legal education, along with related Standards pertaining to the assessment of student learning, and the evaluation of the academic program, learning outcomes, and assessment methods.
- Standard 301(b): added a new requirement that schools must establish and publish each of the learning outcomes it seeks for its graduating students and for its program of legal education.
- Standard 314: added a new requirement that schools must apply both formative and summative assessment methods across the curriculum to provide meaningful feedback to students.
- Standard 315: added a requirement that schools conduct ongoing evaluation of the program of legal education, learning outcomes, and assessment methods.

Clarified/strengthened curricular requirements
- Standard 303: revised to require specific numbers of credit hours for professional responsibility instruction; legal writing instruction; and experiential courses
- Standard 304: new Standard defining simulation courses and law clinics
- Standard 305: clarified requirements regarding supervision of field placements
- Standard 305(e)(5) and (7): reduced from 4 to 3 credits the field placements that require periodic site visits and contemporaneous student reflection
- Standard 307(b): clarified the permissible number of credits for foreign study
- Standard 307(a)(2): clarified requirements regarding field placements in foreign countries
- Standard 308: clarified requirements regarding academic standards
- Standard 309: created new Standard on academic advising and support (moving two Interpretations into the Standard)
- Standard 310: added new Standard and guidance regarding definition of credit hour
- Standard 311(b): stated requirements for graduation in terms of credit hours rather than minutes
- Standard 311(c): provided an exception for extraordinary circumstances regarding completion of the J.D. degree

Acknowledged the three competencies from the MacCr rite Report - knowledge, skills and values
Modified existing rules to provide greater clarity regarding requirements of Standards

- Standard 101: clarified that the approving entity is the Council of the Section of Legal Education and Admissions to the Bar
- Standard 102: clarified requirements for provisional approval
- Standard 103: clarified requirements for full approval
- Standard 105: clarified requirements for major changes in program or structure

- Standard 107: clarified requirements for variances
- Standard 201: clarified requirements on law school governance by reworking and consolidating current Standard 204 (Governing Board of an Independent Law School), current Standard 205 (Governing Board and Law School Authority), current Standard 207 (Allocation of Authority between Dean and Faculty), and parts of current Standard 210 (Law School University Relationships) into new Standard on law school governance.
- Standard 203(c): clarified requirements for decanal appointments
- Clarified definition of full-time faculty member found in current Standard 402(b) and moved the definition to the Definitions section
- Standard 402: clarified requirements regarding size of faculty
- Standard 403: clarified instructional role of faculty
- Standard 404: clarified responsibilities of full-time faculty
- Standard 312: created separate Standard for and clarified requirements for reasonably comparable opportunities for all students [Current Standard 301(b) was moved to new Standard 312]
- Standard 501: clarified requirements for admission
- Standard 502: clarified education requirements for admission to law school
- Standard 504: clarified requirement regarding a law school's responsibility to advise students of character and fitness requirements
- Standard 505: clarified requirements for granting JD credit for prior law study
- Standard 506: clarified Standard for enrollment of non-degree candidates
- Standard 507: clarified responsibility of schools to demonstrate reasonable steps to minimize student loan defaults
- Standard 603(c): clarified requirements regarding education, skill and experience of library director
- Standard 701(a): clarified that facilities includes equipment and technology

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- Standard 701(a): clarified that facilities includes equipment and technology
Provided increased guidance in Standards
- Standard 106: created new Standard for separate locations and branch campuses
- Standard 204: restructured and revised the Standards relating to Self Study and Strategic Plan
- Interpretation 311-3: provided guidance regarding "extraordinary circumstances"
- Standard 504: changed title from “Character and Fitness” to “Qualifications for Admission to the Bar” and added requirement of a specific statement in law school application regarding admission to the bar
- Standard 508: added debt counseling in the Standard on student support services
- Interpretation 605-1: added guidance regarding library services
- Interpretation 701-1: added guidance on determining whether technology and technology support comply with Standard 701.

Streamlined the sabbatical review process
- Standard 204: restructured and revised the Standards relating to Self Study and Strategic Plan

Implemented directions of the Council to review three special committee reports
- Incorporated student learning outcomes into the Standards
- Increased clarity (transparency) in the Standards
- Made recommendations regarding security of position

Responded to changes and requirements in DOE regulations
- Standard 306(g) and Interpretation 306-2: clarified requirements for verifying the identity of students in distance education courses
- Standard 310: added new Standard and guidance regarding definition of credit hour
- Standard 509(c): added new Standard on transfer credit
- Standard 510: created a new Standard that clarifies the responsibility of law schools to maintain records of student complaints and complies with Department of Education requirements that the Council’s requirement be specifically stated in the Standards

Addressed changes in legal education
- Standard 106: clarified requirements regarding branch campuses
- Standard 306: increased permissible number of distance education credits and the number that can be taken in one semester
- Chapter 3: added new Section to address student learning outcomes
- Standard 505: clarified rules for granting of J.D. credit for prior law study
- Standard 606: clarified requirements regarding the library collection
- Interpretation 701-1: clarified Standard regarding technological capacities

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- Interpretation 701-1: clarified Standard regarding technological capacities
Provided schools with increased flexibility
- Standard 107: modified Standard on variances to emphasize experimentation
- Standard 306: increased permissible number of distance education credits and the number that can be taken in one semester
- Standard 311(c): provided an exception for extraordinary circumstances regarding completion of the J.D. degree
- Current Interpretations 402-1 and 402-2: deleted calculation of student-faculty ratio
- Standard 501(c): deleted requirement in current Standard 505 that a previously disqualified student must obtain a letter from the disqualifying school to apply to a new school if two years have not elapsed
- Standard 606: provided greater flexibility on library collection with greater emphasis on reliable access

Increased consumer information
- Standard 509(b)(3): strengthened reporting requirements regarding conditional scholarships
- Standard 509(b)(7): strengthened reporting requirements regarding employment outcomes
- Standard 509(c): added new Standard on transfer credit
- Standard 510: created a new Standard that clarifies the responsibility of law schools to maintain records of student complaints and complies with Department of Education requirements that the Council’s requirement be specifically stated in the Standards

Improved structure of Standards
- Reorganized Chapter 2 to provide better guidance and clarity
- Reorganized Chapter 7
- Moved the requirements for variances from Chapter 8 to Chapter 1
- Moved interpretations relating to variances from Chapter 8 into Rules
- Deleted Chapter 8 (moved provisions to Chapter 1, Rules and IOPs)

Moved Interpretations into Standards where substance of the Interpretation belonged in the Standards [first reference is to current Standards; second is to new Standards]
- 101-1 to 104
- 101-2 to 101(b)
- 102-2 incorporated into 102(a)
- 102-3 to 102(d)
- 102-5 and 102-9 to 102(g)
- 102-6 to 102(e)
- 102-7 to 102(f)
- 105-1 to 105(a)
- 105-2, 3, 4, 5 replaced by new Standard 106
- 105-6 to Rules
103A

- 802-1 to 107(a)
- 802-2, 3, 4 to Rules
- 802-5 to 107(c)
- 301-4 incorporated into 312
- 302-8 to 315
- 306-3 to 306(a)
- 306-4 incorporated into 306(a) and (d)
- 306-5 and 306-6 to 306(c)
- 303-2 to 309(a)
- 303-3 to 309(b)
- 304-4 to 311(e)
- 304-6 to 311(f)
- 304-7 to 305(d)
- 402(b) to definitions
- 601-1 moved to 606-4
- 606-5 to 606(b)

Moved Standards that provided guidance into Interpretations
- 305(e)(5): last sentence moved to 305-1
- 306(b): moved 306-1

Eliminated Standards and Interpretations that are unenforceable, unnecessary, unclear, or repetitive [current Standard references]
- 102-4; 102-8; 102-10
- 103-1
- 201-2
- 204-1
- 209
- 301-1; 301-2; 301-5
- 302-2 to 9
- 304-1; 304-4
- 305-4(b); 305-5
- 306-1; 306-2; 306-7; 306-8; 306-9
- 402-1; 402-2
- 403-1
- 501-2; 501-4
- 503-3; 503-4
- 505-1; 505-2
- 603-1 to 603-4
- 606-2; 606-6; 606-7
- 702-1

2. Approval by Submitting Entity.
At its meeting in March 2014, the Council approved the vast majority of the revisions that had been circulated for Notice and Comment. In addition, the Council approved several additional matters for Notice and Comment. After reviewing the comments received on the matters circulated for comment in March 2014, the Council made final determinations on the recommendations at its meeting on June 6, 2014.

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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
   The revisions modify the existing ABA Standards 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 changes to the ABA Standards for Approval of Law Schools. The Council and the Managing Director’s Office will prepare guidance memoranda and training materials regarding the revised Standards.

8. Cost to the Association. (Both direct and indirect costs)
   Not applicable

9. Disclosure of Interest. (If applicable)
   Not applicable

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

Barry A. Currier, Managing Director  
American Bar Association  
Section of Legal Education and Admissions to the Bar  
321 N. Clark St., 21st floor  
Chicago, IL 60654-7598  
Ph: (312) 988-6744 / Cell: (310) 400-2702  
Email: barry.currier@americanbar.org

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

The Honorable Ruth V. McGregor  
7601 North Central Ave., Unit 23  
Phoenix, AZ 85020  
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1909 K. Street, N.W.  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

Following a comprehensive review of the ABA Standards for Approval of Law Schools, the Council of the Section of Legal Education and Admissions to the Bar approved a complete set of revisions to the Standards.

In summary, the revisions achieved the following:
- Modified Standards to be more objective rather than subjective
- Highlighted reporting requirements
- Incorporated student learning outcomes into the Standards
- Clarified/strengthened curricular requirements
- Acknowledged the three competencies from the MacCrate Report – knowledge, skills, and values
- Modified existing rules to provide greater clarity regarding requirements of Standards
- Provided increased guidance in Standards
- Streamlined the sabbatical review process
- Implemented directions of the Council to review three special committee reports
- Responded to changes and requirements in Department of Education regulations
- Addressed changes in legal education
- Provided schools with increased flexibility
- Increased consumer information
- Improved structure of Standards
- Moved Interpretations into Standards where substance of the Interpretation belonged in the Standards
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- Eliminated Standards and Interpretations that are unenforceable, unnecessary, unclear, or repetitive

2. Summary of the Issue that the Resolution Addresses

In August 2008, the Council of the Section of Legal Education and Admissions to the Bar directed its Standards Review Committee to conduct a comprehensive review of the American Bar Association’s Standards and Rules of Procedure for Approval of Law Schools. The Committee was charged with reviewing the recommendations of the 2007 report of the Accreditation Task Force as well as the recommendations of the 2008 reports of the special committees on Transparency, Security of Position, and Outcome Measures. During the comprehensive review, the Standards Review Committee has engaged in a number of outreach efforts, held open meetings, and held hearings preliminary to the usual Notice and Comment hearing process.

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The Committee was charged with reviewing the recommendations of the 2007 report of the Accreditation Task Force as well as the recommendations of the 2008 reports of the special committees on Transparency, Security of Position, and Outcome Measures.

These reports encouraged the Committee to include in its review the following:

- Consider whether the Standards and Interpretations are appropriately focused to accomplish the goals of accreditation as required by the U.S. Department of Education and whether they avoid unnecessarily micromanaging individual schools.
- Review the Standards to ensure that they are consistent with a conception of the Standards as a set of minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education.
- Re-examine the current Standards and reframe them to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures.
- Consider increased transparency regarding availability of documents, self-studies and strategic plans, and expanding consumer information.
- Consider whether the alternative set of Standards and Interpretation regarding academic freedom, faculty governance, and the ability to attract and retain competent faculty developed by the Special Committee on Security of Position would better serve the interests underlying the existing Standards.

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

The revised Standards present a comprehensive, updated set of regulations governing ABA-approved law schools.

4. Summary of Minority Views

During the Notice and Comment period the Council received a number of comments opposing proposed alternatives to current Standard 405 (Professional Environment). A majority of the Council expressed dissatisfaction with current Standard 405. However, neither of the alternative proposals that the Council had circulated for Notice and Comment were acceptable to a majority of the Council. Both of those proposals were loudly criticized by law school faculty during the comment period. Because no proposal for change garnered a majority of the Council, current Standard 405 was not amended.

Another issue that generated a significant number of comments was a possible change to Interpretation 301-6 on bar passage. No proposed change to the current rule was ever circulated for Notice and Comment. The Interpretation has been moved to become Standard 316 but there has been no change in the current rule on bar passage.

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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 to supplant the 2013 ABA Rules of Procedure for Approval of Law Schools.
REvised RULES OF PROCEDURE
FOR APPROVAL OF LAW SCHOOLS
August 2014

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I. Scope and Authority

Rule 1: Scope and Purpose

These Rules of Procedure govern the accreditation process as carried out by the Council, Accreditation Committee, Managing Director, and Appeals Panel. They establish processes relating to accreditation that further the purposes of the Standards and promote consistency, fairness, and transparency.

Rule 2: Council Responsibility and Authority with Regard to Accreditation Status

The Council has primary authority to determine compliance with the Standards. It has delegated certain authority to the Accreditation Committee as stated in Rule 3. The Council has authority to:

(a) grant or deny an application of a law school for provisional approval or full approval;
(b) withdraw provisional or full approval;
(c) grant or deny applications for acquiescence in a major change, as provided in the Standards;
(d) grant or deny applications for variances;
(e) approve or deny approval of a teach-out plan;
(f) impose sanctions and/or direct specific remedial action;
(g) consider appeals from decisions of the Accreditation Committee; and
(h) set fees for services and activities related to accreditation.

Rule 3: Accreditation Committee Responsibility and Authority

The responsibility and authority of the Accreditation Committee is delegated to it by the Council. The Committee has jurisdiction to make recommendations to the Council concerning:

(1) an application for provisional or full approval;
(2) withdrawal of provisional or full approval;
(3) an application for acquiescence in a major change under Rules 29(a)(1) through 29(a)(13);
(4) an application for a variance; and

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(4) an application for a variance; and
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(5) approval or denial of a teach-out plan.

(b) The Committee has jurisdiction to make decisions concerning all matters other than those specified in Rule 3(a), including:

(1) determining compliance with the Standards of any provisionally or fully approved law school in connection with a site evaluation, a complaint, a response to a request for information, a fact-finding report, interim monitoring of accreditation status, or any other circumstances as provided in these Rules;

(2) granting or denying an application for approval of a foreign program, and the continuance of a foreign program as set forth in the Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools; the Criteria for Approval of Foreign Semester and Year-Long Programs; and the Criteria for Accepting Credit for Student Study at a Foreign Institution; and

(3) granting or denying an application for acquiescence in a major change under Rule 29(a)(14) through 29(a)(17).

(c) The Committee has jurisdiction to impose sanctions and/or direct specific remedial action, or to recommend to the Council that it impose sanctions and/or direct specific remedial action, in accordance with Rules 16 to 18.

(d) The Committee has the authority to create subcommittees and task forces as it deems appropriate. Subcommittees do not have the authority to take action on behalf of the Accreditation Committee but have the authority to make recommendations where appropriate.

Rule 4: Appeals Panel Authority

An Appeals Panel has authority to consider appeals of the following decisions of the Council:

(a) Denial of provisional approval;

(b) Denial of full approval; or

(c) Withdrawal of provisional or full approval.
Rule 5: Site Evaluations

(a) A site evaluation of a law school or of a program is a comprehensive examination of the law school or program conducted by one or more persons qualified to conduct site evaluations who:

(1) Review documents relating to the law school or program;
(2) Perform an on-site evaluation of the law school or program; and
(3) Prepare a factual report to be used by the Committee for purposes of making decisions or recommendations relating to accreditation status of the law school or program.

(b) Site evaluations of law schools shall be conducted according to the following schedule:

(1) A site evaluation of a fully approved law school shall be conducted in the third year following the granting of full approval and every seventh year thereafter.
(2) A site evaluation of a provisionally approved law school shall be conducted in accordance with subsection (g) below.
(3) A site evaluation shall be conducted upon application by a law school for provisional approval.

(c) The Council or Committee may order additional site evaluations of a law school when special circumstances warrant.

(d) In extraordinary circumstances, a site evaluation of a law school may be postponed upon the request of the law school. In such cases, the postponement shall be at the discretion of the Managing Director in consultation with the chair of the Committee and shall not exceed one year.

(e) When a site evaluation of a law school is required under the Standards or these Rules, the Managing Director shall make the following arrangements:

(1) Schedule the site evaluation during the regular academic year, at a time when classes in the program of legal education are being conducted.
(2) Appoint a qualified site evaluation team of sufficient size to accomplish the purposes of the site evaluation, and appointing a chair of the site evaluation team;
(3) Provide the site evaluation team all relevant documents relating to Accreditation
Committee and Council action regarding the law school;

(4) Provide the site evaluation team with any third-party comments received by the Managing Director’s Office regarding the law school’s compliance with the Standards;

(5) Provide the site evaluation team all complaints received under Rule 43 and not dismissed by the Managing Director or the Accreditation Committee; and

(6) Provide the site evaluation team with any necessary or appropriate directions or instructions.

(f) In connection with a site evaluation of a law school, the Managing Director shall direct the law school to provide the following documents to the site evaluation team before the site evaluation:

(1) All completed forms and questionnaires, as adopted by the Council, and

(2) In the case of a law school applying for provisional or full approval, the completed application for provisional or full approval.

(g) Site evaluations for provisionally approved law schools shall be conducted as follows:

(1) In years two and four, and upon application for full approval, the law school shall be inspected in accordance with the rules for site evaluation of fully approved law schools.

(2) The Accreditation Committee has the discretion to order a site evaluation in any other year. The Accreditation Committee may direct that the additional site evaluation be limited in scope.

(h) Following a site evaluation, the site evaluation team shall prepare a written report on facts and observations that will enable the Committee to determine compliance with the Standards or other issues relating to the accreditation status of the law school. A site evaluation report shall not contain conclusions regarding compliance with Standards or make recommendations for action by the Committee or the Council.

(i) The Managing Director shall review the report submitted by a site evaluation team and ensure that it complies with (h). The Managing Director shall then transmit the report to the president and the dean in order to provide an opportunity to make factual corrections and comments. The law school shall be given at least 30 days to prepare its response to the report, unless the law school consents to a shorter time period. The 30 day period shall run from the date on which the Managing Director transmits the report to the law school.

(j) Following receipt of the law school’s response to the site evaluation report, the Managing Director shall forward a copy of the report with the law school’s response to members of the Accreditation Committee and the site evaluation team.
Site evaluations regarding foreign programs shall be conducted as provided under the:

1. Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools;
2. Criteria for Approval of Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools.

Rule 6: Interim Monitoring of Accreditation Status

(a) The Accreditation Committee shall monitor the accreditation status of law schools on an interim basis between site evaluations. In its interim monitoring of a law school's accreditation status, the Committee shall use a law school's annual questionnaire submissions, other information requested by the Committee, and information otherwise deemed reliable by the Committee for its review.

(b) In conducting interim monitoring of law schools, the Committee shall consider at a minimum:

1. Resources available to the law school;
2. Efforts and effectiveness in facilitating student career placement;
3. Bar passage; and
4. Student admissions including student credentials, size of enrollment, and academic attrition.

Rule 7: Acquisition of Additional Information by the Accreditation Committee and Council

At any time in carrying out their responsibilities under the Standards and Rules, the Committee, the Council, or the Managing Director in consultation with the Chair of the Committee or the Council, may require a law school to provide information or respond to an inquiry.

Rule 8: Submission of Information

In any case in which the Committee, the Council, or the Managing Director requests information from a law school pursuant to Rule 7, the law school shall be given a date certain to provide the information.

Rule 9: Appointment of a Fact Finder

(a) One or more qualified persons may be appointed as fact finders for the specific purpose of gathering information to enable the Committee or the Council to determine a law school's
compliance with a Standard. A fact finder may be required at any time at the direction of the Council, Committee, or Managing Director, and may be required under Rules 29(c) and 30(c) in connection with a law school’s application for acquiescence in a major change; under Rule 29(d) to assess compliance subsequent to the effective date of acquiescence in a major change; under Rule 33(b) in connection with a request for a variance; and under Rule 44(b) in connection with a complaint.

(b) The appointment of a fact finder shall include the following:

1. A statement of the Standards, Rules, or other requirements to which the appointment relates;
2. A statement of questions or issues for determination by the fact finder;
3. A statement of relevant documents or information provided to the fact finder; and
4. A date by which the fact finding report shall be submitted.

(c) The fact finder shall prepare a written report on facts and observations that will enable the Committee to determine compliance with a Standard or any other issue before the Committee, or determine appropriate action in response to an actual or potential violation of a Standard. A fact-finding report shall not contain conclusions regarding compliance with the Standards or make recommendations for action by the Committee.

(d) The Managing Director shall review the report submitted by a fact finder and ensure that it complies with (c). The Managing Director shall then transmit the report to the dean in order to provide an opportunity for the law school to make factual corrections and comments. The law school shall be given at least 30 days to prepare its response to the report, unless the law school consents to a shorter time period. The 30 day period shall run from the date on which the Managing Director transmits the report to the law school.

Rule 10: Notice of Accreditation Decision by Other Agency

(a) An approved law school shall promptly inform the Managing Director of the following actions with respect to the law school:

1. Pending or final action by State agency to suspend, revoke, withdraw, or terminate legal authority to provide post-secondary education;
2. Decision by recognized agency to deny accreditation or pre-accreditation;
3. Pending or final action by recognized agency to suspend, revoke, withdraw, or terminate accreditation or pre-accreditation; or
4. Probation or equivalent status imposed by recognized agency.

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2. Decision by recognized agency to deny accreditation or pre-accreditation;
3. Pending or final action by recognized agency to suspend, revoke, withdraw, or terminate accreditation or pre-accreditation; or
4. Probation or equivalent status imposed by recognized agency.
(b) If the law school is part of a university, then the law school shall promptly inform the Managing Director of the above actions with respect to the university or any program offered by the university.

c) A law school must complete and submit the Notice of State or Other Recognized Agency Action Form.

d) The Council will not grant approval to a law school if the Council knows, or has reasonable cause to know, that the law school is subject to the actions in subsection (a), unless the Council can provide a thorough and reasonable explanation, consistent with the Standards, why the action of the other body does not preclude the Council’s grant of approval. Such explanation will be provided to the Secretary of the Department of Education.

e) If the Council learns that an approved law school is the subject of an adverse action by another recognized accrediting agency or has been placed on probation or an equivalent status by another recognized agency, the Council will promptly review its approval of the law school to determine if it should also take adverse action or place the law school on probation.

(f) The Council will, upon request, share with other appropriate recognized accrediting agencies and recognized State approval agencies information about the accreditation status of a law school and any adverse actions it has taken against a law school.

Rule 11: Failure to Provide Information or Cooperate with the Gathering of Information

(a) The Committee or Council may find that a law school has:

(1) Failed to provide information required to be provided under the Standards;

(2) Failed to comply with a request for information under these Rules of Procedure;

(3) Provided information to the Committee or the Managing Director’s Office that the Committee has reason to believe is false or misleading; or

(4) Failed to cooperate with a site evaluation, a fact finder, or other process for the gathering of information under the Standards or these Rules of Procedure.

(b) If the Committee or Council makes a finding under (a) above, then the Committee or Council may direct that representatives of the law school, including any person specifically designated by the Committee or Council, appear at a hearing to determine whether to impose sanctions and/or direct specific remedial action.
III. Action on Information

Rule 12: Proceedings to Determine Compliance with Standards in General

(a) In a proceeding to determine accreditation status or compliance with the Standards within the jurisdiction of the Committee under Rule 3, the Committee may:

(1) Conclude that the law school is in compliance with a Standard or all of the Standards;

(2) Request or gather further information that will enable the Committee to determine compliance with one or more Standards;

(3) Conclude that the Committee has reason to believe that a law school has not demonstrated compliance with the Standards;

(4) Conclude that the law school is not in compliance with a Standard; or

(5) Appoint a fact-finder.

(b) In the event the Committee requests or gathers further information or appoints a fact-finder in accordance with 12(a) upon receipt of the law school’s response or any fact-finding report, the Committee must find the law school in compliance or not in compliance with the Standards for which information was requested or gathered, absent clearly articulated special circumstances. In the event of such special circumstances, the Committee may request or gather further information pursuant to 12(a)(2), 12(a)(3), or 12(a)(5).

Rule 13: Determinations of Compliance

(a) A determination that the law school is in compliance with all of the Standards means that the law school remains an approved law school.

(b) In finding a law school in compliance with a Standard, the Committee may couple the finding with a statement calling the law school’s attention to the requirements of that Standard when the Committee has reason to believe that the law school might, at some time before the next scheduled site evaluation, no longer be in compliance with the Standard in question.

(c) The approval status of a law school is not affected while an appeal from, or review of, a decision or recommendation of the Committee or Council is pending.

Rule 14: Actions on Determinations of Noncompliance with a Standard

(a) Following a determination by the Committee of non-compliance with a Standard in accord with Rule12(a)(4), the Committee shall:
(1) Require the law school to bring itself into compliance and submit information by a specific date to demonstrate that it has come into compliance with the Standard; and
(2) Direct that representatives of the law school, including any person specifically designated by the Committee, appear at a hearing to determine whether to impose sanctions in connection with the law school's non-compliance with the Standard.

(b) The period of time by which a law school is required to demonstrate compliance with a Standard shall not exceed two years from the date of determination of noncompliance, except as provided for in subsection (c).

(c) Upon request of the law school and for good cause shown, the Committee may extend the date of compliance or may recommend that the Council extend the date of compliance.

Rule 15: Reconsideration; Right to Appeal

(a) A law school does not have the right to request reconsideration of a decision or recommendation made by the Accreditation Committee or to request reconsideration of a decision made by the Council.

(b) A law school has a right to appeal a decision of the Accreditation Committee as provided in Rule 23.

(c) A law school has a right to appeal a decision of the Council as provided in Rule 36.

IV. Sanctions

Rule 16: Sanctions for Noncompliance with a Standard

(a) Conduct for which sanctions may be imposed upon a law school includes, without limitation:

(1) Substantial or persistent noncompliance with one or more of the Standards;

(2) Failure to present a reliable plan to bring the law school into compliance with the Standards;

(3) Failure to provide information or to cooperate in a site evaluation as required by the Standards;

(4) Making misrepresentations or engaging in misleading conduct in connection with consideration of the law school's status by the Committee or the Council, or in public statements concerning the law school's approval status;

(5) Initiating a major change or implementing a new program without having obtained the prior approval or acquiescence required by the Standards; or

(1) Require the law school to bring itself into compliance and submit information by a specific date to demonstrate that it has come into compliance with the Standard; and

(2) Direct that representatives of the law school, including any person specifically designated by the Committee, appear at a hearing to determine whether to impose sanctions in connection with the law school's non-compliance with the Standard.

(b) The period of time by which a law school is required to demonstrate compliance with a Standard shall not exceed two years from the date of determination of noncompliance, except as provided for in subsection (c).

(c) Upon request of the law school and for good cause shown, the Committee may extend the date of compliance or may recommend that the Council extend the date of compliance.

Rule 15: Reconsideration; Right to Appeal

(a) A law school does not have the right to request reconsideration of a decision or recommendation made by the Accreditation Committee or to request reconsideration of a decision made by the Council.

(b) A law school has a right to appeal a decision of the Accreditation Committee as provided in Rule 23.

(c) A law school has a right to appeal a decision of the Council as provided in Rule 36.
(6) Provision of incomplete, inaccurate or misleading consumer information in violation of Standard 509.

(b) Sanctions may include any or all of the following:

(1) A monetary payment;

(2) A requirement that the law school refund all or part of tuition or fees paid by students;

(3) Public censure;

(4) Private censure;

(5) Publication or distribution of an apology or corrective statement by the law school;

(6) A prohibition against initiating new programs for a specific period;

(7) Probation for a specific period or until specific conditions are fulfilled; or

(8) Withdrawal of provisional or full approval.

(c) The Committee may itself impose any sanction under (d), except for sanctions under (7) or (8), which the Committee may recommend to the Council.

(d) Any sanction under (e) may be imposed, even if the law school has, at the time of the decision or recommendation, ceased the actions that are the basis for sanctions or otherwise brought itself into compliance with the Standards.

(e) The Committee will consider aggravating and mitigating circumstances in determining the appropriate sanction, including the amount of a monetary payment.

(1) Aggravating circumstances are considerations or factors that may justify an increase in the degree or severity of the sanction to be imposed and include, without limitation:

(i) prior history of violations;

(ii) degree of negligence, recklessness, or knowledge;

(iii) effort to conceal;

(iv) dishonest or selfish motive;

(v) a pattern of misconduct;

6 (6) Provision of incomplete, inaccurate or misleading consumer information in violation of Standard 509.

(6) Aggravating circumstances are considerations or factors that may justify an increase in the degree or severity of the sanction to be imposed and include, without limitation:

(i) prior history of violations;

(ii) degree of negligence, recklessness, or knowledge;

(iii) effort to conceal;

(iv) dishonest or selfish motive;

(v) a pattern of misconduct;
(vi) bad faith obstruction of an investigation or sanction proceeding by failing to comply with requests of the Managing Director’s Office, a Fact Finder, or rules of a sanction proceeding;

(vii) submission of false or misleading evidence, false or misleading statements, or other deceptive practices during the investigation process or sanction proceeding;

(viii) refusal to acknowledge wrongful nature of conduct;

(ix) injury to former, current, or prospective law students;

(x) apparent amount of monetary, strategic, or reputational gain;

(xi) failure to have sufficient systems in place to ensure compliance, including the law school dean’s lack of oversight;

(xii) institutional incentive structures that may contribute to noncompliance; and

(xiii) failure to enquire or investigate when circumstances warrant enquiry or investigation.

Mitigating circumstances are any considerations or factors that may justify withholding or reducing a sanction and include, without limitation:

(i) absence of a prior history of violations;

(ii) degree of negligence, recklessness, or knowledge;

(iii) apparent lack of monetary, strategic, or reputational gain

(iv) self-reporting of violation;

(v) timely good faith effort to rectify consequences of violation;

(vi) full and free disclosure to and cooperation with Managing Director’s Office, cooperation with fact finder, or cooperative attitude toward sanction proceedings; and

(vii) imposition of other sanctions.

Rule 17: Sanctions for Failure to Cure Noncompliance with a Standard

If, following a determination by the Committee that a law school is not in compliance with a Standard, the law school fails to bring itself into compliance within the time specified by the
Committee, including any extension for good cause, or fails to complete remedial action directed under 16(c) or fails to comply with sanctions imposed by the Committee or Council under 16(d), the Committee shall impose or recommend that the Council impose further remedial action or sanctions as provided for in 16(c) and 16(d) or recommend that the Council extend the period for the law school to bring itself into compliance.

Rule 18: Monitoring and Enforcing Compliance with Sanctions

(a) The Committee shall monitor the law school’s compliance with any requirements for remedial action, any sanctions, or any requirements of probation imposed under these Rules. If the Committee concludes that the law school is not complying with the sanctions that have been imposed, or not making adequate progress toward bringing itself into compliance with the Standards, or not fulfilling the requirements of its probation, the Committee may impose or recommend that the Council impose additional sanctions referred to in 16(d). The Committee may itself impose any sanction under 16(d), except for sanctions under (7) or (8).

(b) If a law school has been placed on probation, the law school shall demonstrate compliance with the Standards by the end of the period fixed for probation. If the law school fails to demonstrate compliance, then the Committee shall:

(1) Recommend that the Council withdraw approval; or
(2) Recommend that, for good cause shown, the Council extend the period for the law school to bring itself into compliance.

(c) If a law school has been placed on probation, and the law school demonstrates compliance with the Standards by the end of the period fixed for probation, then the Committee shall recommend to the Council that probationary status be removed.

V. Hearings and Meetings of the Accreditation Committee

Rule 19: Accreditation Committee Consideration

(a) The Accreditation Committee shall consider the status of a law school under Part III or an application from a law school under Part V based on a record consisting of the following, as appropriate:

(1) Any fact finder’s report relating to the subject matter under consideration and any response from the law school;
(2) The most recent site evaluation report and any response from the law school;
(3) The most recent site evaluation questionnaire;
(4) The most recent annual questionnaire;
(5) Any letters reporting Committee or Council decisions written subsequent to the most recent site evaluation report, and any responses of the law school;

(6) The application for provisional or full approval;

(7) The application for acquiescence in a major change;

(8) The application for a variance of a standard; and

(9) Any other information that the Managing Director and the Chair determine relevant to the matter under consideration.

(b) The Committee shall make findings of fact and state conclusions with respect to the matter under consideration. If the matter falls within the provisions of Rule 3(a), the Committee shall make recommendations to the Council.

Rule 20: Attendance at Accreditation Committee Meetings and Hearings

(a) A law school has a right to have representatives of the law school, including legal counsel, appear before the Committee at a hearing regarding (i) the law school’s application for provisional approval, (ii) the law school’s application for full approval, (iii) the law school’s application for acquiescence in a major change under Rule 29(a)(1) – 29(a)(13), or at a hearing to determine whether to impose sanctions and/or direct specific remedial action on the part of the law school.

(b) The Managing Director in consultation with the Chair of the Committee may set reasonable limitations on the number of law school representatives that may appear and on the amount of time allotted for the appearance.

(c) Except as permitted in subsection (a), a law school does not have a right to appear at a meeting of the Accreditation Committee.

(d) The Managing Director or designee and any additional staff designated by the Managing Director shall be present at Accreditation Committee meetings and hearings. Legal Counsel for the Section may also be present at Accreditation Committee meetings and hearings.

Rule 21: Hearings Before the Accreditation Committee

(a) In any hearing held in accordance with Rules 11(b) or 14(a)(2), the Managing Director shall give the law school at least 30 days’ notice of the Committee hearing. The notice shall specify the apparent non-compliance with the Standards or the apparent failure to provide information or to cooperate with the gathering of information and shall state the time and place of the hearing. For good cause shown, the Managing Director in consultation with the Chair may grant the law school additional time, not to exceed 30 days. Both the notice and the request for extension of time must be in writing.

(b) The Committee shall make findings of fact and state conclusions with respect to the matter under consideration. If the matter falls within the provisions of Rule 3(a), the Committee shall make recommendations to the Council.

Rule 20: Attendance at Accreditation Committee Meetings and Hearings

(a) A law school has a right to have representatives of the law school, including legal counsel, appear before the Committee at a hearing regarding (i) the law school’s application for provisional approval, (ii) the law school’s application for full approval, (iii) the law school’s application for acquiescence in a major change under Rule 29(a)(1) – 29(a)(13), or at a hearing to determine whether to impose sanctions and/or direct specific remedial action on the part of the law school.

(b) The Managing Director in consultation with the Chair of the Committee may set reasonable limitations on the number of law school representatives that may appear and on the amount of time allotted for the appearance.

(c) Except as permitted in subsection (a), a law school does not have a right to appear at a meeting of the Accreditation Committee.

(d) The Managing Director or designee and any additional staff designated by the Managing Director shall be present at Accreditation Committee meetings and hearings. Legal Counsel for the Section may also be present at Accreditation Committee meetings and hearings.

Rule 21: Hearings Before the Accreditation Committee

(a) In any hearing held in accordance with Rules 11(b) or 14(a)(2), the Managing Director shall give the law school at least 30 days’ notice of the Committee hearing. The notice shall specify the apparent non-compliance with the Standards or the apparent failure to provide information or to cooperate with the gathering of information and shall state the time and place of the hearing. For good cause shown, the Managing Director in consultation with the Chair may grant the law school additional time, not to exceed 30 days. Both the notice and the request for extension of time must be in writing.
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(b) In any hearing before the Committee, the Managing Director shall provide the Committee with all appropriate questionnaires, reports, correspondence and any other information that the Managing Director and the Chair determine relevant to the hearing.

(c) If the Committee determines following a hearing that a law school is not in compliance with a Standard then the Committee may:

1. Impose sanctions, or recommend that the Council impose sanctions, on the law school; and/or
2. Direct specific remedial action on the part of the law school.

(d) Upon receipt of information demonstrating compliance with the Standard, the Committee may at any time find that the law school is in compliance and cancel the hearing.

VI. Hearings and Meetings of the Council

Rule 22: Council Consideration of Recommendation of Accreditation Committee

(a) A law school has a right to have representatives of the law school, including legal counsel, appear before the Council at a Council hearing following a Committee recommendation regarding (i) the law school's application for provisional approval, (ii) the law school's application for full approval, (iii) the law school's application for acquiescence in a major change under Rule 29(a)(1) – 29(a)(13), and (iv) the Committee's recommendation to impose sanctions following a hearing held in accordance with Rules 11(b) or 14(a)(2).

(b) The Managing Director in consultation with the Chair of the Council may set reasonable limitations on the number of law school representatives that may appear at a meeting and on the amount of time allotted for the appearance.

(c) Except as permitted in subsection (a), a law school does not have a right to appear at a Council meeting, hearing or proceeding on any matter related to the accreditation of a law school.

(d) The Chair of the Council may invite the Chair of the Accreditation Committee to appear at the hearing, if the Chair determines that such person could reasonably be expected to provide information helpful to the Committee. The Chair of the Accreditation Committee may not present new evidence unless the law school has the opportunity to respond to that new evidence.

(e) The Managing Director or designee and any additional staff designated by the Managing Director shall be present at Accreditation Committee meetings and hearings. Legal Counsel for the Section may also be present at Accreditation Committee meetings and hearings.

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(b) In any hearing before the Committee, the Managing Director shall provide the Committee with all appropriate questionnaires, reports, correspondence and any other information that the Managing Director and the Chair determine relevant to the hearing.

(c) If the Committee determines following a hearing that a law school is not in compliance with a Standard then the Committee may:

1. Impose sanctions, or recommend that the Council impose sanctions, on the law school; and/or
2. Direct specific remedial action on the part of the law school.

(d) Upon receipt of information demonstrating compliance with the Standard, the Committee may at any time find that the law school is in compliance and cancel the hearing.

VI. Hearings and Meetings of the Council

Rule 22: Council Consideration of Recommendation of Accreditation Committee

(a) A law school has a right to have representatives of the law school, including legal counsel, appear before the Council at a Council hearing following a Committee recommendation regarding (i) the law school's application for provisional approval, (ii) the law school's application for full approval, (iii) the law school's application for acquiescence in a major change under Rule 29(a)(1) – 29(a)(13), and (iv) the Committee's recommendation to impose sanctions following a hearing held in accordance with Rules 11(b) or 14(a)(2).

(b) The Managing Director in consultation with the Chair of the Council may set reasonable limitations on the number of law school representatives that may appear at a meeting and on the amount of time allotted for the appearance.

(c) Except as permitted in subsection (a), a law school does not have a right to appear at a Council meeting, hearing or proceeding on any matter related to the accreditation of a law school.

(d) The Chair of the Council may invite the Chair of the Accreditation Committee to appear at the hearing, if the Chair determines that such person could reasonably be expected to provide information helpful to the Committee. The Chair of the Accreditation Committee may not present new evidence unless the law school has the opportunity to respond to that new evidence.

(e) The Managing Director or designee and any additional staff designated by the Managing Director shall be present at Accreditation Committee meetings and hearings. Legal Counsel for the Section may also be present at Accreditation Committee meetings and hearings.
Rule 23: Council Consideration of Appeal from Accreditation Committee Decision

(a) A law school may appeal a decision of the Committee by filing a written appeal within 30 days after the date of the letter reporting the Committee’s decision.

(b) The Council shall consider the appeal promptly and, when feasible, at its next regularly scheduled meeting.

(c) A law school shall not have a right to appear before the Council in connection with the appeal.

Rule 24: Evidence and Record for Decision

(a) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council shall adopt the Committee’s findings of fact unless the Council determines that the findings are not supported by substantial evidence in the record.

(b) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the record on which the Council shall make its decision shall be the following:

1. The record before the Committee on which the Committee based its decision or recommendation;
2. The letter setting forth the Committee’s decision or recommendation;
3. The written appeal by the law school, if applicable;
4. Any written submission by the Committee in response to an appeal, if applicable;
5. Any testimony of the law school in a hearing or an appearance before the Council.

(c) Except as specifically provided otherwise in these Rules, the law school shall not present any evidence to the Council that was not before the Committee at the time of the Committee’s decision or recommendation.

(d) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council will accept new evidence submitted by the law school only if the Executive Committee of the Council determines that:

1. The evidence was not presented to the Committee;
2. The evidence could not reasonably have been presented to the Committee;
3. A reference back to the Committee to consider the evidence would, under the circumstances, present a serious hardship to the law school;
The evidence was submitted at least 14 days in advance of the Council meeting;

and

The evidence was appropriately verified at the time of submission.

Rule 25: Decisions by the Council

(a) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council shall give substantial deference to the conclusions, decisions, and recommendations of the Committee.

(b) In any action on a recommendation of the Committee or in any appeal from a Committee decision, the Council may, as appropriate:

1. Affirm the Committee’s decision or recommendation;

2. Amend the Committee’s decision or recommendation, including imposing any sanction regardless of whether the Committee has imposed or recommended any sanction;

3. Reverse the Committee’s decision or recommendation; or

4. Remand the matter to the Committee for further proceedings.

(c) If the Council remands a decision for further consideration or action by the Committee, the Council shall identify specific issues that the Committee must address.

Rule 26: Action by Council Following Appeals Panel Proceeding

(a) If the Appeals Panel remands a decision of the Council for further consideration or action by the Council, the Council shall proceed in a manner consistent with the Appeals Panel’s decisions or instructions.

(b) In implementing the decision of the Appeals Panel, the Council may impose monitoring, reporting or other requirements on the law school consistent with the Appeals Panel decision and the Rules of Procedure.

VII. Applications

Rule 27: Application for Provisional or Full Approval

(a) A law school seeking provisional or full approval shall submit its application to the Managing Director after the beginning of fall term classes but no later than October 15 in the academic year in which the law school is seeking approval.
(1) If the law school is seeking a site evaluation in the fall academic term it shall also file with the Managing Director, during the month of March of the preceding academic year, a written notice of its intent to do so.

(2) A provisionally approved law school may apply for full approval no earlier than two years after the date that provisional approval was granted.

(3) Upon notice to the Managing Director of its intent to seek provisional approval, a law school seeking provisional approval shall comply with Standard 102(f) regarding communication of its status.

(b) The application for provisional or full approval must contain:

(1) A letter from the dean certifying that the law school has completed all of the requirements for seeking provisional or full approval or that the law school seeks a variance from specific requirements of the Standards and that the law school has obtained the concurrence of the president in the application;

(2) All completed forms and questionnaires, as adopted by the Council;

(3) In the case of a law school seeking provisional approval, a copy of a feasibility study that evaluates the nature of the educational program and goals of the law school, the profile of the students who are likely to apply, and the resources necessary to create and sustain the law school, including relation to the resources of a parent institution, if any;

(4) A copy of the self-study;

(5) Financial operating statements and balance sheets for the last three fiscal years, or such lesser time as the institution has been in existence. If the applicant is not a publicly owned institution, the statements and balance sheets must be certified;

(6) Appropriate documents detailing the law school and parent institution's ownership interest in any land or physical facilities used by the law school;

(7) A request that the Managing Director schedule a site evaluation at the law school's expense; and,

(8) Payment to the Section of the application fee.

(c) A law school may not apply for provisional approval until it has completed the first full academic year of its program,

(d) A law school must demonstrate that it or the university of which it is a part is legally authorized under applicable state law to provide a program of education beyond the secondary level.
(e) A law school shall disclose whether an accrediting agency recognized by the United States Secretary of Education has denied an application for accreditation filed by the law school, revoked the accreditation of the law school, or placed the law school on probation. If the law school is part of a university, then the law school shall further disclose whether an accrediting agency recognized by the United States Secretary of Education has taken any of the actions enumerated above with respect to the university or any program offered by the university. As part of such disclosure, the law school shall provide the Managing Director with information concerning the basis for the action of the accrediting agency.

(f) When a law school submits a completed application for provisional or full approval, the Managing Director shall arrange for a site evaluation as provided under Rule 5.

Rule 28: Reapplication for Provisional or Full Approval

(a) If the Council denies an application for provisional or full approval or withdraws provisional or full approval, or if a law school withdraws an application for provisional or full approval, a law school shall not reapply until it is able to certify that it has addressed the reasons for the denial, removal, or withdrawal, explain how it has done so, and is able to demonstrate that it is operating in compliance with the Standards.

(b) Any new application must be filed within the schedule prescribed by Rule 27(a).

Rule 29: Application for Acquiescence in Major Change

(a) Major changes requiring application for acquiescence include:

1. Acquiring another law school, program, or educational institution;
2. Acquiring or merging with another university by the parent university where it appears that there may be substantial impact on the operation of the law school;
3. Transferring all, or substantially all, of the program of legal education or assets of the approved law school to another law school or university;
4. Merging or affiliating with one or more approved or unapproved law schools;
5. Merging or affiliating with one or more universities;
6. Materially modifying the law school’s legal status or institutional relationship with a parent institution;
7. A change in control of the law school resulting from a change in ownership of the law school or a contractual arrangement;
(8) A change in the location of the law school that could result in substantial changes in
the faculty, administration, student body, or management of the law school;
(9) Establishing a branch campus;
(10) Establishing a separate location other than a branch campus;
(11) A significant change in the mission or objectives of the law school;
(12) The addition of courses or programs that represent a significant departure from
existing offerings or method of delivery since the most recent accreditation period
including combined undergraduate and J.D. programs, such as 2/4, 4/3 programs, and
programs leading to a J.D. and a first-degree program at foreign institution; instituting a
new full-time or part-time program; or changing from a full-time to a part-time program or
from a part-time to a full-time program;
(13) The addition of a permanent location at which the law school is conducting a teach-
out for students at another law school that has ceased operating before all students have
completed their program of study;
(14) Contracting with an educational entity that is not certified to participate in Title IV,
HEA programs, that would permit a student to earn 25 percent or more of the course credits
required for graduation from the approved law school;
(15) Establishing a new or different program leading to a degree other than the J.D.
degree;
(16) A change in program length measurement from clock hours to credit hours; and
(17) A substantial increase in the number of clock or credit hours required for
graduation.
(b) An application for acquiescence in a major change shall consist of the following:
(1) All completed forms and questionnaires, as adopted by the Council;
(2) A letter from the dean certifying that the law school has completed all of the
requirements for requesting acquiescence in a major change and that the law school has
obtained the concurrence of the president in the application;
(3) A copy of the law school’s most recent self-study or an updated self-study if the
most recent self-study is more than three years old where the application is for
acquiescence in a major change described in Rule 29(a)(1) through 29(a)(13);
(4) A description of the proposed change and a detailed analysis of the effect of the
proposed change on the law school’s compliance with the Standards;
(5) Payment to the Section of the application fee.

(c) The Managing Director shall appoint a fact finder in connection with an application for acquiescence in a major change, except that no fact finder is required if the Managing Director and the Chair of the Accreditation Committee determine that the application does not require additional information to assist Accreditation Committee and Council determination of the question of acquiescence.

(d) In recommending or granting acquiescence in a major change, the Committee or Council may appoint a fact finder subsequent to the effective date of acquiescence, for purposes of determining whether the law school remains in compliance with the Standards.

(e) A law school’s approval status remains unchanged following acquiescence in any major change.

Rule 30: Major Changes Requiring a Reliable Plan

(a) In addition to satisfying the requirements of Rule 29(b), an application for acquiescence under 29(a)(1) through 29(a)(9) shall include a reliable plan.

(b) The reliable plan in connection with the establishment of a branch campus under Rule 29(a)(9) shall contain information sufficient to allow the Accreditation Committee and the Council to determine that:

1. The proposed branch campus has achieved substantial compliance with the Standards and is reasonably likely to achieve full compliance with each of the Standards within three years of the effective date of acquiescence;

2. The proposed branch campus will meet the requirements of Standard 106 applicable to separate locations and branch campuses.

(c) The reliable plan regarding a matter involving a substantial change in ownership, governance, control, assets, or finances of the law school, under Rule 29(a)(1) through 29(a)(7) shall contain information sufficient to allow the Accreditation Committee and the Council to determine whether the law school is reasonably likely to be in full compliance with each of the Standards as of the effective date of acquiescence.

(d) The reliable plan regarding a change in location of the law school that could result in substantial changes in the faculty, administration, student body, or management of the law school under Rule 29(a)(8) shall contain information sufficient to allow the Accreditation Committee and the Council to determine whether the law school is reasonably likely to be in full compliance with each of the Standards within one year of the effective date of acquiescence.

(e) A law school’s approval status remains unchanged following acquiescence in any major change.

Rule 30: Major Changes Requiring a Reliable Plan

(a) In addition to satisfying the requirements of Rule 29(b), an application for acquiescence under 29(a)(1) through 29(a)(9) shall include a reliable plan.

(b) The reliable plan in connection with the establishment of a branch campus under Rule 29(a)(9) shall contain information sufficient to allow the Accreditation Committee and the Council to determine that:

1. The proposed branch campus has achieved substantial compliance with the Standards and is reasonably likely to achieve full compliance with each of the Standards within three years of the effective date of acquiescence;

2. The proposed branch campus will meet the requirements of Standard 106 applicable to separate locations and branch campuses.

(c) The reliable plan regarding a matter involving a substantial change in ownership, governance, control, assets, or finances of the law school, under Rule 29(a)(1) through 29(a)(7) shall contain information sufficient to allow the Accreditation Committee and the Council to determine whether the law school is reasonably likely to be in full compliance with each of the Standards as of the effective date of acquiescence.

(d) The reliable plan regarding a change in location of the law school that could result in substantial changes in the faculty, administration, student body, or management of the law school under Rule 29(a)(8) shall contain information sufficient to allow the Accreditation Committee and the Council to determine whether the law school is reasonably likely to be in full compliance with each of the Standards within one year of the effective date of acquiescence.
In a case where the Council has acquiesced in a major change subject to (a), the Council shall appoint a fact finder subsequent to the effective date of acquiescence, as provided in (f), (h), or (i).

In the case of the establishment of a branch campus under Rule 29(a)(9), the fact finder required in accordance with (e) shall be appointed within six months of the effective date of acquiescence to verify that the branch campus satisfies the requisites of (b)(2).

In a case involving a substantial change in ownership, control, assets, or finances of the law school under Rule 29(a)(1) through 29(a)(7), the fact finder required in accordance with (e) shall be appointed within six months of the effective date of acquiescence to verify that the law school is in compliance with the Standards.

In a case involving a substantial change in location of the law school that could result in substantial changes in the faculty, administration, student body, or management of the law school, under Rule 29(a)(8), the fact finder required in accordance with (e) shall be appointed within one year of acquiescence to verify that the law school is in compliance with the Standards.

1031: Reapplication for Acquiescence in Major Change

(a) If the Committee or Council denies an application for acquiescence in a major change, or if an application for acquiescence in a major change is withdrawn by a law school, a law school shall not reapply until it is able to certify in its application that it has addressed the reasons for the denial or withdrawal, explains how it has done so, and is able to demonstrate that it is operating in compliance with the Standards.

(b) Any new application must be filed in accordance with Rule 29.

1032: Application for Approval of Foreign Program

(a) A law school may apply for approval of programs in accordance with the procedures set forth in the following Criteria:

(1) Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools;

(2) Criteria for Approval of Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools;

(3) Criteria for Student Study at a Foreign Institution.

1033: Application for Variance

(a) A law school applying for a variance has the burden of demonstrating that the variance should be granted. The application should include, at a minimum, the following:
Rule 34: Teach-Out Plan

(a) If a provisional or fully approved law school decides to cease operations or close a branch campus, the law school shall promptly make a public announcement of the decision and shall notify the Managing Director, the appropriate state licensing authority, and the United States Department of Education of the decision.

(b) A provisional or fully approved law school must submit a teach-out plan for approval upon occurrence of any of the following events:

(1) The law school notifies the Managing Director’s Office that it intends to cease operations or close a branch campus;

(2) The Accreditation Committee recommends, or the Council acts to withdraw, terminate, or suspend, the accreditation of the law school;

(3) The United States Secretary of Education notifies the Managing Director’s Office that the Secretary has initiated an emergency action against an institution, in accordance with section 487(c)(1)(G) of the HEA, or an action to limit, suspend, or terminate an institution participating in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required;

(4) A state licensing or authorizing agency notifies the Managing Director’s Office that an institution’s license or legal authorization to provide an educational program has been or will be revoked.

(c) The law school shall submit the teach-out plan for the law school or branch being closed as required by paragraph (b) to the Managing Director’s Office within the time specified by the
Managing Director. The Managing Director's Office, in consultation with the Chair of the Accreditation Committee, may require a law school to enter into a teach-out agreement as part of its teach-out plan.

(d) A law school must submit the “Teach-Out Plan Approval Form,” as adopted by the Council, and address each item in the form.

e) If a law school voluntarily enters into a teach-out agreement or if the Managing Director requires a law school to submit a teach-out agreement as part of a teach-out plan, the law school must submit the “Teach-Out Agreement Approval Form,” as adopted by the Council, and address each criterion in the form.

(f) The Accreditation Committee will promptly review a teach-out plan submitted in accordance with (b) and (c) and shall recommend approval or denial of the plan by the Council.

1. Approval of the teach-out plan may be conditioned on specified changes to the plan.

2. If the teach-out plan is denied, the law school must revise the plan to meet the deficiencies identified and resubmit the plan no later than 30 days after receiving notice of the decision.

(g) Upon approval of a teach-out plan of a law school or branch that is also accredited by another recognized accrediting agency, the Managing Director’s Office shall notify that accrediting agency within 30 days of its approval.

(h) Upon approval of a teach-out plan, the Managing Director shall within 30 days notify all recognized agencies that accredit other programs offered by the institution of which the law school is a part.

(i) In the event a law school closes without an approved teach-out plan or agreement, the Managing Director’s office will work with the United States Department of Education and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

VIII. Appeals Panel Procedure

Rule 35: Appeals Panel

(a) The Appeals Panel shall consist of at least three persons appointed by the Chair of the Council. Members shall serve a one-year term beginning at the end of the Annual Meeting of the Section and continuing to the end of the next Annual Meeting of the Section or until replaced. Appeals Panel members and alternates are eligible to serve consecutive terms or non-consecutive multiple terms.

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(1) The Chair of the Council shall designate one member of the Appeals Panel to serve as its chair.

(2) The Chair of the Council shall also appoint, at the same time as appointing members of the Appeals Panel and for the same term, an equal number of alternates to the Appeals Panel.

(b) Every member of the Appeals Panel and alternate shall be:

(1) A former member of the Council or Accreditation Committee; or

(2) An experienced site evaluator.

(c) Members of the Appeals Panel and alternates shall be:

(1) Experienced in and knowledgeable about the Standards, Interpretations and Rules of Procedure;

(2) Trained in the Standards, Interpretations and Rules of Procedure at a retreat or workshop or by other appropriate methods within the 3 years prior to appointment; and

(3) Subject to the Section’s Conflicts of Interest Policy, as provided in IOP 19.

(d) The Appeals Panel, and the group of alternates, shall each include legal educators, practitioners, members of the judiciary, and representatives of the public. No more than fifty percent of the members may be persons whose primary professional employment is as a law school dean, faculty or staff member. Public members shall have qualifications and representation consistent with the regulations of the United States Department of Education applicable to the accreditation of professional schools.

Rule 36: Form and Content of Appeals to the Appeal Panel

(a) A law school may appeal decisions of the Council specified in Rule 4 by filing a written appeal with the Managing Director within 30 days after the date of the letter to the law school reporting the decision of the Council.

(b) The written appeal must include:

(1) A statement of the grounds for appeal; and

(2) Documentation in support of the appeal.

(c) The grounds for an appeal are limited to the following:

(1) That the decision of the Council was arbitrary and capricious; or

(2) That the decision of the Council was arbitrary and capricious; or

(3) Subject to the Section’s Conflicts of Interest Policy, as provided in IOP 19.

(d) The Appeals Panel, and the group of alternates, shall each include legal educators, practitioners, members of the judiciary, and representatives of the public. No more than fifty percent of the members may be persons whose primary professional employment is as a law school dean, faculty or staff member. Public members shall have qualifications and representation consistent with the regulations of the United States Department of Education applicable to the accreditation of professional schools.

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(b) The written appeal must include:

(1) A statement of the grounds for appeal; and

(2) Documentation in support of the appeal.

(c) The grounds for an appeal are limited to the following:

(1) That the decision of the Council was arbitrary and capricious; or
(2) That the Council failed to follow the applicable Rules of Procedure and the
procedural error prejudiced its decision.

(d) The written appeal and supporting documentation may not contain or refer to any
evidence that was not in the record before the Council.

Rule 37: Membership of the Appeals Panel for the Proceeding

(a) Within 30 days of receipt of a written appeal within the scope of authority of the Appeals
Panel, the Managing Director shall ensure that the Appeals Panel or the Appeals Panel with
alternates is authorized and available to decide the appeal.

(b) In the event a member of the Appeals Panel cannot participate in the appeal, the
Managing Director shall appoint one of the alternates to the panel hearing the matter and making
the decision, and shall ensure that the panel includes one legal educator, one judge or
practitioner, and one public member.

(c) In the event an alternate cannot be appointed to participate in a decision on appeal so as
to ensure that the panel includes one legal educator, one judge or practitioner, and one public
member, the Managing Director shall appoint to the panel another person who:

(1) Wholly or substantially meets the criteria of Rule 35(b) and (c); and

(2) Whose appointment to the panel ensures that the panel includes one legal
educator, one judge or practitioner, and one public member.

(d) In the event the Chair of the Appeals Panel is unable to participate in the appeal, the
Managing Director shall appoint a Chair Pro Tempore, where possible from among the members
of the Appeals Panel appointed by the Chair of the Council.

Rule 38: Scheduling of Appeals Panel Hearings

(a) Within 30 days of receipt of a written appeal within the scope of authority of the Appeals
Panel, the Managing Director shall refer the appeal to the Appeals Panel. In referring the appeal,
the Managing Director shall provide the members of the Appeals or alternates hearing the appeal
with copies of:

(1) The written appeal;

(2) The decision of the Council; and

(3) The record before the Council, including any transcript of hearing.

(b) The Managing Director, in consultation with the Chair or Chair Pro Tempore of the
Appeals Panel, shall set the date, time, and place of the hearing.
The hearing shall be scheduled within forty-five days of the Managing Director’s referral of the appeal to the Appeal Panel.

The Managing Director shall inform the law school of the date, time, and place of the hearing at least 30 days in advance of the hearing, unless the law school agrees to the hearing on less than 30 days’ notice.

Rule 39: Burdens and Evidence in Appeals Panel Proceedings

(a) The law school appealing to the Appeals Panel has the burden of demonstrating that the Council’s decision was arbitrary and capricious and not supported by the evidence on record, or inconsistent with the Rules of Procedure and that inconsistency prejudiced its decision.

(b) The appeal shall be decided based on the record before the Committee and the Council, the decision letters of those bodies and any documents cited in those decision letters, and transcripts of hearings before the Committee and the Council. Except as provided in Rule 41(e), no new evidence shall be considered by the Appeals Panel.

Rule 40: Procedure in Hearings Before the Appeals Panel

(a) The hearing will be a closed proceeding and not open to the public.

(b) The law school shall have a right to have representatives, including legal counsel, appear at the hearing.

(c) The Council shall be represented at the hearing through the Chair, other members of the Council as the Chair of the Council deems appropriate, and legal representation for the Council.

(d) The Managing Director or designee shall be present at the hearing. The Managing Director may designate additional staff to be present at the hearing.

(c) The hearing shall be transcribed by a court reporter and a transcript of the hearing shall be provided to the Appeals Panel, the Council, and the law school.

Rule 41: Action by the Appeals Panel

(a) Within 30 days of the hearing, the Appeals Panel shall provide the Council and the law school with a written statement of the Appeals Panel’s decision and the basis for that decision.

(b) The Appeals Panel, following a hearing, has the authority to:

1. Affirm the decision of the Council;

2. Reverse the decision of the Council and enter a new decision;

3. The Appeals Panel, following a hearing, has the authority to:

1. Affirm the decision of the Council;

2. Reverse the decision of the Council and enter a new decision;
(3) Amend the decision of the Council; or

(4) Remand the decision of the Council for further consideration.

(c) The decision of the Appeals Panel shall be effective upon issuance. If the Appeals Panel
remands a decision for further consideration or action by the Council, the Appeals Panel shall
identify specific issues that the Council must address.

(d) Decisions by the Appeals Panel under (b)(1), (2) and (3) are final and not appealable.

(e) When the only remaining deficiency cited by the Council in support of an adverse
decision is a law school’s failure to meet the Standards dealing with financial resources for a law
school, the law school may request a review of new financial information that was not part of the
record before the Council at the time of the adverse decision if all of the following conditions are
met:

(1) A written request for review is filed with the Consultant within 30 days after the
date of the letter reporting the adverse decision of the Council to the law school;

(2) The financial information was unavailable to the law school until after the adverse
decision subject to the appeal was made; and

(3) The financial information is significant and bears materially on the financial
deficiencies that were the basis of the adverse decision by the Council.

(f) The request to review new financial information will be considered by the Council at its
next meeting occurring at least 30 days after receipt of the request.

(g) A law school may request review of new financial information only once and a decision
made by the Council with respect to that review does not provide a basis for appeal.

IX. Complaints Regarding Noncompliance With Standards

Rule 42: Complaints in General

(a) The United States Department of Education procedures and rules for the recognition of
accrediting agencies require a recognized accrediting agency to have a process for the reporting
of complaints against accredited institutions that might be out of compliance with the agency’s
accreditation standards. This is the process for the Council with regard to law schools having
J.D. programs approved by the Council.

(b) The process for Complaints under these Rules aims to bring to the attention of the
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(b) The process for Complaints under these Rules aims to bring to the attention of the
Council, the Committee, and the Managing Director facts and allegations that may indicate that
an approved law school is operating its program of legal education out of compliance with the
Standards.
This process is not available to serve as a mediating or dispute-resolving process for persons with complaints about the policies or actions of an approved law school. The Council, the Committee and the Managing Director will not intervene with an approved law school on behalf of an individual with a complaint against or concern about action taken by a law school that adversely affects that individual. The outcome of this process will not be the ordering of any individual relief for any person or specific action by a law school with respect to any individual.

If a law school that is the subject of a complaint is due to receive a regularly scheduled sabbatical site evaluation within a reasonable amount of time after the complaint is received, usually within one year, the complaint may be handled as part of the sabbatical site evaluation.

Rule 43: Submission of Complaints

(a) Any person may file with the Managing Director a written complaint alleging noncompliance with the Standards.

   (1) Except in extraordinary circumstances, the complaint must be filed within one calendar year of the facts on which the allegation is based. Pursuit of other remedies does not toll this one calendar year limit.

   (2) Complaints must be in writing using the form “Complaint Against an ABA Approved Law School” and must be signed. The form shall be available both online and from the Office of the Managing Director.

   (3) Anonymous complaints will not be considered.

(b) The Complaint must provide the following information:

   (1) A clear and concise description of the nature of the complaint and any evidence upon which the allegation is based, with relevant supporting documentation. The description and supporting evidence should include relevant facts that support the allegation that the law school is out of compliance with the Standards referenced in the complaint.

   (2) The Standards and Interpretations alleged to have been violated and the time frame in which the lack of compliance is alleged to have occurred.

   (3) A description of the steps taken to exhaust the law school’s grievance process and the actions taken by the law school in response to the complaint as a result of prescribed procedures.
Rule 44: Disposition of Complaints

(a) The Managing Director, upon receiving a complaint submitted in accordance with Rule 43 and not dismissed, shall proceed as follows:

(1) The Managing Director shall acknowledge receipt of the complaint within 14 days of its receipt.

(2) The Managing Director shall determine whether the complaint alleges facts that raise issues relating to an approved law school's compliance with the Standards. This determination shall be made within six weeks of receiving the complaint. If the Managing Director concludes that the complaint does not raise issues relating to an approved law school's compliance with the Standards, the matter will be closed.

(3) If the Managing Director determines that the complaint may raise issues relating to an approved law school's compliance with the Standards, the Managing Director will send the complaint to the law school and request a response within 30 days. The Managing Director may extend the period for response if, in the judgment of the Managing Director, there is good cause for such an extension.

(4) The Managing Director will review any response to a complaint within 45 days of receipt. If the response establishes that the law school is not out of compliance with respect to the matters raised in the complaint, the Managing Director will close the matter.

(b) If the law school's response to a complaint does not establish that it is in compliance with the Standards on the matters raised by the complaint, the Managing Director, in consultation with the Chair of the Committee, may appoint a fact finder to investigate the issues raised by the complaint and the law school's response.

(c) If the law school's response to a complaint does not establish that it is in compliance with the Standards on the matters raised by the complaint, then the Managing Director shall refer the complaint, along with the law school's response, the fact-finder's report, if any, and any other relevant information, to the Committee for further action in accordance with these Rules.

(4) Disclosure of any other channels the complainant is pursuing, including legal action.

(5) A release authorizing the Managing Director's Office to send a copy of the complaint to the dean.

(c) If the person filing the complaint is not willing to sign a release authorizing the Managing Director's Office to send a copy of the complaint to the dean, the matter will be closed. If the Managing Director concludes that extraordinary circumstances so require, the name of the person filing the complaint may be withheld from the law school.
Rule 45: Notice of Disposition of Complaint

The Managing Director will promptly notify the person submitting a complaint of the final disposition of the complaint. The notification shall not include a copy of the law school’s response, if any, and shall not include a copy of any written decision of the Committee.

Rule 46: Appeal of Managing Director’s Disposition of Complaint

There is no appeal to any body of a conclusion by the Managing Director that a complaint does not raise issues under the Standards.

Rule 47: Review of Complaint Process

To ensure the proper administration of this complaint process, the Committee shall periodically review the written complaints received in the Managing Director’s Office and their disposition.

Rule 48: Records of Complaints

The Managing Director’s Office shall keep a record of the complaints under Part VIII of these Rules for a period of ten years.

X. Transparency and Confidentiality

Rule 49: Confidentiality of Accreditation Matters

Except as otherwise provided in these Rules, all matters relating to the accreditation of a law school, including any proceedings, hearings or meetings of the Committee or Council, shall be confidential.

Rule 50: Communication of Decisions and Recommendations

When a law school is the subject of a decision or recommendation in accordance with these Rules, the Managing Director shall promptly inform the dean and the president of the decision or recommendation, in writing.

Rule 51: Communication and Distribution of Site Evaluation Reports

(a) Except as provided in Part X of these Rules, site evaluation and fact finding reports shall be confidential.

(b) The law school may release an entire site evaluation report or fact finding report or portions of a report.

(1) If the law school makes public the site evaluation report or any portion of it, the...
law school must notify the Managing Director at or before the time of the disclosure. In
the event the law school discloses only a portion of the site evaluation report, the
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Managing Director, in consultation with the Chair of the Council, may subsequently
disclose any other portions of the site evaluation report or the entire report.
(2) Discussion of the contents of a site evaluation report with, or release of the report
to, the faculty, the university administration, or the governing board of the university or
law school, does not constitute release of the report to the public within the meaning of
this Rule.

Rule 52: Disclosure of Decision Letters
(a) Except as provided in Rule 53, decisions and recommendations of the Committee and
Council shall be confidential.
(b) If the law school makes public a decision or recommendation of the Committee or
Council, the law school must make public the entire decision or recommendation.
(1) If the law school makes public a decision or recommendation of the Committee or
Council, the law school must notify the Managing Director at or before the time of the
disclosure.
(i) The Managing Director, in consultation with the Chair of the Council,
may subsequently correct any inaccurate or misleading information released or
published by the law school in connection with the disclosure or the decision or
recommendation.
(ii) A corrective communication by the Managing Director may include the
disclosure of portions of the site evaluation report or the entire site evaluation
report.
(2) Discussion of the contents of a decision or recommendation with, or release of the
decision or recommendation, to the faculty, the university administration, or the governing
board of the university or law school, does not constitute release of the report to the public
within the meaning of this Rule.
(c) If the dean determines that a site evaluation report contains criticism of the professional performance, competence, or behavior of a member of the law school’s faculty or professional staff:
(1) The dean shall make available to the person affected the relevant portions of the report and shall send the Managing Director a copy of those relevant portions and any accompanying memorandum or letter to the affected person.
(2) The affected person shall have the right to file with the Managing Director a document responding to the criticism contained in the site evaluation report.
(3) Any such response to the criticism shall become part of the law school’s official file.
Rule 53: Applications, Decisions and Recommendations Made Public

(a) When a law school has applied for provisional or full approval, acquiescence in a major change, or a variance, the Council or the Managing Director shall provide public notice:

(1) That the law school has submitted an application; and

(2) Of the procedural steps for consideration of the application.

(b) After a law school has been notified of the Committee's decision or recommendation, the Managing Director may state publicly the conclusions of the Committee and its decision or recommendation, with an explanation of the procedural steps in further consideration of the matter, concerning:

(1) The law school's application for provisional or full approval;

(2) The law school's application for acquiescence in a major change;

(3) The law school's application for a variance;

(4) The imposition of sanctions or specific remedial action on the law school;

(5) The placing of the law school on probation; or

(6) The withdrawal of the law school's approval;

(c) After a law school has been notified of the Council's decision, the Managing Director shall provide public notification of the Council's conclusions and decision (except as to a sanction that is explicitly not public), with an explanation of any procedural steps for further consideration of the matter, concerning:

(1) The law school's application for provisional or full approval;

(2) The law school's application for acquiescence in a major change;

(3) The law school's application for a variance;

(4) The imposition of sanctions or specific remedial action on the law school;

(5) The placing of the law school on probation; or

(6) The withdrawal of the law school's approval;
(d) After a matter concerning a law school has been acted upon by an Appeals Panel, the Council or the Managing Director shall provide public notification of the conclusions and decision of the Appeals Panel.

Rule 54: Statistical Reports

(a) School specific information and statistical reports derived from data contained in all questionnaires are for the use of the Council, the Committee, the Managing Director, and deans of ABA-approved law schools, and are not for public release.

(b) Information contained in statistical reports prepared from data contained in annual questionnaires is for exclusive and official use by those persons authorized by the Council to receive such statistical reports, except as public disclosure of information about specific law schools is authorized under Standard 509 or has been made public by the law school.

(c) The Managing Director may release general data from the statistical reports and questionnaires that are not school-specific.

Rule 55: Publication of List of Approved Law Schools

The Council shall publish annually a complete list of all approved law schools. The list shall be published in one or more venues designated by the Council pursuant to Standard 509.

XI. Amendment of Standards, Interpretations and Rules

Rule 56: Council Authority

The Council has authority to adopt, revise, amend or repeal the Standards, Rules, and Interpretations.

Rule 57: Concurrence by the ABA House of Delegates

(a) A decision by the Council to adopt, revise, amend or repeal the Standards, Interpretations or Rules does not become effective until it has been concurred in by the ABA House of Delegates in accordance with House Rule 45.9. After the meeting of the Council at which it decides to adopt, revise, amend or repeal the Standards, Interpretations or Rules, the Chairperson of the Council shall furnish a written statement of the Council action to the House.

(b) Once the action of the Council is placed on the calendar of a meeting of the House, the House shall at that meeting either agree with the Council’s decision or refer the decision back to the Council for further consideration. If the House refers a decision back to the Council, the House shall provide the Council with a statement setting forth the reasons for its referral.

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(b) Once the action of the Council is placed on the calendar of a meeting of the House, the House shall at that meeting either agree with the Council’s decision or refer the decision back to the Council for further consideration. If the House refers a decision back to the Council, the House shall provide the Council with a statement setting forth the reasons for its referral.
A decision by the Council to adopt, revise, amend or repeal the Standards, Interpretations or Rules is subject to a maximum of two referrals back to the Council by the House. If the House refers a Council decision back to the Council twice, then the decision of the Council following the second referral will be final and will not be subject to further review by the House.
On behalf of the Council of the Section of Legal Education and Admissions to the Bar, I respectfully submit to the House of Delegates for its concurrence, the revised ABA Rules of Procedure for Approval of Law Schools.

In August 2008, the Council of the Section of Legal Education and Admissions to the Bar directed its Standards Review Committee (Committee) to conduct a comprehensive review of the ABA Standards and Rules of Procedure for Approval of Law Schools. Such a review is required of all accrediting agencies recognized by the U.S. Department of Education. The Council and its Accreditation Committee are recognized by the U.S. Department of Education as the national accrediting agency for programs leading to the J.D. degree.

The Purpose of the Rules Revision

Four goals framed the examination of the Rules of Procedure. They were to:

1) reorganize the Rules by clearly defined subject matter;
2) modify the language in the Rules to reflect current implementation;
3) clarify terminology and language where ambiguous; and
4) make changes to the Rules, where appropriate, that are commensurate with revisions to the Standards.

Although the Rules have been completely reorganized, it is important to note that very few substantive changes have been made to them. Additionally, each of the current Rules of Procedure has found a “home” within the reorganized draft.

The current Rules of Procedure can be found here:

A correlation chart comparing the current and revised Rules of Procedure can be here:
http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201404_rules_correlation_chart.authcheckdam.pdf.

An Overview of the revised Rules

The Rules of Procedure are divided into 11 Chapters and 57 Rules. The Chapters are designed to group related Rules together. The order of the Rules is designed to parallel the order of accreditation processes. The Rules of Procedure move from jurisdictional authority through the gathering and acting on information including sanctions, to Rules covering meetings and hearings, to Rules affecting applications and Rules governing appeals, with final chapters on third-party complaints, confidentiality and transparency and the authority of the Council to amend the Standards and Rules of Procedure.

Specifically, the organization is as follows:

- **Chapter One, Scope and Authority**, and within it, Rules 1-4 deal with the overarching scope and purpose of the Rules of Procedure, and the authority and jurisdiction of the Council, the Accreditation Committee and the Appeals Panel.
Chapters Two, Three, and Four are the bulk of Rules affecting the mainstay of the accreditation process. Chapter Two, Information and including Rules 5-11, deals with ways that, and by whom, information is gathered in the accreditation process. Chapter Three, Action on Information, and Rules 12-15, govern the procedures and measures taken to determine compliance of the information gathered. Chapter Four, Sanctions, and Rules 16-18, reference the types of sanctions available for noncompliance of the Standards and the Rules affecting monitoring and enforcement.

Chapters Five and Six govern hearings and meetings of the Accreditation Committee and the Council. Chapter Five, Hearings and Meetings of the Accreditation Committee and Rules 19-21, and Chapter Six, Hearings and Meetings of the Council, and Rules 22-26, lay out the specific Rules governing hearings and meetings for each of these accrediting bodies.

Chapter Seven, Applications, and Rules 27-34 deal with specific situations in the accreditation process. They include application and reaplication for provisional and full approval, acquiescence for major changes, request for variances, and Rules affecting teach out plans.


Chapters Nine and Ten deal with other Rules affecting the process. Chapter Nine, Complaints Regarding Noncompliance With Standards, and Rules 42-48, outlines the procedures in place to deal with third-party complaints. Chapter Ten, Transparency and Confidentiality, and Rules 49-55, govern principles of confidentiality in the accreditation process and highlight the Rules that affect transparency.

Chapter Eleven, Amendment of Standards, Interpretations, and Rules, and Rules 56-57 discuss the authority of the Council and concurrence by the House of Delegates to amend the Standards and Rules of Procedure.

Highlighted Substantive Changes to the Rules
1. Acquiescence in a Major Change
Definitions of what constitutes a major change outlined in revised Rules 29 and 30 accords with the definitions contained in current Rules 20 and 21. Where the revised Rules differ is with respect to 1) the necessary showing to receive acquiescence and 2) the status of a law school meeting the requirements of acquiescence. These changes only affect the following major changes: establishment of a branch campus, change in ownership, or change in location that substantially alters aspects of the law school.

Currently, the Rules provide acquiescence to proceed on these major changes. But Council authority to proceed does not confer ABA approval status until such time prescribed by the Rules when the law school would seek provisional approval. Under the current system, the law...
school's burden to demonstrate reasonable likelihood of compliance with the Standards happens after acquiescence.

For these three types of major changes, the revised Rule contains a different approach. The law school must demonstrate prior to acquiescence by the Council a reasonable likelihood that it will be in full compliance with each of the Standards. To enable the shift, Rule 30 requires that the law school file a reliable plan at the time of the request for acquiescence that would demonstrate a reasonable likelihood of being in full compliance with each of the Standards. If the law school is able to meet its burden of proof, the Council's acquiescence of the major change will include ABA approval status.

Current Rules require that a law school must wait ten months to reapply, unless that limitation is waived by the Council. The revised Rules shift from a mandatory timeframe to a certified showing in the new application that a law school has addressed the reasons for the denial or withdrawal and is able to demonstrate that it is operating in compliance with the Standards.

3. Inclusion of Aggravating and Mitigating Circumstances in Rule 16 used to Determine Sanctions
Based on suggestions from a working group of the Council, revised Rule 16 includes a list of aggravating and mitigating circumstances that may be used when determining the appropriate sanction.

4. Evidence and Record for Decision in Revised Rule 24
The revised rule provides a uniform set of procedures for Council consideration of recommendations from the Accreditation Committee as well as Council consideration of appeals from Accreditation Committee decisions. Under current Rules 8 and 9, there are two different procedures for these considerations.

5. Attendance of Representatives by Law School in revised Rule 20
Revised Rule 20(a) combines current Rules 6(a) and 15(c) into one provision addressing when law schools have a right to have representatives appear before the Accreditation Committee. Revised Rules 20(b) through (d) are new and clarify existing practice. The revised Rules have deleted current Rules 6(b) and 15(d) that permit attendance at an Accreditation Committee meeting or hearing by a fact finder or the chair of a site team.

Respectfully submitted,

Hon. Solomon Oliver, Jr., Chair
Council of the Section of Legal Education and Admissions to the Bar

August 2014

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school's burden to demonstrate reasonable likelihood of compliance with the Standards happens after acquiescence.

For these three types of major changes, the revised Rule contains a different approach. The law school must demonstrate prior to acquiescence by the Council a reasonable likelihood that it will be in full compliance with each of the Standards. To enable the shift, Rule 30 requires that the law school file a reliable plan at the time of the request for acquiescence that would demonstrate a reasonable likelihood of being in full compliance with each of the Standards. If the law school is able to meet its burden of proof, the Council's acquiescence of the major change will include ABA approval status.

Current Rules require that a law school must wait ten months to reapply, unless that limitation is waived by the Council. The revised Rules shift from a mandatory timeframe to a certified showing in the new application that a law school has addressed the reasons for the denial or withdrawal and is able to demonstrate that it is operating in compliance with the Standards.

3. Inclusion of Aggravating and Mitigating Circumstances in Rule 16 used to Determine Sanctions
Based on suggestions from a working group of the Council, revised Rule 16 includes a list of aggravating and mitigating circumstances that may be used when determining the appropriate sanction.

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The revised rule provides a uniform set of procedures for Council consideration of recommendations from the Accreditation Committee as well as Council consideration of appeals from Accreditation Committee decisions. Under current Rules 8 and 9, there are two different procedures for these considerations.

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August 2014

3
1. Summary of Resolution(s).

The ABA Rules of Procedure for Approval of Law Schools cover all of the procedures required for the accreditation function of the Council of the Section of Legal Education and Admissions to the Bar. The Rules move from jurisdictional authority through the gathering and acting on information including sanctions, to Rules covering meetings and hearings, to Rules affecting applications and Rules governing appeals, with final chapters on third party complaints, confidentiality and transparency and the authority of the Council to amend the Standards and Rules of Procedure. Four goals framed the examination of the Rules of Procedure. They were to:
1) reorganize the Rules by clearly defined subject matter;
2) modify the language in the Rules to reflect current implementation;
3) clarify terminology and language where ambiguous; and
4) make changes to the Rules, where appropriate, that are commensurate with revisions to the Standards.

2. Approval by Submitting Entity.

At its meeting in March 2014, the Council approved the revised Rules of Procedure to be circulated for Notice and Comment. After reviewing the comments received, the Council made final determinations on the revised Rules of Procedure at its meeting on June 6, 2014.

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

No.

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

The revised Rules replace the existing ABA Rules of Procedures for Approval of Law Schools.

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

No.
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 changes to the ABA Rules of Procedure for Approval of Law Schools.

8. Cost to the Association. (Both direct and indirect costs)
   Not applicable

9. Disclosure of Interest. (If applicable)
   Not applicable

10. Referrals.
    The revisions were 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; Deans of Unapproved Law Schools; and Section Affiliated Organizations.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
    Barry A. Currier, Managing Director
    American Bar Association
    Section of Legal Education and Admissions to the Bar
    321 N. Clark St., 21st floor
    Chicago, IL 60654-7598
    Ph: (312) 988-6744 / Cell: (310) 400-2702 .
    Email: barry.currier@americanbar.org

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

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.
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EXECUTIVE SUMMARY

1. Summary of the Resolution

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Four goals framed the examination of the Rules of Procedure. They were to:
1) reorganize the Rules by clearly defined subject matter;
2) modify the language in the Rules to reflect current implementation;
3) clarify terminology and language where ambiguous; and
4) make changes to the Rules, where appropriate, that are commensurate with revisions to the Standards.

2. Summary of the Issue that the Resolution Addresses

In August 2008, the Council of the Section of Legal Education and Admissions to the Bar directed its Standards Review Committee (Committee) to conduct a comprehensive review of the ABA Standards and Rules of Procedure for Approval of Law Schools. The resolution addresses the need for a review and update of the Rules.

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

The revised Rules present a comprehensive, updated set of procedures governing the accreditation function of the Council of the Section of Legal Education and Admissions to the Bar.

4. Summary of Minority Views

No minority views were expressed.
RESOLVED, That the American Bar Association encourages all law schools to create veterans law clinics to ensure that all veterans who cannot afford legal services can access them.

FURTHER RESOLVED, That where a particular law school lacks the necessary resources to create a stand-alone veterans law clinic, the school is urged to meet those legal needs of qualifying veterans through an existing legal clinic.
"Many Veterans do not know what direction to go…"

On 9 November 2013 more than eighty U.S. Veterans were fortunate enough to receive much needed legal assistance from a clinic organized by the Veterans Legal Assistance Project (VLAP) whose home is Hofstra University School of Law in Hempstead, New York. To date, the clinics run by the VLAP have assisted over one hundred and fifty veterans who might not otherwise have been able to obtain such services. Indeed, one disabled Navy veteran summed it up best when he stated that “[t]he services [the clinic] provided for veterans are outstanding because many veterans do not know what direction to go, and I cannot picture anyone leaving here without a smile on their face. I left with tears of joy.”

I. Why such Institutes / Clinics are Needed – By The Numbers.

1. High Unemployment Rate. Recent data released by the Bureau of Labor Statistics shows that the jobless rate for all U.S. veterans was 6.9 percent in October 2013. While this rate was just below the national average, the below chart (compiled by the Council of Economic Advisers) shows that the unemployment rate for recent veterans (those who served in Iraq and Afghanistan) was around 10 percent in October 2013:

Unemployment Rate for Veterans

The high unemployment rate among recent veterans was not a one-time occurrence. In 2012, the Congressional Research Service noted that the unemployment rate for recent veterans exceeded the national and overall veteran rates during the last four years.\(^3\)

2. Cumulative Effects. Perceived biases in hiring practices, a younger demographic of veterans entering the workforce and disability issues have all been identified as factors contributing to the high unemployment rate for recent veterans. Regardless of the cause, the high unemployment rate has had a staggering effect on the overall veteran population. Once veterans return home, they often face a host of challenges directly related to being unemployed:

a. Poverty.

A 2010 study revealed that "\([m]\)ore than 1.4 million veterans are living below the poverty line, and another 1.4 million veterans are living just above it—numbers that have likely not yet peaked given the tepid recovery from the Great Recession and the large number of service members expected to leave active duty in the near future.\(^4\)"

b. Foreclosures.

Veterans are disproportionately likely to experience mortgage problems and, as discussed below, homelessness. Since the 2008 recession, more than 20,000 active-duty veterans and reservists have lost their homes. Moreover, the Office of the Comptroller of the Currency reported that ten leading financial institutions may have unlawfully foreclosed on the mortgages of nearly 5,000 active-duty members of the U.S. military in recent years.\(^5\)

c. Homelessness.

Veterans are also more likely to become homeless. According to the National Coalition for Homeless Veterans, veterans make up 7 percent of the population; however, they account for nearly 13 percent of the total adult homeless population.\(^6\)

Given the economic difficulties faced by many veterans, it is imperative that the legal community offer assistance to this vulnerable section of the population.

II. Current Models.

To date, some law schools have already heeded the call to serve veterans and have either stood up veterans law clinics aimed at that end or have provided legal services to veterans

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1 https://opencrs.com/document/R42790/2012-10-23/
4 http://nchv.org/index.php/news/media/background_and_statistics/
5 http://nchv.org/index.php/news/media/background_and_statistics/
6 http://nchv.org/index.php/news/media/background_and_statistics/
as part of an already existing clinical program. The approach taken by each of these schools is very instructive and each provides a viable model from which other schools can draw ideas that will assist them in standing up their own programs.

1. Stetson University College of Law: Stetson has a functioning Veterans Law Institute (VLI) which encompasses the Veterans Advocacy Clinic (VAC) Pro Bono Service Initiatives. The VAC program focuses its efforts on assisting qualifying veterans appeal a decision of a denial of disability benefits by the Veterans Administration while the Pro Bono Initiative seeks to assist currently deployed military members by assisting them in obtaining free legal assistance for legal problems that they may face within the Tampa Bay, Florida area. In addition, Stetson’s VLI is also able to offer referrals and other resources for those veterans facing legal issues outside of the Tampa Bay area. 

2. Thomas M. Cooley School of Law: Thomas M. Cooley’s program, entitled Service to Soldiers: Legal Assistance Referral Program, launched in 2007 and aims to assist service members in both Michigan and Florida resolve non-military legal problems that they may face after returning from deployment. The program has three components:

   1) Volunteer attorneys, students, and staff assist JAG officers in briefing deploying troops on their rights under the Uniformed Services Employment and Re-employment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA), and with creating wills and powers-of-attorney for those who need them. 2) Returning troops of E5 rank and below who are experiencing non-military civilian legal problems are matched with participating attorneys for free representation. 3) Program volunteers educate the legal and veteran communities through publications and presentations. This program coordinates the voluntary efforts of hundreds of attorneys and Cooley students, faculty, and staff members and works closely with military leadership to ensure eligible service members are aware of the resource.

3. University of Detroit Mercy College of Law: The University of Detroit Mercy College of Law has stood up both a Veterans Law Clinic (VLC) (with an appellate component) as well as what the school terms “Project SALUTE.” The VLC focuses its efforts on having students assist qualifying veterans in disability cases and to that end, students practice before the Department of Veterans Affairs. The appellate component assists disabled veterans and their survivors by enabling students to prepare cases to be heard before the U.S. Court of Appeals for Veterans Claims. Detroit Mercy’s “Project SALUTE” program further assists veterans by holding legal clinics both in Michigan as well as the rest of the United States. This program’s goal is to provide far reaching assistance to veterans seeking assistance with their disability and/or pension claims. The project also

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8 http://www.cooley.edu/probono/programs.html
trains volunteer attorneys in order to prepare them to represent veterans before the U.S. Department of Veterans Affairs.\textsuperscript{9}

4. Hofstra University School of Law: Hofstra ensures veterans are provided with much needed legal assistance through its Veterans Legal Assistance Project (VLAP). The VLAP was started by students who realized that there was a need for such a service within the local community. Before students are permitted to assist veterans, the faculty at the school conducts a required training which was designed to prepare student-volunteers to assist their clients. To date, the VLAP has hosted two successful clinics, the most recent having taken place on 9 November 2013 where it serviced over eighty veterans. The next clinic is scheduled to take place in March 2014. During each clinic, in addition to the student volunteers, veterans also obtain a free consultation with an attorney that specializes in such areas such as VA benefits and claims, family law, social security disability, employment, USERRA, housing, bankruptcy, debtor/creditor matters, landlord-tenant disputes, elder law, tax, wills, estates, Medicare and Medicaid.\textsuperscript{9}

5. Widener University School of Law: Widener has had a functioning Veterans Law Clinic (VLC) since 1997 and the program was significantly expanded in 2006. The VLC’s mission is to provide:

- free legal assistance to veterans residing in Pennsylvania and Delaware and surrounding areas with meritorious VA claims resulting from a denial of benefits by their Regional Office. The VLC also engages in community outreach, providing wills and other estate documents to low-income veterans, sharing best practices with other clinics around the country, and recruiting and training local attorneys willing to take on veterans’ cases pro bono.\textsuperscript{11}

Given a recent increase in its qualified personnel, the VLC is also able to assist veterans in a broad range of civil legal issues including: benefits, housing, expungements, discharge upgrades, and consumer law, as well as health and social services case management.

6. Yale Law School: In fall 2010, Yale Law School launched its Veterans Legal Services Clinic (VLSC) in order to assist Connecticut’s over 250,000 military veterans obtain much needed legal services. The VLSC enables students to:

- represent veterans and their organizations in a wide variety of litigation and non-litigation matters related to their military service or return to civilian life. Over time, the clinic expects to assist veterans with housing, employment, health care, foreclosures, and immigration and other issues, in addition to VA benefits and discharge upgrades.\textsuperscript{12}

\textsuperscript{9}http://www.law.udmercy.edu/index.php/academics/clinics
\textsuperscript{10}http://law.hofstra.edu/news/articles/2013/11/veterans-clinic.html
\textsuperscript{11}http://law.widener.edu/Academics/ClinicalProgramsandProfessionalTraining/Clinics/VeteransLawClinic.aspx
\textsuperscript{12}http://www.law.yale.edu/about/12740.htm

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\textsuperscript{10}http://law.hofstra.edu/news/articles/2013/11/veterans-clinic.html
\textsuperscript{11}http://law.widener.edu/Academics/ClinicalProgramsandProfessionalTraining/Clinics/VeteransLawClinic.aspx
\textsuperscript{12}http://www.law.yale.edu/about/12740.htm
7. The John Marshall Law School: In 2006 three J.D. candidates recognized that veterans were having extreme difficulty navigating the Veterans Benefit Administration Claims process and with faculty support began the Veterans Legal Support Center & Clinic (VLSC). The VLSC handles all aspects of the claims process; from intake to the appellate level where required. In order to ensure veterans are adequately represented, the VLSC recruits, trains and manages a network of pro bono practitioners.

In the years since its inception, the VLSC has expanded its devotion to assisting veterans by becoming involved in court programs at both the state and federal level. Indeed, with a grant from the Department of Justice, the VLSC has been able to stand up the Justice Involved Veterans Initiative which operates independently within the VLSC and which has four main objectives: (1) to continue working with the newly created Illinois Veterans Treatment Courts and to study the outcomes of similar courts throughout the U.S.; (2) to work with federal magistrates in implementing a holistic approach to aid veterans at the Federal Enclave Misdemeanor Court; (3) to provide a centralized source of information about the relationship of domestic violence to post-traumatic stress disorder and traumatic brain disorder; and (4) to replicate the VLSC at other law schools throughout the U.S.13

8. Harvard University: Harvard’s Legal Services Center, recognizing the over-arching need of veterans to have access to legal assistance, especially those of limited means, has started a clinic in order to ensure that such needs are met. Currently, the clinic assists veterans in the following areas: discharge upgrade and correction of military records cases; veterans benefits cases before Veterans Administration Regional Offices, the Board of Veterans Appeals, and the U.S. Court of Appeals for Veterans Claims; and representation of veterans, family members, or both in other matters involving access to healthcare, financial assistance, and similar life necessities.

Harvard has recognized that “[p]roviding representation in these various areas of practice is especially important given the dramatic growth in the number of new veterans, the aging of the overall veterans population, the complexity of the legal issues, the depth of need, and the gaps in existing services.” In addition to the assistance provided to low income veterans, students also benefit by obtaining significant hands-on experience in representing veterans in various areas of the law while concurrently attaining much needed lawyering skills that will benefit them long after graduation.14

9. Chapman University: In order to meet the legal needs of veterans, Chapman has stood up the Institute for Military Personnel, Veterans, Human Rights & International Law. The Institute not only engaged in scholarly research in relevant topical areas, but also pursues litigation on behalf of military members and veterans. The “Litigation arm” of

13 http://www.jmls.edu/veterans/clients/index.php
14 http://www.law.harvard.edu/academics/clinical/lsc/clinics/veterans.htm

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the Institute is AMVETS legal clinic15 and, according to the Institute’s website, it has been successful in “recovering millions of dollars in benefits, judgments and settlements for its clients.”16 In addition to pursuing involving litigation, the AMVETS arm of the Institute also is tasked with providing legal assistance to veterans and in such a capacity the Institute represents these individuals in the following areas: Discharge Upgrades, Traumatic Service Group Life Insurance Appeals, VA Benefits Appeals, and issues arising under the Service Members Civil Relief Act.

The Institute’s founder and Executive Director, Professor Kyndra Rotunda, has published two textbooks and has another forthcoming. Her first book, Honor Bound: Inside the Guantanamo Trials (Carolina Academic Press, June 2008), was followed by her textbook, Military and Veterans Law, published by Thomson/West Publishing - the first textbook of its kind, geared to the growing number of Military and Veterans Legal Clinics in the country.17

10. Emory University School of Law: Beginning in February 2013 a student-founded veterans clinic began operating at Emory servicing the needs of the more than 200,000 veterans living in the Atlanta, Georgia area. The clinic enables student volunteers to work directly with experienced practitioners in ensuring veterans are provided free legal representation in matters involving disability benefit claims and appeal hearings. In addition, the clinic also accepts cases involving pension claims, claims for increased rating before the regional office of the VA, total disability claims, requested to reopen a claim denied by the VA, issues with VA healthcare and VA determinations of incompetency, applications for discharge upgrades and records corrections, employment law claims and representations, correction of criminal records, consumer law and real property matters.18

III. Conclusion.

Given the over three million veterans living in the United States, there exists a clear and present need for said veterans, especially those experiencing financial hardship, to have access to no cost legal services. In order to assist in meeting that end, it is incumbent on the American Bar Association to encourage all law schools to stand up veterans law clinics, or in the alternative, utilize existing clinics in order to ensure that these veterans have easier access to the legal services that many so desperately need. The ten models cited and described in this report not only show that some schools have realized the need for such services and have answered this call, but also illustrate what kinds of programs have worked for other schools—as such, they provide an admirable framework for other

15 AMVETS Legal Clinic is a cooperative effort with AMVETS Department of California, a non-profit organization that is committed to veterans and community service and that funds the AMVETS Legal Clinic. The clinic is housed on the Chapman University Campus.
16 http://www.chapman.edu/research-and-institutions/military-law-institute/
17 Id.
18 http://www.law.emory.edu/centers-clinics/volunteer-clinic-for-veterans/legal-assistance.html

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16 http://www.chapman.edu/research-and-institutions/military-law-institute/
17 Id.
18 http://www.law.emory.edu/centers-clinics/volunteer-clinic-for-veterans/legal-assistance.html
schools to emulate and expand upon. All veterans have put their lives on the line in the service of their country and we owe it to them to ensure that legal services are attainable for those that have found themselves in financial straits.

Respectfully submitted,

Mario A. Sullivan
Chair, ABA Young Lawyers Division
August 2014
1. **Summary of Resolution(s):** The purpose of this Resolution is to ensure that veterans, especially those who are unemployed or are otherwise below a certain income level, have appropriate and unfettered access to legal services by creating veterans law clinics at all law schools. If a particular school is unable, due to financial or personnel constraints, to create a veterans law clinic, than the school would instead be urged to offer similar services by means of an existing clinic. Such services would range from assistance with filing/appealing disability claims with the Veterans Administration to assistance with other types of civil legal assistance issues. Given the over three million post 9/11 veterans scattered across all fifty states, the need exists for the creation of such institutes and/or clinics which, when attached to a host law school, would have the resources to make a positive impact not only on the lives of our veterans, but would also provide a valuable hands-on legal experience to students.

2. **Approval by Submitting Entity:** This Resolution was approved by the Young Lawyers Division during the meeting of the YLD Assembly at the 2014 Mid-Year ABA meeting.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** No

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

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

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** If this Resolution were adopted by the House of Delegates, correspondence from the ABA President would be created and sent to the sitting deans at all law schools currently in operation throughout the United States requesting that each of their institutions support this new ABA policy.
8. **Cost to the Association.** (Both direct and indirect costs) If this Resolution passed and my suggestion for implementation under item 7 above is followed, there would be nominal indirect costs in the form of staff time needed to draft an appropriate letter. There would be some direct costs in the form of postal charges.

9. **Disclosure of Interest.** (If applicable) N/A

10. **Referrals.**
   a. ABA Standing Committee on Legal Assistance for Military Personnel (LAMP), Referred May 2014, Response – Voted to support
   b. ABA Standing Committee on the Delivery of Legal Services, Referred May 2014, Response – No decision regarding support has yet been made
   c. Solo, Small Firm & General Practice Division (GP Solo) Referred May 2014, Response – Voted to support
   d. Legal Education, Coordinating Committee on Veterans

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

Joshua A. Roman, Vice-Chair
ABA/YLD Government, Military & Public Sector Lawyers Committee
8208 Hangar Loop Drive
MacDill AFB FL 33621
(813) 828-9292 (Office)
(201) 362-7271 (Mobile)
joshua.roman.1@us.af.mil

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.) Same as above
EXECUTIVE SUMMARY

1. Summary of the Resolution

The purpose of this Resolution is to ensure that veterans, especially those who are unemployed or are otherwise below a certain income level, have appropriate and unfettered access to legal services by creating veterans law clinics at all law schools. If a particular school is unable, due to financial or personnel constraints, to create a veterans law clinic, than the school would instead be urged to offer similar services by means of an existing clinic. Such services would range from assistance with filing / appealing disability claims with the Veterans Administration to assistance with other types of civil legal assistance issues. Given the over three million post 9/11 veterans scattered across all fifty states, the need exists for the creation of such institutes and / or clinics which, when attached to a host law school, would have the resources to make a positive impact not only in the lives of our veterans, but would also provide a valuable hands-on legal experience to students.

2. Summary of the Issue that the Resolution Addresses

This Resolution attempts to address the lack of readily available no-cost civil legal services to the over three million veterans of the U.S. Armed Forces who are unable to access traditional legal services due primarily to cost and availability. Though various pro bono initiatives do exist at the local, regional and national level (i.e. ABA Legal Assistance Project) these efforts, though commendable, do not address the over-arching systemic issue itself. Given the over 200 law schools currently in operation throughout the United States, encouraging all such schools to stand-up veterans law clinics or to utilize existing clinics in order to assist this generally underrepresented subset of the population would ensure that a much larger percentage of all veterans could obtain readily available no-cost legal services for their civil legal needs.

See answer in question 2 above.

4. Summary of Minority Views

None.

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See answer in question 2 above.

4. Summary of Minority Views

None.
RESOLVED, That the American Bar Association urges jurisdictions' highest courts of appellate jurisdiction and appropriate territorial entities to adopt a rule permitting and encouraging in-house counsel already authorized to engage in the practice of law, while in the exclusive employment of an organization in a jurisdiction in which they are not licensed, to provide pro bono legal services in that jurisdiction through an authorized not for profit legal services organization or such other organization specifically designated by the highest court of the affected jurisdiction.
“[I]n a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers’ ethical obligation to volunteer their time and skills pro bono publico is manifest.”


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ABA Model Rule of Professional Conduct 6.1 provides that: “Every lawyer has a professional responsibility to provide legal services to those unable to pay.” To date, forty-nine states, the Virgin Islands and the District of Columbia have adopted the ABA Model Rules of Professional Conduct. In so doing, they have demonstrated an understanding of the importance of delivering pro bono legal services and have accepted the responsibility of urging attorneys within their boundaries to deliver these services. In fact, many attorneys regularly donate their skills and time to their local communities in an effort to aid those in need of but unable to afford legal services. These attorneys should be commended and their efforts applauded.

But what about the attorneys whose practice, by its very nature, precludes their engagement in any pro bono legal services in the state in which they work and reside? This group of attorneys - in-house counsel with a multi-jurisdictional practice - has the time, skills, resources and desire to give back to the communities in which they practice but, in many states around the country, is precluded from doing so because of a lack of authorization in their resident state’s rules of professional conduct. This Resolution aims to fill that gap to allow in-house counsel already authorized to engage in the practice of law, while in the exclusive employment of an organization in a state in which they are not licensed, to participate in the delivery of pro bono legal services in that state. This Resolution serves as a critical step toward the ultimate goal of facilitating the provision of pro bono legal services by all attorneys, regardless of the nature of one’s practice.

The Need for Pro Bono Legal Services

The need for pro bono legal services is tremendous. Statistics show at least 40% of low- and moderate-income households nationwide experience a legal problem each year. Approximately half of low- and moderate-income American households are facing one or more

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1 Model Rule 6.1, Voluntary Pro Bono Publico Service. It also provides that “a lawyer should aspire to render at least 50 hours of pro bono public legal services per year” and that “a substantial majority of the 50 hours” should be to persons of limited means or to organizations that support the needs of persons of limited means. See id.

2 See http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited on Nov. 22, 2013). California is the only state that has not modeled its rules of professional responsibility and conduct after the ABA Model Rules of Professional Conduct. Id. Thirty-nine jurisdictions have adopted a version of Model Rule 6.1, with an additional six jurisdictions adopting other policy that encourages the provision of pro bono legal services. See http://www.americanbar.org/groups/probono_public_service/policy/state_ethics_rules.html.

3 See Probono.net, at http://www.probono.net/ (last visited on Nov. 25, 2013).

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situations that could be addressed by the civil justice system each year. Almost 71% of these situations faced by low-income households are not finding their way to the justice system. The most common legal needs of low- and moderate-income American households pertain to personal finances, consumer issues, housing (both owned and rental), and other real property. Low- and moderate-income households most often try to handle their legal needs on their own as self-represented litigants. Indeed, as has been noted recently by the Attorney-in-Chief of Legal Aid Society in New York City, “It’s a very real problem that confronts low-income families and individuals. The need really is limitless.”

Despite this overwhelming need for legal services, studies show that the collective civil legal aid effort is meeting only about 20% of the legal needs of low-income people. Allowing multijurisdictional in-house counsel to serve this need will help improve the access to justice for those in low- and moderate-income households.

In-House Counsel to the Rescue

ABA Model Rule 5.5 was amended in 2002 to allow for the temporary multijurisdictional practice by in-house counsel in any state their employer-client wishes as long as they are in good standing in their home state of bar admission and do not take on any other representations. Specifically, it provides:

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or in a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

4American Bar Association, Consortium on Legal Services and the Public, Legal Needs and Civil Justice: A Survey of Americans – Major Findings from the Comprehensive Legal Needs Study (1994). Although this study was published in 1994, it remains the only national study performed examining the nature and number of unmet legal needs across the country. It is still widely respected and its findings are still relevant and accurate even today, nearly twenty years later. See Legal Services Corporation, Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans (Sept. 2009), at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

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(1) are provided to the lawyer’s employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

Model Rule 5.5 (d). Subsection (e) of Rule 5.5 requires that the foreign lawyer “be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.”

Many states have adopted Model Rule 5.5 or similar language, effectively allowing for the multijurisdictional practice of in-house counsel in their borders.12 The problem is that not all of these provisions include an exception allowing those attorneys to perform pro bono legal work in their resident employer-client state. This Resolution looks to solve this problem by asking the ABA to encourage all appropriate bodies in states containing such multijurisdictional provisions to adopt an exception allowing pro bono legal work by in-house counsel.

Summary of Current Practice Rules
Currently, thirty-one (31) jurisdictions provide for the provision of pro bono legal services by in-house counsel not licensed in the jurisdiction. The following is a summary13 of practice rules applicable to in-house counsel providing pro bono legal services:

- 18 jurisdictions allow attorneys licensed out-of-state or in-house counsel working under the state’s unauthorized practice of law exception or in-house admission rules to perform pro bono legal work, if those attorneys are “associated with” or “affiliated with” approved legal services organizations.
- 1 jurisdictions allow attorneys licensed out-of-state or in-house counsel working under the state’s unauthorized practice of law exception or in-house admission rules to perform pro bono legal work, if those attorneys are “associated with” or “affiliated with” approved legal services organizations and with the supervision of a locally-licensed attorney.
- 3 jurisdictions allow in-house counsel working under the state’s unauthorized practice of law exception or in-house admission rules to perform pro bono legal work, if “associated with” or “affiliated with” approved legal services or with the supervision of a locally-licensed attorney.
- 1 jurisdictions allow registered in-house counsel to perform pro bono work under their limited licenses without restriction other than the local professional rules of conduct.

12See supra note 2, at page 1.
13This information can be found at Corporate Pro Bono, Pro Bono Institute, Multijurisdictional Practice: In-House Counsel Pro Bono (2013), at http://www.cpbo.org/wp-content/uploads/2012/01/MJP-Article-March-20131.pdf.

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• Jurisdictions are silent with regard to in-house counsel who are not locally licensed providing pro bono legal services.

A chart providing a jurisdiction-by-jurisdiction analysis is appended to this Report. It should be noted that Hawaii and Montana do not make exceptions or allowances for non-locally licensed in-house counsel. There are, however, other states that do make these types of exceptions but do have rules allowing non-locally-licensed out-of-state attorneys, under certain circumstances, to provide pro bono legal assistance. Therefore, the fact that a state does not make an exception for non-locally licensed in-house counsel does not preclude that state from providing pro bono legal services.

The十九 states that currently have no rules regarding whether in-house counsel who are not locally licensed may engage in pro bono legal services are:

- Alabama
- Alaska
- Hawaii
- Idaho
- Indiana
- Kansas
- Kentucky
- Louisiana
- Maine
- Michigan
- Montana
- Nevada
- New Hampshire
- Oklahoma
- South Dakota
- Texas
- Utah
- Vermont
- Wyoming

See supra note 13.

See supra note 13, listing West Virginia as not allowing for non-locally licensed in-house counsel to practice within its borders, but allowing out-of-state attorneys, upon application, to provide pro bono legal assistance in all cases in which he or she is associated with an organized legal services or public defender program sponsored, approved or recognized by the Board of Law Examiners. An attorney can only practice under this rule for 36 months. Id.; see also W. VA. ADMISSION TO THE PRACTICE, Rule 9.0.
enacting a rule allowing non-locally licensed in-house counsel from performing pro bono legal work within its borders under certain circumstances.

Conclusion

There is undeniably an overwhelming need to provide pro bono legal services in this country and statistics show that it is not being met. In-house attorneys have the desire, the skills and the opportunities to provide pro bono legal assistance; they simply need the authorization to do so. This Resolution provides at least a partial solution to addressing this unmet need by encouraging uniformity among states in allowing non-locally-licensed in-house counsel authorized to engage in the practice of law with their corporate employer to further engage in and deliver pro bono legal services in their communities.

Summary

This Resolution will enable the ABA to facilitate and urge the appropriate governing bodies of American states and territories to enact rules permitting non-locally-licensed in-house counsel already authorized to engage in the practice of law to engage in pro bono legal services in their communities. 17

Respectfully submitted,

Mario A. Sullivan, Chair, ABA Young Lawyers Division
and
Mary Ryan, Chair, ABA Standing Committee on Pro Bono and Public Service
August 2014

17The intent of this Resolution is not to propose a specific Model Rule or a specific approach to developing a Model Rule. Rather, the intent is to encourage jurisdictions to consider expanding pro bono legal services by further engaging in pro bono through non-locally licensed in-house counsel who are permitted to provide legal work for their corporation and by removing obstacles and barriers to their being able to participate in pro bono within that jurisdiction. This intent is consistent with Resolution 11: In Support of Practice Rules Enabling In-House Counsel to Provide Pro Bono Legal Services, adopted on July 25, 2012 by the Conference of Chief Justices and the Conference of State Court Administrators, which has influenced rule changes to expand in-house pro bono participation in a number of jurisdictions, including Illinois and New York.
### Summary of Multijurisdictional Practice Rules by State

<table>
<thead>
<tr>
<th>State</th>
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<th>Pre-Bono Provision¹</th>
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</thead>
<tbody>
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<td>Alaska</td>
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<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Arizona</td>
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<td>As, Sup. Ct. Rule 80(A)(1) and Rule 9(A)</td>
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<td>Arkansas</td>
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<td>California</td>
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<td>Call Rules of Court Rules 9(A) and Rule 9(A)</td>
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<tr>
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<td>C.R.C.P. 123(D)</td>
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</tr>
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<tr>
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¹ All jurisdictions with a pre-bono provision require that the attorney must be qualified in good standing in one or more jurisdictions, therefore, we have not repeated this requirement for each.

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**APPENDIX 104B**

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<td>Registered in-house attorneys are authorized to provide pro bono legal services through an established not-for-profit bar association pro bono program, or through such organization(s) specifically authorized in the state.</td>
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<td>Maryland</td>
<td>MD. Bar Adm. Rule 15</td>
<td>Out-of-state attorneys may be certified to provide pro bono legal assistance, under the express consent of a Maryland Bar member, if associated with an organized legal services program that is sponsored or approved by Legal Aid Blinn and that provides legal assistance to indigents in the state. Limited to 2 years.</td>
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</tr>
<tr>
<td>Michigan</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Missouri</td>
<td>MN Rules 9 and 19 for Admission to the Bar</td>
<td>&quot;House counsel&quot; registered under Rule 10 and &quot;temporary house counsel&quot; registered under Rule 19 may provide pro bono legal services to pro bono clients admitted to the bar counsel through an approved legal services provider.</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>MSAP 80(B)</td>
<td>Out-of-state attorneys may provide pro bono services under the supervision of a qualified legal services provider.</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>Sup. Ct. Rule 815 (C) R.A. 3.A</td>
<td>Registered in-house counsel may engage in pro bono work with an organization approved for this purpose by the Missouri Bar.</td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>No**</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Neb. Ch. R. 42-120(D)</td>
<td>Registered in-house counsel may provide pro bono legal services through an established not-for-profit association, pro bono program, or legal services program through such organization(s) specifically authorized in Nebraska.</td>
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<tr>
<td>Nevada</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<tr>
<td>New Hampshire</td>
<td>No**</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>New Jersey</td>
<td>NJBPA § 1-1362(D)</td>
<td>Out-of-state attorneys may provide pro bono legal services, under supervision, through a qualified legal services organization. Counsel must submit a statement by the executive director of the coordinating organization.</td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td>NMAP § 3-391-2(C) E</td>
<td>Non-admitted attorneys may obtain a non-renewable 2-year legal service limited license to provide assistance to clients of qualified legal service providers.</td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>North Carolina</td>
<td>NC S.C.A. § 81-1(D)</td>
<td>Out-of-state attorneys permitted by the North Carolina Bar may represent indigent clients in a pro bono basis under the supervision of active members employed by a nonprofit organization qualified to render legal services.</td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>ND. Bar Adm. in Proc. Rule 5.3</td>
<td>Out-of-state attorneys with 5+ years of experience may, upon application,, practice as an unpaid volunteer under the supervision of an approved legal services organization so long as that organization employs at least one North Dakota attorney.</td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>Ohio Gov. Bic-Rule IX</td>
<td>Out-of-state attorneys may apply for a one-year Temporary Certification to provide legal services that may be renewed once, if associated with a legal services program that serves clients from the state public defender that provides services solely to indigent clients.</td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>State</td>
<td>Registration/Certification Requirement</td>
<td>Rule on Pro Bono Practice</td>
<td>Pro Bono Provided*</td>
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<tr>
<td>Oregon</td>
<td>Yes [OR Rule 6-6.5(C)]</td>
<td></td>
<td>Registered in-house counsel may provide pro bono legal services through a pro bono program certified by the Oregon State Bar, provided the attorney has sufficient professional liability coverage.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Yes [PA Bar Rule 502(D)]</td>
<td></td>
<td>Registered in-house counsel may participate in the provision of pro bono services offered under the auspices of organized legal aid agencies or state-level bar association projects, provided under the supervision of an attorney who is also working on the pro bono representation.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Yes RI Reg. Cl. Art. II, Rule 2B</td>
<td></td>
<td>Out-of-state attorneys may, upon application, provide assistance when associated with an organized and Supreme Court approved program providing legal services to indigents, which is funded in whole or in part by the federal government or Rhode Island Bar Foundation or sponsored by an ABA law school or the Rhode Island public defender. Limited to 2 years.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Yes SC App. Cl. Rule 401(D)</td>
<td></td>
<td>Registered in-house counsel may provide pro bono legal services if associated with an approved legal services organization which receives, or is eligible to receive, funds from the Legal Services Corporation, or is working on a case or project through the South Carolina Bar Pro Bono Program, provided that he or she is supervised by a member of the South Carolina Bar.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>No**</td>
<td>No</td>
<td>Registered in-house attorneys may provide pro bono legal services through an unincorporated not-for-profit bar association, pro bono program or local legal services program or through such organization(s) specifically authorized in this jurisdiction.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Yes [ Tenn. Sup. Cl. Rule 7.3(U)(A)(4)]</td>
<td></td>
<td>Registered in-house attorneys may provide pro bono legal services through an unincorporated not-for-profit bar association, pro bono program or local legal services program or through such organization(s) specifically authorized in this jurisdiction.</td>
</tr>
<tr>
<td>Texas</td>
<td>No</td>
<td>No</td>
<td></td>
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<tr>
<td>Utah</td>
<td>Yes</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>No**</td>
<td>No</td>
<td>Registered in-house counsel may provide pro bono public service in accordance with Rule 6.1 of the Virginia Rules of Professional Conduct.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Yes V.S.C.P.R. §A.3 (Post 3rd)</td>
<td></td>
<td>Authorized-in-house lawyers may provide legal services for free through a qualified legal services program for indigent clients. If such services involve representation before a court or tribunal, the lawyer shall seek pro hac vice admission and any fees for such admissions shall be waived.</td>
</tr>
<tr>
<td>Washington</td>
<td>No**</td>
<td>Wash, B.P.C. 5.5</td>
<td>Authorized-in-house lawyers may provide legal services for free through a qualified legal services program for indigent clients. If such services involve representation before a court or tribunal, the lawyer shall seek pro hac vice admission and any fees for such admissions shall be waived.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>No*</td>
<td>W. Va. Adm. to the President, Rule 11</td>
<td>Registered in-house counsel may provide legal assistance to qualified clients of a legal service program.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Yes [ Wis. Bar. Cert. No. 25A</td>
<td></td>
<td>Wisconsin SC B. 2012</td>
</tr>
<tr>
<td>Wyoming</td>
<td>No**</td>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>

* These states do not make exceptions or allowances for non-locally licensed in-house counsel.

** These States have adopted the ABA model rules (or a version thereof) that allow in-house counsel to practice for their employer without registering.

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GENERAL INFORMATION FORM

Submitting Entities: ABA Young Lawyers Division and ABA Standing Committee on Pro Bono and Public Service

Submitted By: Mario A. Sullivan, Chair, ABA Young Lawyers Division, and Mary Ryan, Chair, ABA Standing Committee on Pro Bono and Public Service

1. Summary of Resolution: This Resolution will enable the ABA to facilitate and urge the appropriate governing bodies of American states and territories to enact rules permitting non-locally-licensed in-house counsel already authorized to engage in the practice of law to engage in pro bono legal services in their communities.

2. Approval by Submitting Entities: This Resolution was adopted by the ABA Standing Committee on Pro Bono and Public Service at its February 2014 Meeting and by the ABA Young Lawyers Division during the meeting of the YLD Assembly at the 2014 ABA Midyear 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? Resolution 121A – adopted at the 2006 Annual Meeting: Urges solo and small firm attorneys, larger law firms, corporate law departments and government and military law offices to encourage their lawyers, partners as well as associates, to serve their communities through pro bono and public service activities consistent with applicable rules of professional conduct and adopts Pro Bono Policies and Procedures, dated August 2006, to provide their lawyers with opportunities to do pro bono work and to adopt specific internal policies and procedures to support such work.

   Resolution 102A – Adopted at the 2009 Annual Meeting: Urges corporate counsel to work with the corporation and outside counsel to waive certain limited positional conflicts in areas related to mortgage, bankruptcy and consumer finance in order to reduce the number of pro bono matters declined by outside counsel due to conflicts, so long as the waivers are not inconsistent with applicable rules of professional conduct.

   Neither would be affected by this Resolution’s adoption.

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


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates: The Standing Committee on Pro Bono and Public Service will work to implement the recommended policy in rule changes in each jurisdiction pursuant to the proper channels. The Young Lawyers Division will implement educational programs at
its quarterly conferences to educate young lawyers as to this policy and its significant impact on pro bono legal services across the country.

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

9. **Disclosure of Interest:**

No interests of the Standing Committee, its members, the Young Lawyers Division or its members are implicated by this resolution.

10. **Referrals:**

ABA Section on Litigation
National Conference of Bar Presidents
National Association of Bar Executives
ABA Center for Professional Responsibility
ABA Business Law Section

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

Dana M. Hrelic  
ABA YLD Resolutions Team  
90 Gillett Street  
Hartford, CT 06105  
860/522-8338  
dhrelic@hortonshieldsknox.com

Michael G. Bergmann  
ABA YLD House of Delegates Representative  
321 North Clark Street, 28th Floor  
Chicago, IL 60654  
312/832-5129  
mbergmann@pili.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.):  

Michael G. Bergmann  
(see above)
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution will enable the ABA to facilitate and urge the appropriate governing bodies of American states and territories to enact rules permitting non-locally-licensed in-house counsel already authorized to engage in the practice of law to engage in pro bono legal services in their communities. It offers that such engagement in pro bono legal services be under the supervision of others who are locally-licensed to foster teamwork and to provide guidance and advice regarding local custom and law, although the intent of this Resolution is not to propose a specific Model Rule or a specific approach to developing a Model Rule. Rather, the intent is to encourage jurisdictions to consider expanding pro bono legal services within their borders.

2. Summary of the Issue that the Resolution Addresses

This Resolution attempts to address the tremendous need for pro bono legal services across the country. Through the adoption of the ABA Model Rules of Professional Conduct, nearly every state, the Virgin Islands, and the District of Columbia have demonstrated an understanding of the importance of delivering pro bono legal services and have accepted the responsibility of urging attorneys within their boundaries to deliver these services. While commendable, however, studies show that this collective civil legal aid effort is meeting only about 20% of the legal needs of low-income people. Allowing multijurisdictional in-house counsel to serve these legal needs will help improve the access to justice for those in low- and moderate-income households. This Resolution ultimately serves as a critical step toward the ultimate goal of facilitating the provision of pro bono legal services by all attorneys, regardless of the nature of one’s practice.

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

See Answer to Question 2.

4. Summary of Minority Views

Concern has been expressed as to opening the practice of law in a jurisdiction to those not-locally-licensed. The enclosed report addresses this concern.
RESOLVED, That the American Bar Association opposes the suspension or delay of the fundamental right to a civil jury trial, even in the face of difficult fiscal circumstances.
I. Statement of Reasons for the Resolution

The funding crisis faced by the judiciary at both the state and federal levels has encouraged courts to adopt a variety of cost-saving measures, including decisions to close one day a week, furlough employees, and even place a moratorium on civil jury trials. It is this last action, the suspension of civil jury trials, that has broad constitutional implications that some jurisdictions have failed to acknowledge. For example, in 2009, the Supreme Court of New Hampshire suspended civil jury trials in order to save money.1

Similarly, in Glynn County, Georgia, a moratorium on all civil jury trials was issued in 2009 for budgetary reasons.2 Denial of the right to a civil jury trial is not limited to outright suspensions of trials. In some instances, cuts in judicial funding have been so extreme that courts lack the resources to afford litigants their day in court without inordinate delay. For example, recent cuts to the California judicial branch’s funding were so extensive that litigants reported showing up on the day of trial only to be told that trial had to be postponed for six to eight months.3

Although the financial pressures of the recent economic downturn may have eased somewhat, there is good reason for concern that courts will suffer in the wake of future budgetary crises. Rising Medicaid costs and underfunded retirement obligations may result in fiscal hardships in the near future.4 Even in the absence of economic downturns, political budgetary battles can impact court funding and jeopardize civil jury trials. When Congress appeared unable to resolve a budget impasse in September 2012, Chief Judge David Sentelle of the U.S. Circuit Court of Appeals for the District of Columbia stated that all federal civil jury trials might have to be eliminated.5

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II. Background

While civil jury trials are threatened by inadequate funding of the courts, no such suspension of criminal jury trials are likely to take place because courts recognize that the Constitution guarantees a right to a speedy trial before an impartial jury to criminal defendants. This recognition of the need to maintain jury trials for criminal defendants, while diminishing the right to a civil jury overlooks the fundamental nature of the jury-guarantee in state constitutions and in the U.S. Constitution. The Seventh Amendment provides:

In Suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the Common Law.

Justice Oliver Wendell Holmes referred to this guarantee as one of the “great ordinances of the Constitution.” Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). More than any other right, the demand for the right to a jury trial helped trigger the fight for independence. The Stamp Act controversy heavily involved taxing of legal documents that were needed to pursue cases in civil court. The onerous tax to obtain a legal stamp effectively closed the civil courts to the colonists. Admiralty courts, which operated without juries, were given jurisdiction to enforce the act, precisely because the British wanted to avoid juries, whom they correctly assumed would be sympathetic to the American plight. In response, the colonists convened the Stamp Act Congress to protest that “trial by jury is the inherent and invaluable right of every British subject in these colonies.” Resolutions of the Stamp Act Congress 1765, § 7, reproduced in Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 270 n.5 (Richard L. Perry & John C. Cooper eds., rev. ed., Am. B. Found, 1978). Chief Justice Rehnquist acknowledged this history when he wrote that the right to a jury trial was “one of the important grievances leading to the break with England.” Parklane Hosiery Co. v. Shore, 430 U.S. 322, 340 (1979) (Rehnquist, J., dissenting).

That grievance reflected protest against the Crown’s use of bench trials to avoid decisions by juries. Charles Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 654 n. 47 (1973). Thus, the Declaration of Independence charged England with “depriving us in many cases, of the benefit of Trial by Jury.” Declaration of Independence [520] (1776). Without the promise of its addition, the Constitution likely never would have been ratified. Parsons v. Bedford, 28 U.S. 433, 445 (1830) (Story, J.). The Supreme Court has declared the right to jury trials in civil cases to be “a basic and fundamental feature of our system of federal jurisprudence,” as well as “fundamental and sacred to the citizen.” Jacob v. New York, 315 U.S. 752, 752-53 (1942).

The States have similarly recognized the transcendent importance of trial by jury in civil cases. It was “probably the only one universally secured by the first American state constitutions.” Leonard Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 281 (1960) (quoted in Parklane Hosiery Co., 439 U.S. at 341 (Rehnquist, J., dissenting)). State courts have recognized that trial by jury in civil cases “has been regarded from

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the earliest times as one of the safeguards of the liberties of the people and as one of the essentials to the due administration of justice." Chesson v. Kieckhefer Container Co., 26 S.E.2d 904, 906 (N.C. 1943). All but two state constitutions similarly recognize the importance of the right to trial by jury in civil cases, commonly referring to that right as "inviolate." In each of these instances, the right has properly been regarded to be of transcendent importance. Thus, representative of the prevailing attitude of state courts, the North Carolina Supreme Court observed, the guarantee of trial by jury in civil cases "has been regarded from the earliest times as one of the safeguards of the liberties of the people and as one of the essentials to the due administration of justice."

Efforts to suspend civil jury trials due to a lack of adequate court funding have been held to violate the Seventh Amendment when an individual is not afforded, for any significant period of time, a jury trial he would otherwise receive. Armster v. United States District Court for the District of Alaska, 792 F.2d 1423, 1430 (9th Cir. 1986). The Armster court was faced with a challenge to the suspension of civil jury trials due to an alleged insufficiency of funds and aptly stated:

We conclude that the availability of constitutional rights does not vary with the rise and fall of account balances in the Treasury. Our basic liberties cannot be offered and withdrawn as "budget crunches" come and go, nor may they be made contingent on transitory political judgments regarding the advisability of raising or lowering taxes, or on pragmatic or tactical decisions about how to deal with the perennial problem of the national debt. In short, constitutional rights do not turn on the political mood of the moment, the outcome of cost/benefit analyses or the results of economic or fiscal calculations. Rather, our constitutional rights are fixed and immutable, subject to change only in the manner our forefathers established for the making of constitutional amendments. The constitutional mandate that federal courts provide civil litigants with a system of civil jury trials is clear. There is no price tag on the continued existence of that system, or on any other constitutionally-provided rights.

Id. at 1429. At least one state court has followed the Armster Court’s lead and declared that blanket moratoriums on civil jury trials for a significant period of time due to budgetary concerns violate state constitutional rights. Odden v. The Honorable James H. O’Keefe, 450 N.W.2d 707, 6 Robert S. Peck, Violating the Inviolate: Caps on Damages and the Right to Trial by Jury, 31 U. Dayton L. Rev. 307, 311 n.30 (2006) (listing constitutional provisions).

7 Chesson v. Kieckhefer Container Co., 26 S.E.2d 904, 906 (N.C. 1943). See also, e.g., Dimick v. Schied, 293 U.S. 474, 485 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care."); White v. White, 196 S.W. 508, 512 (Tex. 1917) (jury trial right is “bulwark of human liberty ... held ... sacred ... in English and American history”).
The maxim that “justice delayed is justice denied” is deeply rooted in our jurisprudence. It has been traced to the Magna Carta’s proclamation that “[t]o no one will we sell, to no one will we refuse or delay, right or justice.” Magna Carta ch. 40 (1215). In recognition of the historical importance of this principle and the rights secured by our federal and state constitutions, the American Bar Association should declare that the fundamental right to a jury trial in civil cases should not be suspended or delayed on account of inadequate judicial funding. At the same time, supporting this resolution and guaranteeing the continued availability of civil jury trials does not detract or limit in any way the availability or use of alternative forms of dispute resolution.

**Conclusion**

The American Bar Association should oppose the suspension of the fundamental right to trial by jury in civil cases, enabling it to participate in efforts to protect the civil jury trial, even in the face of budgetary pressures.

Respectfully submitted,
Eugene G. Beckham, Chair
Tort Trial and Insurance Practice Section
August 2014
1. Summary of Resolution(s).

The resolution puts the American Bar Association on record in recognizing the fundamental right to trial by jury and in opposing the suspension or delay of that right as a cost-saving measure.

2. Approval by Submitting Entity.

Approved by the Council of the Tort Trial and Insurance Practice Section on March 25, 2014.

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

No.

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

The proposed resolution is consistent with existing Association policies, but expands upon them. These policies are:

ABA Principles Relating to Juries and Jury Trials, adopted February 2005, states that “[i]n civil cases the right to jury trial may be waived as provided by applicable law, but waiver should neither be presumed nor required where the interests of justice demand otherwise.” (emphasis added). In addition, these Principles state that “parties in civil matters have the right to a fair, accurate and timely jury trial in accordance with the law.”

In August, 2011, the ABA House of Delegates adopted Resolution 302, which was the product of the ABA Task Force on Preservation of the Justice System. The Task Force report recognized that curtailment of civil jury trials was among the drastic steps courts had taken to deal with chronic underfunding and specifically referenced the closing of courthouse doors to all civil cases in one Georgia judicial circuit. Resolution 302 urged state, territorial, and local governments to recognize their constitutional responsibilities to fund their justice systems adequately. There is no ABA policy specifically opposing suspension of jury trials in civil cases.
5. **What urgency exists which requires action at this meeting of the House?**

The budgetary crisis that has plagued court systems has resulted, in a number of prominent instances, the suspension of civil jury trials. Although the crisis has somewhat abated of late, it is neither entirely over. Moreover, we are likely to see its repetition as the country and individual states go through economic cycles that inevitably reduce court budgets. The resolution will put the ABA in a position to comment on plans to suspend civil jury trials and to participate, in appropriate cases, as *amicus curiae*, in cases seeking to overturn the suspension of that constitutional right.

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.**

Appropriate notice to relevant policymakers and state and local bar associations would be made. In addition, if adopted, the Section plans to inform and educate judges and local jurisdictions about the Resolution and Report. Finally, the policy would support, in appropriate cases, the filing of an amicus brief to assure the continued availability of juries in civil cases.

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

None

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

None

10. **Referrals.**

Section of Dispute Resolution  
Section of Business Law  
Section of Labor and Employment Law  
Section of Litigation  
Judicial Division  
National Conference of Bar Presidents
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

James A. Wells
Haines & Associates
1835 Market St. Suite 2420
Philadelphia, PA 19103
215/256-2217
FAX: 215/246-2211
jwells@haines-law.com

Robert S. Peck
Delegate, TIPS
202/944-2874 (o)
202/27-6006 (c)
E-mail: Robert.peck@cclfirm.com

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

Robert S. Peck
Delegate, TIPS
202/944-2874 (o)
202/27-6006 (c)
E-mail: Robert.peck@cclfirm.com
1. **Summary of the Resolution**

   The Resolution opposes the suspension or delay of the fundamental right to a civil jury trial, even when difficult fiscal circumstances forces courts to cut services.

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

   The funding crisis faced by the judiciary at both the state and federal levels has encouraged courts to adopt a variety of cost-saving measures, including decisions to close one day a week, furlough employees, and even place a moratorium on civil jury trials. It is this last action, the suspension of civil jury trials, that has broad constitutional implications that some jurisdictions have failed to acknowledge.

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

   By approving the resolution, the ABA will be able to support members opposing policy decisions to suspend civil jury trials and, in appropriate cases, file amicus briefs to oppose those suspensions.

4. **Summary of Minority Views**

   The co-sponsors are not aware of any minority views or opposition.
RESOLVED, That the American Bar Association endorses the 2014 American Civil Trial Bar Roundtable’s "A White Paper on Increasing the Professionalism of American Lawyers" and urges lawyers and legal organizations to implement its recommendations.
INTRODUCTION

The American Civil Trial Bar Roundtable has been in existence since 1997. There are 14 participating organizations. The Roundtable brings together the most significant law or bar related organizations and trial practitioners representing diverse viewpoints in the civil trial bar. Participants acknowledge lack of consensus on some issues, but express common belief in the importance of the civil trial system to the American justice system and the importance of a forum for the exchange of ideas.

The Roundtable occasionally issues White Papers on issues participating organizations find to be of significant importance to maintaining the American justice system, especially the civil trial system. The Roundtable issued a White Paper in 2000, revised in 2006, concerning the state of the civil justice system in the United States with recommendations for strengthening it.¹

This White Paper builds on our earlier 2006 White Paper, which noted:

1. America’s civil justice system is the envy of other nations in both the developed and undeveloped world.
2. The civil justice system operates best when each party is on as level a playing field as possible with regard to trial resources and litigants are represented by qualified and competent counsel.
3. A sophisticated economic system like that in place in the United States needs a reliable judicial system rendering fair and impartial justice.²

The 2006 White Paper also observed:

... the legal system and ... civil trial practice in particular have come under rather sharp attack. Lack of respect and confidence seems to have developed in the public’s mind for ... trial practice and trial practitioners of all types. Much of the criticism appears without justification but nevertheless has taken hold ... the perception of lack of civility of lawyers toward one another leading to “win at any cost” tactics and hardball ultimatums have reduced the public’s esteem of lawyers.

¹ The assistance in the preparation of this white paper of the Nelson Mullins Riley Scarborough Center on Professionalism and Dean Emeritus John E. Montgomery at the University of South Carolina School of Law are acknowledged.
² American Civil Trial Bar Roundtable, A White Paper Concerning an Overview of the Civil Justice System (2000, revised Sept. 9, 2006).
generally and trial practitioners in particular. Roundtable organizations and legal organizations of all types should encourage their members to persuade partners and associates to help in the effort to restore a sense of professionalism in younger colleagues through mentoring and other programs that stress fair and ethical treatment of opposing counsel.\(^1\)

The 2006 Civil Justice System White Paper raised two broad themes on which this White Paper will build:

1. The civil justice system, properly functioning, ensures that rule of law principles, the foundation of a democratic society, apply to every dispute.

2. Unprofessional conduct of lawyers undermines both the efficient, effective operation of the civil justice system and the standing of the legal profession, especially trial practitioners, in the eyes of broader society.

This White Paper addresses an important, related topic, increasing the professionalism of lawyers. Lack of professionalism not only decreases public confidence in the American civil justice system and impairs its effective operation, it undermines the legal profession itself. Finding ways to strengthen professionalism is essential.

II. PURPOSE

The purpose of this White Paper is to suggest effective strategies for strengthening the professionalism of lawyers, building on the extensive initiatives of courts, bars, legal organizations and law schools. These initiatives, for the most part, have consisted of codes, standards, and oaths asserting the importance of professional conduct and establishing principles for lawyer conduct. Reflecting the aspirational nature of professionalism, these efforts have focused primarily on education, not enforcement, with the hope that education about professionalism will cause lawyers to avoid unprofessional behavior.\(^4\)

This White Paper goes a step beyond existing efforts and proposes a more comprehensive approach to improving the professionalism of lawyers, and, in so doing, strengthening the American civil justice system.

III. THE IMPORTANCE OF LAWYER PROFESSIONALISM TO THE AMERICAN CIVIL JUSTICE SYSTEM

There is no generally accepted definition of professionalism,\(^5\) which complicates the task of improving it. While a precise definition remains elusive, broad agreement exists on

\(^{1}\) Id. at 5.

\(^{4}\) Public education is a widely used strategy to convey information about a specific problem and ways to address it. It is probably the most cost-effective strategy for organizations to employ but alone is never completely effective.

\(^{5}\) See Neil Hamilton, Professionalism Clearly Defined, 18 PROFESSIONAL LAWYER 4 (2008), for a particularly thoughtful approach. A few state codes have attempted a definition. The Oregon Bar Statement of Professionalism defines it as “the courage to care about and act for the benefit of our clients, generally and trial practitioners in particular. Roundtable organizations and legal organizations of all types should encourage their members to persuade partners and associates to help in the effort to restore a sense of professionalism in younger colleagues through mentoring and other programs that stress fair and ethical treatment of opposing counsel.\(^1\)

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professionalism's major components: competency, ethics, integrity, access to justice, respect for the rule of law, independent judgment, and civility are all generally accepted aspects of professionalism. Stated another way, professionalism encompasses the core values of the American legal profession and reflects the moral traditions of lawyering: the obligation to represent clients diligently, and the obligation to support the processes and institutions of the justice system.6

While the definition of professionalism is elusive, the effects of its absence are not. Despite the efforts of bars, courts, legal organizations, and law schools to improve professionalism, the common experience of the profession suggests that unprofessional conduct of lawyers remains unacceptably high.7

Lack of professionalism has a negative impact on the civil justice system, the legal profession, and even lawyers who cross acceptable behavioral lines. Ultimately, and of most significance, professionalism is of crucial importance to the rule of law and the civil justice system itself. Rule of law principles are universally agreed upon and include clear, publicized, fair laws, accountable government officials, access to justice provided by competent, honest, ethical attorneys and judges and an accessible, fair, impartial, efficient justice system, which resolves disputes based on legal principles and processes, not arbitrariness or the power or resources of any individual or entity.8 All of the accepted elements of professionalism, from civility to integrity to ethics, access to justice and independence, have a direct impact on respect for the rule of law and the strength of the civil justice system.

Lawyers play a central role in assuring that rule of law principles apply. Without exaggeration, in every proceeding lawyers have the obligation, through diligently representing clients, to assure that rule of law principles govern the resolution of their clients' disputes. This is one of the pillars of a democratic society.


6 Virtually all professional codes and statements of professionalism reflect obligations both to clients and to the justice system. See id.

7 One survey of Illinois lawyers reported that 92% of responding attorneys experienced “strategic incivility” at some point in their careers and 98% believed that a “win at all costs” mentality contributed to unprofessional behavior. See SURVEY ON PROFESSIONALISM: A STUDY OF ILLINOIS LAWYERS 11 (Dec. 2007) [hereinafter SURVEY ON PROFESSIONALISM].

Unprofessional conduct, whether uncivil behavior, improper exercise of independent judgment to needlessly prolong discovery, or lack of integrity, imposes unnecessary delays and costs and can result in loss of public confidence in both the legal profession and the civil justice system itself. Lawyers, by engaging in unprofessional conduct, are violating the profession’s social contract with the public to maintain the framework of the justice system and placing the independence and self-governance privilege of the profession at risk.

Aside from these broader obligations of lawyers to the justice system, the public, and the profession itself, unprofessional conduct often undermines the lawyer’s own self-interest as a member of a learned profession. Whatever the perceived, immediate benefit in any individual representation of uncivil conduct or “win at any cost” tactics, lawyers often ultimately suffer the considerable costs of their own unprofessional conduct. Loss of respect by other lawyers and judges, loss of referrals and even loss of clients are not insignificant consequences of unprofessional behavior.

IV. THE BACKGROUND OF CURRENT PROFESSIONALISM INITIATIVES

The roots of modern professionalism extend back two millennia to the Roman legal system. Advocates in that system were required to take an “oath of calumny” which obligated them to exhibit proper conduct, integrity and fair dealing.9 Beginning in the thirteenth century, English lawyers had obligations similar to those expected of American lawyers today. Fair dealing, competency, loyalty, confidentiality, reasonable fees and public service all were obligations assumed by English advocates.10 Those obligations have continued in the modern era through the English Inns of Court.

In nineteenth century America, David Dudley Field, the author of the Field Code, included in his model statute, adopted by about 15 states, basic ethical obligations for lawyers.11 Two law professors, David Hoffman of Maryland and George Sharswood of Pennsylvania, proposed what in effect were codes of lawyer conduct in their treatises. Hoffman referred to his as “resolutions,” which urged lawyers to demonstrate loyalty, competency, gentlemanly behavior, civility and respect.12

9 See generally JAMES A. BRUNDAIGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS (2008), which discusses the influence of the Roman legal system on medieval lawyers.
11 Id. at 1425. The Field Code specified duties to maintain confidentiality, to respect courts, not to mislead courts, to do justice, to abstain from offensive personality, to not unduly prejudice parties or witnesses, to not incite passion or greed in litigation and to take cases on behalf of the poor and oppressed.
12 Id. at 1427–28.
The twentieth century was marked by continued efforts to codify and make mandatory ethical standards which themselves include some elements of professionalism.13

Modern efforts to improve the professionalism of lawyers extend back four decades. In the 1970’s Chief Justice Warren Burger, concerned about the state of the American legal profession, urged organized bars to take steps to increase professionalism. The ABA responded through the Stanley Commission Report, which urged a greater emphasis on lawyers’ public obligations to the profession and to society.14 At the state level, the Conference of Chief Justices’ National Action Plan on Lawyer Conduct and Professionalism introduced the idea that professionalism is aspirational, encompassing broader standards than compliance with ethical rules.

Professionalism is a much broader concept than legal ethics—professionals includes not only civility among members of the bench and bar, but also competency, integrity, respect for the rule of law, participation in pro bono and community service and conduct by members of the legal profession that exceeds the minimum ethical requirements. Ethics are what a lawyer must obey. Principles of professionalism are what a lawyer should live by in conducting his or her affairs.15

In 2008, the ABA Standing Committee on Professionalism reexamined professionalism and issued its own White Paper.16 It recommended steps to strengthen professionalism and, in doing so, promoting “... the fundamental traditions and core values of the legal profession ... inculcating and enhancing professionalism among lawyers practicing in the 21st Century.”17

13 Alabama enacted the first state bar code of ethics in 1887. It became a model for several state ethics codes and was the basis for the American Bar Association’s 1908 Canons of Ethics. Ethics codes, which address some aspects of professionalism, are now in force in every state.


17 Id. at 1.
All these “foundational” reports and White Papers have had the laudatory effect of contributing to broad initiatives from every part of the profession—courts, bars, legal organizations and law schools—to establish professionalism codes, creeds and oaths, continuing education and legal education programs and, increasingly, mentoring to improve the professionalism of American lawyers.

Efforts of the profession to improve the professionalism of American lawyers are national in scope and comprehensive in content. A review of those professionalism initiatives follows.

V. PROFESSIONALISM INITIATIVES

1. State Court Professionalism Commissions

Professionalism commissions, usually established by state supreme courts, are active in 12 states. Most were established in the 1990s and early 2000s. Their common mission is to promote professionalism. Their activities include coordination with bars, courts and law schools, initiating and sponsoring professionalism initiatives, improving access to justice and administering the justice system and providing guidance and assistance on professionalism initiatives.

Professionalism commissions have been very active in promoting professionalism and initiating professionalism initiatives. The commissions have well defined missions and responsibilities and, in most cases, permanent staff and budgets. Many professionalism initiatives in place today have their origins in these commissions. Statewide mentoring programs for new lawyers are a prime example.

While all commissions are very active, the work of these organizations in Georgia, North Carolina, Colorado, Illinois, Florida, Ohio, and Texas are illustrative of the kinds of professionalism initiatives which commissions have advocated. Development of MCLE programs emphasizing professionalism, mentoring, regular convocations for the bench, bar, and law schools and special professionalism programs and courses are typical examples.

18 For detail on specific commissions, see Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina School of Law, http://professionalism.law.sc.edu/ (last visited Aug. 7, 2013). The Supreme Court of Florida Commission is a representative example. In 1987 a Florida Bar task force found “steep decline” in the professionalism of Florida lawyers, in 1996 the Bar requested the Supreme Court create a Supreme Court of Florida Commission on Professionalism. Its objective is to increase the professionalism aspirations of all lawyers in Florida and ensure that the practice of law remains a high calling with lawyers invested in not only the service of individual clients but also service to the public good as well. See Supreme Court of Florida, No. SC 13-688, In re Code for Resolving Professionalism Complaints (June 6, 2013).

19 Statewide mentoring programs in Georgia, Ohio, and South Carolina, for example, originated from those states’ supreme court professionalism commissions.

20 Commissions are effective in promoting professionalism because they bring together all interests in the profession and have the support of their supreme courts.

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20 Commissions are effective in promoting professionalism because they bring together all interests in the profession and have the support of their supreme courts.
2. State Bar Professionalism Committees
Almost half of the states and the District of Columbia have bar professionalism committees. Twenty-six states have such commissions. For details, see the Nelson Mullins Professionalism website, supra note 18 and the ABA Center on Professional Responsibility website, http://www.americanbar.org/groups/professional_responsibility.html (last visited Aug. 7, 2013).

Four states have both court commissions and professionalism committees with complimentary missions. A number of states have ethics and professional responsibility committees, which do not separately address professionalism, although a few deal with both areas.

Like commissions, state bar professionalism committees generally have specific responsibilities for promoting professionalism. One of their major responsibilities has been developing professionalism standards for their states. Specific activities of these committees include: promoting professionalism to the profession and the public, sponsoring programs to increase ethical, professional conduct, and educating newly admitted members of the bar on professionalism.

3. Bar Professionalism Codes, Creeds, Principles and Standards
Almost two thirds of state bars, the District of Columbia, scores of local bars and many federal district courts have adopted professionalism standards. While they generally cover all aspects of professionalism, civility is the most widely addressed topic. While language varies, most standards, codes, or creeds emphasize the core values of the profession: honesty, integrity, civility, and service. Those values are also affirmed by Roundtable organizations. The accompanying charts included in the Appendix categorize these standards by topics covered.

Appendix A summarizes by state the most common standards, the majority of which address civility. Appendix B includes standards on areas of professionalism other than civility.

4. Oaths
A significant number of states have some form of civility oath. In 12 states, the oaths are incorporated into the oath of admission prescribed by the state’s supreme court and are included in the state's bar laws.

Twenty-six states have such commissions. For details, see the Nelson Mullins Professionalism website, supra note 18 and the ABA Center on Professional Responsibility website, http://www.americanbar.org/groups/professional_responsibility.html (last visited Aug. 7, 2013).

Florida, Georgia, Maryland, New York. The Florida Bar professionalism committee specifically supports that state’s supreme court professionalism commission. See Keith W. Rizzardi, Defining Professionalism: I Know It When I See It, 79 FLA. BAR 1, 38, n.3 (2005).

Twelve states have such bar committees. For details, see Nelson Mullins Professionalism website, supra note 18.

Indiana and Maryland.

In states without supreme court professionalism commissions, bar professionalism committees have responsibilities similar to commissions. In general, they have not been as involved as court commissions in mentoring and in sponsoring regular meetings of all parts of the profession on professionalism.

There are well over one hundred different professionalism codes, guidelines, standards, and creeds. Some states have both codes and creeds. Guidelines and codes tend to focus more on specific types of conduct, creeds on the central values of the profession. See Rizzardi, supra note 22, for a discussion of Florida’s guidelines, ideals, and creed.

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5. Mandatory CLE Programs
Currently, 44 states have mandatory CLE requirements. Forty-three of the forty-four require some portion of hours (usually 1 or 2) be on ethics or professional responsibility. Nineteen states allow either ethics or professionalism to fulfill that requirement.30

6. Mentoring Programs
The majority of states have some form of mentoring program for newly admitted attorneys. A number of these are mentor-match programs where, if requested, the bar assists in locating a mentor.31 These programs are extremely limited in scope and the number of new lawyers who participate is hard to determine. Of much great impact are the 13 voluntary and 8 mandatory mentoring programs, which operate on a statewide basis.32 Georgia pioneered mandatory mentoring for all newly admitted lawyers and its program is about a decade old. Ohio has an extremely successful voluntary program with a large percentage of those eligible participating.33 These programs have become models for other state programs. All these programs place significant emphasis on professionalism and the core values of the profession. There are also a large number of local bar mentoring programs, which often mirror the structure of state programs. Texas has a particularly strong system of local bar-based mentoring programs.

27 For typical language, see the South Carolina oath, which states “to opposing parties and their counsel, I pledge fairness, integrity and civility, not only in court, but also in all written and oral communications.” See http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=402A&subRuleID=&mleType=APP (last visited Aug. 28, 2013). The Alaska oath states, “I will be candid, fair and courteous before the court and other attorneys.” See http://www.courts.alaska.gov/bar.html#5 (last visited Aug. 5, 2013).

28 Most states have disciplinary rules based on ABA Model Rules of Professional Conduct Rule 8.4(d), which provides it is professional misconduct for a lawyer “to engage in conduct that is prejudicial to the administration of justice.”

29 Conversation with Mary Germack, Director, South Carolina Supreme Court Continuing Education Commission (Oct. 15, 2012).

30 Id.

31 A compilation and description of all state mentoring programs can be found at the websites in supra note 21.

32 Voluntary and mandatory programs handle the vast majority of new lawyers participating in statewide mentoring, probably exceeding 95%. Mentor-Match programs have few participants.

33 According to Lori Keating, Secretary of the Ohio Supreme Court Professionalism Commission, about two-thirds of eligible lawyers in Ohio participate (Interview, Aug. 1, 2012).
in most of the state’s largest metropolitan areas. Further, some national legal organizations provide mentoring or otherwise participate in mentoring. The American Inns of Court Model Mentoring Program, available for use by local inns, is an example. Mentoring is rapidly growing in the legal profession. Many firms, in addition to bars, have strong mentoring programs. A recently formed national organization, the National Legal Mentoring Consortium, with representatives from bars, courts, law schools, law firms, and corporations, is working to facilitate effective mentoring practices throughout the profession. Most mentoring programs are regularly evaluated and participants, both mentors and mentees, report they are highly effective in addressing problems of new lawyers. These programs now provide mentoring to some 9,500 new lawyers each year, about 20 percent of all new lawyers annually admitted to practice.

7. Law Schools

A decade ago, few law schools placed any emphasis on professionalism. That has started to change with the publication of influential studies on legal education and pressures from legal employers to graduate students better prepared for practice. While a strong focus on professionalism can be found at only a few law schools, most law schools are incorporating

37 Good examples are the evaluation processes established at the start of statewide mentoring in Georgia, Ohio, and South Carolina. These evaluations, conducted during every mentoring cycle, indicate that among 90% of participants find mentoring to be valuable in learning the proper way to practice, introducing new lawyers to the “culture” of law practice and in increasing satisfaction with practice.
38 Derived from ABA statistical information on the number of lawyers admitted annually and from state bar and court statistics on the number of participants in statewide mentoring programs. For the most comprehensive information on mentoring, see NALP FOUNDATION, THE STATE OF MENTORING IN THE LEGAL PROFESSION (2013).
40 A comprehensive assessment of professionalism programs in American law schools can be found in Alison D. Kehner & Mary Ann Robinson, Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools, 38 U. DAYTON L. REV. 57 (2012). A consortium of law schools making up the National Institute for the Teaching of Ethics and Professionalism (NIFTP) has a particularly strong focus on professionalism. Member Schools are: Georgia State (Headquarters school), Mercer, Fordham, Indiana-Bloomington, St. Thomas and the University of South Carolina. The Halloran Center at St. Thomas focuses on professional identity formation. The Nelson Mullins Riley Scarborough Professionalism Center at the University of South Carolina specializes in mentoring. All member schools have specialized and innovative courses emphasizing professionalism.
professionalism in orientation programs, specific classes or clinics, lectures and other programs. A rapidly growing number of law schools have established mentoring programs, special lectures on professionalism and awards. Schools in states with court professionalism commissions usually work with those commissions' on professionalism initiatives.

Law schools, while perhaps slower than the rest of the profession to make professionalism a priority, are making an increasingly important contribution. First, they serve as valuable "laboratories" in trying and evaluating new ways to introduce professionalism. With some 200 ABA accredited law schools in the United States, the sheer number and diversity of their approaches to professionalism is indeed impressive. With time, some best practices to introducing professionalism to law students will emerge. Second, law schools are serving as important collectors and disseminators of information on professionalism initiatives both in legal education and in the profession. It is far easier than a decade ago to access information on professionalism in the profession because some law schools are regularly collecting the information. This is an important addition to the ABA Center for Professional Responsibility’s valuable website and makes information sharing much easier. Finally, law schools are increasingly relying on lawyers, judges, and members of national legal organizations to lecture and participate in professionalism programs. This brings a measure of real world practice experience beyond the capabilities of most law schools.

8. National Legal Organizations

Many national legal organizations, especially Roundtable members, place significant emphasis on professionalism generally or one of its major components. They have been leaders in the professionalism movement. As representative examples, the American Board of Trial Advocates has established a Code of Professionalism, Principles of Civility, Integrity and Professionalism. Also of note are programs at the University of Denver Sturm College of Law, which have a strong professionalism focus. See http://educatingtonormaslawyers.du.edu (last visited Aug. 7, 2013), which is an initiative of the Institute for the Advancement of the American Legal System at the University of Denver Sturm College of Law.

41 Of special note are the three-year mandatory mentoring programs for all students at St. Thomas Law School, the situational mentoring program at Cooley Law School and the combined legal profession class, mandatory mentoring and judicial observation program for the first year students at the University of South Carolina School of Law.

42 Most supreme court commissions have law school representatives. The Georgia, Ohio, and South Carolina commissions are representative examples.

43 See Educating Tomorrow’s Lawyers website, supra note 40; Nelson Mullins Riley & Scarborough Center on Professionalism website, supra note 18.

44 In part this reflects the establishment of centers and initiatives at several law schools which regularly collect and disseminate information about professionalism generally and programs involving professionalism.

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and the educational publication “Civility Matters.” The Defense Research Institute, the voice of the defense bar supports excellence and fairness in the civil justice system. The Substance Law Committee on Professionalism and Ethics coordinates with the organization’s other committees to make sure every DRI seminar has professionalism panels and supports work with law schools. The American Association for Justice promotes a fair and effective justice system and access to justice. The International Association of Defense Counsel supports enhanced skills and professionalism to serve clients, the civil justice system, and society. The International Academy of Trial Lawyers, with both plaintiff and defense members and prosecutors and civil defense attorneys, supports law reform, facilitates the administration of justice, promotes the rule of law internationally and elevated standards of Integrity, honor, and courtesy in the legal profession. The Federal Bar Association, serving the needs of the federal public and private practitioner and the judiciary, supports the sound administration of justice and professional and ethical practice in the federal bar. The Federation of Insurance and Corporate Counsel is “dedicated to pursuing professionalism . . . and a course of balanced justice.” The Association of Defense Trial Attorney, “. . . champions the jury trial system as being essential to the American system of jurisprudence.” The Association of Defense Counsel of Northern California “. . . promotes the administration of justice . . . and enhancing “. . . the standarids of civil defense practice.” The American Inns of Court promotes professionalism, ethics, and integrity and has established a professionalism creed. The American Bar Association through its many committees, sections, and divisions, places significance on professionalism. The Torts and Insurance Practice section, the Standing Committee on Professionalism, the Professionalism Consortium, the Young Lawyers Division and the Giambrell Professionalism Award are representative of the ABA’s work in the area of professionalism. Professionalism programs of the ABA can be accessed through its website. See http://www.americanbar.org/aba.html (last visited Aug. 7, 2013). One valuable recent ABA publication is Essential Qualities of the Professional Lawyer (Paul A. Hawkins ed. 2013).
The commitment of these organizations is representative of the work and purposes of many others. Collectively, national legal organizations demonstrate impressive commitment to professionalism. Through programs for their members, educational initiatives such as ABO's “Civility Matters,” these organizations provide significant support for a strong civil trial system.

For the most part, the efforts of these organizations are focused on their members and not on outreach to the profession generally. A few, for example, the ABA, ABOTA and the American Inns of Court, have programs more broadly directed at the profession. Several are actively engaged in law reform efforts.57

9. Bar, Bar Counsel and Disciplinary Office Initiatives

A significant number of state bars and bar and disciplinary counsel offices conduct training, educational and rehabilitation programs with an emphasis on professionalism. They are far too numerous and diverse to categorize. The Texas Center for Legal Ethics, for example, offers numerous courses, which emphasize ethics and professionalism.58 Its course on professionalism is an excellent example.59 Professionalism, especially civility, is also a common topic in many state “bridge the gap” programs for new lawyers. Disciplinary offices and bar counsel talk widely to lawyer groups and some states have “schools” for lawyers who have been warned or sanctioned for unprofessional conduct,60 usually day-long remedial programs on specific topics.

10. Other Significant Judicial and Bar Initiatives

Courts in Florida and Utah have created, by court order, new mechanisms designed to address unprofessional conduct. The Colorado Bar has established a similar process. These are innovative new approaches which hold promise.

The Utah Supreme Court has established a board of five counselors to “counsel and educate members of the Court concerning the Court’s Standards of Professionalism and Civility.”61 The purposes of the board are to counsel lawyers on professionalism issues in response to complaints by other lawyers and referrals from judges, to provide counseling upon request from lawyers about their obligations under the standards, provide CLE on the standards and publish advice and information on the board’s work. The board will respond to complaints, inquiries, and referrals from lawyers and judges but not from the public. Complaints may be resolved by face-to-face meetings or by written advisory opinions, which may also be provided to the attorneys, supervisors, or employers.

57 The ABA is a prime example.


60 South Carolina is typical of many states which offer remedial courses through the office of the Supreme Court Disciplinary Counsel.

61 The text of the Utah Supreme Court Standard Order No. 7, which was effective April 1, 2008, and revised in 2012, is at http://www.utcourts.gov/resources/rules/urap/supeto.htm (last visited Aug. 7, 2013)

The Utah Supreme Court has established a board of five counselors to “counsel and educate members of the Bar concerning the Court’s Standards of Professionalism and Civility.”61 The purposes of the board are to counsel lawyers on professionalism issues in response to complaints by other lawyers and referrals from judges, to provide counseling upon request from lawyers about their obligations under the standards, provide CLE on the standards and publish advice and information on the board’s work. The board will respond to complaints, inquiries, and referrals from lawyers and judges but not from the public. Complaints may be resolved by face-to-face meetings or by written advisory opinions, which may also be provided to the attorneys, supervisors, or employers.

61 The text of the Utah Supreme Court Standard Order No. 7, which was effective April 1, 2008, and revised in 2012, is at http://www.utcourts.gov/resources/rules/urap/supeto.htm (last visited Aug. 7, 2013)
In June 2013, the Florida Supreme Court issued an order establishing a Code for Resolving Professionalism Complaints, based on a proposal from the Supreme Court of Florida Professionalism Commission.\(^{62}\) The new Florida Code prohibits members of the Florida Bar from engaging in “unprofessional conduct,” defined as “substantial or repeated violations of the Florida Bar Oath of Admission, the Florida Bar Creed of Professionalism, the Florida Bar Ideals and Goals of Professionalism, the Rules Regulating the Florida Bar and the decisions of the Florida Supreme Court.”\(^{63}\)

The Code provides that complaints be directed either to the Attorney Consumer Assistance and Intake Program or a local district professionalism panel. If the complaint involves violation of a disciplinary rule, it will be handled by normal disciplinary procedures. If the complaint involves unprofessional conduct, which does not constitute a disciplinary rule violation, it will be handled either by the attorney intake process or a local district panel. Any person, including non-lawyers, may initiate a complaint. The Florida Bar may also initiate complaints on its own initiative.\(^{64}\) Complaints may be resolved informally, such as by providing remedial guidance. There are also procedures for review by the Grievance Committee and a number of possible actions such as letters of advice and recommendations for diversion to a practice and professionalism enhancement program.\(^{65}\)

The Colorado Bar has established the Peer Professionalism Assistance Group which offers assistance on professionalism issues. Judges and lawyers can refer attorneys to the group for such matters as lack of cooperation in scheduling, refusing to communicate, personal attacks and rude, contentious communications. Matters are addressed and resolved through mentoring, counseling, and other informal means. Complaints are addressed by single members or by panels.\(^{66}\)

The approaches of the Utah and Florida supreme courts and the Colorado Bar are new avenues to strengthening professionalism beyond the philosophy of education on professionalism followed universally by bars, courts, legal organizations, and law schools. For the first time, two courts and a state bar have established processes for raising professionalism complaints not involving separate violations of court or professional responsibility rules and having them resolved. The Utah and Colorado processes also allow for guidance, similar to obtaining ethics advisory opinions. By creating these newer procedures there will also be the opportunity to collect

\(^{62}\) See Supreme Court of Florida Code for Resolving Professionalism Complaints, supra note 18.

\(^{63}\) Id. at 6.

\(^{64}\) Id. at 8.

\(^{65}\) Id. at 9.

information on the number of unprofessional conduct cases arising in the three states, a metric so far, unavailable elsewhere.67

11 The Use of Judicial Sanctions and Disciplinary Actions for Unprofessional Conduct

Judicial sanctions for unprofessional conduct are uncommon, except in limited circumstances involving particularly egregious conduct.68 They are not appropriate for broad application. Professionalism is universally considered to be aspirational, a level of practice which every lawyer should aspire to achieve, not something mandated because of ethical requirements.69 Many bar professionalism codes and standards specifically state that professionalism codes and standards are not to be used as the basis of disciplinary actions. Trial judges are also sometimes reluctant to take valuable court time to resolve disputes between lawyers which often have little to do with the merits of the case. In the words of the Supreme Court of Florida, “professionalism involves principles, character, critical and reflective judgment, along with an understanding of ourselves and others working in and under stressful circumstances.”70 Establishing clear standards on which sanctions for unprofessional conduct could be based, in the areas of reflective judgment or self-understanding, for example, is not feasible and could raise free speech concerns. Accordingly, initiatives to strengthen professionalism in its broad scope have focused on educating lawyers about the various aspects of professionalism and its importance to the profession.

Judicial sanctions are not a broadly applicable or effective means to improve professionalism beyond their current use for clearly egregious behavior. Professionalism is not a lawyering trait amenable to clear standards enforceable by sanctions.71 Further, expanded use of sanctions cuts against the fundamental aspirational basis of professionalism.

67 Both Utah and Colorado have some experience with their respective programs. Over the past few years, the Utah Professionalism Board has dealt with approximately 50 complaints. Most involved civility issues, both inadvertent and “tactical.” The Utah process has been particularly helpful for new lawyers unsure about how to deal with a particular situation. The Colorado program has experienced a comparable volume of complaints, again with most dealing with civility. Colorado has a much larger group (15 versus 5 in Utah) to deal with complaints and consequently, a group of panelists with more diverse practice experience. Both programs engage in outreach programs to educate lawyers about using the programs. (Interview with Robert Clark, Chair, Utah Supreme Court Professionalism Board, Aug. 18, 2013, and John Baker, Director, Colorado Mentoring Program and member, Colorado Bar Peer Professionalism Assistance Group, Aug. 19, 2013).


69 See Hannaford, supra note 15.

70 See supra note 18, at 2.

71 For example, in PNS Stores, INC. v. Rivera, 379 S.W. 34 267-77 (Tex. 2012), the Supreme Court of Texas stated the Lawyer’s Creed was intended to encourage lawyers to be mindful that abusive tactics—
There are however, limited areas where disciplinary actions for very specific types of unprofessional conduct have been based on court rules, court rules. Civility, an important part of professionalism, is part of the oath of admission in several states and falls within court rules. Based on court rules requiring civility and on administration of the justice system, several states have imposed disciplinary sanctions such as public reprimands or suspensions for egregious uncivil conduct.

VI. OBSERVATIONS ON CURRENT INITIATIVES TO STRENGTHEN PROFESSIONALISM

Efforts to strengthen the professionalism of American lawyers through broad education efforts are truly impressive. Virtually the entire legal profession has implemented a broad range of professionalism initiatives. Chief Justice Warren Burger's call to improve professionalism has been embraced by the profession. Two critical questions remain: have these initiatives been effective in increasing the professionalism of practicing attorneys and what more can and should be done?

Insight into those questions comes from the Supreme Court of Florida's rule creating a structure for resolving professionalism complaints, a rule adopted after Florida already had a professionalism code, a professionalism creed and a civility oath in place. The Court observed, "Although it is impossible to determine with scientific certainty the true or exact status of professionalism today, the passive academic approach to such problems has probably had a positive impact toward improving professionalism or at least maintaining the status quo by ranging from hostility to obstructionism-do not serve justice. Id. at 276. The court continued that the Lawyer's Creed serves as an important reminder that the conduct of lawyers "should be characterized at all times by honesty, candor, and fairness." Id. at 276-77. The court also stated that the Lawyer's Creed is aspirational. Id. "It does not create new duties and obligations enforceable by the courts beyond those existing as a result of (1) the courts' inherent powers and (2) the rules already in existence." Id. at 276-77.

South Carolina had three significant disciplinary cases involving violation of its civility oath in 2011 alone. See In re White III, 707 S.E.2d 411 (S.C. 2011) (sanctions for letter suggesting opposing counsel had "no brains" and questioning if "he has a soul"); In re Anonymous Member of South Carolina Bar, 709 S.E.2d 633 (S.C. 2011) (derogatory remarks in email to opposing counsel suggesting counsel's daughter involved with drugs, which had no relation to legal matter at issue); In re Lovelace, 710 S.E.2d 919 (S.C. 2011) (attorney threatened and slapped a witness during deposition). The first recorded South Carolina case sanctioning a lawyer for uncivil conduct was decided in 1850. See The State v. B.F. Hunt, 355 S.C. L. (4 Strob.) 322, 1850 WL 2817 (1850). See also In re Abbott, 925 A.2d 482 (Del. 2007) (violation of attorney oath by accusing another lawyer of fabrication; civility not incorporated in court rule); cf. Peters v. Pine Meadow Ranch Home Ass'n, 151 P.3d 962 (Utah 2007) (till civil language in brief). Michigan has no oath but has sanctioned lawyers for incivility through its professional responsibility rules. Greavence Adm'r v. Ficer, 719 N.W.2d 123 (Mich. 2006). For a review of civility cases involving written documents, see Judith D. Fischer, Incivility in Lawyers Writing: Judicial Handling of Rambo Run Amok, 50 WASHBURN L.J. 365 (2011). A very useful discussion of civility cases is Donald A. Winder, Enforcing Civility in an Uncivilized World (unpublished paper, available from the author, at Winder and Counsel PC, Salt Lake City Utah, updated July 17, 2013).

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This observation of the Florida Supreme Court is worth elaboration because it is probably representative of reactions to professionalism initiatives across the profession.

First, since professionalism is considered to be aspirational, the overriding strategy behind professionalism initiatives has been educational. Standards, codes, CLE programs, lectures and articles, the core of most professionalism initiatives, all are aimed at informing lawyers of the various aspects of professionalism and proper responses to specific practice situations. Less frequently, some states have adopted oaths and make reference to central professional values. Remedial measures such as disciplinary actions have been used only in limited circumstances where court rules prohibit certain kinds of unprofessional conduct, for example, incivility. Second, despite the comprehensiveness of professionalism education initiatives, there has been no real measurement of their effect. No doubt, all these educational efforts have had some success in improving professionalism but the extent of the improvement is uncertain. The common experience of many in the profession is that unprofessional conduct remains at unacceptably high levels. It is hard to say whether some, any or all the professionalism initiatives have had major impact because of insufficient data collection. As a profession, we have been responsible for adopting a broad range of initiatives designed to strengthen professionalism but have not followed up with measuring their effectiveness. Third, most professionalism initiatives do not explicitly state a central purpose or focus on why professionalism is important. Some also do not set out the central values of the profession such as integrity, civility, ethics and a commitment to service. This is in contrast to the values often referred to in the missions of many national legal organizations. That one of the most important purposes of professionalism is to support the rule of law and the civil justice system also is rarely referenced in most initiatives. As a consequence, lawyers are not reminded sufficiently of the core values of the profession or the importance of professionalism to the operation of the justice system. Finally, of all the professionalism initiatives in place, mentoring is the one approach that clearly makes a positive difference. States with both mandatory and voluntary statewide programs such as Georgia, South Carolina, Utah, and Ohio have conducted extensive evaluations of their programs. They have found that mentoring works well in introducing lawyers to the important values of the profession, helps them develop proper habits and increases their satisfaction with practice.

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176 See supra notes 46-57 and accompanying text.
177 See supra note 37.

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180 See supra notes 46-57 and accompanying text.
181 See supra note 37.
At one level, mentoring of course is an educational process, usually in one-on-one or small group settings. As such, it is consistent with the broad education strategy of professionalism initiatives generally. Yet mentoring is different because it relies on close personal contact and building a relationship of trust with another experienced, professional lawyer. This process is effective in conveying the importance of professionalism and establishing a norm of professional conduct.

The central goal in the profession’s commitment to increase professionalism should be to instill a norm of professional conduct in lawyers. The Conference of Chief Justices National Action Plan stated as much over two decades ago. Current initiatives, while laudatory in both scope and content, do work but only to a point. There remain a group of lawyers, unknown in size but probably significant, for whom professionalism is not a practice norm or at least not an important factor in how they practice. Nor is it likely that current initiatives will persuade them otherwise. Establishing a more broadly accepted professionalism norm requires both an understanding of existing behavior and barriers to changing unprofessional conduct. For some lawyers lack of professionalism may be attributable to lack of knowledge about the importance of professionalism or what it requires in a particular practice setting. For this group, the current education approach should work. There are, however, other barriers to change which are more difficult to overcome. Some lawyers may respond unprofessionally because of their belief that these clients expect “hardball” tactics. Addressing this may be not so much a lawyer education issue but a client education issue. Lawyers should educate their clients about what is professional in a representation and exercise their independent judgment about how to address their client’s needs. Both national legal organizations and bars should urge lawyers to better educate their clients on the importance of civility and consider adding a client education component to professionalism codes and creeds. This could specifically address the assertions of many lawyers that they are only doing what their clients demand. Finally, there are lawyers who believe “win at any cost” tactics benefit them financially or produce better results for their clients, no matter what the costs to others or to the civil trial system itself. For them, unprofessional conduct is perhaps nothing more than a strategy of winning embodied in the notion of zealous advocacy. Of course, it is not. Such lawyers in effect are treating the civil justice system as a “free good” allowing the use of any “legal” or “ethical” tactic without regard to the costs or consequences to others or to the civil trial system itself. They are certainly not fulfilling their professional obligations to the justice system.

78 See THE STATE OF MENTORING IN THE LEGAL PROFESSION, supra note 38, at 127.

79 See Hannaford, supra note 15.

80 Some state bar professionalism codes and creeds actually suggest this. See, for example, the Arizona Lawyer’s Creed which instructs attorneys to inform clients of the importance of civility (“I will advise my client that civility and courtesy are not equated with weakness.”), available at http://www.azbar.org/membership/admissions/lawyer/screedprofessionalism (last visited Aug. 22, 2013). See also Denis T. Rice, Incivility In Litigation: Causes and Possible Cures 10 (unpublished paper prepared for ABA Tort Trial and Insurance Practice Session 2013 Annual Meeting, Aug. 15, 2013, San Francisco, CA) (“A lawyer should educate his or her client to appreciate that incivility will not benefit the client’s interest. Not only do hardball battles over discovery drive up the fees, but it rarely improves the client’s litigation posture. The client should understand that credibility with counsel and the court is a highly valuable asset”).

81 See THE STATE OF MENTORING IN THE LEGAL PROFESSION, supra note 38, at 127.

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The challenge here is to strengthen the professionalism of the great majority of American lawyers who already practice with professionalism and pursue a more effective strategy to change the behaviors of the group who do not. How ideas, innovations and values become norms which are widely adopted has been exhaustively studied. It is well established that the ideas and innovations of small groups become the norms of the great majority through a process social scientists refer to as diffusion. Education can introduce an idea broadly but people are far more likely to actually adopt it and make it a norm when others they know and trust embrace the idea and provide personal evidence of its importance. Peer-to-peer communication and the influence of peer networks are crucial to the process. This process is known to work in professional groups like physicians in the adoption of new practice standards. The process of diffusion is also remarkably similar to what goes on in a mentoring environment where an experienced professional who practices with professionalism as a norm transmits an approach to practice based on the central values of the profession. Related to this is the common observation that lawyers are less likely to act improperly to other lawyers they know and handle matters with repeated. It is far easier to be uncivil to a lawyer in a single matter than one likely to be seen again. The growth of the profession and handling more matters through exchange of paper and email has reduced personal contact and the opportunity for the diffusion process to have as great an effect.

This is to suggest that if we as a profession want to strengthen professionalism further and reach lawyers who do not see or are indifferent to its importance, we must think beyond the current education strategy. To be sure, the education strategy common in the professionalism movement works and must be continued. It should, however, be more focused and tied more directly to the importance of professionalism to the rule of law and the effective operation of the civil justice system. The professionalism panels created by the Florida and Utah supreme courts and the Colorado Bar are a promising middle ground to resolve professionalism complaints informally using something similar to a mediation process.

Mentoring offers significant promise in furthering professionalism. It does require individual commitment to the intensive task of transmitting to others appropriate practice norms. Yet thousands of lawyers are already engaged in state, local, firm and law school mentoring program around the country. A broader commitment to mentoring in the profession would certainly be in keeping with other professionalism obligations such as service to the profession. Increasing transmittal of the importance of professionalism both to individual lawyers and even to clients, has the potential beyond current initiatives to strengthen professionalism and could reach a broader audience than education initiatives alone. Obviously, mentoring can have the greatest long term benefit if it is focused on new lawyers.

81 The standard work is EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS (5th ed. 2003). There are more than 6,800 research studies and field tests of this process.


83 For a discussion, see Rice, supra note 79, at 2–3.
Finally, the whole area of professionalism suffers from a lack of hard information on the frequency and types of unprofessional conduct occurring. Ways to bridge this information gap are clearly important.

VII. POINTS OF AGREEMENT AND RECOMMENDATIONS
Professionalism of lawyers is essential to the effective operation of the civil justice system, which in turn is crucial to the rule of law and a democratic society. Strengthening the civil justice system has long been a priority of the Civil Trial Bar Roundtable. The following recommendations to strengthen professionalism will contribute to a strong civil trial system, which operates with fairness, effectiveness, and efficiency:

1. The professionalism movement so far has concentrated on educating lawyers about the various aspects of professionalism. It needs more focus. Current professionalism initiatives could be more effective if they have a central focus on supporting rule of law principles, the civil justice system, and the core values of the profession: honesty, integrity, civility, and service. While current initiatives are impressive in scope and have drawn the active involvement of bars, courts, legal organizations, and law schools, few articulate a central purpose of professionalism or the central values of the profession. A new focus on the importance of professionalism to the rule of law and the civil justice system could improve their effectiveness and should be encouraged. Also, a new emphasis on lawyers educating their clients should be added to professionalism codes and creeds. This, coupled with other efforts to better educate clients on the importance of civility, could improve professionalism.

2. Civility oaths based on rules of court have been adopted in several states. Courts are using violations of these oaths as the basis of disciplinary sanctions and lawyers consequently can see the limits of appropriate conduct. Efforts to incorporate civility oaths into court rules should be encouraged in those states which have not yet adopted them.

3. New initiatives by the Florida and Utah supreme courts and the Colorado Bar to establish professionalism boards to resolve professionalism complaints informally appear promising. They are important first steps in creating a mechanism to address professionalism issues which fall outside the scope of disciplinary rules. If these approaches prove successful, their adoption by other bars and state supreme courts should be encouraged and supported.

4. Mentoring can take many forms and is rapidly increasing in the legal profession. It is demonstrably effective in transmitting the “culture” of a professional approach to law practice. It also is known to be one of the most effective ways in establishing new behavioral norms where education alone won’t succeed. Mentoring can be most effective in impressing on new lawyers the importance of professionalism. Its increased use in the legal profession should be strongly encouraged and supported.

5. Supreme court professionalism commissions have been the most active organizations in the profession in dealing with professionalism by bringing together all stakeholders.

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They operate in only about 25% of the states. Their creation in every state should be encouraged.

6. Hard information on the frequency of unprofessional conduct, either nationally or in individual states, is difficult to obtain and not routinely collected. Nor have the effectiveness of individual initiatives such as professionalism codes been evaluated. The only exception here is mentoring which is evaluated in most states on an ongoing basis. More comprehensive gathering of data on professionalism and the effectiveness of various initiatives should be encouraged. As a part of this process, the Civil Trial Bar Roundtable supports the development of a "professionalism directory" for each state. This directory would be a qualitative state-by-state measure of the breadth of each state's professionalism efforts. Possibilities for inclusion are the existence of supreme court commissions, bar committees, professionalism standards, civility oaths, bar and disciplinary counsel programs, mentoring, CLE programs on professionalism, access to justice initiatives, working with law schools and data gathering. This is not an inclusive list. The Roundtable supports such an effort and is willing to participate in a meaningful way in its development.

7. The Civil Trial Bar Roundtable, through local groups of its national organizations, encourages active involvement with as many law schools as possible. The experience of individuals in member organizations could be invaluable in assisting law schools to strengthen their professionalism programs. This is a time of declining enrollments and tight resources for law schools. They could benefit from the active participation of Roundtable organizations and their members in increasing the professionalism and skills of law students.
This resolution seeks American Bar Association endorsement of a White Paper it and some of its constituent entities helped develop as part the American Civil Trial Bar Roundtable. The White Paper urges all lawyers and legal organizations to support a more comprehensive approach to strengthening the professionalism of lawyers while building on the extensive existing professionalism initiatives of courts, bars, legal organizations and law schools. The American Civil Trial Bar Roundtable, in conjunction with the work of the American Inns of Court Foundation, has prepared this extensive White Paper outlining a number of strategies to be utilized in the further education and promotion of lawyer professionalism. That White Paper constitutes is appended to this report.

For decades, the American Civil Trial Bar Roundtable has brought together leaders of the major civil trial bar organizations and the ABA to work together in the continuation and preservation of the civil trial justice system. Its goal is to provide its member organizations with a forum to foster and encourage frank and open discussion and dialogue on the status of the U.S. civil justice so as to seek improvements in that system that all stakeholders can support. The American Bar Association is represented at the American Civil Trial Bar Roundtable by the American Civil Trial Bar Association (as a whole), the Section of Litigation, the Tort Trial and Insurance Practice Section, and the Commission on the American Jury Project. In addition, other national trial legal organizations that are members and have endorsed this White Paper include the American Association for Justice, American Board of Trial Advocates, Association of Defense Trial Attorneys, American Board of Professional Liability Attorneys, Academy of Rail Labor Attorneys, Defense Research Institute, Federal Bar Association, Federation of Defense and Corporate Counsel, International Association of Defense Counsel, International Academy of Trial Lawyers, International Society of Barristers, and National Crime Victim Bar Association. Although the American Inns of Court Foundation has approved the White Paper, it does not normally take public positions on issues that might come before the Roundtable. The Roundtable takes no position unless all members of the Roundtable endorse the proposal.

BACKGROUND

The Tort Trial and Insurance Practice Section has long promoted professionalism through resolutions approved by the American Bar Association House of Delegates. In 1988 the House adopted Resolution 116A, sponsored by TIPS, which recommended state and local bar associations encourage members to accept as a guide for the individual conduct a lawyer’s creed of professionalism. In 1991 the House adopted Resolution 104, sponsored by TIPS, recommending a discussion of professional by law school faculties. The Tort Trial and Insurance Practice Section is represented in the American Civil Trial Bar Roundtable.

The Commission on the American Jury Project also cosponsors this resolution, recognizing the importance of professionalism to a properly functioning jury system.

A persistent impression that professionalism, and civility in particular, have declined and continue to wane within the profession prompted the drafting of the White Paper. A recent poll
found that more than two-thirds of all lawyers believe civility continues to ebb among lawyers and 80 percent of judges have witnessed attorney conduct within their courtrooms that lacked civility. One commentator found that many lawyers view civility as "anachronistic or incompatible with the modern day practice of law." Nonetheless, courts generally "believe and defend the idea that maintaining a bar that promotes civility and collegiality is in the public interest and greatly advances judicial efficiency: better 'to secure the just, speedy[,] and inexpensive determination of every action and proceeding,' as Rule 1 demands." Szyharski v. Prugh, Holliday & Karatinos, P.L., 560 F.3d 1241, 1244 n.5 (11th Cir. 2009), cert. denied, 131 S. Ct. 415 (2010).

The American Bar Association has consistently taken a stand that professionalism is a necessary component of a lawyer’s job as an officer of the court and requires the exercise of civility. Operating in a professional manner is necessary to making the justice system work for all. The Association’s efforts on professionalism include a number of resolutions approved by the House of Delegates. For example, the House of Delegates renewed the Association’s commitment to civility in 2011 and also approved a 1995 resolution encouraging bar associations and courts to adopt standards of civility, courtesy and conduct as aspirational goals to promote professionalism of lawyers and judges. The Association’s efforts have not gone unnoticed. The ethical implications of uncivil conduct has received increasing attention in the states, with some states adopting enforceable civility codes.

The adoption of this White Paper continues those efforts to advance civility and professionalism by calling attention to a number of existing programs and initiatives that may be adopted in other venues.

EXPLANATION OF THE RESOLUTION

The White Paper this resolution endorses details salutary strategies for strengthening the professionalism of lawyers by moving beyond aspirational approaches to more concrete steps. The paper recognizes that unprofessional conduct adversely affects the quest for justice, as well as public respect and confidence in both the legal profession and the civil justice system itself. Appalling conduct includes uncivil behavior, dilatory tactics, and lack of integrity, all of which imposes unnecessary delays and costs and can result in loss of public confidence in both the legal profession and the civil justice system itself.

Among the many strategies utilized in different states and described in the White Paper are: state court professionalism commissions, state bar professionalism committees, bar professionalism

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codes, creeds, principles and standards promoting honesty, integrity, civility, and service, civility oaths, mandatory CLE programs on ethics or professionalism, mentoring programs, law school programs and courses on professionalism, programs sponsored by national legal organizations, bar and bar/disciplinary counsel professionalism initiatives, and other efforts. The White Paper provides descriptions of these programs for potential replication.

Respectfully submitted,

Eugene G. Beckham, Chair
Tort Trial and Insurance Practice

August 2014
1. **SUMMARY OF RESOLUTION**

The Resolution endorses a White Paper prepared under the auspices of the American Civil Trial Bar Roundtable, of which the American Bar Association is a member, that recognizes concrete strategies to advance the professionalism of lawyers in order to strengthen the American civil justice system and describes the extensive existing initiatives of courts, bars, legal organizations and law schools.

2. **APPROVAL BY SUBMITTING ENTITY**

   February 9, 2014

3. **HAS THIS OR A SIMILAR RESOLUTION BEEN SUBMITTED TO THE HOUSE OR BOARD PREVIOUSLY?**

   No

4. **WHAT EXISTING ASSOCIATION POLICIES ARE RELEVANT TO THIS RESOLUTION AND HOW WOULD THEY BE AFFECTED BY ITS ADOPTION?**


5. **WHAT URGENCY EXISTS WHICH REQUIRES ACTION AT THIS MEETING OF THE HOUSE?**

   The need to combat the decline in professionalism and civility that has affected the profession advises in favor of immediate action. Moreover, this meeting of the House is the first opportunity since approval of the White Paper by the American Civil Trial Bar Roundtable and its constituent members for adoption by the House.

6. **STATUS OF LEGISLATION (IF APPLICABLE)**

   N/A

7. **BRIEF EXPLANATION OF PLANS FOR IMPLEMENTATION OF THE POLICY, IF ADOPTED BY THE HOUSE OF DELEGATES**

   The Tort Trial & Insurance Practice, with the Resolution co-sponsors, will promote the strategies outlined in the report.
8. COST TO THE ASSOCIATION (BOTH DIRECT AND INDIRECT COSTS)
   No cost

9. DISCLOSURE OF INTEREST (IF APPLICABLE)
   N/A

10. REFFERRALS
    This Resolution has been sent to other ABA entities requesting support or co-sponsorship:

    - Section of Litigation
    - Standing Committee on Bar Activities and Services
    - Standing Committee on Ethics and Professional Responsibility
    - Standing Committee on Lawyers' Professional Liability
    - Standing Committee on Professional Discipline
    - Standing Committee on Professionalism

11. CONTACT NAME AND ADDRESS INFORMATION (PRIOR TO THE MEETING)
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls for the American Bar Association to endorse the 2014 White Paper produced by the American Civil Trial Bar Roundtable, which describes strategies and initiatives to enhance professionalism in order to support the rule of law, the civil justice system, and core values of the profession, including honesty, integrity, civility, and service.

2. Summary of the issue that the Resolution Addresses

Many observers believe that professionalism is in decline. That decline is marked by tactics that demonstrate lack of respect for adversaries, incivility and even dishonesty. The White Paper highlights some of the efforts throughout the nation that attempts to reverse this trend.

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

Through endorsement, the American Bar Association will aid in dissemination of descriptions of programs and other efforts designed to enhance professionalism within the legal profession.

4. Summary of Minority Views

The co-sponsors are not aware of any minority views or opposition.
RESOLVED, That the American Bar Association urges that states and territories adopt judicial disqualification and recusal procedures which: (1) take into account the fact that certain campaign expenditures and contributions, including independent expenditures, made during judicial elections raise concerns about possible effects on judicial impartiality and independence; (2) are transparent; (3) provide for the timely resolution of disqualification and recusal motions; and (4) include a mechanism for the timely review of denials to disqualify or recuse that is independent of the subject judge; and

RESOLVED FURTHER, That the American Bar Association urges all states and territories to provide guidance and training to judges in deciding disqualification/recusal motions.
Introduction

Assuring fair and impartial courts, essential to preserving justice and the Rule of Law, remains a paramount objective of the structure and process of our justice system. To assure that laudable goal, judges must act without regard to the identity of parties or their attorneys, the judge’s own self-interest, or the likely criticism any decision might engender. To eliminate any perception of bias, the law has long recognized recusal or disqualification as a means to assure fundamental fairness. Although a number of specific prohibitions are found in the Model Code of Judicial Conduct and in various statutes, rules, and codes adopted in the States, there is widespread acceptance as well of the general standard that disqualification is warranted when a “judge’s impartiality might reasonably be questioned.”

Increases in the amount of money expended in judicial elections, both by a judicial candidate’s own campaign and by independent interests, have heightened concerns about the potential for bias in the courts and can adversely affect the public’s confidence that judicial decisions not be influenced, even subtly, by elements external to the merits of the case. While the phenomenon of increased spending in what were once relatively quiet campaigns for judicial office has grown lately, recent decisions invalidating campaign finance laws, such as Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010) and McCutcheon v. Fed. Election Comm’n, 134 S.Ct. 1434 (2014), suggest that the role of money in judicial selection may continue to grow and require that greater attention be paid to how disqualification, when warranted, ought to take place.

In Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009), considering a state supreme court justice’s denial of a party’s recusal motion, the Supreme Court held that due process requires recusal when “there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” Id. at 884. That holding created a conceptual framework for thinking about recusal, but also recognized that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal.” Id.

Responding to the Caperton decision, the House of Delegates approved Resolution 107 in August 2011, which asked the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professional Discipline “to consider what amendments, if any, to the Model Code of Judicial Conduct are necessary to respond to new facts and circumstances.” 1


2 The terms “disqualification” and “recusal” are often used interchangeably. See Hendrix v. Sec’y, Fla. Dep’t of Corrections, 527 F.3d 1149, 1152 (11th Cir. 2008). Technically, however, “recusal” refers to a judge’s decision to withdraw sua sponte, while “disqualification” refers to a ruling on a motion asking the judge to withdraw from hearing a particular case. See Forrest v. State, 904 So.2d 829, 829 n.1 (Fla. 4th D.C.A. 2005).


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should be made to the ABA Model Code of Judicial Conduct or to the ABA Model Rules of Professional Conduct to provide necessary additional guidance to the states on disclosure requirements and standards for judicial disqualification.” Those committees proposed changes to Rule 2.11 of the Model Code of Judicial Conduct, which were designated as Resolution 108 for the 2012 Annual Meeting. The proposals, however, engendered opposition largely because the language suggested that judges were responsible to investigate and determine, sua sponte, whether outsized campaign contributions or expenditures, even independent expenditures by separate organizations made outside of the knowledge or control of judges, warranted recusal. Such an expectation, particularly in an era of limited judicial resources and statutes in some states that prohibited judges from knowing who has contributed to their own campaigns, was not the intent of the sponsors of Resolution 108, but language that made that intent clear in a manner satisfactory to all interested parties proved elusive.

Responding to a resolution approved by the Conference of Chief Justices (CCJ) in July 2013, both Resolution 108 and a competing measure, designated as Resolution 10B and cosponsored by the Judicial Division (JD) and the Indiana State Bar, were withdrawn to permit CCJ to participate in the process of considering new language.

In meetings held in Chicago in September 2013 and February 2014, representatives of the Standing Committees, the JD, and CCJ met to discuss possible approaches, agreeing that a resolution that addressed procedural issues in seeking judicial recusal had risen in priority and required the development of the principles now reflected in the present resolution.

Background

The Massachusetts Constitution, authored by John Adams in 1780, declares it the “right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.” Mass. Const. Pt. 1, art. 29. The Massachusetts provision reflects a goal shared across states and the nation as a whole. Under the federal Constitution, due process plays the key constitutional role in assuring fair and impartial courts. See In re Murchison, 349 U.S. 133, 136 (1955). The importance of assuring judicial neutrality is not solely important to litigants; it is crucial to public confidence that the rule of law still prevails.

In the states, judicial disqualification may be governed by such diverse sources as constitutional provisions, statutes, court rules, judicial precedent, codes of judicial conduct, ethical rulings, and administrative directives. While many of these provisions detail the instances in which recusal is appropriate or mandatory, as Ninth Circuit Judge Margaret McKeown has written “[i]n most cases, the issue is not an actual conflict of interest or a claim of actual bias, but rather the appearance of potential bias in hearing a case where a judge’s impartiality is perceived to be in doubt.” M. Margaret McKeown, Don’t Shoot the Canons: Maintaining the Appearance of Propriety Standard, 7 J. App. Prac. & Process 45, 45 (2005).

It is therefore critical that timely procedures be in place to permit a party to move for disqualification, receive a timely decision, understand the basis for the decision, and, when warranted, be permitted to seek timely review, without having first to litigate the case to a final disposition before receiving the relief that due process affords. As with the standards governing disqualification generally, states handle the process of disqualification differently. About a third of the states have a system of peremptory disqualification that allows litigants to seek a new

should be made to the ABA Model Code of Judicial Conduct or to the ABA Model Rules of Professional Conduct to provide necessary additional guidance to the states on disclosure requirements and standards for judicial disqualification.” Those committees proposed changes to Rule 2.11 of the Model Code of Judicial Conduct, which were designated as Resolution 108 for the 2012 Annual Meeting. The proposals, however, engendered opposition largely because the language suggested that judges were responsible to investigate and determine, sua sponte, whether outsized campaign contributions or expenditures, even independent expenditures by separate organizations made outside of the knowledge or control of judges, warranted recusal. Such an expectation, particularly in an era of limited judicial resources and statutes in some states that prohibited judges from knowing who has contributed to their own campaigns, was not the intent of the sponsors of Resolution 108, but language that made that intent clear in a manner satisfactory to all interested parties proved elusive.

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judge without a show of cause. Michelle T. Friedland, Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech, 104 Colum. L. Rev. 563, 615 (2004). However, procedures vary within states and even between civil and criminal trials, as well as jury and bench trials. Goldberg, 46 Washburn L.J. at 517. Where disqualification is for cause, the differences between states “tend to be procedural, not substantive.” Id. at 522. Observers have detailed some of these differences:

Some courts require the challenged judge to transfer these motions immediately to a colleague (a presiding judge or chief judge chooses which colleague); some require transfer only after the challenged judge has ensured the motion’s timeliness and sufficiency; the rest let the challenged judge decide on these motions herself. Most state and federal courts, including the Supreme Court, follow the latter policy and rarely, if ever, require transfer. Nor is voluntary transfer typical. Likewise, while some jurisdictions encourage or require challenged judges to hold evidentiary hearings, most leave the decision of whether to do so entirely to the judge’s discretion. With or without hearings, judges in most—though again, not all—jurisdictions do not need to give a reasoned explanation for their recusal decisions. In practice, judges have been much more likely to give reasons when they decline to recuse themselves.

Id. at 523 (footnote omitted).

The objective of this resolution is not to seek uniformity of procedure across states or even across different levels of courts within a state, but to assure that certain key concepts are followed in resolving disqualification disputes. Explanation of the Resolution

First, the Resolution puts the American Bar Association on record as supporting a disqualification process that is clearly articulated, transparent, and timely. It is axiomatic that a process designed to assure fairness and impartiality in the judiciary must be spelled out with sufficient specificity and concreteness that no one could complain afterwards that no understandable path to raise the issue and see it resolved exists. Nor should a litigant or counsel have to guess at the process by which a decision on a motion to disqualify is considered. Transparency is both an end itself and a means by which fairness and efficiency is promoted. It assures that reviewable reasons are expressed on the recusal decision. Timeliness is also essential to a system of justice. Our Due Process clauses derive from Magna Carta’s Chapter 40, which promised: “To no one will we sell, to no one will we refuse or delay, right or justice.” Here, timeliness anticipates that the recusal issue will be fully resolved before the time and expense of trial or briefing and argument occur through a timely motion and by frontloading the process and permitting some form of interlocutory review, whether by a higher court or by another authority independent of the subject judge.

This portion of the resolution also conceptually adopts the principal elements found in every enunciation of the grounds for recusal: actual conflict or bias, other impropriety, and the appearance of impropriety. It further calls attention to the modern reality of campaign spending by “recognizing certain campaign expenditures and contributions, including independent
expenditures, made during judicial elections raise concerns about possible effects on judicial impartiality and independence.”

Second, understanding that in many instances state procedures permit a motion for disqualification to be considered by the judge who is the subject of the motion, the resolution urges that procedures be put in place that would allow for independent review of an order denying the motion. Such a procedure recognizes the difficulty anyone has in judging a matter in which he or she is accused of having a potential bias. See, e.g., The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison) (“No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”). Still, a judge who denies a motion to disqualify, even when later overturned, generally does not do anything improper. The Caperton Court recognized that “inquiring into actual bias . . . is often a private inquiry.” Caperton, 556 U.S. at 883. Yet, it is not difficult to imagine the situation where a judge “simply misreads or misapprehends the real motives at work in deciding the case.” Id.

The question that must be answered, then, is “not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’” Id. at 881. Timely review by someone other than the subject judge thus assures that a decision against disqualification is not personal, but reflects a reasonable judge standard. While the judge asked to recuse may honestly believe that he or she can hear a matter and come to a fair and impartial decision, believe that any appearance of bias is too attenuated to act upon, and believe that the more important judicial value at stake is the duty to sit, the availability of independent review will further assure litigants and the public of a full and fair consideration of the potential for bias.

Finally, the Resolution urges all states and territories to provide guidance and training to judges in deciding motions to recuse. To assure that judges understand the requirements imposed by due process and state law and achieve a measure of uniformity in the determinations made on recusal, educational programs and other forms of training are helpful and ought to be conducted.

Respectfully submitted,

Eugene G. Beckham, Chair
Tort Trial and Insurance Practice Section
August 2014
1. Summary of Resolution(s).

This resolution follows up on Resolution 107, passed at the 2011 Annual Meeting, by urging states to establish clearly articulated procedures that assure that properly made motions to disqualify a judge for a conflict of interest receive timely consideration, grounds for the decision on the motion are transparent, and immediate independent review of the decision be available, before the time and expense of a case’s merits is engaged.

2. Approval by Submitting Entity.

Approved by the Council of the Tort Trial and Insurance Practice Section on May 1, 2014.

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

No. While this resolution has some overlap with Resolution 107, that is both a necessity of the subject matter and the process by which this resolution was drafted, incorporating concerns expressed by the Conference of Chief Justices and by the proponents of previous competing resolutions that were ultimately withdrawn from consideration by the House.

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

The proposed resolution is consistent with existing Association policies, but expands upon them. These policies are:

In August 1999, the ABA House of Delegates adopted Resolution 123, which included revisions to Canon 3 of the Model Rules of Judicial Conduct and adopted an approach that would have judicial candidates limit the size of contributions accepted in order to reduce the instances in which recusal would be necessary. Model Rule 2.11, part of the Model Code of Judicial Conduct adopted by the House in February 2007, addresses judicial disqualification and provides a judge should disqualify himself or herself when a “party, a party’s lawyer, or the law firm of a party’s lawyer has” made aggregate contributions in an amount greater than a number set by state law.

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In August 2011, the House adopted Resolution 107, which urged states to establish procedures for judicial disqualification determinations and prompt review of denials of requests to disqualify.
5. What urgency exists which requires action at this meeting of the House?

The issues represented by this resolution were the product of discussions between representatives of different groups that previously proposed competing judicial disqualification resolutions to the House and which were withdrawn, most recently, because of objections advanced by the Conference of Chief Justices. The resolution proposed is consistent with concepts that each of the stakeholder groups approved.

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.

Appropriate notice to relevant policymakers would be made. In addition, if adopted, the Section plans to inform and educate judges and local jurisdictions about the Resolution and Report.

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

None

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

Judicial Division
Standing Committee on Ethics and Professional Responsibility
Standing Committee on Professional Discipline
Standing Committee on Judicial Independence
Section of Litigation
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Robert S. Peck
Center for Constitutional Legislation
777 6th St. NW, Ste 520
Washington, DC 20001
202/944-2874
FAX: 202/965-0920
E-mail: Robert.peck@cclfirm.com

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

Robert S. Peck
Delegate, TIPS
202/944-2874 (o)
202/27-6006 (c)
E-mail: Robert.peck@cclfirm.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls for states and territories to adopt transparent and timely procedures to ensure that judges disqualify or recuse themselves that take into account the fact that certain campaign expenditures and contributions, including independent expenditures, made during judicial elections raise concerns about possible effects on judicial impartiality and independence. It further urges the adoption of a mechanism for the timely review of denials to disqualify or recuse that is independent of the subject judge.

2. Summary of the Issue that the Resolution Addresses

The resolution recognizes that grounds for recusal or disqualification could exist when certain large campaign expenditures and contributions, including independent expenditures, are made during judicial elections, because those expenditures or contributions may raise concerns about judicial impartiality and independence. Too often, decisions about recusal are made solely by the judge who is the subject of the motion to recuse, without any articulation of the basis for denial of such a motion or any form of independent review. The resolution urges states and territories to adopt procedures that will enable litigants to make timely motions, receive timely determinations of those motions, and prompt independent review of the denial of any motion.

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

By articulating the principles that must be in place to assure fair and impartial justice in light of the potential for bias that reasonable people may view as a result of outsized campaign contributions or expenditures and urging states and territories to provide guidance and training to judges in deciding such motions, the proposed policy advances previous ABA resolutions on the issue.

4. Summary of Minority Views

The co-sponsors are not aware of any minority views or opposition.
RESOLVED, That the American Bar Association urges all state and territorial continuing legal education accrediting agencies to approve law practice skills programs and training, including the use of technology, law practice management and client relations for mandatory continuing legal education requirements and to not restrict the maximum number of credit hours that can be earned for such programs and training.

FURTHER RESOLVED, That the American Bar Association encourages all state and territorial continuing legal education accrediting agencies to partner with law schools, bar associations and law student and young lawyer organizations to offer law practice skills programs and training to students and recent graduates.

FURTHER RESOLVED, That the Standing Committee on Continuing Legal Education is encouraged to consider amendments to the ABA Model Rule for Continuing Legal Education to effectuate the purposes of this Resolution, including provisions for distance learning through technology, and such other issues as deemed appropriate by the Committee.
A. Context

Pursuant to The Profile of Legal Malpractice Claims (2008-2011) published by the American Bar Association Standing Committee on Lawyers' Professional Liability, administrative errors, lawyer/client relations and communication and time management issues constitute the majority of causes of malpractice claims. “Law Practice Skills” play a significant role in these issues and are essential from a claims prevention point of view.

Lawyers require far more than a simple knowledge of substantive law to set up and operate a law practice in a competent manner. Some of these Law Practice Skills could be considered professional knowledge, skills, attitude, and ethics and are relevant to the issues that all lawyers face when dealing with running their practices:

- Client intake and ongoing client communication and management
- Records/file management and retention
- Billing and financial records management (including lawyer trust accounts)
- Time, task and deadline management
- Firm management, human resources and operation issues
- Supervision/delegation to staff and/or outsourcing to outside vendors
- Competent use of systems and technology (including applicable computer hardware and software, research tools, Internet sites, mobility tools, etc.)
- Security and privacy of client and firm data (paper and electronic forms)
- Personal, health and stress management
- Succession planning and disaster preparedness planning

The issue of accrediting Law Practice Skills courses continues to be an impediment to the American Bar Association, its constituent entities and other providers of law practice CLE. Currently, Indiana, Nebraska and North Carolina, do not specifically accredit Law Practice Skills courses. Some jurisdictions have special categories of CLE which may be either required or restricted. Minnesota restricts the amount of law office management credits to six hours every three years (See: MN ST CLE Rule 6). Florida limits law office management and economics to ten hours per course and reporting period and computer training to three hours (See FL CLER Rule 5.08).

New York, on the other hand, has a Law Practice Skills requirement. NY Rule 1500.12 requires seven (7) hours of CLE in law practice or other areas of professional practice over two (2) years for newly admitted attorneys. Law practice is defined as relating “to the practice of law and may encompass, among other things, office management, applications of technology, state and federal court procedures, stress management, management of legal work and avoiding malpractice and litigation.” See: www.nycourts.gov/attorneys/cle/programrules.pdf.

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Washington’s approach to Law Practice Skills credit is exemplary. Its list of CLE activities that may qualify for credit specifically includes: “courses about running a law office – in particular, docket control, malpractice avoidance, education on substance abuse by lawyers and other legal professionals, time management, increasing office efficiency, business planning, financial management, billing and collections procedures, office technology, and customer service, as each relates to the practice of law.”


Tennessee has a unique approach to Law Practice Skills CLE and other non-traditional programming. See: www.tsc.state.tn.us/rules/supreme-court/21. TN Rule 5(b) on CLE standards provides: “The activity must deal primarily with matters related to substantive law, the practice of law, professional responsibility or ethical obligations of attorneys.” Reg 5H specifically says that credit will be given for programs or topics that (among other things) are “designed to sustain or increase the capacity of attorneys to strive for and to achieve the highest, aspirational levels of professionalism, including programs aimed at increasing attorney well-being, optimism, resilience, relationship skills, and energy and engagement in their practices, designed to help lawyers re-connect with, strengthen, and apply their values, strengths of character, and sense of purpose toward achieving outstanding professionalism, designed to protect lawyers or help them recover from the deleterious effects on professionalism of stress, substance abuse, and poor staff, financial, or time management.”

The general standard in most jurisdictions for accreditation is whether a program “contributes directly to lawyers’ professional skills and competence.” Under this standard, all states and territories should accredit programs teaching general and legal specific technology skills, as well as management and business skills. Both directly relate to lawyers’ professional competence.

Much time has passed since 1992 when the widely cited MacCrate Report studied the skills needed to be a successful lawyer and made recommendations to help lawyers acquire those skills. The need to address the concerns of the MacCrate Report and subsequent reports has become urgent.

In 2009, the ALI-ABA Committee on Continuing Professional Education held a “Critical Issues Summit” with the Association for Continuing Legal Education (ACLEA). One of the recommendations in its final report provided:

“MCLE regulators should accredit training in the content or skills necessary to effectively practice law, even if such content or skills are not directly related to substantive law.”

The Reporter’s Comment to this recommendation notes that: “[t]his recommendation speaks to the not-uncommon mandatory CLE provision that denies accreditation to CLE courses on practice management, computer usage, or other skills lawyers need but that do not relate directly
to substantive law. The rationale in some states for such limitations has been that CLE should encourage legal skills and knowledge, not practice management skills. Participants at the Summit argued that effective client service requires lawyers to be good managers of their time and offices, skilled managers of the financial aspects of running a practice, and knowledgeable in areas that do not necessarily involve substantive law. Several conferences involved in lawyer disciplinary matters noted that the percentage of cases involving lawyers' shortcomings in personal and practice management far outweighs the percentage of cases involving lack of substantive law awareness. This fact argues in favor of mandatory CLE rules that encourage lawyers to develop skills in practice management, practice development, client communication, and the like.

At the ABA 2012 Annual Meeting, the ABA House of Delegates approved amending the comment to Rule 1.1 of the ABA Model Rules of Professional Conduct, governing lawyer competence, to provide that, in addition to keeping abreast of changes in the law and its practice, a lawyer should keep abreast of "the benefits and risks associated with relevant technology", highlighting the need for CLE in technology.

In recommending this amendment, the ABA Ethics 20/20 Commission concluded "that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment" and "a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document."

The Phase I Report from the California Task Force on Admission Regulation Reform in 2013 noted the need to meet the demands of training lawyers for the modern practice of law. Law Practice Skills are uniquely tied to ethics requirements such as confidentiality, client communication, conflicts of interest, and trust accounting. California recognized this in its Task Force on Admissions Regulation Reform report noting that "because law practice management problems do tend to be closely associated with disciplinary patterns, we are convinced that any new competency training requirement should include a significant law practice management component." The State Bar of California Task Force on Admissions Regulation Reform further stated: "Running a law practice competently requires business skill, and as a result, we believe that the nuts-and-bolts of operating a business should be part and parcel of good competency training for young lawyers. The fiduciary responsibilities of lawyers provide a special overlay to the kind of business training that lawyers need, but at bottom law practice management is about understanding the financial aspects -- and risks -- of operating an enterprise. That subject can and should be taught, and taught early." While California's examination was in the context of a broader look at preparing attorneys with proper skills for the practice of law, both during and after law school, that does not dilute the currency of their thinking. If attorneys are to adapt and thrive in the new economy, they need to be competent in the business of law. The comments cited the 1992 MacCrate Report which set forth the skills needed to successfully practice law.

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As outlined in Richard Susskind's latest book, *Tomorrow's Lawyers: An Introduction to Your Future*, market forces include consumer expectations, declining numbers of traditional legal positions, the desire of corporations to get "more for less" from their legal providers, and competition from non-lawyers. Susskind has written extensively on the need for the legal profession to adapt to change. The current challenge of law school debt vs. employment opportunities prompted the American Bar Association to commission the Task Force on the Future of Legal Education which submitted its final report earlier this year.

B. Essential Premise of This Resolution

This Resolution calls upon state and territorial continuing legal education accrediting agencies to approve law practice skills programs and training, including the use of technology, law practice management and client relations for mandatory continuing legal education requirements and to not restrict the maximum number of credit hours that can be earned for such programs.

It also encourages law practice skills CLE providers to partner with law schools, bar associations and law student and young lawyer organizations to offer law practice skills training to law students and recent law school graduates.

In conclusion, this Resolution encourages the ABA Standing Committee on Continuing Legal Education to consider amendments to the ABA Model Rule for Continuing Legal Education to effectuate the purposes of this Resolution including provisions for distance learning through technology and such other issues as deemed appropriate by the Committee.

C. Recommended Actions

Upon adoption of this Resolution, the ABA would forward a copy of the Resolution to all state and territorial bar associations, state and territorial continuing legal education accrediting agencies, and ABA accredited law schools. The Standing Committee on Continuing Legal Education may consider amendments to the ABA Model Rule for Continuing Legal Education to effectuate the purposes of the Resolution, including provisions for distance learning through technology, and such other issues as deemed appropriate by the Committee.

D. Essential Entities

The essential entities to which this Resolution is directed include the state and territorial continuing legal education accrediting agencies that approve participatory credit for mandatory continuing legal education, and the Standing Committee on Continuing Legal Education, which is encouraged to consider amendments to the ABA Model Rule for Continuing Legal Education to effectuate the purposes of this Resolution, including provisions for distance learning through technology, and such other issues as deemed appropriate by the Committee.
E. Related ABA Resolutions

This Resolution is consistent with and furthers the objectives of previous American Bar Association resolutions that support the concept of mandatory continuing legal education for all active lawyers (86A117A) and that all state and territorial continuing legal education accrediting agencies approve for mandatory CLE credit the full spectrum of technology-based continuing education formats (02M108). It also is consistent with and furthers the objectives of previous American Bar Association resolutions urging the training and education of lawyers and law students in current law practice management and client relations skills necessary to effectively deliver legal services; and that mandatory continuing legal education governing bodies give full credit to courses that teach current law practice management and improved client relations (94A10A).

F. Related ABA Activities

This Resolution is consistent with and furthers the mission of the Law Practice Division, the Standing Committee on Continuing Legal Education, the Standing Committee on Lawyers’ Professional Liability and the ABA Center for Professional Development.

Respectfully submitted,

Michael P. Downey, Chair
Law Practice Division

W. Andrew Gowder, Jr., Chair
Section of State and Local Government Law

Vincent J. Polley, Chair
Standing Committee on Continuing Legal Education

Dwight L. Smith, Chair
Standing Committee on Delivery of Legal Services

James A. Brown, Chair
Standing Committee on Lawyers’ Professional Liability

Arnold R. Rosenfeld, Chair
Standing Committee on Professional Discipline

August 2014
1. **Summary of Resolution(s).**
   This Resolution calls upon state and territorial continuing legal education accrediting agencies to approve law practice skills programs and training, including the use of technology, law practice management and client relations for mandatory continuing legal education requirements and to not restrict the maximum number of credit hours that can be earned for such programs.

   It also encourages law practice skills CLE providers to partner with law schools, bar associations and law student and young lawyer organizations to offer law practice skills training to law students and recent law school graduates.

   This Resolution further encourages the Standing Committee on CLE to consider amendments to the ABA Model Rule for Continuing Legal Education to effectuate the purposes of this Resolution including provisions for distance learning through technology and such other issues as deemed appropriate by the Committee.

2. **Approval by Submitting Entities.**
   Law Practice Division Council
   May 2, 2014, St. Louis, MO
3. **Has this or a similar resolution been submitted to the House or Board previously?**

   Yes. Report 10A adopted at the ABA Annual Meeting in 1994 urged: "(1) the training and education of lawyers and law students in current law practice management and client relations skills necessary effectively to deliver legal services; and (2) that mandatory continuing legal education governing bodies give full credit for courses which teach current law practice management and improved client relations."

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

   The Resolution furthers the policies of existing ABA resolutions regarding that support the concept of mandatory continuing legal education for all active lawyers; that the ABA urges the training and education of lawyers and law students in current law practice management and client relations skills necessary to effectively deliver legal services and that mandatory continuing legal education governing bodies give full credit for courses which teach current law practice management and improved client relations.

   As detailed in the Report, existing Resolutions whose policies are fostered are: Law Practice Management/Client Relations Skills Training 94A10/A; Mandatory Continuing Legal Education 86A117A, 02M108; Minimum Continuing Legal Education 88A115, Amended 89M114.

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

   Not applicable. This Report is timely.

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

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

In addition, upon approval by the House of Delegates, the Law Practice Division, through its Education Board and Law Career Paths Task Force will liaise with and support the essential entities and the Standing Committee on Continuing Legal Education in their efforts to effectuate the goals of the Resolution.

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

Adopting the recommendations would not result in additional direct or indirect costs to the Association.

9. Disclosure of Interest. (If applicable)

There are no known conflicts of interest with regard to this recommendation.

10. Referrals.

The recommendations and report have been mailed to the Chairs and Staff Liaisons of each ABA Section, Division, Forum, Task Force, Standing Committee and Commission.

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

   Tom Bolt
   Law Practice Division Vice Chair
   c/o Bolt Nagi PC
   5600 Royal Dane Mall, Suite 21
   St. Thomas, VI 00802-6410
   340-774-2944; 340-690-2944 (on site)
   tbolt@vilaw.com (on site)

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

   Thomas C. Grella, Law Practice Division Delegate
   c/o McGuire, Wood & Bissette, PA
   Post Office Box 3180
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EXECUTIVE SUMMARY

1. Summary of the Resolution
This Resolution urges all state and territorial continuing legal education accrediting agencies to approve for mandatory continuing legal education law practice skills programs and training, including the use of technology, law practice management and client relations and not to restrict the maximum number of credit hours that can be earned for such programs. It encourages law practice skills CLE providers to partner with law schools, bar associations, and law student and young lawyer organizations to provide law practice skills training and education.

This Resolution further encourages the Standing Committee on Continuing Legal Education to consider amendments to the ABA Model Rule for Continuing Legal Education to effectuate the purposes of this Resolution including provisions for distance learning through technology and such other issues as deemed appropriate by the Committee.

2. Summary of the Issue that the Resolution Addresses
The issue this Resolution addresses is lack of acceptance of law practice skills programs, courses, education and training by continuing legal education accrediting agencies for MCLE credit for attorneys and the need for law practice skills programs, courses and training for all practicing attorneys, specifically law students and young lawyers. This Resolution further addresses this concern by encouraging the Standing Committee on Continuing Legal Education to recommend amendments to the ABA Model Rule on Continuing Legal Education to effectuate the purposes thereof, including provisions for distance learning through technology, and such other issues as deemed appropriate by the Committee.

3. An Explanation of How the Proposed Policy Position Will Address the Issue
This Resolution urges state and territorial continuing legal education accrediting agencies to approve law practice skills programs, courses, education and training mandatory CLE credit and to not restrict the maximum amount of allowed credits for law practice skills programs, courses, education and training. This Resolution also calls upon law practice skills CLE providers to partner with various organizations to provide such training and education to law students and young lawyers and encourages the Standing Committee on Continuing Legal Education to consider amendments to the ABA Model Rule on Continuing Legal Education to effectuate the purposes of the Resolution.

4. Summary of Any Minority or Opposing Views that Have Been Identified
No minority views or opposition to this Resolution have been identified.
RESOLVED That the American Bar Association opposes the proposal, made in the administration's FY 2015 budget (or similar legislative proposals), that would limit forgiveness of student loans, after ten years of public service, to $57,500 (or such other cap that unreasonably limits the utility of the program), and that would require borrowers who are in public service and who have remaining balances exceeding that amount to repay them for fifteen more years, or until the debt was retired.

FURTHER RESOLVED, That the American Bar Association urges Congress and the Administration to support and continue public service student loan repayment and forgiveness programs, such as the current federal Public Service Loan Forgiveness Program, that enable law school graduates to embark upon less remunerative public service careers without having to make payments on their student loans for most of their working lives.

FURTHER RESOLVED, That the American Bar Association urges Congress and the Administration not to create, in student loan repayment programs, greater burdens for married couples than for similarly-situated couples who are cohabitating.
Introduction

Over the past fifteen years, the cost of legal education has risen dramatically. In 2012, the average annual private law school tuition was $40,634, while the average annual public law school tuition was $36,202 for non-residents. In 2000, these figures were dramatically lower—the average private law school tuition was $22,790 and the average public law school tuition was $15,683 for non-residents.\(^1\) Long ago, Tulane University Law School’s dean John Kramer analyzed why law school tuition increased so quickly: the quality of legal education had improved. The major factors he identified as causes of tuition increases were “reduced student-faculty ratios, computerization, expanded libraries, and increased scholarships.”\(^2\)

Although the American system of legal education is envied and increasingly copied throughout the world, the rising cost of legal education has burdened many of today’s law graduates, who, by the time they finish law school, have borrowed an average of $150,000 for their undergraduate and professional educations.\(^3\) For graduates following the “standard” 10-year repayment schedule, this may result in payments of more than $1700 per month for 10 years following graduation. With the average starting salary for a lawyer in the nonprofit sector at only $43,000,\(^4\) or a bit more for some jobs, these mortgage-size debts bar most graduates from pursuing public service legal jobs.\(^5\) In the absence of an affordable repayment plan, graduates who are able to take such positions immediately after graduation usually have to leave public service after two or three years to pursue more lucrative employment, because they are unable to start families while paying large fractions of their low salaries toward their student loans.

Beginning in 1993, the federal government began to address this problem by making loan repayment easier for persons with high educational debt. In that year Congress created the income-contingent repayment option (“ICR”) of the William D. Ford Federal Direct Loan Program. The ICR option was designed to enable graduates with high debt, including law students, to take low-paying community service jobs. ICR based annual loan repayment obligations on a borrower’s income and forgave any remaining balance after 25 years. But graduates pursuing public interest careers, whom the program was intended to benefit, did not use ICR. In particular, empirical research demonstrated that the 25-year horizon for

\(^1\)ABA Section of Legal Education and Admissions to the Bar.


\(^3\)Debra Cassens Weiss, Average Debt of Private Law School Grad Is $123K; It’s Highest at These Five Schools, ABA Jornal, Mar. 28, 2013 (reporting on graduates of private law schools in the class of 2012); in addition to this law school debt, the average undergraduate debt was $29,400 for the class of 2012. Blake Ellis, CNN Money, Dec. 5, 2013, http://money.cnn.com/2013/12/05/pf/college/student-loan-debt/.

\(^4\)$43,000 was the median starting salary for a legal services attorney in 2012. NLAP, New Public Interest and Public Sector Salary Figures from NLAP Show Little Growth Since 2004, http://www.nalp.org/2012_public_salaris.

\(^5\)For purposes of this report, “public service legal jobs” refers to a broad range of jobs, including employers such as federal, state or local government, prosecutors, public defenders and legal aid organizations.
repayment of the debt before the balance could be forgiven discouraged new law graduates from taking advantage of that program. 6

In 2001, ABA President Robert Hirshon appointed a Commission on Loan Repayment and Forgiveness. The Commission recommended that Congress should amend the law to provide more rapid forgiveness for high-debt borrowers who had served for a substantial period of time in full-time lower-income public service jobs. 6 In 2003, the ABA’s House of Delegates supported this recommendation. 6 Congress responded positively in 2007, creating the income-based repayment (IBR) loan repayment system and the Public Service Loan Forgiveness (PSLF) Program. 9 The systems created in 2007 are described in the discussion below, along with changes subsequently adopted by Congress and by Executive Branch rulemaking.

In recent years, some individuals and organizations have called for a retrenchment of the current version of IBR. Some of these critics of IBR have praised PSLF, while others have criticized PSLF as well. In early 2014, in its FY 2015 budget proposal, the Obama administration suggested to Congress that it change the IBR and PSLF programs drastically, apparently to free funds for more forgiveness of undergraduate debt. The administration’s proposals would eliminate most of the benefits of the PSLF program for high-debt, lower-income borrowers, particularly public service lawyers.

Discussion

In 1993, Congress created the Federal Direct Loan Program (FDLP), through which the Department of Education (“the Department”) would offer loans directly to students. 10 Congress designed the FDLP to provide options in addition to loans by lending institutions offering federally guaranteed loans through the Federal Family Education Loan Program (“FFELP”). When Senator Edward Kennedy introduced the legislation, he stated that one of its purposes would be "[t]o provide borrowers with a variety of repayment plans, including an income-contingent repayment plan, so that borrower[']s obligations do not foreclose community service."

The legislative history of ICR is replete with references to public service. For example, the report of the House Committee on Education and Labor stated that one of the purposes of the legislation was to provide "an income-contingent repayment plan...so that...

9 The Federal Direct Loan Program is now known as the William D. Ford Federal Direct Loan Program. See 20 U.S.C. § 1087a. Today, nearly all student loans for legal education are done through this program.
10 Staff of Senate Committee on the Budget, 103d Congress, Reconciliation of the Instructed Committees Pursuant to the Concurrent Resolution on the Budget (H. Con. Res 64), 453 (Committee Print 1993).

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10 Staff of Senate Committee on the Budget, 103d Congress, Reconciliation of the Instructed Committees Pursuant to the Concurrent Resolution on the Budget (H. Con. Res 64), 453 (Committee Print 1993).
The legislation required the Secretary of Education to offer borrowers an income-contingent repayment plan through which students would pay 20% of their income each year toward their federal student loan repayment, and the Secretary would cancel any remaining balance at the end of a period of repayment "not to exceed 25 years." The legislation did not offer more generous terms for borrowers who took public service jobs.

Although ICR was designed to enable graduates to pursue public service careers, very few law graduates used it. A survey of law students identified the top reason why most students did not elect ICR: an unwillingness to repay their student loans for as long as 25 years.

Additionally, the study showed that many law school financial aid advisors discouraged students from using the program, in part because they too believed that twenty-five years was too long of an amortization period for graduates.

In 2003, the ABA Commission on Loan Repayment and Forgiveness found that the high debt burden discouraged law graduates from entering lower-paying public service careers and recommended that borrowers who entered such careers should be given more favorable loan repayment and forgiveness terms than ICR provided. It particularly recommended a shorter repayment period for such borrowers than for borrowers generally. The House of Delegates endorsed these recommendations, and also urged that loan forgiveness programs should not be constructed so as to impose marriage penalties on borrowers.

Four years later, Congress improved on ICR in two ways. First, it created the income-based repayment (IBR) method of repaying student loans. Borrowers could pay 15% of their discretionary income each year (rather than 20% of their income as under ICR) toward their student loans, although the number of years of repayment before forgiveness of a remaining balance would remain at 25. Second, it created the Public Service Loan Forgiveness Program (PSLF). Borrowers who have spent ten years in full-time public service employment, while repaying through IBR, are entitled to forgiveness of the remaining balance.

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14 Philip G. Schrag, The Federal Income-Contingent Repayment Option for Law Student Loans, 29 Hofstra L. Rev. 733, 830-31 (2001). ("Policymakers originally anticipated ICR would be used by 15-30% of borrowers. The Secretary of Education projected that between 1996-2000, 17% of all direct loans...would be repaid under the income-contingent repayment option. In fact, [as of 2000] fewer than 1% of new borrowers at schools that offer federal direct loans [chose] income-contingent repayment.")
15 Id. at 791-803.
17 Discretionary income is adjusted gross income minus 150% of the poverty level for a family of the size of the borrower’s family. For an explanation of the calculation, see EdFinancial Services, Income-based Repayment, http://www.edfinancial.com/IBR.
18 20 U.S.C. Sec. 1087e(m).
19 Public service employment is defined to include full-time service for any level of government and for any borrowers’ obligations do not foreclose community service-oriented career choices for them.
22 Philip G. Schrag, The Federal Income-Contingent Repayment Option for Law Student Loans, 29 Hofstra L. Rev. 733, 830-31 (2001). ("Policymakers originally anticipated ICR would be used by 15-30% of borrowers. The Secretary of Education projected that between 1996-2000, 17% of all direct loans...would be repaid under the income-contingent repayment option. In fact, [as of 2000] fewer than 1% of new borrowers at schools that offer federal direct loans [chose] income-contingent repayment.")
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26 20 U.S.C. Sec. 1087e(m).
27 Public service employment is defined to include full-time service for any level of government and for any...
after 10 rather than 25 years. For these individuals, forgiveness of the remaining debt is not taxable.20 All borrowers who meet the employment criterion—not just lawyers—are entitled to the more generous terms of PSLF.

Three changes were subsequently made to these systems. First, as originally passed, IBR was flawed in that it attributed to the borrower, for purposes of calculation of the annual repayment obligation, all of the income of the borrower’s spouse, even if the spouse kept his or her income separately, made it unavailable to the borrower, and filed a separate tax return. This provision created an enormous “marriage penalty;” a married borrower whose spouse had a substantial income would have a much higher annual repayment obligation than an otherwise identically situated borrower who cohabited with a partner, or who became divorced but still lived with the former spouse. It incentivized cohabitation and divorce. Congress could have alleviated the problem by attributing to the borrower only half of the combined income of the married couple, an outcome that occurs by operation of law for borrowers in community property states. It did not do so, but it addressed the marriage penalty issue in a different way. Two months after creating the IBR system, it passed a technical amendments act providing that for purposes of IBR repayment, the borrower would count, as the borrower’s income, only the borrower’s own income, so long as the borrower and spouse filed separate tax returns.21

Second, in 2010, Congress amended the law to provide that for those who first borrowed in 2014 or later, the repayment obligation would be only 10%, rather than 15%, of discretionary income, and the repayment period before forgiveness would be 20 rather than 25 years. The repayment period for those in full-time public service remained at 10 years.22

Finally, in 2012, the administration issued new regulations that reprogrammed funds so that the more generous terms offered by the 2010 legislation could be offered not only to persons who borrowed after 2014 but also to those who obtained their first federal loans after 2007 and entered repayment in 2012 or later.23 The current version of IBR, as amended in 2010 and 2012, is called the Pay As You Earn (PAYE) plan.24

PSLF is not a free ride for public service lawyers at the expense of taxpayers. First, all borrowers who use PAYE must pay 10% of their discretionary income toward their loans each year until the loan is retired or forgiven. 10% is approximately the limit that personal finance experts believe is the maximum amount that people should pay toward student loans—percentages higher than that result in economic and personal hardships (such as not being able to
buy a home or raise children) and risk eventual loan default. Second, taxpayers reap enormous benefits from the work done by public service lawyers, whether they work in federal, state or local governments or in nonprofit service organizations such as legal aid and public defender offices or faith-based charities. The public is particularly advantaged by programs like PSLF that enable government agencies to retain talented lawyers for ten or more years, by giving them incentives to remain employed in public service. Training lawyers who leave an agency after only two years to pursue higher-paying private sector employment is wasteful. It is a poor use of government resources. Finally, the government profits by making student loans, particularly to graduate students. It charges a 4% origination fee on each loan, and it borrows money (through treasury bonds) at much lower rates of interest than the interest it charges to borrowers. Although partial forgiveness of loans to public servants is a cost to the government, it is very small compared to the profit that the government makes on the student loan system as whole, and the profit margin on loans to lawyers is particularly high because of lawyers’ low default rates.

Public Service Loan Forgiveness is not merely a program for making graduate and professional education affordable for all Americans. It also provides substantial benefits for the public through the services provided by talented individuals who are willing and able to accept moderate salaries in order to help people in need, particularly the poor. The leading surveys of the legal needs of the public, which were conducted by the American Bar Association in the 1990s, found that among the poorest 20% of the population, only 29% used a lawyer to solve a legal problem. This figure grew only to 39% for the middle 60% of the population. Later statewide studies made similar findings. PSLF makes it possible for lawyers to work and remain in legal aid and public defender offices. PAYE, which helps lower-income borrowers to repay their student loans, enables lawyers to serve middle-income clients, reducing the extent to which legal services in America are disproportionately directed to large corporations and wealthy individuals. And a broad swath of the public benefits indirectly from PSLF because it facilitates higher education for lower-income individuals in other professions, such as nurses, teachers, social workers, employees of state, local and tribal governments, and doctors who join the Public Health Service.

Some individuals and organizations have criticized PAYE. Professor Brian Tamanaha argues that it sustains some law schools that “would go under” without it. The New America Foundation believes that the current PAYE repayment terms are too generous and should be pared back to a somewhat modified version of the IBR terms enacted by Congress in 2007. In

25 Sandy Baum and Saul Schwartz, How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt (2005), http://www.cqpress.com/cqfind/download/files/How_Much_Debt_is_Too_Much.pdf (“Individuals with incomes near the median should not devote more than about 10% of their income to education debt repayment.”)


2013, Rep. Thomas Petri (R.-WI) introduced a bill to require all borrowers to repay through an IBR system, but his bill would eliminate forgiveness entirely, even for public servants, so that some high-debt, lower-income borrowers would make payments on their student loans every year for their entire lives. In 2014, the administration proposed in its FY 2015 budget to extend PAJE repayment terms to all borrowers, including those who borrowed before 2007. But that proposal would drastically cut back PAJE. Specifically, the proposal would require persons who borrow more than a total of $57,500 (the current borrowing limit for undergraduates), for their undergraduate and legal education, to repay their loans for 25 years, rather than 20 years, unless they are fully repaid first. Two-thirds of all law students who borrow exceed this $57,500 limit. In addition, borrowers who have completed ten years of public service would receive only partial rather than full forgiveness. They would have $57,500 of their debt forgiven, but they would be required to make monthly payments on the remaining balance for 15 more years, or until the debt was repaid. For many, this would mean 25 years of repayment. Interest on the loans, however, would be capped at 50% of the original balance.

For example, suppose that a typical law graduate borrower today enters repayment with a debt of $150,000 (including $25,000 of undergraduate debt) at 6.8% interest. Suppose also that the borrower begins a legal aid job at $50,000 ($7000 higher than the median starting salary), earns raises of 3% a year, and remains at the job for her entire career. Under present law, she will pay $37,252 over the ten year period, and the remaining balance of $239,427 in principal and accumulated interest will be forgiven. Under the administration’s proposal, accumulating interest would be capped and $57,500 would be forgiven of the $187,748 amount that the borrower would owe at the end of 10 years. That will leave a debt of $130,248, which the borrower would continue to repay over the next 15 years before finally obtaining additional forgiveness of $49,026. In other words, instead of paying about $37,000 over ten years, this legal aid lawyer will have to pay about $118,000 over 25 years. Few borrowers will seriously consider careers in legal aid under these circumstances. Careers in public interest law could become the province only of the independently wealthy.

The budget proposal also states that Congress should change the law to “calculate payments for married borrowers filing separately on the combined household Adjusted Gross Income.” The Department subsequently stated that the administration means that the income of a spouse should be added to the income to the borrower for purposes of the PAJE calculation, except that the total would be divided by two if both spouses are borrowers. For families in which only one spouse has student debt, the proposal would restore the severe marriage penalty that Congress addressed in the technical amendments act in 2007. It would encourage cohabitation and divorce and militate against marriage. It is true that the current law anomalously benefits borrowers who give up the benefits of filing a joint tax return so that they can entirely exclude the incomes of their spouses from the PAJE calculation. The current law

This example assumes an applicable poverty level of $11,670 which increases at the same 3% rate as inflation. In 2014, the administration proposed in its FY 2015 budget to extend PAJE repayment terms to all borrowers, including those who borrowed before 2007. But that proposal would drastically cut back PAJE. Specifically, the proposal would require persons who borrow more than a total of $57,500 (the current borrowing limit for undergraduates), for their undergraduate and legal education, to repay their loans for 25 years, rather than 20 years, unless they are fully repaid first. Two-thirds of all law students who borrow exceed this $57,500 limit. In addition, borrowers who have completed ten years of public service would receive only partial rather than full forgiveness. They would have $57,500 of their debt forgiven, but they would be required to make monthly payments on the remaining balance for 15 more years, or until the debt was repaid. For many, this would mean 25 years of repayment. Interest on the loans, however, would be capped at 50% of the original balance.

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This example assumes an applicable poverty level of $11,670 which increases at the same 3% rate as inflation.
also provides a benefit in the majority of states that is not available to borrowers in community property states. A reasonable solution to this problem would be to base the PAYE determination, for all married borrowers, on an average of the borrower’s income and the spouse’s income. A marriage penalty would remain for some borrowers, but it would not be nearly as steep as the one caused by simply adding the two incomes.33

Even if Congress does not adopt the administration’s suggested plan, similar ideas may emerge during the process of reauthorizing the Higher Education Act. As noted above, one bill that was introduced by a senior member of the House Committee on Education and the Workforce would completely eliminate Public Service Loan Forgiveness.

Conclusion

The American Bar Association continues to support federal programs, such as the Public Service Loan Forgiveness Program, that enable law graduates to accept lower-paying employment in public service. Congress should be discouraged from enacting proposals, like the one suggested by the administration’s FY 2013 budget, that would require public service lawyers to repay their student loans for more than ten years. Congress should also be wary of discouraging marriage, or encouraging divorce, by imposing a steep marriage penalty as part of a student loan repayment formula.

Respectfully submitted,
Lisa Wood, Chair
Standing Committee on Legal Aid and Indigent Defendants
August 2014

33 This recommendation was also made by the New America Foundation, New America Foundation, Safety Net or Windfall: Examining Changes to Income-Based Repayment for Federal Student Loans 12 (2012) at 14.
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants

Submitted By: Lisa Wood, Chair

1. Summary of Resolution(s).

Opposes changes in current educational debt loan forgiveness programs for public service lawyers; urges Congress and the Administration to support and continue public service student loan repayment and forgiveness programs, urges Congress and the Administration not to create, in student loan repayment programs, greater burdens for married couples than for similarly-situated couples who are cohabitating; encourages law schools to promote responsible borrowing and responsible repayment of student loans and to make legal education affordable for all law students.

2. Approval by Submitting Entity.

The resolution was approved for submission at the April 10-11, 2014 meeting of the Standing Committee, upon motion duly made, seconded and adopted.

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


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

Resolutions 02M300B, 03A113, 10M301 and 11A111A are relevant. This resolution will build upon the foundations established by these prior resolutions, and is entirely consistent with the positions taken in those resolutions.

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)

No legislation has yet been filed, but the federal Administration’s budget request to Congress for FY2015 suggests changes addressed by the first resolved clause of this resolution.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
ABA Governmental Affairs Office will use this policy as a foundation for future lobbying.

8. Cost to the Association. (Both direct and indirect costs)
No direct or indirect costs are anticipated.

9. Disclosure of Interest. (If applicable)
No interests of the Standing Committee or its members are implicated by this resolution.

10. Referrals.
Law Student Division
Young Lawyers Division
Section of Legal Education and Admission to the Bar
Standing Committee on Pro Bono and Public Service
Commission on Interest on Lawyers' Trust Accounts
Commission on Homelessness and Poverty
Section of Individual Rights and Responsibilities
Commission on Racial and Ethnic Diversity in the Profession
Coalition on Racial and Ethnic Justice
Commission on Hispanic Legal Rights and Responsibilities
Commission on Immigration

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

Lisa Wood
Foley Hoag LLP
Seaport World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2600
Office: (617) 832-1117
Mobile: (617) 759-1274
Email: LWood@foleyhoag.com
12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Lisa Wood  
Foley Hoag LLP  
Seaport World Trade Center West  
155 Seaport Boulevard  
Boston, MA 02210-2600  
Office: (617) 832-1117  
Mobile: (617) 759-1274  
Email: LWood@foleyhoag.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

Opposes changes in current educational debt loan forgiveness programs for public service lawyers; urges Congress and the Administration to support and continue public service student loan repayment and forgiveness programs, urges Congress and the Administration not to create, in student loan repayment programs, greater burdens for married couples than for similarly-situated couples who are cohabitating; encourages law schools to promote responsible borrowing and responsible repayment of student loans and to make legal education affordable for all law students.

2. Summary of the Issue that the Resolution Addresses

The current federal Administration budget request proposes changes to the public service loan forgiveness program, and there have also been proposals by others for even more draconian changes to such programs. These programs enable thousands of lawyers to enter and most importantly remain in public service careers. The proposed changes would drastically reduce the capacity for lawyers who are not independently wealthy to remain in public service careers.

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

The policy proposal will oppose any changes in the current programs, and articulates clear guidelines for the essential elements of effective public service loan forgiveness programs.

4. Summary of Minority Views

No minority views within the Association are known.
RESOLVED, That the American Bar Association urges national, state, local and territorial bar associations and foundations; courts; law schools; legal aid organizations; and law firms to create and advance initiatives that marshal the resources of newly-admitted lawyers to meet the unmet legal needs of underserved populations in sustainable ways.
I. Introduction

Our nation is facing an “access to justice” paradox. Our struggle to meet the legal needs of the poor, disenfranchised and even those of moderate incomes has been well-documented over the past several decades. More recently we have seen substantial numbers of newly-admitted lawyers who are not being assimilated into the infrastructure of the legal profession.

Stakeholders, including bar associations and foundations at every level, the courts, the law schools, legal aid organizations and even law firms, can and should address the paradox by collaborating to design, implement and advance long-term sustainable solutions.

Initiatives are emerging to support newly-admitted lawyers and marshal their resources in ways that assist the profession’s obligation to meet the needs of low and moderate income households. Some of these initiatives, such as modest means panels of bar-sponsored lawyer referral services and mentoring programs, are well established. Others, such as incubator projects and rural placement initiatives, have emerged recently and are not yet widely in place. Nevertheless, this paradox can only be effectively addressed through a focused effort at every level from among the widest array of stakeholders.

II. The Needs

a. Unmet Legal Needs

Unmet legal needs in America have been well documented for over a generation. In its seminal 1994 research, the ABA’s Comprehensive Legal Needs Study found that only three out of ten low income people and four out of ten moderate income people turned to the legal system when confronted with a legal need. More than 40 percent of low income people and over a quarter of moderate income people did nothing to address their legal problems.

Since then, state studies have shown similar results time and time again. More than a decade after the ABA Legal Needs Study, the Legal Services Corporation synthesized state research and concluded that less than one in five of the legal needs of the poor were addressed by a lawyer either in the private sphere or through legal aid.1 More recently, the Legal Services Corporation concluded that nearly a million people a year are unable to access their legal services simply because the programs lack sufficient resources to serve them.2

In 2014, the World Justice Project ranked the United States 64th out of 99 countries in the accessibility and affordability of its civil justice system.3 In this regard, the United States ranks behind Albania, Botswana, China, Nigeria and Russia, to name a few.

2 Id.
b. Resources of Newly-Admitted Lawyers

The recession, and perhaps other factors such as the use of technology, has resulted in a high percentage of newly-admitted lawyers in recent years who are not stepping into long-term, full-time positions requiring a law degree after graduation.

According to the ABA Section of Legal Education and Admission to the Bar, the percentage of law school graduates who had long-term, full-time positions requiring a law degree nine months after graduation was 54.9 percent for the class of 2011, 56.2 percent for the class of 2012 and 57.0 percent for the class of 2013. Even though the class of 2013 showed a slight improvement in this metric, at 57.0 percent, unemployment increased in each of these years. The percentage of unemployed lawyers nine months after graduation was 9.7 for the class of 2011, 10.6 percent for the class of 2012 and 11.2 percent for the class of 2013.\(^4\)

According to the Bureau of Labor Statistics, unemployment in the United States was at 6.7 percent while it was 11.2 percent for recent law school graduates.\(^5\) At the same time unemployment in general dropped from 8.3 percent to 6.7 percent, unemployment of recent law school graduates rose from 9.7 percent to 11.2 percent.

In terms of sheer numbers, 5,229 members of the class of 2013 reported they were unemployed, at the same time that 2,227 members of that class had entered public service positions and 1,068 had begun their own private practices.\(^6\)

Although law schools have reduced enrollments in the past two years and are pursuing other reforms, and the market for legal service may become more robust over time, steps are necessary to address the un- and under-employment of young lawyers today.

III. Current Initiatives

Initiatives to address the paradox are both long-standing and newly emerging. They have been created by a wide variety of stakeholders and some tilt toward one or the other of the dual issues. The more established initiatives include post-graduate fellowships, lawyer referral service modest means panels and mentoring projects. More recent initiatives include incubators to launch practices of recently-admitted lawyers, programs providing rural placement assistance and programs designed to assist lawyers in transition.

\(^4\) ABA Section of Legal Education and Admission to the Bar, 2012 Law Graduate Employment Data, AM. BAR Ass'N at: http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/law_graduate_employment_dataarts/recheckdm.pdf; and ABA Section of Legal Education and Admission to the Bar, 2013 Law Graduate Employment Data, AM. BAR Ass'N at: http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2013_law_graduate_employment_dataarts/recheckdm.pdf.


\(^6\) Supra note 4.
Law schools, non-profit organizations and, in a few instances, law firms have, for some time, offered newly-admitted lawyers the opportunity for public service through post-graduate fellowships. While scores of law schools provide opportunities for their graduates to participate in public interest work, Harvard and Yale have expansive programs and the University of Miami places more than 60 graduates each year in public service positions across the country. University of California Hastings College of Law is experimenting with a two-year public placement program that begins with the student’s last year of law school and continues through the first year of practice.

Outside of the law school fellowships, scores of newly-admitted lawyers are placed into public service opportunities through non-profit organizations such as Equal Justice Works, the Skadden Fellowship Foundation and the ACLU.

These opportunities are generally short-term but give participating lawyers valuable practice experience and exposure while serving underserved populations. In many circumstances, fellows are subsequently hired by their program hosts.

b. Modest Means Programs and Panels

Modest means panels are often an integrated part of a bar-sponsored lawyer referral service and occasionally constitute a separate program. Lawyers participating in these programs typically agree to provide reduced hourly fees and/or capped fees for specific services. The panels often have sliding-fee scales or qualify clients based on household incomes.

The Modest Means Project of the Arizona Foundation for Legal Services and Education and the State Bar of Arizona enables those of modest means to obtain a lawyer for no more than $75 per hour.

The Moderate Means Program of the Washington State Bar Association combines the resources of practitioners with law students to provide low-cost representation to those with incomes of 200 to 400 percent of the Federal Poverty Guidelines.

The Baltimore-based Civil Justice Inc. maintains a network of practitioners who provide low cost representation on consumer matters such as credit abuse and foreclosure.

c. Mentoring Programs

Bar-supported mentoring projects currently exist in 42 jurisdictions. The purpose of such projects is to facilitate mutually beneficial relationships of personal growth and career development between established attorneys and newly admitted attorneys or law students.

In addition, some programs are highly focused. For example, the ABA Commission on Disability Rights maintains a mentoring program for law students and newly-admitted lawyers with disabilities.
Mentoring programs need not be exclusively set within bar associations. For example, ALPS, a professional liability carrier, has recently launched a multi-state project called ALPS Attorney Match. The project not only facilitates matches of mentors with mentees, but also enables the transition of law practices from retiring lawyers to those interested in assuming established practices.

d. Incubators

Law practice incubators have emerged as a model to foster the development of new practices, much like business incubators foster new businesses. The first incubator was launched by the City University of New York (CUNY) in 2007. Since then, the economic downturn has stimulated the development of similar projects in 22 communities, with others being planned. Most incubators are housed in or sponsored by law schools, although some are projects advanced by other stakeholders, including bar associations, bar foundations, legal aid programs and, in at least one instance, a law firm.

There is no perfect template for incubators and no two are alike. However, the various programs provide a variety of resources, including free or low-cost office space, office amenities, continuing legal education programming, practice management assistance, mentoring, opportunities for pro bono to develop and enhance substantive skills and, perhaps most importantly, an environment of collegiality that enable practitioners who otherwise tend to be isolated to have a system of support. Almost without exception the goal of the incubators is to use these resources and implement practice innovations in order to better serve underserved populations. Although particular programs have limited numbers of lawyers participating, over time, they should have a substantial impact on access to legal services as the incubator participants launch their practices using tools designed for long-term sustainability.

Profiles of incubators are maintained at http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main.html.

e. Rural Support Programs

Most states have substantial rural areas and some of them have an aging lawyer population. As a result, many communities are now without lawyers. For example, in one South Dakota community, the nearest lawyer is 120 miles away. State bars faced with this challenge are creating rural placement projects designed to encourage and give incentives for recently admitted lawyers to set up or assume practices in these communities.

The State Bar of South Dakota has been a leader in rural initiatives, advancing legislation that gives lawyers financial incentives, with support divided among the state, the local communities and the bar. The State Bar of North Dakota is following a similar track, while the state bar associations in Iowa and Nebraska are encouraging rural placements through law student summer internships.

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A variety of other initiatives have been advanced and are emerging. Bar associations at all levels are active in the support of solo and small firm practitioners, with designated committees and high-quality conferences. Some bars provide practice management assistance staffed by experts in these areas that present CLE programming, as well as hands on consultations. A few bar associations have now established committees for lawyers in transition, providing tools and support for those lawyers who are facing transitions in their practice settings as a result of economic conditions.

A few bar associations, including the New York City Bar, the State Bar of Wisconsin and the Colorado Bar Association, have comprehensively examined the paradox and issued concrete recommendations and sometimes proposed bold action. For example, the New York City Bar Association Task Force on New Lawyers in a Changing Profession plans to launch a pilot program "to design and test a mission-driven, commercial business model to deliver a defined set of legal services to people who can afford to pay something, but do not have practical access at the present time to such services at an affordable rate." These initiatives are not the exclusive domain of bar associations. For example, the Immigrant Justice Corps has emerged in the past year and will sponsor recent law school graduates as fellows providing legal services for the poor and immigrants. As noted, the professional liability company, ALPS, has created a platform to provide mentors and introduce new lawyers to retiring practitioners in order to transitions those practices.

IV. ABA Legal Access Job Corps

The ABA launched its Legal Access Job Corps at the 2013 Annual Meeting. ABA President Silkenat appointed a Task Force, which has advanced the initiative’s mission of marshalling the resources of newly-admitted lawyers to expand access to underserved populations in three ways:

1. The initiative has advanced outreach efforts designed to stimulate the focus of the dual issues within the mission among the array of stakeholders within the legal community. To this end, the Task Force has created a video entitled “Be the Change,” illustrating the wide variety of models that support better opportunities for participating lawyers while encouraging all stakeholders to become more active.

2. The initiative has collected a wealth of resources that demonstrate both well-established and emerging projects designed to advance the mission. This information is updated on the project website as soon as new information becomes available and is designed to enable those interested in new programs to turn to those who have similar models in place.

3. The initiative has fostered the development and growth of projects around the country through a series of catalyst grants, intended to stimulate innovations.


f. Additional Efforts

A variety of other initiatives have been advanced and are emerging. Bar associations at all levels are active in the support of solo and small firm practitioners, with designated committees and high-quality conferences. Some bars provide practice management assistance staffed by experts in these areas that present CLE programming, as well as hands on consultations. A few bar associations have now established committees for lawyers in transition, providing tools and support for those lawyers who are facing transitions in their practice settings as a result of economic conditions.

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3. The initiative has fostered the development and growth of projects around the country through a series of catalyst grants, intended to stimulate innovations.

These developments are set out on the initiative’s website, at www.ambar.org/legalaccessjobcorps.

V. Conclusion

The ABA has a long-standing and unparalleled commitment to improving access to legal services. It has historically advocated for models that serve both those of low and moderate incomes through public service and within the legal marketplace. We continue here to be that advocate for lawyers in all stages of their careers, from the beginning through, and into, retirement. Without, in any way, undermining the responsibility of lawyers in all settings to contribute services to expand access, this resolution specifically advocates for those models that turn to the resources of newly-admitted lawyers.

As we address the “access to justice” paradox, we see that much has been done, much is in development and much remains to be done. The ABA has a special role in both recognizing and advancing the extent to which these problems exist and in fostering the development of initiatives that contribute to the solutions. No single over-arching solution will solve either of the problems within the paradox, let alone both of them. We must, however, recognize the value of each solution, encourage their replication and urge all stakeholders to rise to the challenges now faced as we marshal the resources of newly-admitted lawyers to better address the legal needs of underserved populations.

Respectfully Submitted,

Allan J. Tanenbaum
Dean Patricia White
Judge Eric Washington
Co-chairs,
Legal Access Job Corps Task Force

August 2014
Summary of Resolution(s).

This Resolution proposes that the American Bar Association urge national, state, local and territorial bar associations and foundations; courts; law schools; legal aid organizations; and law firms to create and advance initiatives that marshal the resources of newly-admitted lawyers to meet the unmet legal needs of underserved populations in sustainable ways.

Approval by Submitting Entity.

Approved by the Legal Access Job Corps Task Force on May 5, 2014.

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

While the House of Delegates has passed resolutions advancing better access to legal services for underserved populations, neither the House nor the Board has taken previous action advocating the development of models that marshal the resources of newly-admitted lawyers to expand access to legal services.

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

The following resolutions have been adopted by the House of Delegates in support of increased access to justice in various ways. To the extent this resolution supports access to justice, it supports each resolution:

1. Resolution Endorsing a Civil Right to Counsel
   Submitting Entity: Task Force on Access to Civil Justice
   Adopted by the House of Delegates: August 2006
   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.

2. ABA Principles of a State System for the Delivery of Civil Justice
   Adopted by the House of Delegates: August 2006
   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.
The Goal: A state’s system for the delivery of civil legal aid provides a full range of high quality, coordinated and uniformly available civil law-related services to the state’s low-income and other vulnerable populations who cannot afford counsel, in sufficient quantity to meet their civil legal needs.

3. Basic Principles of a Civil Right to Counsel

Submitting Entity: STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, SECTION OF LITIGATION...
Adopted by the House of Delegates: August 2010

RESOLVED, That the American Bar Association adopts the black letter and commentary ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings, dated August 2010

4. Limited Scope Representation

Submitting Entity: Standing Committee on the Delivery of Legal Services
Adopted by the House of Delegates: February 2013

RESOLVED, That the American Bar Association encourages practitioners, when appropriate, to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services.

FURTHER RESOLVED, That the American Bar Association encourages and supports the efforts of national, state, tribal, local and territorial bar associations, the judiciary and court administrations, and CLE providers to take measures to assure that practitioners who limit the scope of their representation do so with full understanding and recognition of their professional obligations.

FURTHER RESOLVED, That the American Bar Association encourages and supports the efforts of national, state, tribal, local and territorial bar associations, the judiciary and court administrations, and those providing legal services to increase public awareness of the availability of limited scope representation as an option to help meet the legal needs of the public.

5. Prepaid Legal Service Plans

Submitting Entity: Standing Committee on Group & Prepaid Legal Services
Adopted by the House of Delegates: February 1983
Encourage development of prepaid legal service plans designed to make legal services available at reasonable cost.

6. **GP Solo Delivery of Legal Services**

**Submitting Entity:** General Practice, Solo and Small Firm Division

**Adopted by the House of Delegates:** February 2012

RESOLVED, That the American Bar Association supports and encourages the continued efforts of solo, small firm, and general practice lawyers to provide access to justice by delivery of legal services to those in need.

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

In recent years, fewer than 60 percent of law school graduates obtained full-time, long-term employment requiring a law degree within nine months of graduation. Unemployment of law school graduates has risen (and is now about 11 percent) at the same time unemployment in the nation as a whole has seen a dramatic reduction. Unmet legal needs have been documented for decades. In recent years, models have emerged and advanced that assist newly-admitted lawyers address unmet needs, but they are insufficient, need to be fostered and need to expand.

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 Task Force will continue to advocate the advancement of programs that address the paradox set out in the resolution. It will work more closely with those in other ABA entities as well as stakeholders, to critique, expand and replicate models that advance the Task Force mission.

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

None

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

Not applicable
10. Referrals.

This Resolution has been sent to the following ABA entities requesting support or co-sponsorship:

Standing Committee on the Delivery of Legal Services
Standing Committee on Legal Aid and Indigent Defendants
Standing Committee on Pro Bono & Public Service

11. Contact Person, (Prior to the meeting)

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

Dwight L. Smith  
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Office Phone: (918) 585-1446  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution proposes that the American Bar Association urge national, state, local and territorial bar associations and foundations; courts; law schools; legal aid organizations; and law firms to create and advance initiatives that marshal the resources of newly-admitted lawyers to meet the unmet legal needs of underserved populations in sustainable ways.

2. Summary of the Issue the Resolution

An alarming number of poor, disenfranchised and moderate-incomes individuals have unmet legal needs; only three out of ten low income people and four out of ten moderate income people turned to the legal system when confronted with a legal need; more than 40 percent of low income people and over a quarter of moderate income people did nothing to address their legal problems. At the same time, a substantial number of newly-admitted lawyers are not being assimilated into the infrastructure of the legal profession and in recent years a high percentage of newly-admitted lawyers are not stepping into long-term, full-time positions requiring a law degree after graduation.

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

This resolution would better position the ABA to recognize and advance the extent to which these problems exist and to foster the development of initiatives that contribute to the solutions.

4. Summary of Minority Views

No minority views have arisen at the time of filing.
RESOLVED, That the American Bar Association encourages all private and public sector organizations to develop, implement, and maintain an appropriate security program, including:

(1) conducting regular assessments of the threats, vulnerabilities, and risks to their data, applications, networks, and operating platforms, including those associated with operational control systems; and

(2) implementing appropriate security controls to address the identified threats, vulnerabilities, and risks, consistent with the types of data and systems to be protected and the nature and scope of the organization;

FURTHER RESOLVED, That the American Bar Association encourages these organizations to develop and test a response plan for possible cyber attacks, including disclosure of data breaches, notification of affected individuals, and the recovery and restoration of disrupted operations; and

FURTHER RESOLVED, That the American Bar Association encourages these organizations to (1) engage in partnerships or cooperative relationships, where appropriate, to address the problem of cyber attacks by sharing information on cyber threats, and (2) develop points of contact and protocols to enable such information sharing.
This Resolution addresses security issues that are critical to the national and economic security of the United States (U.S.). It calls for private and public sector organizations to address the security of their digital assets through an organization-wide security program that includes regular assessments of the threats and risks to their data, applications, networks, and operating platforms, including those associated with operational control systems, and (2) the development and implementation of an appropriate security program to address the identified threats, vulnerabilities, and risks. The activities comprising a security program should be undertaken in accordance with accepted security frameworks and standards and be consistent with the types of data and systems to be protected and the nature and scope of the organization.

The Resolution also urges these organizations to develop and test a response plan for possible cyber attacks and engage in partnerships or cooperative relationships, where appropriate, to address the problem of cyber attacks by sharing information about cyber threats.

The protection of one of the most valuable and vulnerable assets of all organizations—its information—is not only vitally important, but it also avoids the high costs associated with cybercrime, including forensic investigations and data breach notification; the loss of confidential, classified, and proprietary data; reputational damage; loss of public confidence; and in the case of business, drops in stock price, and loss of market share and trust. Breaches also have resulted in the disclosure of closely-held government information, and businesses have faced regulatory fines and investigations, civil damage actions, administrative proceedings, and criminal indictments. The first- and third-party losses associated with security incidents are rising, and cybersecurity is now one of the top risks organizations must manage.

II. CYBERSECURITY THREATS

The threat environment today is highly sophisticated, and massive data breaches are occurring with alarming frequency. Cyber-criminals exploit weaknesses in software and operating platforms, the domain name system, and mobile and web-based applications. They conduct successful social engineering through phishing attacks, social media, email, and various applications. Malware can quickly morph, change security controls, lurk in systems undetected, download other malware, and exfiltrate data undetected.

An organization-wide security program with defined controls based on risk categorizations reflecting the operational impact and magnitude of harm of a cyber incident can mitigate risk to a considerable degree. In many cases, data breaches or other types of cyber incidents could have been prevented or detected early and the risks of the incident mitigated if the organization had undertaken proper security planning and implemented appropriate security safeguards.

1 This includes law firms and organizations authorized to provide legal services.
In today’s digital world, threats to data and information systems are found almost everywhere a computer, server, smart phone, thumb drive, or other electronic device is operating. Many organizations provide access to their networks to business partners and entrust their data and business functions to outsourcers and cloud providers, creating additional risks. The proliferation of mobile devices and wireless technologies that enable mobile commerce and a continually expanding array of applications—more than 1.5 million—also present vulnerable points in the flow of sensitive data in computer networks.

Security is only as strong as its weakest link. Failed security has resulted in thousands of data breaches that have led to the loss or compromise of millions of personally identifiable records, as well as the theft of classified information, valuable intellectual property and trade secrets, and the compromise of critical infrastructure. The consequences of a cyber incident or data breach can have a disturbing impact on the victim, whether a business, organization, government entity, or an individual.

Sensitive Data At Risk

There are many types of sensitive data that are targeted by cyber-criminals or subject to unauthorized access, use, disclosure, or sabotage by insiders. This includes personally identifiable information (PII), personal health information (PHI), and financial records, confidential and proprietary business data, intellectual property and trade secrets, research data, privileged legal documents, and classified information (including sensitive national security information). There is a vibrant market for these data, and all organizations—regardless of size—should consider themselves at risk.

The sensitive personal data being amassed by companies and governments is staggering. Inexpensive storage has enabled companies to collect and store large amounts of data and retain it far longer than they would have if it were in paper. “Big data,” the term applied to the collection of massive amounts of data that can be correlated, analyzed, and parsed for targeted advertising and strategic business purposes, creates rich targets for cyber-criminals. PII that can be used for fraud is being collected and often stored by organizations unprotected, putting many Americans at risk.

On its website, the Internal Revenue Service (IRS) indicates that it “has seen a significant increase in refund fraud that involves identity thieves who file false claims for refunds by stealing and using someone’s Social Security number.”

Another aspect of the problem is illustrated by the dependence of American society on electronic transactions and e-commerce, which has fueled data breaches in all industry sectors. Failed security has resulted in massive data breaches of millions of personally identifiable records. The sensitive data being amassed by companies and governments is staggering. Inexpensive storage has enabled companies to collect and store large amounts of data and retain it far longer than they would have if it were in paper. “Big data,” the term applied to the collection of massive amounts of data that can be correlated, analyzed, and parsed for targeted advertising and strategic business purposes, creates rich targets for cyber-criminals. PII that can be used for fraud is being collected and often stored by organizations unprotected, putting many Americans at risk. On its website, the Internal Revenue Service (IRS) indicates that it “has seen a significant increase in refund fraud that involves identity thieves who file false claims for refunds by stealing and using someone’s Social Security number.”

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recent data breaches of leading retail companies and credit bureaus have caught the attention of the public, politicians, and law enforcement. The success of these breaches, however, has also created a "me too" among cyber-criminals eager to capture their own trove of data. Risks will increase with the "Internet of Things," as the Internet becomes the backbone for appliances, gadgets, and operational aspects of daily life. Many of the most personal aspects of people's lives will be documented and transmitted over the Internet, subject to interception or theft.

Protecting the Nation's Critical Infrastructure

The national and economic security of the United States depends on the reliable functioning of critical infrastructure: cybersecurity threats exploit the increased complexity and connectivity of critical infrastructure systems, placing the Nation's security, economy, and public safety and health at risk. Similar to financial and reputational risk, cybersecurity risk affects a company's bottom line. It can drive up costs and impact revenue. It can harm an organization's ability to innovate and to gain and maintain customers. 6


Presidential Policy Directive 21 (PPD-21) on Critical Infrastrucure Security and Resilience, issued in February 2013, advances a national policy to strengthen and maintain secure, functioning, and resilient critical infrastructure. Comprehensive security programs are essential for critical infrastructure organizations, and following appropriate security frameworks and standards is central to achieving a strong security posture and resilience. The electric sector, for example, voluntarily agreed to comply with cybersecurity requirements promulgated by the North American Electric Reliability Corporation and the Federal Energy Regulatory Commission (NERC/FERC).

The National Institute of Standards and Technology (NIST) recently published the Framework for Improving Critical Infrastructure Cybersecurity, and mapped the Framework to other accepted security frameworks and standards. Law Firms Are Targets of Cyber Attacks

Law firms are businesses and should take special care to ensure that they have a strong security posture and a well-implemented security program. The data and information kept by law firms are largely protected by the attorney-client privilege and/or the work product doctrine, as well as by various legal ethics requirements.

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The threat of cyber attacks against law firms is growing. Lawyers and law offices are facing unprecedented challenges from the widespread use of electronic records and mobile devices. There are many reasons for hackers to target the information being held by law firms. They collect and store large amounts of critical, highly valuable corporate records, including intellectual property, strategic business data, and litigation-related theories and records collected through e-discovery.

Both large and small law firms have been the target of hacker attacks in the U.S. as well as abroad. The FBI has issued warnings to firms and held a meeting in early 2012 with approximately 200 law firms in New York City to discuss the risk of breaches and theft of client data. A cybersecurity firm that helps organizations secure their networks against threats and resolve computer security incidents estimated that 80 major law firms were breached in 2011 alone.9

The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals (2013) provides practical threat information, guidance and strategies to lawyers and law firms of all sizes, and explores the relationship and legal obligations between lawyers and clients when a cyber-attack occurs. Lawyers and law offices have a responsibility to protect confidential records from unauthorized access and disclosure, whether malicious or unintentional, by both insiders and hackers. Amendments to the black letter and comments to the ABA Model Rules of Professional Conduct (Model Rules) adopted in 2012 explicitly provide that a lawyer’s duty of competence includes keeping abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology (Comment [8] to Model Rule 1.1). Further, to enhance the protection of client confidential information, Model Rule 1.6 (Confidentiality) provides that a lawyer shall make “reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

III. SECURITY PROGRAM—FRAMEWORKS AND STANDARDS

There are a number of accepted frameworks and standards for developing, implementing, and maintaining a security program. Some of these well-known standards include:

- International Organization of Standardization (ISO), the 27000 series[10], http://www.iso.org/iso/home/standards/management-standards/iso27001.htm

Given the cost and effort required to obtain and maintain ISO 270001 certification, this may not be appropriate for small organizations, particularly where the risks are not great and the benefit achieved would be minimal.

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Fortunately, they are generally consistent, and a number of the requirements in the various security frameworks and standards map to one another. Thus, it is less important which framework or standard an organization follows and more important that it undertakes all of the key activities of a security program.

An organization-wide security program is comprised of a series of activities, including governance by boards of directors and senior executives; development of security strategies and plans, policies and procedures; creation of inventories of digital assets; selection of security controls; determination of technical configuration settings; performance of annual audits; and delivery of training. The foregoing is not an exhaustive list.

Due to the nature of the threat environment, certain activities in a security program are ongoing. Continuous monitoring and log analysis are a critical part of an organization-wide risk management, and are designed to provide meaningful, actionable intelligence and reporting that can provide early detection of threats. To maintain a highly proactive security posture, potential threats must be investigated and targeted attacks detected in advance or addressed as they occur. The objective is to address the multitude of security threats and risks in a timely, disciplined, and structured fashion.

To properly support an organization’s risk management framework, privacy compliance requirements also must be incorporated into the security program. In addition, an effective security program requires a team of trained personnel to evaluate the security impact of actual and proposed changes to the system, assess security controls, correlate and analyze security-related information, and provide actionable communication of the security status across all levels of the organization.

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The determination of security controls is one of the most important activities of a security program. Effective security programs have administrative, technical, organizational and physical controls to help ensure the confidentiality, availability, and integrity of digital assets. Such controls must be carefully determined, implemented, and enforced. NIST has published extensive guidance on the selection of controls for government systems, which is equally appropriate for all organizations.\(^\text{12}\)

The problem, however, is that many organizations are undertaking some of the required security activities, but not others, and some activities are performed without all the critical inputs. Therefore, the resulting security program has gaps and deficiencies and associated risks that impact the organization’s operations, financial bottom line, and compliance is not adequately managed. In part, this is due to (a) a lack of attention at the top of many organizations, (b) a failure to assign key roles and responsibilities for privacy and security, and (c) deficient funding for security personnel, training, and program activities.

To protect against massive data breaches, it is clear that all organizations—whether private or public—must take immediate action to strengthen their security posture.

**Small Organizations**

Recognizing that small law offices and solo practitioners may lack the financial resources of larger firms, the components of a security program are flexible and their implementation must be practical and determined based upon the types of data and systems to be protected, the nature and scope of the organization, its compliance requirements, and system architecture. Small organizations, including small law offices and solo practitioners, will need to create a security program that prioritizes key security activities and is tailored to address the specific risks that have been identified. NIST has recognized that for some small organizations, “the security of their information, systems, and networks might not be a high priority, but for their customers, employees, and trading partners it is very important.”\(^\text{13}\) Similarly, the U.S. Department of Health and Human Services (HHS) has accorded flexibility in its HIPAA Security Series guidance for the needs of small covered entities.\(^\text{14}\)

**IV. RISK-BASED ASSESSMENT—AN ACCEPTED BUSINESS PROCESS**

Organizational risk can include many types of risk (e.g., management, investment, financial, legal liability, safety, logistics, supply chain, and security risk). Security risks related to the operation and use of information systems is just one of many components of organizational risk.

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that senior executives address as part of their ongoing risk management responsibilities. This Resolution focuses on one aspect of a comprehensive enterprise risk management program—operational and IT/cyber risk.

Risk assessments inform decision-makers and support the risk management process by identifying: (i) relevant threats to the organization or threats directed through third party entities; (ii) vulnerabilities both internal and external to the organization; (iii) the impact (i.e., harm) to the organization and individuals that may occur given the potential for threats exploiting vulnerabilities; and (iv) likelihood that harm will occur. The end result is a categorization of risk according to the degree of risk and magnitude of harm to the organization flowing from the threat or vulnerability if it occurred.

Risk assessments are an essential element of a security program. Cybersecurity is based on a systematic assessment of risks that are present in a particular operating environment. Ensuring the confidentiality, integrity, and availability of digital assets is fundamental to their protection. A risk assessment may be used to identify gaps and deficiencies in a security program due to operational changes, new compliance requirements, an altered threat environment, or changes in the system architecture and technologies deployed.

Risk assessments are the basis for the selection of appropriate security controls and the development of remediation plans so that risks and vulnerabilities are reduced to a reasonable and appropriate level. The principal goal of the organization’s risk management process should be to protect the organization and its ability to perform its mission, not just to protect its IT assets.

Risk assessment is not new to most companies. It is a fundamental business process they have been following since at least 1977 when Congress enacted the requirement in the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78dd-l, et seq., that public companies have internal controls. Nearly all rely on the COSO Framework to comply with the internal control reporting requirements under the FCPA and the Sarbanes-Oxley Act of 2002, PL 107-204, 116 Stat 745. The framework, issued in 1992 and updated in 2013, is designed to assist companies in structuring and evaluating controls that address a broad range of risks. It is geared to the achievement of three important objectives—operations (operational and financial reporting goals, and safeguarding assets from loss), reporting (financial and non-financial), and compliance (with laws and regulations). Safeguarding organizational assets, including the confidentiality, integrity and availability of sensitive personal data and computer networks, from theft or fraud by hackers and malicious insiders is at the core of what an effective security program is designed to do.

Risk assessment is necessary for publicly-traded companies to meet Securities and Exchange Commission (SEC) guidance on Disclosure by Public Companies Regarding Cybersecurity Risks and Cyber Incidents. Examples of cybersecurity risk management frameworks and standards include:

15 The Committee on Sponsoring Organizations of the Treadway Commission ("COSO"), an initiative of several groups with an interest in effective internal control, available at http://www.coso.org.
• ISO/IEC 27005:2011: Information Security Risk Management. It supports the general concepts specified in ISO/IEC 27001 and is designed to assist the implementation of information security based on a risk management approach.

• ISO/IEC 31000:2009: Risk Management–Principles and Guidelines. This document is intended to harmonize risk management processes in existing and future standards. It provides a common approach in support of standards dealing with specific risks and/or sectors, and does not replace those standards. It can be applied throughout the life of an organization, and to a wide range of activities, including strategies and decisions, operations, processes, functions, projects, products, services and assets.


• Critical Sectors – DSB Infrastructure Risk Management Approach. This guidance provides a useful approach to critical infrastructure risk management utilizing a risk management framework enunciated by DHS. It is designed to be applied to all threats and hazards, including cyber incidents, natural disasters, man-made safety hazards, and acts of terrorism, although different information and methodologies may be used to understand each. Risk information allows partners, from facility owners and operators to federal agencies, to prioritize their risk management efforts.

• DOE Electricity Subsector Cybersecurity Risk Management Process (RPM). The electricity subsector increasingly relies on digital technology to reduce costs, increase efficiency, and maintain reliability during the generation, transmission, and distribution of electric power. Managing cybersecurity risk is critical to achieving their strategic goals and objectives, including reliability, resiliency, security, and safety. Issued by the Department of Energy in conjunction with NIST and NERC, this guidance is designed to help utilities better understand their cybersecurity risks, assess severity, and allocate resources more efficiently to manage those risks.

Incident response is the practice of detecting a problem, determining its cause, minimizing the damage it causes, resolving the problem, and documenting each step of the response for future reference. Fully developed and tested incident response plans and business continuity/disaster recovery plans are critical components of a security program. Organizations must be prepared if a cyber attack or data breach occurs or if an event interrupts their operations. Thus, response plans, policies, and procedures must be able to accommodate the full array of threats, not just data breaches.

Incident response plans must involve stakeholders across an organization, including IT, security, legal, finance, operational units, human resources, and procurement. The incident response team should be identified and their roles and responsibilities defined. The communication with and coordination among stakeholders is one of the most important aspects of an incident response plan. This includes the identification of who within an organization should be responsible for communicating with external stakeholders, investors, employees, customers, and other key groups. External stakeholders include first responders, forensic investigation experts, Computer Emergency Response Teams (CERTs), Information Sharing and Analysis Centers (ISACs), regulators, communications providers, and outside counsel.

If litigation is anticipated, adequate documentation and evidentiary procedures for incident response are very important. This ensures valuable tracking and tracing data and evidence of what happened within a system are preserved and secured and chain of custody is documented. Advance planning and the advice of a crisis communications expert can be invaluable in keeping a cybersecurity incident from becoming a disaster.

For many organizations, adequate incident response planning is a compliance requirement. For example, those subject to the Federal Information Security Management Act (FISMA), the Health Insurance Portability and Accountability Act (HIPAA), Gramm-Leach-Bliley Act (GLBA), or numerous state data breach laws must implement and maintain security programs.

There are ample resources available to assist organizations in understanding the key components of incident response. NIST, for example, has published an excellent guide, the Computer Security Incident Handling Guide, and Carnegie Mellon has issued the Handbook for Computer Security Incident Response Teams.

Business Continuity Management—The other critical cyber response plan for a security program is a business continuity/disaster recovery plan. Although they are commonly lumped together as BC/DR, there are separate processes for business continuity and disaster recovery. A cybersecurity incident that is initially handled under an incident response plan may cause a business interruption that requires implementation of business continuity procedures. Thus, each

plan must be drafted and tested for such circumstances to ensure a smooth and efficient response and continuity of operations.

Certain critical infrastructure sectors have BC/DR requirements. NERC, for example, has requirements for BC/DR in its required standards, and it conducts ongoing work regarding continuity of operations and resiliency of electricity grids. These activities help these companies stay abreast of threats and develop, implement, and maintain sophisticated BC/DR plans.

VI. INFORMATION SHARING

Sharing threat information regarding cyber incidents with others, such as law enforcement, continuity emergency response teams (CERTs), information sharing and analysis centers (ISACs), business partners, and public sector cyber officials who could benefit from the knowledge, helps advance cyber defenses and resiliency in other organizations. An attack on any organization may impact all others, or it may be targeted at a particular activity or business process, such as point-of-sale systems or control processes. The sharing of threat information can substantially improve the ability of other organizations to respond to a similar attack. It also improves the knowledge base about threats and effective mitigation measures.

Many companies have not thought through their comprehensive incident response or developed cyber response plans, much less thought about how they might share threat information. Establishing relationships with external organizations—such as FBI Infragard, ISACs, CERTs, and industry cyber groups—regarding cyber threats is an important defensive measure for any organization. Such organizations are usually open to receiving information in an anonymized or sanitized fashion, if desired, by the entity providing the information.

It is important that organizations identify what data they might share, determine to whom they would share it and in what form, and consider any legal ramifications associated with the data or sharing it with third parties. Although some have raised concerns that antitrust constraints may arise with information sharing, the U.S. Department of Justice (DOJ) has indicated a willingness to provide letters of exception, if requested, to enable cyber information sharing. On April 14, 2014, DOJ joined with the Federal Trade Commission (FTC) and issued a joint “Antitrust Policy Statement on Sharing of Cybersecurity Information,” which clarifies the issue:

Through this Statement, the Department of Justice’s Antitrust Division (the “Division”) and the Federal Trade Commission (the “Commission” or “FTC”) 25


26 Lawyers, law firms, and organizations and entities authorized to provide legal services must take into consideration any ethical constraints that may apply to client records, and any legal restrictions applicable to records under seal, grand jury information, classified information, etc.

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Through this Statement, the Department of Justice’s Antitrust Division (the “Division”) and the Federal Trade Commission (the “Commission” or “FTC”) 26
collectively, the "Agencies") explain their analytical framework for information sharing and make it clear that they do not believe that antitrust is—or should be—a roadblock to legitimate cybersecurity information sharing.27

VII. EXISTING ABA POLICY

In recent years, the ABA House of Delegates and Board of Governors have adopted several policies regarding cybersecurity and lawyers’ use of technology, and the proposed Resolution is consistent with, and would build upon, those existing ABA policies. These ABA policies include the following:

Resolution 118, Adopted by the House of Delegates at the 2013 Annual Meeting in San Francisco (August 2013)

This Resolution condemns intrusions into computer systems and networks utilized by lawyers and law firms, urges federal, state, and other governmental bodies to examine and amend existing laws to fight such intrusions, and makes other related recommendations. The complete Resolution and Report are available at:

http://www.americanbar.org/content/dam/aba/administrative/law_national_security/resolution_118.authcheckdam.pdf

Resolution Adopted by the ABA Board of Governors (November 2012)

The ABA’s Board of Governors approved a policy in November 2012 comprised of five cybersecurity principles developed by the ABA Cybersecurity Legal Task Force. The complete Resolution and Report are available at:

http://www.americanbar.org/content/dam/aba/marketing/Cybersecurity/aba_cybersecurity_res_and_report.authcheckdam.pdf


Resolution 105A amends the black letter and Comments to Model Rule 1.0 (Terminology), the Comments to Model Rule 1.1 (Competence) and Model Rule 1.4 (Communication), and the black letter and Comments to Model Rule 1.6 (Confidentiality of Information) and Model Rule 4.4 (Respect for Rights of Third Parties) of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers’ use of technology and confidentiality.


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The Resolution 105B amends the black letter and Comments to Model Rules 1.18 and 7.3, and the Comments to Model Rules 7.1, 7.2 and 5.5 of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers’ use of technology and client development.

Resolution 105C amends the Comments to Model Rule 1.1 (Competence) and Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), and the title and Comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding the ethical implications of retaining lawyers and nonlawyers outside the firm to work on client matters (i.e., outsourcing).

The complete Resolutions and the related Reports are available at:
http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_annual_meeting_105a.doc
http://www.americanbar.org/content/dam/aba/administrative/law_national_security/resolution_105b_authorcheckkman.pdf
http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_annual_meeting_105c.doc

VIII. CONCLUSION

It is imperative that all organizations—private sector companies and other organizations, government departments and agencies, and professional firms such as legal, accounting, engineering, and consulting entities—develop, implement, and maintain an organization-wide security program in accordance with accepted security frameworks and standards. Today, too many organizations and entities—including critical infrastructure companies—have completed some activities within a security program, but not all, making them easy targets for sophisticated cyber-criminals. The lack of a disciplined process for the selection of security controls and ongoing reviews are two of the most serious gaps in security programs. Likewise, many organizations do not devote adequate funding to address known gaps and deficiencies in their security programs or to ensure that their organizations have well-developed plans to enable them to respond adequately to incidents and maintain continuity of business operations.

Through this Resolution, the ABA stresses the importance of security programs for all organizations as a matter of sound governance and risk management and as an imperative that is linked directly to our nation’s economic and national security. Cybersecurity has moved beyond the realm of technical personnel; the maintenance of a security program, including the components stressed in this Resolution, is a responsibility that all senior executives, business owners, attorneys, general counsels, compliance officers, and government officials should embrace.
1. Summary of Resolution(s).

This Resolution addresses security issues that are critical to the national and economic security of the U.S. It calls for all private and public sector organizations to address the security of their digital assets through the development, implementation, and maintenance of an organization-wide security program that includes (1) regular assessments of the threats and risks to their data, applications, networks, and operating platforms, including those associated with operational control systems, and (2) implementation of appropriate security controls to address the identified threats, vulnerabilities, and risks. All activities comprising a security program should be undertaken in accordance with accepted security frameworks and standards and they should be consistent with the types of data and systems to be protected and the nature and scope of the organization, its compliance requirements, and system architecture.

The Resolution also encourages these organizations to develop and test a response plan for possible cyber attacks, and engage in information sharing partnerships or cooperative relationships, where appropriate, to address the problem of cyber attacks by sharing information about cyber threats.

2. Approval by Submitting Entities.

The Cybersecurity Legal Task Force approved the Resolution on May 6, 2014.

The Section of Science & Technology Law voted to co-sponsor this Resolution by email vote of the Section Council (in accordance with the Section Bylaws) on May 6, 2014.

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

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

The proposed Resolution consistent with, and would build upon, several existing ABA policies, including the following:

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Resolution 105A amends the black letter and Comments to Model Rule 1.0 (Terminology), the Comments to Model Rule 1.1 (Competence) and Model Rule 1.4 (Communication), and the black letter and Comments to Model Rule 1.6 (Confidentiality of Information) and Model Rule 4.4 (Respect for Rights of Third Parties) of the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding lawyers' use of technology and confidentiality.

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

The Resolution addresses security issues that are critical to the national and economic security of the U.S. The threat environment today is highly sophisticated, and massive data breaches are occurring with alarming frequency. The consequences of a cyber incident or data breach can have a disturbing impact on the victim, whether a business, organization, government entity, or an individual. It is clear that all organizations—whether private or public sector—must take immediate action to strengthen their security posture.

The only effective defense is a fully implemented security program with controls based on operational criteria and magnitude of harm and risk categorization. In many cases, data breaches of other types of cyber incidents could have been prevented or detected early and the risks of the incident mitigated if the organization had undertaken proper security planning and implemented appropriate security safeguards.
6. **Status of Legislation.** (If applicable)

Not applicable.

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

The Resolution will be distributed to various private and public sector organizations, and other stakeholders in order to alert them to the ABA’s newly-adopted policy and to encourage them to take action consistent with the ABA policy.

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

9. **Disclosure of Interest.** (If applicable) Not Applicable.

10. **Referrals.**

   The proposed Resolution and Report has been sent to the Chairs and staff liaisons of each ABA Section, Division, Task Force, Standing Committee and Commission represented in the ABA Cybersecurity Legal Task Force. They are: Section of Administrative Law, Business Law, Center for Professional Responsibility, Criminal Justice Section, Section of Individual Rights and Responsibilities, Section of Environment, Energy and Resources, International Law, Law Practice Management Section, Litigation, Science and Technology Law, Special Committee on Disaster Response and Preparedness, Standing Committee on Law and National Security, Standing Committee on Technology and Information Systems, State and Local Government Law, Tort, Trial and Insurance Practice and Public Utility, Communications and Transportation Law.

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

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   Judith.miller3@gmail.com
12. Contact Name and Address Information. (Who will present the report to the House?)

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Judith.miller3@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution calls for all private and public sector organizations to address the security of their digital assets through the development, implementation, and maintenance of an organization-wide security program that includes (1) regular assessments of the threats and risks to their data, applications, networks, and operating platforms, including those associated with operational control systems, and (2) implementation of appropriate security controls to address the identified threats, vulnerabilities, and risks. All activities comprising a security plan should be undertaken in accordance with accepted security frameworks and standards, and they should be consistent with the types of data and systems to be protected and the nature and scope of the organization, its compliance requirements, and system architecture.

The Resolution also urges these organizations to develop and test a response plan for possible cyber attacks, and engage in information sharing partnerships or cooperative relationships, where appropriate, to address the problem of cyber attacks by sharing information about cyber threats.

2. Summary of the Issue that the Resolution Addresses

This Resolution addresses security issues that are critical to the national and economic security of the U.S. The threat environment today is highly sophisticated, and massive data breaches are occurring with alarming frequency. The consequences of a cyber incident or data breach can have a disturbing impact on the victim, whether a business, organization, government entity, or an individual. It is clear that all organizations—whether private or public—must take immediate action to strengthen their security posture.

The only effective defense is a fully-implemented security program with security controls based on operational criteria and magnitude of harm and risk categorization. In many cases, data breaches or other types of cyber incidents could have been prevented or detected early and the risks of the incident mitigated if the organization or entity had undertaken proper security planning and implemented appropriate security safeguards.

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

Through this Resolution, the ABA stresses the importance of security plans for all private and public sector organizations as a matter of sound governance and risk management and as an imperative that is linked directly to our nation’s economic and national security. Cybersecurity has moved beyond the realm of technical personnel; the maintenance of a security plan, including the components stressed in this Resolution, is a responsibility that all senior executives, business owners, attorneys, general counsels, compliance officers, and government officials should embrace.

4. Summary of Minority Views

No minority views have come to our attention.
RESOLVED, That the American Bar Association urges each federal, state, and territorial jurisdiction where capital punishment is permitted to adopt a statute or rule providing an appropriate judicial procedure whereby successors of an executed individual may bring and litigate a claim that the individual executed was in fact innocent of the capital offense.

FURTHER RESOLVED, That such statute or rule shall provide for the award of monetary compensation to the successors of the wrongfully executed individual for the period of the wrongfully executed individual’s wrongful incarceration awaiting his or her execution and also for the specific act of wrongfully executing the individual.
This Resolution urges federal, state, and territorial jurisdictions1 that authorize the execution of individuals convicted of committing capital offenses to provide statutory or other legal means by which the successors2 of executed individuals may establish that those individuals were wrongfully executed. The Resolution further urges that these jurisdictions provide compensation for the successors of those who have been legally determined to have been wrongfully executed. Recovery under such statutes should compensate for both the wrongful incarceration leading up to the wrongful execution and for the act of wrongful execution itself.3

Since 1989, there have been at least 1,324 individuals who have been found to have been wrongfully convicted and incarcerated in the United States.4 There are various known causes of wrongful conviction and incarceration. These include erroneous witness identifications, false confessions, invalid forensic evidence, false testimony by government informants, government misconduct, and poor legal representation.5 Some jurisdictions have taken steps to address these various contributors to wrongful conviction, but it is difficult to identify and resolve all such issues.

1 Even if some jurisdictions do not currently authorize capital punishment, this Resolution urges that any jurisdictions adopting capital punishment in the future provide statutory or other legal means by which the successors of executed individuals may establish that those individuals were wrongfully executed and also provide compensation for individuals legally determined to have been wrongfully executed.

2 "Successors" of executed individuals include the executed individual’s heirs, devisees, and beneficiaries as defined by the law in which the executed individual was domiciled at the time of his execution. Cf. UNIFORM PROBATE CODE § 1-201(49) (2010) (defining “successors” as “persons, other than creditors, who are entitled to property of a decedent under his [or her] will or this [code]”). Where executed individuals have no heirs, devisees, or beneficiaries as defined by the law in which the executed individual was domiciled at the time of his execution. Cf. UNIFORM PROBATE CODE § 1-201(49) (2010) (defining “successors” as “persons, other than creditors, who are entitled to property of a decedent under his [or her] will or this [code]”). Where executed individuals have no heirs, devisees, or beneficiaries to attempt to establish the executed individual’s wrongful execution, “successors” of executed individuals may include a non-profit legal organization, which may attempt to establish the wrongful execution. If such a non-profit legal organization successfully establishes a wrongful execution, the awarded compensation should be used to fund the legal representation of indigent criminal defendants or to assist other successors attempting to litigate wrongful execution claims within the jurisdiction.

3 For a more robust argument that jurisdictions should compensate for wrongful execution, see generally Meghan J. Ryan, Remedying Wrongful Execution, 45 U. Mich. J.L. Reform 261 (2012).


potential errors in the criminal justice system. In 2005, the ABA House of Delegates adopted Resolution 108A, which "urges federal, state, local and territorial jurisdictions to enact statutes to adequately compensate persons who have been convicted and incarcerated for crimes they did not commit." Today, twenty-nine states, as well as the federal government and the District of Columbia, have statutes providing some form of compensation for those who have been wrongfully convicted and incarcerated.8

Although the ABA and various jurisdictions have recognized the concern of wrongful conviction and incarceration, there has been no similar recognition of the parallel, and even more egregious, matter of wrongful execution. To date, there have been no legal determinations that any individual has been wrongfully convicted and executed in the United States.7 But this is not necessarily because no wrongful executions have occurred. In fact, approximately 8% of the 1,324 exonerations since 1989 were of individuals sentenced to death, suggesting that it is certainly possible for an individual to be sentenced to death despite the more rigorous procedural protections provided for defendants in capital cases.6 Additionally, there are several cases in which death row defendants died in prison of natural causes but were later exonerated.10 For example, Frank Lee Smith—a man convicted of raping and murdering an eight-year-old girl but who then died of cancer on death row—was exonerated in 2000 after DNA evidence cleared him and the sole eyewitness in his case recanted.10 Similarly, Louis Greco and Henry Tameleio, who were convicted of murder in 1965 and sentenced to death but then later died in prison, were exonerated when it was discovered that the Federal Bureau of Investigation had participated in framing them.11 Moreover, there are several cases in which the guilt of an executed individual has been seriously questioned.12

There are several hurdles to establishing wrongful execution. First, “[t]he attorneys and media that are often essential in bringing to light wrongful convictions tend to focus their

7 Ryan, supra note 3, at 262.
8 See id. at 273, 302-03; National Registry of Exonerations, supra note 4. One recent study estimates that approximately 4% of individuals sentenced to death are innocent and maintains that, although many of these individuals are exonerated before they are executed, “it is all but certain that several of the 1,320 defendants executed since 1977 were innocent.” See Samuel R. Gross et al., Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death, PNAS EARLY EDITION (2014).
9 For several examples of such posthumous exonerations, see Ryan, supra note 3, at 277-78.
12 See, e.g., Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 STAN. L. REV. 21, 72 (1987) (empirically studying wrongful executions and near-wrongful executions, and cataloguing “twenty-three cases of persons we believe to be innocent defendants who were executed”); Ronald J. Tabak, Capital Punishment, in THE STATE OF CRIMINAL JUSTICE 2014 (forthcoming 2014) (telling the stories of several executed individuals who were quite possibly innocent of the crimes for which they were convicted).
resources on the stories of those who are still alive rather than those who have already been executed and thus cannot be saved. Further, "it generally becomes more difficult to prove a defendant's factual innocence as time passes because memories fade and evidence and witnesses disappear."14 Perhaps most importantly, though, very few, if any, jurisdictions have provided legal avenues—aside from executive clemency—through which the families and friends of executed individuals can legally establish that the individual was wrongfully executed.15 In Texas, litigants have sought to make use of a state judge's authority to establish a Court of Inquiry to investigate cases of public interest in their pursuit to have an executed individual exonerated.16 Virginia law provides for the grant of a "writ of actual innocence," which could potentially be another vehicle for establishing wrongful execution.17 The law, however, requires the "petitioner" to have been convicted before the writ is granted, and the writ appears not to have been granted in any case in which the convicted defendant was deceased. A writ of coram nobis or coram vobis might also hold potential for establishing wrongful execution, although neither writ appears to have ever been used for this purpose. Regardless of the vehicle used, though, it is important to learn whether innocent individuals have been, and are continuing to be, wrongfully executed. And because there is a very real possibility that this is the case, jurisdictions should provide legal avenues by which these claims can be argued and established.

Once a case of wrongful execution has been legally established, existing compensation statutes are inadequate to address the wrong. First, several existing statutory compensation schemes fail to allow a deceased individual's successors to inherit any amount owed to the deceased individual for his wrongful conviction and incarceration. For example, Nebraska's compensation statute provides that "[a] claimant's cause of action under the act shall not be assignable and shall not survive the claimant's death."18 Accordingly, once an individual is wrongfully executed, any right to compensation he had for wrongful conviction and incarceration vanishes under these statutes. Moreover, current compensation statutes fail to account for the act of wrongful execution, itself. While some statutes might provide compensation for an individual's time incarcerated, they do not provide for death at the hand of the government. This is despite the fact that the act of execution has been found to be the worst

13 Ryan, supra note 3, at 274.
14 Id. As Meghan J. Ryan explains, "[p]erhaps the only way to persuasively establish innocence is through DNA evidence. However, there is often no DNA evidence available for testing, and even when it is available, this evidence degrades over time and could be useless by the time the defendant is executed." Id.
15 See id. at 272–78 (outlining the difficulties of establishing wrongful execution).

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15 See id. at 272–78 (outlining the difficulties of establishing wrongful execution).
punishment available in the United States. As the U.S. Supreme Court has stated over and over again, the punishment of death is unique due to its extreme severity. It is important that jurisdictions imposing capital punishment be held responsible and accountable for wrongful executions. Not only would this be fairer, but it would also likely cause individual actors responsible for death decisions—such as state prosecutors and governors—to take these decisions more seriously. For example, when substantial funds are at risk, state governors may more carefully consider clemency in a capital case when substantial evidence has been raised suggesting the innocence of the convicted individual. Additionally, if wrongful executions are legally established, this might encourage some jurisdictions to abandon capital punishment altogether. While providing compensation to the successors of wrongfully executed individuals cannot make up for the egregious wrong of wrongful execution, it at least start to recognizing the existence of this wrong and a step toward holding the jurisdiction in which the wrongful execution occurred responsible and accountable for its actions.

If it is legally determined that someone has indeed been wrongfully executed, then the wrongfully executed individual’s successors ought to be able to recover for the deceased’s wrongful incarceration. To accomplish this, jurisdictions should already have statutes to compensate those who have been wrongfully convicted and incarcerated could amend their statutes to provide for the survival of the compensation claims and payments. Capital jurisdictions that do not already have such compensation statutes should enact statutes providing for compensation for those who are wrongfully convicted, incarcerated, and executed. Additionally, jurisdictions’ compensation statutes should provide for even greater compensation in cases of wrongful execution than in cases of wrongful conviction and incarceration. “Not only have wrongfully executed individuals been wrongfully incarcerated, but they have also suffered what our nation has concluded is the worst punishment available in the United States: the death penalty. Accordingly, if it is legally determined that someone has indeed been wrongfully executed, then the wrongfully executed individual’s successors ought to be able to recover for the deceased’s wrongful execution. To accomplish this, jurisdictions should already have statutes to compensate those who have been wrongfully convicted and incarcerated could amend their statutes to provide for the survival of the compensation claims and payments. Capital jurisdictions that do not already have such compensation statutes should enact statutes providing for compensation for those who are wrongfully convicted, incarcerated, and executed. Additionally, jurisdictions’ compensation statutes should provide for even greater compensation in cases of wrongful execution than in cases of wrongful conviction and incarceration. “Not only have wrongfully executed individuals been wrongfully incarcerated, but they have also suffered what our nation has concluded is the worst punishment available in the United States: the death penalty. Accordingly, the punishment of death is unique due to its extreme severity. It is important that jurisdictions imposing capital punishment be held responsible and accountable for wrongful executions. Not only would this be fairer, but it would also likely cause individual actors responsible for death decisions—such as state prosecutors and governors—to take these decisions more seriously. For example, when substantial funds are at risk, state governors may more carefully consider clemency in a capital case when substantial evidence has been raised suggesting the innocence of the convicted individual. Additionally, if wrongful executions are legally established, this might encourage some jurisdictions to abandon capital punishment altogether. While providing compensation to the successors of wrongfully executed individuals cannot make up for the egregious wrong of wrongful execution, it at least start to recognizing the existence of this wrong and a step toward holding the jurisdiction in which the wrongful execution occurred responsible and accountable for its actions.

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compensation for wrongful execution should reflect this even greater injustice by providing even
greater compensation.\footnote{Ryan, supra note 3, at 304.}

Respectfully submitted,

Mathias H. Heck, Jr.
Criminal Justice Section
August 2014
1. **Summary of Resolution(s).** This Resolution urges federal, state, and territorial jurisdictions that authorize the execution of individuals convicted of committing capital offenses to provide statutory or other legal means by which the successors of executed individuals may establish that those individuals were wrongly executed. The Resolution further urges that these jurisdictions provide compensation for the successors of those who have been legally determined to have been wrongly executed. Recovery under such statutes should compensate for both the wrongful incarceration leading up to the wrongful execution and for the act of wrongful execution itself.

2. **Approval by Submitting Entity.** This resolution was approved by the Criminal Justice Section Council at its Spring meeting on April 12, 2014.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** This resolution covers topics similar to Resolution 108A from Midyear 2005, however it will not affect it as policy.

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

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

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The policy will be distributed to various criminal justice stakeholders in order to encourage the necessary legislative action to provide means by which the successors of executed individuals may establish that those individuals were wrongly executed. The policy will also be featured on the Criminal Justice Section website and in Section publications.

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

10. Referrals.
    At the same time this policy resolution is submitted to the ABA Policy Office for
    inclusion in the 2014 Annual Agenda Book for the House of Delegates, it is being
    circulated to the chairs and staff directors of the following ABA entities:

    **Standing Committees**
    - Ethics and Professional Responsibility
    - Governmental Affairs
    - Legal Aid and Indigent Defendants

    **Special Committees and Commissions**
    - Center for Human Rights
    - Center for Racial and Ethnic Diversity
    - Coalition on Racial and Ethnic Justice
    - Commission on Domestic and Sexual Violence
    - Commission on Youth at Risk
    - Death Penalty Representation Project

    **Sections, Divisions**
    - Government and Public Sector Lawyers Division
    - Individual Rights and Responsibilities
    - Judicial Division
    - Legal Education Division
    - Litigation
    - Law Student Division
    - Local Government Law
    - Probate, Trusts, and Estates
    - State and Local Government Law
    - Tort Trial and Insurance Practice
    - Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name,
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges federal, state, and territorial jurisdictions that authorize the execution of individuals convicted of committing capital offenses to provide statutory or other legal means by which the successors of executed individuals may establish that those individuals were wrongfully executed. The Resolution further urges that these jurisdictions provide compensation for the successors of those who have been legally determined to have been wrongfully executed. Recovery under such statutes should compensate for both the wrongful incarceration leading up to the wrongful execution and for the act of wrongful execution itself.

2. Summary of the Issue that the Resolution Addresses

Although the ABA and various jurisdictions have recognized the concern of wrongful conviction and incarceration, there has not been similar recognition of the parallel, and even more egregious, matter of wrongful execution. To date, there have been no legal determinations that any individual has been wrongfully convicted and executed in the United States. But this is not necessarily because no wrongful executions have occurred. In fact, approximately 8% of the 1,324 exonerations since 1989 were of individuals sentenced to death, suggesting that it is certainly possible for an individual to be sentenced to death despite the more rigorous procedural protections provided for defendants in capital cases. Additionally, there are several cases in which death row defendants died in prison of natural causes but were later exonerated. Moreover, there are several cases in which the guilt of an executed individual has been seriously questioned.

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

This Resolution would create the means by which the successors of executed individuals may establish that those individuals were wrongfully executed. The Resolution would further provide compensation for the successors of those who have been legally determined to have been wrongfully executed.

4. Summary of Minority Views

None are known.

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4. Summary of Minority Views

None are known.
CRIMINAL JUSTICE STANDARDS
for the
PROSECUTION FUNCTION

Chair, Criminal Justice Section Council: Mathias H. Heck, Jr., Montgomery County Prosecuting
Attorney, Dayton, Ohio.

Standards Committee Chair: The Hon. Mark R. Dwyer, New York Court of Claims.

Reporter: Professor Rory K. Little, U.C. Hastings College of the Law, San Francisco

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

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

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### PART I. GENERAL STANDARDS

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3. **Standard 3-1.3** The Client of the Prosecutor
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PART I.
GENERAL STANDARDS

Standard 3.1.1 The Scope and Function of These Standards

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

(b) These Standards are intended to provide guidance for the professional conduct and performance of prosecutors. They are not intended to modify a prosecutor’s obligations under applicable rules, statutes, or the constitution. They are aspirational or describe “best practices,” and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.

(c) These Standards are intended to address the performance of prosecutors in all stages of their professional work. Other ABA Criminal Justice Standards should also be consulted for more detailed consideration of the performance of prosecutors in specific areas.

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

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

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

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

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

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

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

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

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

(c) The prosecutor should disclose to a court legal authority in the controlling jurisdiction known to the prosecutor to be directly adverse to the prosecutor’s position and not disclosed by others.
At every stage of representation, the prosecutor should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.
[New] Standard 3-1.6 Improper Bias Prohibited [New]

(a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor’s authority.

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

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

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

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

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

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

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

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

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

(i) The prosecutor ordinarily should not recommend the services of particular defense counsel to accused persons or witnesses in cases being handled by the prosecutor’s office. If requested to make such a recommendation, the prosecutor should consider instead referring the person generally to the public defender, or to a panel of available criminal defense attorneys, or to

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the court. In the rare case where a specific recommendation is made by the prosecutor, the recommendation should be to an independent and competent attorney, and the prosecutor should not make a referral that embodies, creates or is likely to create a conflict of interest. A prosecutor should not comment negatively upon the reputation or abilities of a defense counsel to an accused person or witness who is seeking counsel in a case being handled by the prosecutor’s office.

(j) The prosecutor should promptly report to a supervisor any but the most obviously frivolous misconduct allegations made, publicly or privately, against the prosecutor. If a supervisor or judge initially determines that an allegation is serious enough to warrant official investigation, reasonable measures, including possible recusal, should be instituted to ensure that the prosecution function is fairly and effectively carried out. A mere allegation of misconduct, however, is not ordinarily a sufficient basis for prosecutorial recusal, and should not deter a prosecutor from attending to the prosecutor’s duties.
(a) The prosecutor should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers the interests of justice in fairness, accuracy, or the timely disposition of charges, or has a significant potential to lead to the breach of professional obligations. A prosecutor whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in existing matters. A prosecutor within a supervisory structure should notify supervisors when counsel’s workload is approaching or exceeds professionally appropriate levels.

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

(c) The chief prosecutor for a jurisdiction should inform governmental officials of the workload of the prosecutor’s office, and request funding and personnel that are adequate to meet the criminal caseload. The prosecutor should consider seeking such funding from all appropriate sources. If workload exceeds the appropriate professional capacity of a prosecutor or prosecutor’s office, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief.
Standard 3.1.9 Diligence, Promptness and Punctuality

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

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

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

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

(e) The prosecutor should be punctual in attendance in court, in the submission of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses and others. The prosecutor should emphasize to assistants and prosecution witnesses the importance of punctuality in court attendance.
Standard 3-1.10 Relationship with the Media

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

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

(c) The prosecutor should not make, cause to be made, or authorize or condone the making of, a public statement that the prosecutor knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of the accused, but the prosecutor may make statements that inform the public of the nature and extent of the prosecutor’s or law enforcement actions and serve a legitimate law enforcement purpose.

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

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

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

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

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

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

(i) During the pendency of a criminal matter, the prosecutor should not re-enact, or assist law enforcement in re-enacting, law enforcement events for the media. Absent a legitimate law enforcement purpose, the prosecutor should not display the accused for the media, nor should the prosecutor invite media presence during investigative actions without careful consideration of the interests of all involved, including suspects, defendants, and the public. However, a prosecutor may reasonably accommodate media requests for access to public information and events.
Standard 3-1.11  Literary or Media Rights Agreements Prohibited

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

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

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

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

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

(c) If, despite the prosecutor's efforts in accordance with sections (a) and (b) above, the chief prosecutor permits, fails to address, or insists upon an action or omission that is clearly a violation of law, the prosecutor should take further remedial action, including revealing information necessary to address, remedy, or prevent the violation to appropriate judicial, regulatory, or other government officials not in the prosecutor's office.
(a) The prosecutor's office should develop and maintain programs of training and continuing education for both new and experienced prosecutors and staff. The prosecutor's office, as well as the organized Bar or courts, should require that current and aspiring prosecutors attend a reasonable number of hours of such training and education.

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

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

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

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

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(e) Adequate funding for continuing training and education, within and outside the office, should be requested and provided by funding sources.
Standard 3-2.1 Prosecution Authority to be Vested in Full-time, Public-Official Attorneys

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

(i) a public official,

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

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

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

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

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

(d) Unless impractical or unlawful, the prosecutor's office should implement a system for allowing qualified law students, cross-designated prosecutors from other offices, and private attorneys temporarily assigned to the prosecutor's office, to learn about and assist with the prosecution function.
Standard 3-2.2 Assuring Excellence and Diversity in the Hiring, Retention, and Compensation of Prosecutors

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

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

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

(d) Compensation and benefits for prosecutors and their staffs should be commensurate with the high responsibilities of the office, sufficient to compete with the private sector, and regularly adjusted to attract and retain well-qualified personnel. Compensation for prosecutors should be adequate and also comparable to that of public defense counsel in the jurisdiction.
The prosecutor should be provided with funds for qualified experts as needed for particular matters. When warranted by the responsibilities of the office, funds should be available to the prosecutor's office to employ professional investigators and other necessary support personnel, as well as to secure access to forensic and other experts.
Standard 3.2.4 Office Policies and Procedures

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

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

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

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

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

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

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

PROSECUTORIAL RELATIONSHIPS

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

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

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

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

(d) Federal, state, and local prosecution offices should develop practices and procedures that encourage useful coordination with prosecutors within the jurisdiction and in other jurisdictions. Prosecutors should work to identify potential issues of conflict, coordinate with other prosecution offices in advance, and resolve inter-office disputes amicably and in the public interest.
(a) The prosecutor should maintain respectful yet independent judgment when interacting with law enforcement personnel.

(b) The prosecutor may provide independent legal advice to law enforcement about actions in specific criminal matters and about law enforcement practices in general.

(c) The prosecutor should become familiar with and respect the experience and specialized expertise of law enforcement personnel. The prosecutor should promote compliance by law enforcement personnel with applicable legal rules, including rules against improper bias. The prosecutor’s office should keep law enforcement personnel informed of relevant legal and legal ethics issues and developments as they relate to prosecution matters, and advise law enforcement personnel of relevant prosecution policies and procedures. Prosecutors may exercise supervision over law enforcement personnel involved in particular prosecutions when in the best interests of justice and the public.

(d) Representatives of the prosecutor’s office should meet and confer regularly with law enforcement agencies regarding prosecution as well as law enforcement policies. The prosecutor’s office should assist in developing and administering training programs for law enforcement personnel regarding matters and cases being investigated, matters submitted for charging, and the law related to law enforcement activities.
Standard 3.3.3 Relationship With Courts, Defense Counsel and Others

(a) In all contacts with judges, the prosecutor should maintain a professional and independent relationship. A prosecutor should not engage in unauthorized ex parte discussions with, or submission of material to, a judge relating to a particular matter which is, or is likely to be, before the judge. With regard to generalized matters requiring judicial discussion (for example, case-management or administrative matters), the prosecutor should invite a representative defense counsel to join in the discussion to the extent practicable.

(b) When ex parte communications or submissions are authorized, the prosecutor should inform the court of material facts known to the prosecutor, including facts that are adverse, sufficient to enable the court to make a fair and informed decision. Except when non-disclosure is authorized, counsel should notify opposing counsel that an ex parte contact has occurred, without disclosing its content unless permitted.

(c) In written filings, the prosecutor should respectfully evaluate and respond as appropriate to opposing counsel’s arguments and representations, and avoid unnecessary personalized disparagement.

(d) The prosecutor should develop and maintain courteous and civil working relationships with judges and defense counsel, and should cooperate with them in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system. Prosecutors should cooperate with courts and organized bar associations in developing codes of professionalism and civility, and should abide by such codes that apply in their jurisdiction.
Standard 3-3.4 Relationship With Victims and Witnesses

(a) “Witness” in this Standard means any person who has or might have information about a matter, including victims.

(b) The prosecutor should know and follow the law and rules of the jurisdiction regarding victims and witnesses. In communicating with witnesses, the prosecutor should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons.

(c) The prosecutor or the prosecutor’s agents should ordinarily interview witnesses, and should not act to intimidate or unduly influence any witness.

(d) The prosecutor should not use means that have no substantial purpose other than to embarrass, delay, or burden, and not use methods of obtaining evidence that violate legal rights. The prosecutor and prosecution agents should not misrepresent their status, identity or interests when communicating with a witness.

(e) The prosecutor should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented and disclosed to the defense. A prosecutor should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness’s testimony.

(f) A prosecutor should avoid the prospect of having to testify personally about the content of a witness interview. The prosecutor’s interview of most routine or government witnesses (for example, custodians of records or law enforcement agents) ordinarily should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, the prosecutor should be accompanied by another trusted and credible person during the interview. The prosecutor should avoid being alone with any witness who realistically has potential or actual criminal liability, or foreseeably hostile witnesses.

(g) The prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to independent counsel when the law so requires. Even if the law does not require it, a prosecutor should consider so advising a witness if the prosecutor reasonably believes the witness may provide self-incriminating information and the witness does not know his or her rights. However, a prosecutor should not so advise, or discuss or exaggerate the potential criminal liability of, a witness with a purpose, or in a manner likely, to intimidate the witness, to influence the truthfulness or completeness of the witness’s testimony, or to change the witness’s decision about whether to provide information.

(h) The prosecutor should not discourage or obstruct communication between witnesses and the defense counsel, other than the government’s employees or agents if consistent with applicable ethical rules. The prosecutor should not advise any person, or cause any person to be advised, to decline to provide defense counsel with information which such person has a right to give. The prosecutor may, however, advise witnesses as to the likely consequences of their providing information.
(i) Consistent with any specific laws or rules governing victims, the prosecutor should ordinarily provide victims of serious crimes, or their representatives, an opportunity to consult with and to provide information to the prosecutor, prior to making significant decisions such as whether or not to prosecute, to pursue a disposition by plea, or to dismiss charges. The prosecutor should ordinarily ensure that victims of serious crimes, or their representatives, are given timely notice of:

(i) judicial proceedings relating to the victims' case;
(ii) proposed dispositions of the case;
(iii) sentencing proceedings; and
(iv) any decision or action in the case that could result in the defendant's provisional or final release from custody, or change of sentence.

(j) The prosecutor should ensure that victims and witnesses who may need protections against intimidation or retaliation are advised of and afforded protections where feasible.

(k) Subject to ethical rules and the confidentiality that criminal matters sometimes require, and unless prohibited by law or court order, the prosecutor should information about the status of matters in which they are involved to victims and witnesses who request it.

(l) The prosecutor should give witnesses reasonable notice of when their testimony at a proceeding is expected, and should not require witnesses to attend judicial proceedings unless their testimony is reasonably expected at that time, or their presence is required by law. When witnesses' attendance is required, the prosecutor should seek to reduce to a minimum the time witnesses must spend waiting at the proceedings. The prosecutor should ensure that witnesses are given notice as soon as practicable of scheduling changes which will affect their required attendance at judicial proceedings.

(m) The prosecutor should not engage in any inappropriate personal relationship with any victim or other witness.
Standard 3-3.5  Relationship with Expert Witnesses

(a) An expert may be engaged for consultation only, or to prepare an evidentiary report or testimony. The prosecutor should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.

(b) A prosecutor should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of a government or other expert based on employer, affiliation or prominence alone.

(c) Before engaging an expert, the prosecutor should investigate the expert’s credentials, relevant professional experience, and reputation in the field. The prosecutor should also examine a testifying expert’s background and credentials for potential impeachment issues. Before offering an expert as a witness, the prosecutor should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

(d) A prosecutor who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert’s opinion on the relevant subject.

(e) Before offering an expert as a witness, the prosecutor should seek to learn enough about the substantive area of the expert’s expertise, including ethical rules that may be applicable in the expert’s field, to enable effective preparation of the expert, as well as effective cross-examination of any defense expert on the same topic. The prosecutor should explain to the expert that the expert’s role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(f) The prosecutor should not pay or withhold any fee or provide or withhold a benefit for the purpose of influencing the substance of an expert’s testimony. The prosecutor should not fix the amount of the fee contingent upon the expert’s testimony or the result in the case. Nor should the prosecutor promise or imply the prospect of future work for the expert based on the expert’s testimony.

(g) The prosecutor should provide the expert with all information reasonably necessary to support a full and fair opinion. The prosecutor should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. The prosecutor should be aware of expert discovery rules and act to protect confidentiality and the public interest, for example by not sharing with the expert confidences and work product that the prosecutor does not want disclosed.

(h) The prosecutor should timely disclose to the defense all evidence or information learned from an expert that tends to negate the guilt of the accused or mitigate the offense, even if the prosecutor does not intend to call the expert as a witness.
When physical evidence is delivered to the prosecutor consistent with Defense Function Standard 4-4.7, the prosecutor should not offer the fact of delivery as evidence before a fact-finder for purposes of establishing the culpability of defense counsel’s client. The prosecutor may, however, offer evidence of the fact of such delivery in response to a foundational objection to the evidence based on chain-of-custody concerns, or in a subsequent proceeding for the purpose of proving a crime or fraud regarding the evidence.
PART IV

INVESTIGATION; DECISIONS TO CHARGE, NOT CHARGE, OR DISMISS; AND GRAND JURY

Standard 3-4.1 Investigative Function of the Prosecutor

(a) When performing an investigative function, prosecutors should be familiar with and follow the ABA Standards on Prosecutorial Investigations.

(b) A prosecutor should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so. Prosecutors should research and know the law in this regard before acting, understanding that in some circumstances a prosecutor’s ethical obligations may be different from those of other lawyers.
(a) While the decision to arrest is often the responsibility of law enforcement personnel, the decision to institute formal criminal proceedings is the responsibility of the prosecutor. Where the law permits a law enforcement officer or other person to initiate proceedings by complaining directly to a judicial officer or the grand jury, the complainant should be required to present the complaint for prior review by the prosecutor, and the prosecutor’s recommendation regarding the complaint should be communicated to the judicial officer or grand jury.

(b) The prosecutor’s office should establish standards and procedures for evaluating complaints to determine whether formal criminal proceedings should be instituted.

(c) In determining whether formal criminal charges should be filed, prosecutors should consider whether further investigation should be undertaken. After charges are filed the prosecutor should oversee law enforcement investigative activity related to the case.

(d) If the defendant is not in custody when charged, the prosecutor should consider whether a voluntary appearance rather than a custodial arrest would suffice to protect the public and ensure the defendant’s presence at court proceedings.
Minimum Requirements for Filing and Maintaining Criminal Charges

(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

(b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.

(c) If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor’s office should then determine whether it is appropriate to proceed with the case.

(d) A prosecutor’s office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.
(a) In order to fully implement the prosecutor’s functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support. Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are:

(i) the strength of the case;
(ii) the prosecutor’s doubt that the accused is in fact guilty;
(iii) the extent or absence of harm caused by the offense;
(iv) the impact of prosecution or non-prosecution on the public welfare;
(v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
(vii) the views and motives of the victim or complainant;
(viii) any improper conduct by law enforcement;
(ix) unwarranted disparate treatment of similarly situated persons;
(x) potential collateral impact on third parties, including witnesses or victims;
(xi) cooperation of the offender in the apprehension or conviction of others;
(xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;
(xiii) charges in law or policy;
(xiv) the fair and efficient distribution of limited prosecutorial resources;
(xv) the likelihood of prosecution by another jurisdiction; and
(xvi) whether the public’s interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

(b) In exercising discretion to file and maintain charges, the prosecutor should not consider:

(i) partisan or other improper political or personal considerations;
(ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor;
(iii) the impermissible criteria described in Standard 1.6 above.

(c) A prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.

(d) The prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct.

(e) A prosecutor may condition a dismissal of charges, nolle prosequi, or similar action on the accused’s relinquishment of a right to seek civil redress only if the accused has given informed consent.

(a) In order to fully implement the prosecutor’s functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support. Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are:

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(iv) the impact of prosecution or non-prosecution on the public welfare;
(v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
(vii) the views and motives of the victim or complainant;
(viii) any improper conduct by law enforcement;
(ix) unwarranted disparate treatment of similarly situated persons;
(x) potential collateral impact on third parties, including witnesses or victims;
(xi) cooperation of the offender in the apprehension or conviction of others;
(xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;
(xiii) charges in law or policy;
(xiv) the fair and efficient distribution of limited prosecutorial resources;
(xv) the likelihood of prosecution by another jurisdiction; and
(xvi) whether the public’s interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

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(e) A prosecutor may condition a dismissal of charges, nolle prosequi, or similar action on the accused’s relinquishment of a right to seek civil redress only if the accused has given informed consent.
consent, and such consent is disclosed to the court. A prosecutor should not use a civil waiver to avoid a bona fide claim of improper law enforcement actions, and a decision not to file criminal charges should be made on its merits and not for the purpose of obtaining a civil waiver.

The prosecutor should consider the possibility of a noncriminal disposition, formal or informal, or a deferred prosecution or other diversionary disposition, when deciding whether to initiate or prosecute criminal charges. The prosecutor should be familiar with the services and resources of other agencies, public or private, that might assist in the evaluation of cases for diversion or deferral from the criminal process.
(a) In presenting a matter to a criminal grand jury, and in light of its ex parte character, the prosecutor should respect the independence of the grand jury and should not preempt a function of the grand jury, mislead the grand jury, or abuse the processes of the grand jury.

(b) Where the prosecutor is authorized to act as a legal advisor to the grand jury, the prosecutor should appropriately explain the law and may, if permitted by law, express an opinion on the legal significance of the evidence, but should give due deference to the grand jury as an independent legal body.

(c) The prosecutor should not make statements or arguments to a grand jury in an effort to influence grand jury action in a manner that would be impermissible in a trial.

(d) The entirety of the proceedings occurring before a grand jury, including the prosecutor’s communications with and presentations and instructions to the grand jury, should be recorded in some manner, and that record should be preserved. The prosecutor should avoid off-the-record communications with the grand jury and with individual grand jurors.
Standard 3-4.6 Quality and Scope of Evidence Before a Grand Jury

(a) A prosecutor should not seek an indictment unless the prosecutor reasonably believes the charges are supported by probable cause and that there will be admissible evidence sufficient to support the charges beyond reasonable doubt at trial. A prosecutor should advise a grand jury of the prosecutor’s opinion that it should not indict if the prosecutor believes the evidence presented does not warrant an indictment.

(b) In addition to determining what criminal charges to file, a grand jury may properly be used to investigate potential criminal conduct, and also to determine the sense of the community regarding potential charges.

(c) A prosecutor should present to a grand jury only evidence which the prosecutor believes is appropriate and authorized by law for presentation to a grand jury. The prosecutor should be familiar with the law of the jurisdiction regarding grand juries, and may present witnesses to summarize relevant evidence to the extent the law permits.

(d) When a new grand jury is empanelled, a prosecutor should ensure that the grand jurors are appropriately instructed, consistent with the law of the jurisdiction, on the grand jury’s right and ability to seek evidence, ask questions, and hear directly from any available witnesses, including eyewitnesses.

(e) A prosecutor with personal knowledge of evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. The prosecutor should relay to the grand jury any request by the subject or target of an investigation to testify before the grand jury, or present other non-frivolous evidence claimed to be exculpatory.

(f) If the prosecutor concludes that a witness is a target of a criminal investigation, the prosecutor should not seek to compel the witness’s testimony before the grand jury absent immunity. The prosecutor should honor, however, a reasonable request from a target or subject who wishes to testify before the grand jury.

(g) Unless there is a reasonable possibility that it will facilitate flight of the target, endanger other persons, interfere with an ongoing investigation, or obstruct justice, the prosecutor should give notice to a target of a grand jury investigation, and offer the target an opportunity to testify before the grand jury. Prior to taking a target’s testimony, the prosecutor should advise the target of the privilege against self-incrimination and obtain a voluntary waiver of that right.

(h) The prosecutor should not seek to compel the appearance of a witness whose activities are the subject of the grand jury’s inquiry, if the witness states in advance that if called the witness will claim the constitutional privilege not to testify, and provides a reasonable basis for such claim. If warranted, the prosecutor may judiciously challenge such a claim of privilege or seek a grant of immunity according to the law.

(i) The prosecutor should not issue a grand jury subpoena to a criminal defense attorney or defense team member, or other witness whose testimony reasonably might be protected by a recognized privilege, without considering the applicable law and rules of professional responsibility in the jurisdiction.
Except where permitted by law, a prosecutor should not use the grand jury in order to obtain evidence to assist the prosecution’s preparation for trial of a defendant who has already been charged. A prosecutor may, however, use the grand jury to investigate additional or new charges against a defendant who has already been charged.

Except where permitted by law, a prosecutor should not use a criminal grand jury solely or primarily for the purpose of aiding or assisting in an administrative or civil inquiry.
Standard 3-5.1 Role in First Appearance and Preliminary Hearing

(a) A prosecutor should be present at any first appearance of the accused before a judicial officer, and at any preliminary hearing.

(b) At or before the first appearance, the prosecutor should consider:

(i) whether the accused has counsel, and if not, whether and when counsel will be made available or waived;

(ii) whether the accused appears to be mentally competent, and if not, whether to seek an evaluation;

(iii) whether the accused should be released or detained pending further proceedings; and, if released, whether supervisory conditions should be imposed; and

(iv) what further proceedings should be scheduled to move the matter toward timely resolution.

(c) The prosecutor handling the first appearance should ensure that the charges are consistent with the conduct described in the available law enforcement reports and any other information the prosecutor possesses.

(d) If the accused does not yet have counsel and has not waived counsel, the prosecutor should ask the court not to engage in substantive proceedings, other than a decision to release the accused. The prosecutor should not obtain a waiver of other important pretrial rights, such as the right to a preliminary hearing, from an unrepresented accused unless that person has been judicially authorized to proceed pro se.

(e) The prosecutor should not approach or communicate with an accused unless a voluntary waiver of counsel has been entered or the accused’s counsel consents. If the accused does not have counsel, the prosecutor should make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and is given reasonable opportunity to obtain counsel.

(f) If the prosecutor believes pretrial release is appropriate, or it is ordered, the prosecutor should cooperate in arrangements for release under the prevailing pretrial release system.

(g) If the prosecutor has reasonable concerns about the accused’s mental competence, the prosecutor should bring those concerns to the attention of defense counsel and, if necessary, the judicial officer.

(h) The prosecutor should not seek to delay a prompt judicial determination of probable cause for criminal charges without good cause, particularly if the accused is in custody.

PART V
PRETRIAL ACTIVITIES and NEGOTIATED DISPOSITIONS

Standard 3-5.1 Role in First Appearance and Preliminary Hearing

(a) A prosecutor should be present at any first appearance of the accused before a judicial officer, and at any preliminary hearing.

(b) At or before the first appearance, the prosecutor should consider:

(i) whether the accused has counsel, and if not, whether and when counsel will be made available or waived;

(ii) whether the accused appears to be mentally competent, and if not, whether to seek an evaluation;

(iii) whether the accused should be released or detained pending further proceedings; and, if released, whether supervisory conditions should be imposed; and

(iv) what further proceedings should be scheduled to move the matter toward timely resolution.

(c) The prosecutor handling the first appearance should ensure that the charges are consistent with the conduct described in the available law enforcement reports and any other information the prosecutor possesses.

(d) If the accused does not yet have counsel and has not waived counsel, the prosecutor should ask the court not to engage in substantive proceedings, other than a decision to release the accused. The prosecutor should not obtain a waiver of other important pretrial rights, such as the right to a preliminary hearing, from an unrepresented accused unless that person has been judicially authorized to proceed pro se.

(e) The prosecutor should not approach or communicate with an accused unless a voluntary waiver of counsel has been entered or the accused’s counsel consents. If the accused does not have counsel, the prosecutor should make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and is given reasonable opportunity to obtain counsel.

(f) If the prosecutor believes pretrial release is appropriate, or it is ordered, the prosecutor should cooperate in arrangements for release under the prevailing pretrial release system.

(g) If the prosecutor has reasonable concerns about the accused’s mental competence, the prosecutor should bring those concerns to the attention of defense counsel and, if necessary, the judicial officer.

(h) The prosecutor should not seek to delay a prompt judicial determination of probable cause for criminal charges without good cause, particularly if the accused is in custody.
Standard 3-5.2 The Decision to Recommend Release or Seek Detention

(a) The prosecutor should favor pretrial release of a criminally accused, unless detention is necessary to protect individuals or the community or to ensure the return of the defendant for future proceedings.

(b) The prosecutor’s decision to recommend pretrial release or seek detention should ordinarily be based on the facts and circumstances of the defendant and the offense, rather than made categorically. The prosecutor should consider information relevant to these decisions from all sources, including the defendant.

(c) The prosecutor should cooperate with pretrial services or other personnel who review or assemble information to be provided to the court regarding pretrial release determinations.

(d) The prosecutor should be open to reconsideration of pretrial detention or release decisions based on changed circumstances, including an unexpectedly lengthy period of detention.
(a) The prosecutor should prepare in advance for court proceedings unless that is impossible. Adequate preparation depends on the nature of the proceeding and the time available, and will often include: reviewing available documents; considering what issues are likely to arise and the prosecution’s position regarding those issues; how best to present the issues and what solutions might be offered; relevant legal research and factual investigation; and contacting other persons who might be of assistance in addressing the anticipated issues. If the prosecutor has not had adequate time to prepare and is unsure of the relevant facts or law, the prosecutor should communicate to the court the limits of the prosecutor’s knowledge or preparation.

(b) The prosecutor should make effort to appear at all hearings in cases assigned to the prosecutor. A prosecutor who substitutes at a court proceeding for another prosecutor assigned to the case should make reasonable efforts to be adequately informed about the case and issues likely to come up at the proceeding, and to adequately prepare.

(c) The prosecutor handling any court appearance should document what happens at the proceeding, to aid the prosecutor’s later memory and so that necessary information will be available to other prosecutors who may handle the case in the future.

(d) The prosecutor should take steps to ensure that any court order issued to the prosecution is transmitted to the appropriate persons necessary to effectuate the order.

(e) The prosecutor’s office should be provided sufficient resources and be organized to permit adequate preparation for court proceedings.
Standard 3-5.4 Identification and Disclosure of Information and Evidence

(a) After charges are filed if not before, the prosecutor should diligently seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government’s witnesses or evidence, or reduce the likely punishment of the accused if convicted.

(b) The prosecutor should diligently advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in (a) above.

(c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding, unless relieved of this responsibility by a court’s protective order. (Regarding discovery prior to a guilty plea, see Standard 3-5.6(f) below.) A prosecutor should not intentionally attempt to obscure information disclosed pursuant to this standard by including it without identification within a larger volume of materials.

(d) The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.

(e) A prosecutor should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. The prosecutor should ordinarily provide specific responses to defense requests for specific information rather than boilerplate or a general acknowledgement of discovery obligations.

(f) The prosecutor should make prompt efforts to identify and disclose to the defense any physical evidence that has been gathered in the investigation, and provide the defense a reasonable opportunity to examine it.

(g) A prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused.

(h) A prosecutor should determine whether additional statutes, rules or caselaw may govern or restrict the disclosure of information, and comply with these authorities absent court order.
Standard 3-5.5 Preservation of Information and Evidence

(a) The prosecutor should make reasonable efforts to preserve, and direct the prosecutor’s agents to preserve, relevant materials during and after a criminal case, including:

(i) evidence relevant to investigations as well as prosecutions, whether or not admitted at trial;

(ii) information identified pursuant to Standard 3-5.4(a); and

(iii) other materials necessary to support significant decisions made and conclusions reached by the prosecution in the course of an investigation and prosecution.

(b) The prosecutor’s office should develop policies regarding the method and duration of preservation of such materials. Such policies should be consistent with applicable rules and laws (such as public records laws) in the jurisdiction. These policies, and individual preservation decisions, should consider the character and seriousness of each case, the character of the particular evidence or information, the likelihood of further challenges to judgments following conviction, and the resources available for preservation. Physical evidence should be preserved so as to reasonably preserve its forensic characteristics and utility.

(c) Materials should ordinarily be preserved at least until a criminal case is finally disposed of or is final on appeal and the time for further appeal has expired. In felony cases, if post-conviction collateral litigation is reasonably anticipated, materials should ordinarily be preserved until that litigation is concluded or time-limits have expired. In death penalty cases, information should be preserved until the penalty is carried out or is precluded.

(d) The prosecutor should comply with additional statutes, rules or caselaw that may govern the preservation of evidence.
110B  Conduct of Negotiated Disposition Discussions

Standard 3-5.6

(a) The prosecutor should ordinarily be open, at every stage of a criminal matter, to discussions with defense counsel concerning disposition of charges by guilty plea or other negotiated disposition.

(b) A prosecutor should not engage in disposition discussions directly with a represented defendant, except with defense counsel’s approval. Where a defendant has properly waived counsel, the prosecutor may engage in disposition discussions with the defendant, and should make and preserve a record of such discussions.

(c) The prosecutor should not enter into a disposition agreement before having information sufficient to assess the defendant’s actual culpability. The prosecutor should consider collateral consequences of a conviction before entering into a disposition agreement. The prosecutor should consider factors listed in Standard 3-4.4(a), and not be influenced in disposition discussions by inappropriate factors such as those listed in Standards 3-1.6 and 3-4.4(b).

(d) The prosecutor should not set unreasonably short deadlines, or demand conditions for a disposition, that are so coercive that the voluntariness of a plea or the effectiveness of defense counsel is put into question. A prosecutor may, however, set a reasonable deadline before trial or hearing for acceptance of a disposition offer.

(e) A prosecutor should not knowingly make false statements of fact or law in the course of disposition discussions.

(f) Before entering into a disposition agreement, the prosecutor should disclose to the defense a factual basis sufficient to support the charges in the proposed agreement, and information currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to reduce punishment.

(g) A prosecutor should not agree to a guilty plea if the prosecutor reasonably believes that sufficient admissible evidence to support conviction beyond reasonable doubt would be lacking if the matter went to trial.
Standard 3-5.7 Establishing and Fulfilling Conditions of Negotiated Dispositions

(a) A prosecutor should not demand terms in a negotiated disposition agreement that are unlawful or in violation of public policy.

(b) The prosecutor may properly promise the defense that the prosecutor will or will not take a particular position concerning sentence and conditions. The prosecutor should not, however, imply a greater power to influence the disposition of a case than is actually possessed.

(c) The prosecutor should memorialize all promises and conditions that are part of the agreement and, in any written disposition agreement accurately and completely reflects the precise terms of the agreement including the prosecutor's promises and the defendant's obligations. At any court hearing to finalize a negotiated disposition, the prosecutor should ensure that all relevant details of the agreement have been placed on the record. The presumption is that the hearing and record will be public, but in some cases the hearing or record (or a portion) may be sealed for good cause.

(d) Once a disposition agreement is final and accepted by the court, the prosecutor should comply with, and make good faith efforts to have carried out, the government's obligations. The prosecutor should construe agreement conditions, and evaluate the defendant's performance including any cooperation, in a good-faith and reasonable manner.

(e) If the prosecutor believes that a defendant has breached an agreement that has been accepted by the court, the prosecutor should notify the defense regarding the prosecutor's belief and any intended adverse action. If the defense presents a good-faith disagreement and the parties cannot quickly resolve it, the prosecutor ordinarily should not act before judicial resolution.

(f) If the prosecutor reasonably believes that a court is acting inconsistently with any term of a negotiated disposition, the prosecutor should raise the matter with the court.
(a) A prosecutor should not condition a disposition agreement on a waiver of the right to appeal the terms of a sentence which exceeds an agreed-upon or reasonably anticipated sentence. Any waiver of appeal of sentence should be comparably binding on the defendant and the prosecution.

(b) A prosecutor should not suggest or require, as a condition of a disposition agreement, any waiver of post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence, unless such claims are based on past instances of such conduct that are specifically identified in the agreement or in the transcript of proceedings that address the agreement. If a proposed disposition agreement contains such a waiver regarding ineffective assistance of counsel, the prosecutor should ensure that the defendant has been provided the opportunity to consult with independent counsel regarding the waiver before agreeing to the disposition.

(c) A prosecutor may propose or require other sorts of waivers on an individualized basis if the defendant’s agreement is knowing and voluntary. No waivers of any kind should be accepted without an exception for manifest injustice based on newly-discovered evidence, or actual innocence.

(d) Although certain claims may have been waived, a prosecutor should not condition a disposition agreement on a complete waiver of the right to file a habeas corpus or other comparable post-conviction petition.

(e) A prosecutor should not request or rely on waivers to hide an injustice or material flaw in the case which is undisclosed to the defense.
When criminal charges are dismissed on the prosecution's motion, including by plea of \textit{nolle prosequi} or its equivalent, the prosecutor ordinarily should make and retain an appropriate record of the reasons for the dismissal, and indicate on the record whether the dismissal was with or without prejudice.
Final control over the scheduling of court appearances, hearings and trials in criminal matters should rest with the court rather than the parties. When the prosecutor is aware of facts that would affect scheduling, the prosecutor should advise the court and, if the facts are case-specific, defense counsel.
Standard 3.6.2 Civility With Courts, Opposing Counsel, and Others

(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the courtroom by adherence to codes of professionalism and civility, and by manifesting a professional and courteous attitude toward the judge, opposing counsel, witnesses, defendants, jurors, court staff and others. In court as elsewhere, the prosecutor should not display or act out of any improper or unlawful bias.

(b) When court is in session, unless otherwise permitted by the court, the prosecutor should address the court and not address other counsel or the defendant directly on any matter related to the case.

(c) The prosecutor ordinarily should comply promptly and civilly with a court’s orders. If the prosecutor considers an order to be significantly erroneous or prejudicial, the prosecutor should ensure that the record adequately reflects the events. The prosecutor has a right to make respectful objections and reasonable requests for reconsideration, and to seek other relief as the law permits. If a judge prohibits making an adequate objection, proffer, or record, the prosecutor may take other lawful steps to protect the public interest.
Standard 3-6.3 Selection of Jurors

(a) The prosecutor’s office should be aware of legal standards that govern the selection of jurors, and train prosecutors to comply. The prosecutor should prepare to effectively discharge the prosecution function in the selection of the jury, including exercising challenges for cause and peremptory challenges. The prosecutor’s office should also be aware of the process used to select and summon the jury pool and bring legal deficiencies to the attention of the court.

(b) The prosecutor should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity. The prosecutor should consider contesting a defense counsel’s peremptory challenges that appear to be based on such criteria.

(c) In cases in which the prosecutor conducts a pretrial investigation of the background of potential jurors, the investigative methods used should not harass, intimidate, or unduly embarrass or invade the privacy of potential jurors. Absent special circumstances, such investigation should be restricted to review of records and sources of information already in existence and to which access is lawfully allowed. If the prosecutor uses record searches that are unavailable to the defense, such as criminal record databases, the prosecutor should ordinarily share the results with defense counsel.

(d) The opportunity to question jurors personally should be used solely to obtain information relevant to the well-informed exercise of challenges. The prosecutor should not seek to commit jurors on factual issues likely to arise in the case, and should not intentionally present arguments, facts or evidence which the prosecutor reasonably should know will not be admissible at trial. Voir dire should not be used to argue the prosecutor’s case to the jury, or to unduly ingratiate counsel with the jurors.

(e) During voir dire, the prosecutor should seek to minimize any undue embarrassment or invasion of privacy of potential jurors, for example by seeking to inquire into sensitive matters outside the presence of other potential jurors, while still enabling fair and efficient juror selection.

(f) If the court does not permit voir dire by counsel, the prosecutor should provide the court with suggested questions in advance, and request specific follow-up questions during the selection process when necessary to ensure fair juror selection.

(g) If the prosecutor has reliable information that conflicts with a potential juror’s responses, or that reasonably would support a “for cause” challenge by any party, the prosecutor should inform the court and, unless the court orders otherwise, defense counsel.

110B
Standard 3.6.4  Relationship With Jurors

(a) The prosecutor should not communicate with persons the prosecutor knows to be summoned for jury duty or impaneled as jurors, before or during trial, other than in the lawful conduct of courtroom proceedings. The prosecutor should avoid even the appearance of improper communications with jurors, and minimize any out-of-court proximity to or contact with jurors. Where out-of-court contact cannot be avoided, the prosecutor should not communicate about or refer to the specific case.

(b) The prosecutor should treat jurors with courtesy and respect, while avoiding a show of undue solicitude for their comfort or convenience.

(c) After discharge of a juror, a prosecutor should avoid contacts that may harass or embarrass the juror, that criticize the jury’s actions or verdict, or that express views that could otherwise adversely influence the juror’s future jury service. The prosecutor should know and comply with applicable rules and law governing the subject.

(d) After a jury is discharged, the prosecutor may, if no statute, rule, or order prohibits such action, communicate with jurors to investigate whether a verdict may be subject to legal challenge, or to evaluate the prosecution’s performance for improvement in the future. The prosecutor should consider requesting the court to instruct the jury that, if it is not prohibited by law, it is not improper for jurors to discuss the case with the lawyers, although they are not required to do so. Any post-discharge communication with a juror should not disparage the criminal justice system and the jury trial process, and should not express criticism of the jury’s actions or verdict.

(e) A prosecutor who learns reasonably reliable information that there was a problem with jury deliberations or conduct that could support an attack on a judgment of conviction and that is recognized as potentially valid in the jurisdiction, should promptly report that information to the appropriate judicial officer and, unless the court orders otherwise, defense counsel.

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Standard 3-6.5 Opening Statement at Trial

(a) The prosecutor should give an opening statement before the presentation of evidence begins.

(b) The prosecutor’s opening statement at trial should be confined to a fair statement of the case from the prosecutor’s perspective, and discussion of evidence that the prosecutor reasonably believes will be available, offered and admitted to support the prosecution case. The prosecutor’s opening should avoid speculating about what defenses might be raised by the defense unless the prosecutor knows they will be raised.

(c) The prosecutor’s opening statement should be made without expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion or personal attacks on opposing counsel. The prosecutor should scrupulously avoid any comment on a defendant’s right to remain silent.

(d) When the prosecutor has reason to believe that a portion of the opening statement may be objectionable, the prosecutor should raise that point with defense counsel and, if necessary, the court, in advance. Similarly, visual aids or exhibits that the prosecutor intends to use during opening statement should be shown to defense counsel in advance.
Standard 3.6.6 Presentation of Evidence

(a) The prosecutor should not offer evidence that the prosecutor does not reasonably believe to be true, whether by documents, tangible evidence, or the testimony of witnesses. When a prosecutor has reason to doubt the truth or accuracy of particular evidence, the prosecutor should take reasonable steps to determine that the evidence is reliable, or not present it.

(b) If the prosecutor reasonably believes there has been misconduct by opposing counsel, a witness, the court or other persons that affects the fair presentation of the evidence, the prosecutor should challenge the perceived misconduct by appealing or objecting to the court or through other appropriate avenues, and not by engaging in retaliatory conduct that the prosecutor knows to be improper.

(c) During the trial, if the prosecutor discovers that false evidence or testimony has been introduced by the prosecution, the prosecutor should take reasonable remedial steps. If the witness is still on the stand, the prosecutor should attempt to correct the error through further examination. If the falsity remains uncorrected or is not discovered until the witness is off the stand, the prosecutor should notify the court and opposing counsel for determination of an appropriate remedy.

(d) The prosecutor should not bring to the attention of the trier of fact matters that the prosecutor knows to be inadmissible, whether by offering or displaying inadmissible evidence, asking legally objectionable questions, or making impermissible comments or arguments. If the prosecutor is uncertain about the admissibility of evidence, the prosecutor should seek and obtain resolution from the court before the hearing or trial if possible, and reasonably in advance of the time for proffering the evidence before a jury.

(e) The prosecutor should exercise strategic judgment regarding whether to object or take exception to evidentiary rulings that are materially adverse to the prosecution, and not make every possible objection. The prosecutor should not make objections without a reasonable basis, or for improper reasons such as to harass or to break the flow of opposing counsel’s presentation. The prosecutor should make an adequate record for appeal, and consider the possibility of an interlocutory appeal regarding significant adverse rulings if available.

(f) The prosecutor should not display tangible evidence (and should object to such display by the defense) until it is admitted into evidence, except insofar as its display is necessarily incidental to its tender, although the prosecutor may seek permission to display admissible evidence during opening statement. The prosecutor should avoid displaying even admitted evidence in a manner that is unduly prejudicial.
(a) The prosecutor should conduct the examination of witnesses fairly and with due regard for dignity and legitimate privacy concerns, and without seeking to intimidate or humiliate a witness unnecessarily.

(b) The prosecutor should not use cross-examination to discredit or undermine a witness’s testimony, if the prosecutor knows the testimony to be truthful and accurate.

(c) The prosecutor should not call a witness to testify in the presence of the jury, or require the defense to do so, when the prosecutor knows the witness will claim a valid privilege not to testify. If the prosecutor is unsure whether a particular witness will claim a privilege not to testify, the prosecutor should alert the court and defense counsel in advance and outside the presence of the jury.

(d) The prosecutor should not ask a question that implies the existence of a factual predicate for which a good faith belief is lacking.
(a) In closing argument to a jury (or to a judge sitting as trier of fact), the prosecutor should present arguments and a fair summary of the evidence that proves the defendant guilty beyond reasonable doubt. The prosecutor may argue all reasonable inferences from the evidence in the record, unless the prosecutor knows an inference to be false. The prosecutor should, to the extent time permits, review the evidence in the record before presenting closing argument. The prosecutor should not knowingly misstate the evidence in the record, or argue inferences that the prosecutor knows have no good-faith support in the record. The prosecutor should scrupulously avoid any reference to a defendant’s decision not to testify.

(b) The prosecutor should not argue in terms of counsel’s personal opinion, and should not imply special or secret knowledge of the truth or of witness credibility.

(c) The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier’s duty to decide the case on the evidence, and should not seek to divert the trier from that duty.

(d) If the prosecutor presents rebuttal argument, the prosecutor may respond fairly to arguments made in the defense closing argument, but should not present or raise new issues. If the prosecutor believes the defense closing argument is or was improper, the prosecutor should timely object and request relief from the court, rather than respond with arguments that the prosecutor knows are improper.
When before a jury, the prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience, or are matters of which a court clearly may take judicial notice, or are facts the prosecutor reasonably believes will be entered into the record at that proceeding. In a nonjury context the prosecutor may refer to extra-record facts relevant to issues about which the court specifically inquires, but should note that they are outside the record.
Standard 3.6.10 Comments by Prosecutor After Verdict or Ruling

(a) The prosecutor should respectfully accept acquittals. Regarding other adverse rulings (including the rare acquittal by a judge that is appealable), while the prosecutor may publicly express respectful disagreement and an intention to pursue lawful options for review, the prosecutor should refrain from public criticism of any participant. Public comments after a verdict or ruling should be respectful of the legal system and process.

(b) The prosecutor may publicly praise a jury verdict or court ruling, compliment government agents or others who aided in the matter, and note the social value of the ruling or event. The prosecutor should not publicly gloat or seek personal aggrandizement regarding a verdict or ruling.
PART VII

POST-TRIAL MOTIONS AND SENTENCING

[New] Standard 3.7.1  Post-trial Motions [New]

The prosecutor should conduct a fair evaluation of post-trial motions, determine their merit, and respond accordingly and respectfully. The prosecutor should not oppose motions at any stage without a reasonable basis for doing so.
Standard 3-7.2 Sentencing

(a) The severity of sentences imposed should not be used as a measure of a prosecutor's effectiveness.

(b) The prosecutor should be familiar with relevant sentencing laws, rules, consequences and options, including alternative non-imprisonment sentences. Before or soon after charges are filed, and throughout the pendency of the case, the prosecutor should evaluate potential consequences of the prosecution and available sentencing options, such as forfeiture, restitution, and immigration effects, and be prepared to actively advise the court in sentencing.

(c) The prosecutor should seek to assure that a fair and informed sentencing judgment is made, and to avoid unfair sentences and disparities.

(d) In the interests of uniformity, the prosecutor's office should develop consistent policies for evaluating and making sentencing recommendations, and not leave complete discretion for sentencing policy to individual prosecutors.

(e) The prosecutor should know the relevant laws and rules regarding victims' rights, and facilitate victim participation in the sentencing process as the law requires or permits.
Standard 3-7.3 Information Relevant to Sentencing

(a) The prosecutor should assist the court in obtaining complete and accurate information for use in sentencing, and should cooperate fully with the court’s and staff’s presentence investigations. The prosecutor should provide any information that the prosecution believes is relevant to the sentencing to the court and to defense counsel. A record of such information provided to the court and counsel should be made, so that it may be reviewed later if necessary. If material incompleteness or inaccuracy in a presentence report comes to the prosecutor's attention, the prosecutor should take steps to present the complete and correct information to the court and defense counsel.

(b) The prosecutor should disclose to the defense and to the court, at or before the sentencing proceeding, all information that tends to mitigate the sentence and is known to the prosecutor, unless the prosecutor is relieved of this responsibility by a court order.

(c) Prior to sentencing, the prosecutor should disclose to the defense any evidence or information it provides, whether by document or orally, to the court or presentence investigator in aid of sentencing, unless contrary to law or rule in the jurisdiction or a protective order has been sought.

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(b) The prosecutor should disclose to the defense and to the court, at or before the sentencing proceeding, all information that tends to mitigate the sentence and is known to the prosecutor, unless the prosecutor is relieved of this responsibility by a court order.

(c) Prior to sentencing, the prosecutor should disclose to the defense any evidence or information it provides, whether by document or orally, to the court or presentence investigator in aid of sentencing, unless contrary to law or rule in the jurisdiction or a protective order has been sought.
The prosecutor ordinarily has a duty to defend convictions obtained after fair process. This duty is not absolute, however, and the prosecutor should temper the duty to defend with independent professional judgment and discretion. The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.
(a) All prosecutors should be sufficiently knowledgeable about appellate practice to be able to make a record sufficient to preserve issues and arguments for appeal, and should make such a record at the trial court level.

(b) When the prosecutor receives an adverse ruling, the prosecutor should consider whether it may be appealed. If the ruling may be appealed, the prosecutor should consider whether an appeal should be filed, and refer it to an appellate prosecutor if appropriate for decision.

(c) When considering whether an adverse ruling should be appealed, the prosecutor should evaluate not only the legal merits, but also whether it is in the interests of justice to pursue such an appeal, taking into account the benefits to the prosecution, the judicial system, and the public, as well as the costs of the appellate process and of delay to the prosecution, defendant, victims and witnesses.

(d) A prosecutor handling a criminal appeal should know the specific rules, practices and procedures that govern appeals in the jurisdiction.

(e) The prosecutor’s office should designate one or more prosecutors in the office to develop expertise regarding appellate law and procedure, and should develop contacts with other offices’ prosecutors who have such expertise. The prosecutor’s office should develop consistent policies and positions regarding issues that are common or recurring in the appellate process or court. The prosecutor’s office should regularly notify its prosecutors and law enforcement agents about new developments in the law or judicial decisions, and should provide regular training to such personnel on such topics.

(f) A prosecutor handling a criminal appeal who was not counsel in the trial court should consult with the trial prosecutor, but should exercise independent judgment in reviewing the record and the defense arguments. The appellate prosecutor should not make or oppose arguments in an appeal without a reasonable legal basis.

(a) All prosecutors should be sufficiently knowledgeable about appellate practice to be able to make a record sufficient to preserve issues and arguments for appeal, and should make such a record at the trial court level.

(b) When the prosecutor receives an adverse ruling, the prosecutor should consider whether it may be appealed. If the ruling may be appealed, the prosecutor should consider whether an appeal should be filed, and refer it to an appellate prosecutor if appropriate for decision.

(c) When considering whether an adverse ruling should be appealed, the prosecutor should evaluate not only the legal merits, but also whether it is in the interests of justice to pursue such an appeal, taking into account the benefits to the prosecution, the judicial system, and the public, as well as the costs of the appellate process and of delay to the prosecution, defendant, victims and witnesses.

(d) A prosecutor handling a criminal appeal should know the specific rules, practices and procedures that govern appeals in the jurisdiction.

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(f) A prosecutor handling a criminal appeal who was not counsel in the trial court should consult with the trial prosecutor, but should exercise independent judgment in reviewing the record and the defense arguments. The appellate prosecutor should not make or oppose arguments in an appeal without a reasonable legal basis.
If a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is innocent, the prosecutor should comply with ABA Model Rules of Professional Conduct 3.8(g) and (h). The prosecutor's office should develop policies and procedures to address such information, and take actions that are consistent with applicable law, rules, and the duty to pursue justice.
Standard 3-8.4 Challenges to the Effectiveness of Defense Counsel

(a) In any post-conviction challenge to the effectiveness of defense counsel, the prosecutor should be cognizant of the defendant's potential attorney-client privilege with former defense counsel as well as former defense counsel's other ethical or legal obligations, and not seek to abrogate such privileges or obligations without an unambiguous legal basis, or court order.

(b) If a prosecutor observes, at any stage of a criminal proceeding, defense counsel conduct or omission that might reasonably constitute ineffective assistance of counsel, the prosecutor should take reasonable steps to preserve the defendant's right to effective assistance as well as the public's interest in obtaining a valid conviction, while not intruding on a defendant's constitutional right to counsel. During an ongoing defense representation, the prosecutor ordinarily should not express concerns regarding possible ineffective assistance on the public record without an unambiguous legal basis or court order, and should not communicate any such concerns directly to the defendant.
If required to respond to a collateral attack on a conviction, the prosecutor should consider all lawful responses, including applicable procedural or other defenses. The prosecutor need not, however, invoke every possible defense to a collateral attack, and should consider potential negotiated dispositions or other remedies, if the prosecutor and the prosecutor's office reasonably conclude that the interests of justice are thereby served.

-- END of Proposed Revisions to the PROSECUTION FUNCTION Standards --
THE AMERICAN BAR ASSOCIATION

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

Presented by the
CRIMINAL JUSTICE SECTION
for Adoption by the House of Delegates
Annual Meeting, Boston MA
August 2014

CRIMINAL JUSTICE STANDARDS

for the
DEFENSE FUNCTION

Chair, Criminal Justice Section Council: Mathias H. Heck, Jr., Montgomery County Prosecuting
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Reporter's Notes
1. Each Standard begins on a separate page. There are 65 proposed Defense Function Standards here, up from 43 Standards in the 1993 Edition. Where there is no 1993 equivalent
Standard (or a subsection of a 1993 Standards is now made into a separate Standard), the proposed revision is designated a "New" Standard.

2. This draft reflects final revisions approved by the Council of the Criminal Justice Section at its April 2014 meeting.

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PART I

GENERAL STANDARDS

Standard 4-1.1 The Scope and Function of these Standards

(a) As used in these Standards, “defense counsel” means any attorney — including privately retained, assigned by the court, acting pro bono or serving indigent defendants in a legal aid or public defender’s office — who acts as an attorney on behalf of a client being investigated or prosecuted for alleged criminal conduct, or a client seeking legal advice regarding a potential, ongoing or past criminal matter or subpoena, including as a witness. These Standards are intended to apply in any context in which a lawyer would reasonably understand that a criminal prosecution could result.

(b) These Standards are intended to provide guidance for the professional conduct and performance of defense counsel. They are not intended to modify a defense attorney’s obligations under applicable rules, statutes or the constitution. They are aspirational or describe “best practices,” and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for clients, or to create a standard of care for civil liability. They may be relevant in judicial evaluation of constitutional claims regarding the right to counsel.

(c) These Standards are intended to address the performance of criminal defense counsel in all stages of their professional work. Other ABA Criminal Justice Standards should also be consulted for more detailed consideration of the performance of criminal defense counsel in specific areas.
Standard 4-1.2 Functions and Duties of Defense Counsel

(a) Defense counsel is essential to the administration of criminal justice. A court properly constituted to hear a criminal case should be viewed as an entity consisting of the court (including judge, jury, and other court personnel), counsel for the prosecution, and counsel for the defense.

(b) Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.

(c) Defense counsel should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. Defense counsel should seek out supervisory advice when available, and defense counsel should provide ethical guidance when the proper course of conduct seems unclear. Defense counsel who disagrees with a governing ethical rule should seek its change if appropriate, and directly challenge it if necessary, but should comply with it unless relieved by court order.

(d) Defense counsel is the client's professional representative, not the client's alter-ego. Defense counsel should act zealously within the bounds of the law and standards on behalf of their clients, but have no duty to, and may not, execute any directive of the client which violates the law or such standards. In representing a client, defense counsel may engage in a good faith challenge to the validity of such laws or standards if done openly.

(e) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, counsel should stimulate and support efforts for remedial action. Defense counsel should provide services to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A public defense organization should support such activities, and the office's budget should include funding and paid release time for such activities.

(f) Defense counsel should be knowledgeable about, and consider, alternatives to prosecution or conviction that may be applicable in individual cases, and communicate them to the client. Defense counsel should be available to assist other groups in the community in addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

(g) Because the death penalty differs from other criminal penalties, defense counsel in a capital case should make extraordinary efforts on behalf of the accused and,
more specifically, review and comply with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.
Some duties of defense counsel run throughout the period of representation, and 
even beyond. Defense counsel should consider the impact of these duties at all stages of 
a criminal representation and on all decisions and actions that arise in the course of 
performing the defense function. These duties include:

(a) a duty of confidentiality regarding information relevant to the client’s 
representation which duty continues after the representation ends;
(b) a duty of loyalty toward the client;
(c) a duty of candor toward the court and others, tempered by the duties of 
confidentiality and loyalty;
(d) a duty to communicate and keep the client informed and advised of 
significant developments and potential options and outcomes;
(e) a duty to be well-informed regarding the legal options and developments that 
can affect a client’s interests during a criminal representation;
(f) a duty to continually evaluate the impact that each decision or action may 
have at later stages, including trial, sentencing, and post-conviction review;
(g) a duty to be open to possible negotiated dispositions of the matter, including 
the possible benefits and disadvantages of cooperating with the prosecution;
(h) a duty to consider the collateral consequences of decisions and actions, 
including but not limited to the collateral consequences of conviction.
(a) In light of criminal defense counsel’s constitutionally recognized role in the criminal process, defense counsel’s duty of candor may be tempered by competing ethical and constitutional obligations. Defense counsel must act zealously within the bounds of the law and applicable rules to protect the client’s confidences and the unique liberty interests that are at stake in criminal prosecution.

(b) Defense counsel should not knowingly make a false statement of fact or law or offer false evidence, to a court, lawyer, witnesses, or third party. It is not a false statement for defense counsel to suggest inferences that may reasonably be drawn from the evidence. In addition, while acting to accommodate legitimate confidentiality, privilege, or other defense concerns, defense counsel should correct a defense representation of material fact or law that defense counsel knows is, or later learns was, false.

(c) Defense counsel should disclose to a court legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the client and not disclosed by others.
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(a) Defense counsel should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. Defense counsel should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of defense counsel’s authority.

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

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Conflicts of Interest

(a) Defense counsel should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring withdrawal exists and is non-waivable, or informed consent has not been obtained, defense counsel should decline to proceed further, or take only minimal actions necessary to protect the client's interests, until an adequate waiver or new counsel is in place, or a court orders continued representation.

(b) Defense counsel should not permit their professional judgment or obligations regarding the representation of a client to be adversely affected by loyalties or obligations to other, former, or potential clients; by client obligations of their law partners; or by their personal political, financial, business, property, or other interests or relationships.

(c) Defense counsel should disclose to the client at the earliest feasible opportunity any information, including any interest in or connection to the matter or to other persons involved in the matter, that would reasonably be relevant to the client's selection of unconflicted counsel or decision to continue counsel's representation. Conflict of interest disclosures by counsel should ordinarily be in writing and include communication of information reasonably sufficient to permit the client to appreciate the material risks involved and reasonably available alternatives. Defense counsel should obtain informed consent from a client before proceeding with any representation where an actual or realistically potential conflict is present.

(d) Except where necessary to secure counsel for preliminary matters such as initial hearings or applications for bail, a defense counsel (or multiple counsel associated in practice) ordinarily should not undertake to represent more than one client in the same criminal matter. Such multiple representation should be engaged in only when, after careful investigation and consideration, it is clear that no conflict is likely to develop at any stage of the proceeding, or that multiple representation will be advantageous to each of the clients represented and that foreseeable conflicts can be (and later, are,) waived.

(e) In instances of permissible multiple representation:
   (i) the clients should be fully advised that the lawyer may be unable to continue if a conflict develops, and that confidentiality may not exist between the clients;
   (ii) informed written consent should be obtained from each of the clients, and
   (iii) if the matter is before a tribunal, such consent should be made on the record with appropriate inquiries by counsel and the court.

(f) Defense counsel who has formerly represented a client should not thereafter use information related to the former representation to the disadvantage of the former client, unless the information has become generally known or the ethical obligations of confidentiality and loyalty otherwise do not apply, and should not take legal positions that are substantially adverse to a former client.
In accepting payment of fees by one person for the representation of another, defense counsel should explain to the payor that counsel's loyalty and confidentiality obligations are owed entirely to the person being represented and not to the payor, and that counsel may not release client information to the payor unless applicable ethics rules allow. Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services. In addition, defense counsel should not accept such third-party compensation unless:

(i) the client gives informed consent after full disclosure and explanation;

(ii) defense counsel is confident there will be no interference with defense counsel's independence or professional judgment or with the client-lawyer relationship; and

(iii) defense counsel is reasonably confident that information relating to the representation of the client will be protected from disclosure as required by counsel's ethical duty of confidentiality.

Defense counsel should not represent a client in a criminal matter in which counsel, or counsel's partner or other lawyer in counsel's law office or firm, is the prosecutor in the same or a substantially related matter, or is a prosecutor in the same jurisdiction.

(i) If defense counsel's partner or other lawyer in counsel's law office was formerly a prosecutor in the same or substantially related matter or was a prosecutor in the same jurisdiction, defense counsel should not take on representation in that matter unless appropriate screening and consent measures under applicable ethics rules are undertaken, and no confidential information of the client or of the government has actually been exchanged between defense counsel and the former prosecutor.

(j) If defense counsel is a candidate for a position, or seeking employment, as a prosecutor or judge, this should be promptly disclosed to the client, and informed consent to continue be obtained.

(k) Defense counsel who formerly participated personally and substantially in the prosecution or criminal investigation of a defendant should not thereafter represent any person in the same or a substantially related matter, unless waiver is obtained from both the client and the government. Defense counsel who acquired confidential information about a person when counsel was formerly a prosecutor should not use such information in the representation of a client whose interests are adverse to that other person, unless the information has become generally known or the ethical obligations of confidentiality and loyalty otherwise do not apply.

(l) Defense counsel whose current relationship to a prosecutor is parent, child, sibling, spouse, or sexual partner should not represent a client in a criminal matter in which defense counsel knows the government is represented by that prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter in which defense counsel knows the
government is represented in the matter by such prosecutor, except upon informed consent by the client regarding the relationship.

(m) Defense counsel should not act as surety on a bond either for a client whom counsel represents or for any other client in the same or a related case, unless it is required by law or it is clear that there is no risk that counsel’s judgment could be materially limited by counsel’s interest in recovering the amount ensured.

(n) Except as law may otherwise permit, defense counsel should not negotiate to employ any person who is significantly involved as an attorney, employee, or agent of the prosecution in a matter in which defense counsel is participating personally and substantially.
Standard 4-1.8  Appropriate Workload

(a) Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel's existing matters. Defense counsel within a supervisory structure should notify supervisors when counsel's workload is approaching or exceeds professionally appropriate levels.

(b) Defense organizations and offices should regularly review the workload of individual attorneys, as well as the workload of the entire office, and adjust workloads (including intake) when necessary and as permitted by law to ensure the effective and ethical conduct of the defense function.

(c) Publicly-funded defense entities should inform governmental officials of the workload of their offices, and request funding and personnel that are adequate to meet the defense caseload. Defense counsel should consider seeking such funding from all appropriate sources. If workload exceeds the appropriate professional capacity of a publicly-funded defense office or other defense counsel, that office or counsel should also alert the court(s) in its jurisdiction and seek judicial relief.
(a) Defense counsel should act with diligence and promptness in representing a client, and should avoid unnecessary delay in the disposition of cases. But defense counsel should not act with such haste that quality representation is compromised. Defense counsel and publically-funded defense entities should be organized and supported with adequate staff and facilities to enable them to represent clients effectively and efficiently.

(b) When providing reasons for seeking delay, defense counsel should not knowingly misrepresent facts or otherwise mislead. Defense counsel should use procedural devices that will cause delay only when there is a legitimate basis for their use. Defense counsel should not accept a representation for the purpose of delaying a trial or hearing.

(c) Defense counsel should not unreasonably oppose requests for continuances from the prosecutor.

(d) Defense counsel should know and comply with timing requirements applicable to a criminal representation so as to not prejudice the client’s rights.

(e) Defense counsel should be punctual in attendance at court, in the submission of motions, briefs, and other papers, and in dealings with opposing counsel, witnesses and others. Defense counsel should emphasize to the client, assistants, and defense witnesses the importance of punctuality in court attendance.
Standard 4-1.10 Relationship With Media
(a) For purposes of this Standard, a “public statement” is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media, including social media. An extrajudicial statement is any oral, written, or visual presentation not made either in a courtroom during the criminal proceedings or in court filings or correspondence with the court or counsel regarding the criminal proceedings.

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

(c) Defense counsel should not make, cause to be made, or authorize or condone the making of, a public statement that counsel knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding. Defense counsel’s public statements should otherwise be consistent with the ABA Standards on Fair Trial and Public Discourse.

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

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

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

(g) In making any public statement regarding a representation, defense counsel should comply with ethical rules governing client confidentiality and loyalty, and should not provide confidential information to the media, on or off the record, without authorization from the client.

(h) Defense counsel should not allow the client’s representation to be adversely affected by counsel’s personal interest in potential media contacts or attention.

(i) A defense attorney uninvolved in a matter who is commenting as a media source may offer generalized media commentary concerning a specific criminal matter that serves to educate the public about the criminal justice system and does not risk prejudicing a specific criminal proceeding. Counsel acting as such a media commentator should make reasonable efforts to be well-informed about the facts of the matter and the circumstances of the proceedings outside of the courtroom.

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governing law. Counsel should not ordinarily offer commentary regarding the specific merits of an ongoing prosecution or investigation, except in a rare case to address a manifest injustice and the attorney is reasonably well-informed about the relevant facts and law.
Standard 4-1.11  Advisory Groups and Communications for Guidance on Issues of Professional Conduct

(a) In every jurisdiction, a group of lawyers with recognized experience, integrity, and standing in the criminal defense bar should be established to consider issues of professional conduct for defense attorneys in criminal matters. Members of this group should provide prompt and confidential guidance and advice to defense counsel seeking assistance in the application of standards of professional conduct in criminal representations.

(b) Defense counsel should initially take steps to ensure that the member from whom advice is sought does not have any conflicting interests, and the advisory group should establish procedures to avoid such conflicts.

(c) Communications between a defense lawyer and an advisory group member, and the seeking of advice itself, should be treated as confidential, and such communications should be afforded the same attorney-client privilege and other protections of the client’s confidences as ordinarily exists between any other lawyer and client. A group member should be bound by statute or rule of court in the same manner as a lawyer is ordinarily bound in that jurisdiction not to reveal confidences of the client of the consulting lawyer.

(d) In seeking advice from a group member, defense counsel should take steps to protect the client’s confidences (for example, by the use of anonymous hypotheticals), and reveal only such confidential information as may be necessary.

(e) Defense counsel should employ the foregoing confidentiality measures even when informally seeking advice from any other lawyer, and such informal consultations should be cautious and protect confidences when seeking advice outside the advisory group context.

(f) Confidences regarding a consultation may later be revealed to the extent necessary if:

(i) defense counsel’s client challenges the effectiveness of counsel’s conduct of the matter and counsel has relied on the guidance received from an advisory group member, and the information is subpoenaed or otherwise judicially supervised, or

(ii) the defense counsel’s conduct is called into question in a disciplinary inquiry or other proceeding against which counsel must defend.
(a) The community of criminal defense attorneys, including public defense offices and State and local Bar Associations, should develop and maintain programs of training and continuing education for both new and experienced defense counsel. Defense offices, as well as the organized Bar or courts, should require that current and aspiring criminal defense counsel attend a reasonable number of hours of such training and education.

(b) In addition to knowledge of substantive legal doctrine and courtroom procedures, a core training curriculum for criminal defense counsel should seek to address: investigation, negotiation and litigation skills; knowledge of the development, use, and testing of forensic evidence; available sentencing structures including non-conviction and non-imprisonment alternatives and collateral consequences; professional responsibility, civility, and a commitment to professionalism; relevant office, court, and prosecution policies and procedures and their proper application; appreciation of diversity and elimination of improper bias; and available technology and the ability to use it. Some training programs might usefully be open to, and taught by, persons outside the criminal defense community, such as prosecutors, law enforcement agencies, court staff, and members of the judiciary.

(c) A public defense office’s training program should include periodic review of the office’s policies and procedures, which should be amended when necessary. Counsel defending in specialized subject areas should receive training in those specialized areas. Individuals who will supervise attorneys or staff should receive training in how effectively to supervise.

(d) A public criminal defense organization should also make available opportunities for training and continuing education programs outside the office, including training for non-attorney staff.

(e) Adequate funding for continuing training and education programs, within and outside of public defense offices, should be requested and provided by funding sources.

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(e) Adequate funding for continuing training and education programs, within and outside of public defense offices, should be requested and provided by funding sources.
Assuring Excellence and Diversity in the Hiring, Retention, and Compensation of Public Defense Counsel

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

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

(c) The function of public criminal defense requires highly developed professional skills and a variety of backgrounds, talents and experience. A defender's office should promote continuing professional development and continuity of service, while providing defenders the opportunity to gain experience in all aspects of the defense function.

(d) Compensation and benefits for public defense counsel and their staffs should be commensurate with the high responsibilities of the office, sufficient to compete with the private sector, and regularly adjusted to attract and retain well-qualified personnel.

Compensation for public defense counsel should be adequate and also comparable to that of prosecutors in the same jurisdiction.
PART II

ACCESS TO DEFENSE COUNSEL

Standard 4-2.1 Duty to Make Qualified Criminal Defense Representation

Available

(a) The government has an obligation to provide, and fully fund, services of qualified defense counsel for indigent criminal defendants. In addition, the organized Bar of all lawyers in a jurisdiction has a duty to make qualified criminal defense counsel available, including for the indigent, and to make lawyers' expertise available in support of a fair and effective criminal justice system.

(b) The Bar should encourage the widest possible participation in the defense of criminal cases by qualified lawyers. Unqualified lawyers should not be assigned the primary role in criminal representation, but interested lawyers should be encouraged to qualify themselves for participation in criminal cases by formal training and by experience as associate counsel. Law firms should encourage and support efforts by their interested attorneys to become qualified and then take on criminal representations.

(c) Qualified defense counsel should be willing and ready to undertake the defense of a suspect or an accused regardless of public hostility or personal distaste for the offense or the client.

(d) Qualified defense counsel should not seek to avoid appointment by a tribunal to represent an accused except for good cause, such as: representing the accused is likely to result in violation of applicable ethical codes or other law; representing the accused is likely to result in an unreasonable financial burden on the lawyer; or the client or crime is so repugnant to the lawyer that it will likely prejudicially impair the lawyer's ability to provide quality representation.

(e) Lawyers who are not qualified to serve as criminal defense counsel should:

(i) be encouraged to seek qualification;
(ii) make their legal skills and expertise available to assist qualified counsel in providing indigent criminal defense; and
(iii) provide or assist in obtaining financial assistance and political support for indigent criminal defense budgets and resources.
Confidential Defense Communication with Detained Persons

[(c) and (d) are New]

(a) Every jurisdiction should guarantee by statute or rule the right of a criminally-detained or confined person to prompt, confidential, affordable and effective communication with a defense lawyer throughout a criminal investigation, prosecution, appeal, or other quasi-criminal proceedings such as habeas corpus.

(b) All detention or imprisonment institutions should provide reasonable, affordable access to confidential and unmonitored telephonic and other communication facilities to allow effective confidential communication between defense counsel and their detained clients. This should include providing or allowing access to language translation or other communication services when necessary.

(c) All detention or imprisonment institutions should provide adequate facilities for private, unmonitored meetings between defense counsel and an accused. Private facilities should also be provided for the review of evidence and discovery materials by counsel together with their detained clients.

(d) Absent a credible threat of immediate danger or violence, or advance judicial authorization, persons working in detention or imprisonment institutions should be prohibited from examining, monitoring, recording, or interfering with confidential communications between defense counsel and their detained clients.
A defense counsel should be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance.
Standard 4-2.4 Referral Service for Criminal Cases

(a) To assist persons who wish to retain defense counsel, every jurisdiction should have a referral service for qualified criminal defense counsel. The referral service should maintain a list of qualified counsel willing to undertake the defense of a criminal case, for a fee as well as pro bono, and should be organized so that it can provide prompt service at all times.

(b) A defense referral service should employ an objective set of standards for defense attorneys to qualify for placement on the referral list, and should employ fair and neutral criteria for admitting qualified attorneys to the list, making referrals, and striking counsel from the list. Such standards, criteria, and procedures concerning referral lists should be published and readily available.

(c) The availability of the referral service should be publicized, and information regarding fees should be included. Notices containing the essential information about the referral service and how to contact it should be posted in police stations, jails, and wherever else it is likely to give effective notice to criminally-accused persons, including the internet.
Standard 4-2.5 Referrals for Representation

(a) Defense counsel should not give anything of more than nominal value to a person for recommending the lawyer’s services, except that

(i) counsel may pay reasonable costs of advertisements, or the usual charges for a legal services plan or qualified lawyer referral service, as described in ABA Model Rule 7.2; and

(ii) counsel may maintain nonexclusive reciprocal referral arrangements with other lawyers, if the client is fully informed of the arrangement and the arrangement does not constrain defense counsel’s independent professional judgment regarding the client’s best interests.

(b) Defense counsel should not have an ongoing or regular referral relationship with any source (such as prosecutors, public defender programs, law enforcement personnel, bondsmen, or court personnel) when such an ongoing relationship is likely to create conflicting loyalties for the lawyers involved or an appearance of impropriety. Defense counsel’s relationship with a referral source should be disclosed to the client.

(c) Referrals by one defense counsel to another should be based on merit, experience, competence for the particular matter, and other appropriate considerations.

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Standard 4-3.1 Establishing and Maintaining An Effective Client Relationship

(a) Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client. Defense counsel should explain, at an appropriate time, the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense. Defense counsel should explain that the attorney-client privilege ordinarily protects the confidentiality of communications with counsel, and what the client can do to help preserve confidentiality.

(b) At an early stage, counsel should discuss with the client the objectives of the representation and through what stages of a criminal matter the defense counsel will continue to represent the accused. An engagement letter as described in Standard 4-3.5 should also be provided.

(c) Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. Even if a client appears to have such a condition, this does not diminish defense counsel’s obligations to the client, including maintaining a normal attorney-client relationship in so far as possible. In such an instance, defense counsel should also consider whether a mental examination or other protective measures are in the client’s best interest.

(d) In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.

(e) Defense counsel should ensure that space is available and adequate for confidential client consultations.

(f) Defense counsel should actively work to maintain an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody.
Standard 4-3.2  Seeking a Detained Client's Release from Custody, or Reduction in Custodial Conditions [New]

(a) In every case where the client is detained, defense counsel should discuss with the client, as promptly as possible, the client’s custodial or release status and determine whether release, a change in release conditions, or less restrictive custodial conditions, should be sought. Counsel should be aware of applicable statutes and rules, and all alternatives less restrictive than full institutional detention. Counsel should investigate community and family resources that might be available to assist in implementing such alternatives.

(b) Counsel should investigate the factual predicate that has been advanced to support detention and custodial conditions, and not assume its accuracy.

(c) Once counsel has sufficient command of the facts, counsel should approach the prosecutor to see if agreement to release or a change in release or custodial conditions can be negotiated and submitted for approval by the court.

(d) If the prosecutor does not agree, counsel should submit to the court a statement of facts, legal argument, and proposed conditions if necessary, to support the client’s release or a reduction in release or custodial conditions.

(e) If a court orders release, counsel should fully explain all conditions of release to the client, as well as the consequences of their violation. Counsel should assist the client and others acting for the client in properly implementing the release conditions.

(f) If counsel is unable to secure the client’s release, counsel should, after discussion with the client and with due regard to any relevant confidentiality concerns, alert the court and institutional personnel to any special medical, psychiatric, religious, dietary, or security needs of the client while in government custody, and request that the court order the appropriate officials to take steps to meet such special needs.

(g) Counsel should reevaluate the client’s eligibility for release, or for reduced release or custodial conditions, at all significant stages of a criminal matter and when there is any relevant change in facts or circumstances. Counsel should request reconsideration of detention or modification of conditions whenever it is in the client’s best interests.
Standard 4-3.3 Interviewing the Client

(a) In the initial meeting with a client, defense counsel should begin the process of establishing an effective attorney-client relationship. This ordinarily would include

(b) Counsel should interview the client as many times as necessary for effective representation, which in all but the most simple and routine cases will ordinarily mean more than once. Defense counsel should ordinarily meet in person with the client.

(c) As early as practicable in the representation, defense counsel should also discuss:

(i) and share with the client evidentiary materials relevant to the matter (consistent with the terms of any applicable protective order), and determine in depth the client’s view of the facts and other relevant facts known to the client;

(ii) the likely length and course of the pending proceedings;

(iii) potential sources of helpful information, evidence, and investigation;

(iv) the client’s wishes regarding, and the likelihood of and steps necessary to gain, release or reduction of supervisory conditions;

(v) likely legal options such as motions, trial, and potential negotiated dispositions;

(vi) the range of potential outcomes and alternatives, and if convicted, possible punishments;

(vii) if appropriate, the possibility and potential costs and benefits of a negotiated disposition, including one that might include cooperation with the government; and

(viii) relevant collateral consequences resulting from the current situation as well as from possible resolutions of the matter.

(d) When asking the client for information and discussing possible options and strategies with the client, defense counsel should not seek to induce the client to make factual responses that are not true. Defense counsel should encourage candid disclosure by the client to counsel and not seek to maintain a calculated ignorance.
(a) Counsel should be familiar with statutes and rules regarding fees and costs that govern in the jurisdiction(s) in which counsel practices. Before or within a reasonably short time after commencing a representation, defense counsel should discuss with the client:

(i) the likely cost of the representation including the attorney’s fees, billing structure, and likely expenses;

(ii) how fees and costs will be paid, and any available options regarding the fee structure;

(iii) what services and expenses the fees will cover;

(iv) what stages of the matter the fee covers, such as pre-charge investigation, preliminary hearing, negotiated disposition or trial, sentencing or appeal; and

(v) whether the fee extends to addressing any related matters.

(b) In determining the amount of the fee in a criminal case, it is proper to consider the time and effort required, the responsibility assumed by counsel, the novelty and difficulty of the issues involved, the skill requisite to proper representation, the need for any special technology, experts, investigators, or other unusual expenses, the likelihood that other employment will be precluded, the fee customarily charged in the locality for similar services, the gravity of the charge, the experience, reputation, and expertise of defense counsel, and the ability of the client to pay the fee.

(c) Once agreed upon, the amount, rate, and terms of the fee should be promptly communicated to the client, in clear terms and in writing, ordinarily as part of the Engagement Letter.

(d) Defense counsel should not enter into an agreement for, charge, or collect an illegal or unreasonable fee. Defense counsel should be aware that accepting a fee comprised of assets that are contraband or proceeds of crime may be a crime and may also subject those fee assets to seizure and forfeiture.

(e) Defense counsel should not permit a dispute or unhappiness regarding compensation to interfere with providing competent and zealous representation. A competent defense does not require all possible expenditures, and counsel ordinarily is not required to spend out of counsel’s own pocket. If funding becomes an issue, counsel should discuss other possible sources of funds with the client and pursue those that are appropriate. If funding is inadequate, counsel may seek withdrawal in accordance with applicable laws, including court and ethics rules.

(f) A publicly-paid defense counsel should not request or accept additional money or other compensation from non-public sources to represent a client in an appointed criminal case, unless permitted by rules of the jurisdiction.
(g) Retained defense counsel may accept compensation from third parties for the representation of a client, subject to counsel’s duties of loyalty and confidentiality to the client and the criteria in Standard 4-1.5(f) above.

(h) Defense counsel should not state or imply that their compensation is for any unethical or secret influence.

(i) Defense counsel should not divide a fee with a nonlawyer, except as permitted by applicable ethics rules.

(j) Defense counsel not in the same firm should not divide fees in a criminal matter among lawyers unless consistent with the rules of the jurisdiction and the division is in reasonable proportion to the experience, ability, and services performed by each counsel and is disclosed to the client; or by written agreement with the client each counsel assumes joint responsibility for the representation, the client is advised of and does not object to the participation of all counsel involved, and the total fee is reasonable.

(k) Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case or in a criminal forfeiture action.

(l) Defense counsel may charge a non-refundable “flat rate” fee if such is permitted by the law of the jurisdiction and the arrangement is fully explained in advance, but defense counsel should refund any part of such a fee that constitutes an undeserved windfall if exceptional and unanticipated developments arise such that a significant amount of anticipated work is not done by counsel.

(m) When a representation ends, counsel should offer to return any unearned fee.
(a) Upon agreeing or being appointed to take on a criminal representation, defense counsel should promptly provide a new client with an engagement letter, email, or other written communication, as described below, written in plain language that the particular client can understand. If material conditions of the representation change during the representation, counsel should, after consultation with the client, promptly and specifically communicate the changes in writing to the client. Counsel should also provide an engagement letter to clients who have been previously-represented by the same counsel but have now engaged counsel on a new matter, explaining the scope of and any material changes in the terms of the new representation.

(b) While the content and level of detail may vary depending on the context, an engagement letter should ordinarily include a description of:

(i) the identity of the client and the scope of, and limitations on, the representation;

(ii) the fee arrangement (including costs and expenses);

(iii) the fact that counsel’s duties of confidentiality and loyalty are owed to the client;

(iv) materials that counsel may retain although related to the representation (e.g., legal research for use in future cases);

(v) any other information that is particularly relevant to the specific representation.
Standard 4-3.6  Literary or Media Rights Agreements Prohibited

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

(b) Defense counsel should not allow the client's representation to be adversely affected by the possibility of future personal literary or other media rights.

(c) In creating or participating in any literary or other media account of a matter in which defense counsel was involved, counsel's duty of confidentiality must be respected even after a matter is concluded or the client is deceased. When protected confidences are involved, defense counsel should not make disclosure without consent from the client or the client's authorized representative.
Standard 4-3.7 Prompt and Thorough Actions to Protect the Client

(a) Many important rights of a criminal client can be protected and preserved only by prompt legal action. Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity, and timely plan and take necessary actions to vindicate such rights within the scope of the representation.

(b) Defense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution. Defense counsel should, when relevant, take prompt steps to ensure that the government’s physical evidence is preserved at least until the defense can examine or evaluate it.

(c) Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.

(d) Not all defense actions need to be taken immediately. If counsel has evidence of innocence, mitigation, or other favorable information, defense counsel should discuss with the client and decide whether, going to the prosecution with such evidence is in the client’s best interest, and if so, when and how.

(e) Defense counsel should consider whether an opportunity to benefit from cooperation with the prosecution will be lost if not pursued quickly, and if so, promptly discuss with the client and decide whether such cooperation is in the client’s interest.

(f) For each matter, defense counsel should consider what procedural and investigative steps to take and motions to file, and not simply follow rote procedures learned from prior matters. Defense counsel should not be deterred from sensible action merely because counsel has not previously seen a tactic used, or because such action might incur criticism or disfavor. Before acting, defense counsel should discuss novel or unfamiliar matters or issues with colleagues or other experienced counsel, employing safeguards to protect confidentiality and avoid conflicts of interest.

(g) Whenever defense counsel is confronted with specialized factual or legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, consider engaging or consulting with an expert in the specialized area.

(h) Defense counsel should always consider interlocutory appeals or other collateral proceedings as one option in response to any materially adverse ruling.

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(h) Defense counsel should always consider interlocutory appeals or other collateral proceedings as one option in response to any materially adverse ruling.
Standard 4-3.8 Anticipated Unlawful Conduct

(a) If defense counsel anticipates that a client may engage in unlawful conduct, defense counsel should advise the client concerning the meaning, scope and validity of the law and the possible consequences of violating the law, and should ordinarily advise the client to comply with the law.

(b) Defense counsel should not knowingly propose, advise, or assist in a course of conduct which defense counsel knows to be criminal or fraudulent, but defense counsel may discuss the legal consequences of a proposed course of conduct with a client, and may counsel or assist a client in a good faith effort to determine the validity, scope, meaning, or application of the law.

(c) Defense counsel should not enter into an arrangement with persons or organizations counsel knows to be engaged in ongoing criminal conduct, to provide representation on a regular basis to the participants, if the legal services will knowingly assist the ongoing criminal conduct. Counsel may agree in advance to represent clients as part of a good faith effort to determine the validity, scope, meaning, or application of the law, or incident to a general retainer for providing legal services to a person or enterprise engaged in primarily legitimate activities, or if counsel’s services are intended to bring conduct into conformance with the law.

(d) When unlawful conduct by a client is anticipated or has taken place, defense counsel should be aware of and follow applicable ethical rules, including provisions that require confidentiality and provisions that mandate or permit disclosures.
(a) Defense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer's services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.

(b) Defense counsel should promptly comply with the client's reasonable requests for information about the matter and for copies of or access to relevant documents, unless the client's access to such information is restricted by law or court order. Counsel should ordinarily challenge such restrictions on the client's access to information unless there is good reason not to do so.
Standard 4-3.10 Maintaining Continuity of Representation; Relationship with Successor Counsel

(a) Defense counsel who withdraws from a representation at any stage of a criminal matter before its resolution should make reasonable efforts to assist the client in securing competent defense counsel as successor counsel, and to not leave the client unrepresented, unless the client otherwise directs.

(b) Defense counsel should make reasonable efforts to establish and maintain a cooperative relationship with any prior, or successor, defense counsel in the representation.

(c) When successor counsel enters a representation, prior counsel should still act to protect the client’s privileges, confidences and secrets, and obtain consent (express or implied) from the client before providing such information to the new counsel.
(a) When a representation ends, defense counsel should ordinarily provide the client's file to the client or, with the client's consent, to successor counsel or other authorized representative, and provide the client some notice of the file's disposition. However, unless rules or statutes in the jurisdiction require otherwise, public defense offices may retain clients’ files unless a client requests the file. If the client’s file is retained by defense counsel, counsel should retain copies of essential portions of the client’s file until the client provides further instructions, for at least the length of time consistent with statutes and rules of the jurisdiction.

(b) Even during a representation, defense counsel should provide the client with the client’s file upon request, even if fees or costs are disputed or unpaid in whole or in part.

c) Not everything in defense counsel’s files on a matter is the client's, and the definition of the contents of "the client’s file" may vary among jurisdictions. Original documents and property delivered to the attorney by the client are ordinarily part of the client’s file, as are correspondence and court filings in the client’s matter.

d) When a representation ends, defense counsel may seek a release from the client regarding the representation, but may not unreasonably withhold the client’s file pending such release.
PART IV

Standard 4-4.1 Duty to Investigate and Engage Investigators

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not necessarily terminated by factors such as the apparent force of the prosecution’s evidence, a client’s alleged admissions to others of facts suggesting guilt, a client’s expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

(c) Defense counsel’s investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, defense counsel’s investigation of the merits of the criminal charges should ordinarily include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. Counsel’s investigation should also include evaluation of the prosecution’s evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence) and consideration of inconsistencies, potential avenues of impeachment of prosecution witnesses, and other possible suspects and alternative theories that the evidence may raise.

(d) Defense counsel should determine whether the client’s interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation.

(e) If the client lacks sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors. Application to the court should be made ex parte if appropriate to protect the client’s confidentiality. Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective.
Defense counsel should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so.
Standard 4-4.3  Relationship With Witnesses

1. **“Witness”** in this Standard means any person who has or might have information about a matter, including victims and the client.

2. Defense counsel should know and follow the law and rules of the jurisdiction regarding victims and witnesses. In communicating with witnesses, counsel should know and abide by law and ethics rules regarding the use of deceit and engaging in communications with represented, unrepresented, and organizational persons.

3. Defense counsel or counsel’s agents should ordinarily interview witnesses, including seeking to interview the victim or victims, and should not act to intimidate or unduly influence any witness.

4. Defense counsel should not use means that have no substantial purpose other than to embarrass, delay, or burden, and not use methods of obtaining evidence that violate legal rights. Defense counsel and their agents should not misrepresent their status, identity or interests when communicating with a witness.

5. Defense counsel should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses, other than expert witnesses, unless authorized by law, regulation, or well-accepted practice. All benefits provided to witnesses should be documented so that they may be disclosed if required by law or court order. Defense counsel should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness’s testimony.

6. Defense counsel should avoid the prospect of having to testify personally about the content of a witness interview. An interview of routine witnesses (for example, custodians of records) ordinarily should not require a third-party observer. But when the need for corroboration of an interview is reasonably anticipated, counsel should be accompanied by another trusted and credible person during the interview. Defense counsel should avoid being alone with foreseeably hostile witnesses.

7. It is not necessary for defense counsel or defense counsel’s agents, when interviewing a witness, to caution the witness concerning possible self-incrimination or a right to independent counsel. Defense counsel should, however, follow applicable ethical rules that address dealing with unrepresented persons. Defense counsel should not discuss or exaggerate the potential criminal liability of a witness with a purpose, or in a manner likely, to intimidate the witness, or to influence the truthfulness or completeness of the witness’s testimony, or to change the witness’s decision about whether to provide information.

8. Defense counsel should not discourage or obstruct communication between witnesses and the prosecution, other than a client’s employees, agents or relatives if
consistent with applicable ethical rules. Defense counsel should not advise any person,
or cause any person to be advised, to decline to provide the prosecution with information
which such person has a right to give. Defense counsel may, however, advise witnesses
as to the likely consequences of their providing information.

(i) Defense counsel should give their witnesses reasonable notice of when their
testimony at a proceeding is expected, and should not require witnesses to attend judicial
proceedings unless their testimony is reasonably expected at that time, or their presence is
required by law. When witnesses' attendance is required, defense counsel should seek to
reduce to a minimum the time witnesses must spend waiting at the proceedings. Defense
counsel should ensure that defense witnesses are given notice as soon as practicable of
scheduling changes which will affect their required attendance at judicial proceedings.

(j) Defense counsel should not engage in any inappropriate personal relationship
with any victim or other witness.
Standard 4.4-4 Relationship With Expert Witnesses

(a) An expert may be engaged to prepare an evidentiary report or testimony, or for consultation only. Defense counsel should know relevant rules governing expert witnesses, including possibly different disclosure rules governing experts who are engaged for consultation only.

(b) Defense counsel should evaluate all expert advice, opinions, or testimony independently, and not simply accept the opinion of an expert based on employer, affiliation or prominence alone.

c) Before engaging an expert, defense counsel should investigate the expert’s credentials, relevant professional experience, and reputation in the field. Defense counsel should also examine a testifying expert’s background and credentials for potential impeachment issues. Before offering an expert as a witness, defense counsel should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

d) Defense counsel who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert’s opinion on the relevant subject.

e) Before offering an expert as a witness, defense counsel should seek to learn enough about the substantive area of the expert’s expertise, including ethical rules that may be applicable in the expert’s field, to enable effective preparation of the expert, as well as to cross-examine any prosecution expert on the same topic. Defense counsel should explain to the expert that the expert’s role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

f) Defense counsel should not pay or withhold a fee, or provide or withhold a benefit, for the purpose of influencing an expert’s testimony. Defense counsel should not fix the amount of the fee contingent upon the substance of an expert’s testimony or the result in the case. Nor should defense counsel promise or imply the prospect of future work for the expert based on the expert’s testimony.

(g) Subject to client confidentiality interests, defense counsel should provide the expert with all information reasonably necessary to support a full and fair opinion. Defense counsel should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. Defense counsel should be aware of expert discovery rules and act to protect confidentiality, for example by not sharing with the expert client confidences and work product that counsel does not want disclosed.
Defense counsel should timely respond to legally proper discovery requests, and make a diligent effort to comply with legally proper disclosure obligations, unless otherwise authorized by a court. Defense counsel should ordinarily provide specific responses to discovery requests for specific information rather than boilerplate or a general acknowledgement of discovery obligations.
(a) Defense counsel should prepare in advance for court proceedings unless that is impossible. Adequate preparation depends on the nature of the proceeding and the time available, and will often include: reviewing available documents; considering what issues are likely to arise and the client’s position regarding those issues; how best to present the issues and what solutions might be offered; relevant legal research and factual investigation; and contacting other persons who might be of assistance in addressing the anticipated issues. If defense counsel has not had adequate time to prepare and is unsure of the relevant facts or law, counsel should communicate to the court the limits of the defense counsel’s knowledge or preparation.

(b) Defense counsel should make an effort to appear at all hearings in cases assigned to them. A defense attorney who substitutes at a court proceeding for another attorney should make reasonable efforts to be adequately informed about the case and issues likely to come up at the proceeding and to adequately prepare as necessary.

(c) Defense counsel handling any court appearance should document what happens at the proceeding, to aid counsel’s own memory and the client’s future reference, and so that necessary information will be available to counsel who may handle the case in the future.

(d) Defense counsel should take steps to ensure that any court order issued to the defense is transmitted to the appropriate persons necessary to effectuate the order.

(e) A public criminal defense office should be provided sufficient resources and be organized to permit adequate preparation for court proceedings.
Handling Physical Evidence With Incriminating Implications

(a) Counseling the client: If defense counsel knows that the client possesses physical evidence that the client may not legally possess (such as contraband or stolen property) or evidence that might be used to incriminate the client, counsel should examine and comply with the law and rules of the jurisdiction on topics such as obstruction of justice, tampering with evidence, and protection for the client's confidentiality and against self-incrimination. Counsel should then competently advise the client about lawful options and obligations.

(b) Permissible actions of the client: If requested or legally required, defense counsel may assist the client in lawfully disclosing such physical evidence to law enforcement authorities. Counsel may advise destruction of a physical item if its destruction would not obstruct justice or otherwise violate the law or ethical obligations. Counsel may not assist the client in conduct that counsel knows is unlawful, and should not knowingly and unlawfully impede efforts of law enforcement authorities to obtain evidence.

(c) Confidentiality: Defense counsel should act in accordance with applicable confidentiality laws and rules. In some circumstances, applicable law or rules may permit or require defense counsel to disclose the existence of, or the client's possession or disposition of, such physical evidence.

(d) Receipt of physical evidence: Defense counsel should not take possession of such physical evidence, personally or through third parties, and should advise the client not to give such evidence to defense counsel, except in circumstances in which defense counsel may lawfully take possession of the evidence. Such circumstances may include:

(i) when counsel reasonably believes the client intends to unlawfully destroy or conceal such evidence;

(ii) when counsel reasonably believes that taking possession is necessary to prevent physical harm to someone;

(iii) when counsel takes possession in order to produce such evidence, with the client's informed consent, to its lawful owner or to law enforcement authorities;

(iv) when such evidence is contraband and counsel may lawfully take possession of it in order to destroy it; and

(v) when defense counsel reasonably believes that examining or testing such evidence is necessary for effective representation of the client.

(e) Compliance with legal obligations to produce physical evidence: If defense counsel receives physical evidence that might implicate a client in criminal conduct, counsel should determine whether there is a legal obligation to return the evidence to its source or owner, or to deliver it to law enforcement or a court, and comply with any such legal obligations. A lawyer who is legally obligated to turn over such physical evidence should do so in a lawful manner that will minimize prejudice to the client.

(b) Permissible actions of the client: If requested or legally required, defense counsel may assist the client in lawfully disclosing such physical evidence to law enforcement authorities. Counsel may advise destruction of a physical item if its destruction would not obstruct justice or otherwise violate the law or ethical obligations. Counsel may not assist the client in conduct that counsel knows is unlawful, and should not knowingly and unlawfully impede efforts of law enforcement authorities to obtain evidence.

(c) Confidentiality: Defense counsel should act in accordance with applicable confidentiality laws and rules. In some circumstances, applicable law or rules may permit or require defense counsel to disclose the existence of, or the client’s possession or disposition of, such physical evidence.

(d) Receipt of physical evidence: Defense counsel should not take possession of such physical evidence, personally or through third parties, and should advise the client not to give such evidence to defense counsel, except in circumstances in which defense counsel may lawfully take possession of the evidence. Such circumstances may include:

(i) when counsel reasonably believes the client intends to unlawfully destroy or conceal such evidence;

(ii) when counsel reasonably believes that taking possession is necessary to prevent physical harm to someone;

(iii) when counsel takes possession in order to produce such evidence, with the client’s informed consent, to its lawful owner or to law enforcement authorities;

(iv) when such evidence is contraband and counsel may lawfully take possession of it in order to destroy it; and

(v) when defense counsel reasonably believes that examining or testing such evidence is necessary for effective representation of the client.

(e) Compliance with legal obligations to produce physical evidence: If defense counsel receives physical evidence that might implicate a client in criminal conduct, counsel should determine whether there is a legal obligation to return the evidence to its source or owner, or to deliver it to law enforcement or a court, and comply with any such legal obligations. A lawyer who is legally obligated to turn over such physical evidence should do so in a lawful manner that will minimize prejudice to the client.
Retention of producible item for examination. Unless defense counsel has a legal obligation to disclose, produce, or dispose of such physical evidence, defense counsel may retain such physical evidence for a reasonable time for a legitimate purpose. Legitimate purposes for temporarily obtaining or retaining physical evidence may include: preventing its destruction; arranging for its production to relevant authorities; arranging for its return to the source or owner; preventing its use to harm others; and examining or testing the evidence in order to effectively represent the client.

Testing physical evidence. If defense counsel determines that effective representation of the client requires that such physical evidence be submitted for forensic examination and testing, counsel should observe the following practices:

(i) The item should be properly handled, packaged, labeled and stored, in a manner designed to document its identity and ensure its integrity.

(ii) Any testing or examination should avoid, when possible, consumption of the item, and a portion of the item should be preserved and retained to permit further testing or examination.

(iii) Any person conducting such testing or examination should not, without prior approval of defense counsel, conduct testing or examination in any manner that will consume the item or otherwise destroy the ability for independent re-testing or examination by the prosecution.

(iv) Before approving a test or examination that will entirely consume the item or destroy the prosecution’s opportunity and ability to re-test the item, defense counsel should provide the prosecution with notice and an opportunity to object and seek an appropriate court order.

If a motion objecting to consumptive testing or examination is filed, the court should consider ordering procedures that will permit independent evaluation of the defense’s analysis, including but not limited to:

(A) permitting a prosecution expert to be present during preparation and testing of the evidence;

(B) video recording the preparation and testing of the evidence;

(C) still photography of the preparation and testing of evidence; and

(D) access to all raw data, notes and other documentation relating to the defense preparation and testing of the evidence.

Client consent to accept a physical item. Before voluntarily taking possession from the client of physical evidence that defense counsel may have a legal obligation to disclose, defense counsel should advise the client of potential legal implications of the proposed conduct and possible lawful alternatives, and obtain the client’s informed consent.
Retention or return of item when law permits. If defense counsel reasonably determines that there is no legal obligation to disclose physical evidence in counsel’s possession to law enforcement authorities or others, the lawyer should deal with the physical evidence consistently with ethical and other rules and law. If defense counsel retains the evidence for use in the client’s representation, the lawyer should comply with applicable law and rules, including rules on safekeeping property, which may require notification to third parties with an interest in the property. Counsel should maintain the evidence separately from privileged materials of other clients, and preserve it in a manner that will not impair its evidentiary value. Alternatively, counsel may deliver the evidence to a third-party lawyer who is also representing the client and will be obligated to maintain the confidences of the client as well as defense counsel.

Adoption of judicial and legislated procedures for handling physical evidence. Courts and legislatures, as appropriate, should adopt procedures regarding defense handling of such physical evidence, as follows:

(i) When defense counsel notifies the prosecution of the possession of such evidence or produces such evidence to the prosecution, the prosecution should be prohibited from presenting testimony or argument identifying or implying the defense as the source of the evidence, except as provided in Standard 3-3.6;

(ii) When defense counsel reasonably believes that contraband does not relate to a pending criminal investigation or prosecution, counsel may take possession of the contraband and destroy it.

(i) Adoption of judicial and legislated procedures for handling physical evidence. Courts and legislatures, as appropriate, should adopt procedures regarding defense handling of such physical evidence, as follows:

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(ii) When defense counsel reasonably believes that contraband does not relate to a pending criminal investigation or prosecution, counsel may take possession of the contraband and destroy it.
PART V.

CONTROL AND DIRECTION OF LITIGATION

Standard 4-5.1 Advising the Client

(a) Defense counsel should exercise independent professional judgment when advising a client.

(b) Defense counsel should keep the client reasonably and regularly informed about the status of the case. Before significant decision-points, and at other times if requested, defense counsel should advise the client with candor concerning all aspects of the case, including an assessment of possible strategies and likely as well as possible outcomes. Such advisement should take place after counsel is as fully informed as is reasonably possible in the time available about the relevant facts and law. Counsel should act diligently and, unless time does not permit, advise the client of what more needs to be done or considered before final decisions are made.

(c) Defense counsel should promptly communicate to the client every plea offer and all significant developments, motions, and court actions or rulings, and provide advice as outlined in this Standard.

(d) In rendering advice to the client, counsel should consider the client’s desires and views, and may refer not only to law but also to other considerations such as moral, economic, social or political factors that may be relevant to the client’s situation. Counsel should attempt to distinguish for the client between legal advice and advice based on such other considerations.

(e) Defense counsel should provide the client with advice sufficiently in advance of decisions to allow the client to consider available options, and avoid unnecessarily rushing the accused into decisions.

(f) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case or exert undue influence on the client’s decisions regarding a plea.

(g) Defense counsel should ordinarily advise the client to avoid communication about the case with anyone, including victims or other possible witnesses, persons in custody, family, friends, and any government personnel, except with defense counsel’s approval, although where the client is a minor consultation with parents or guardians may be useful. Counsel should advise the client to avoid any contact with jurors or persons called for jury duty; and to avoid either the reality or the appearance of any other improper activity.

(h) Defense counsel should consider and advise the client of potential benefits as well as negative aspects of cooperating with law enforcement or the prosecution.
After advising the client, defense counsel should aid the client in deciding on the best course of action and how best to pursue and implement that course of action.
Standard 4-5.2 Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.

(b) The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include:

(i) whether to proceed without counsel;
(ii) what pleas to enter;
(iii) whether to accept a plea offer;
(iv) whether to cooperate with or provide substantial assistance to the government;
(v) whether to waive jury trial;
(vi) whether to testify in his or her own behalf;
(vii) whether to speak at sentencing;
(viii) whether to appeal; and
(ix) any other decision that has been determined in the jurisdiction to belong to the client.

(c) If defense counsel has a good faith doubt regarding the client’s competence to make important decisions, counsel should consider seeking an expert evaluation from a mental health professional, within the protection of confidentiality and privilege rules if applicable.

(d) Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced.

(e) If a disagreement on a significant matter arises between defense counsel and the client, and counsel resolves it differently than the client prefers, defense counsel should consider memorializing the disagreement and its resolution, showing that record to the client, and preserving it in the file.
Standard 4-5.3 Obligations of Stand-By Counsel

(a) An attorney whose assigned duty is to actively assist a pro se criminally accused person should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case, while still providing the attorney’s best advice.

(b) An attorney whose assigned duty is to assist a pro se criminally accused person only when the accused requests assistance may bring to the attention of the accused steps that could be potentially beneficial or dangerous to the accused, but should not actively participate in the conduct of the defense unless requested by the accused or as directed by the court.

(c) In either case, the assigned attorney should respect the accused’s right to develop and present the accused’s own case, while still advising the accused of potential benefits and dangers the attorney perceives in the course of the litigation. Such an attorney should be fully prepared about the matter, in order to offer such advice and in case the court and the accused determine that the full representation role should be transferred to defense counsel at some point during the criminal proceedings.
Standard 4-5.4 Consideration of Collateral Consequences

(a) Defense counsel should identify, and advise the client of, collateral consequences that may arise from charge, plea or conviction. Counsel should investigate consequences under applicable federal, state, and local laws, and seek assistance from others with greater knowledge in specialized areas in order to be adequately informed as to the existence and details of relevant collateral consequences. Such advice should be provided sufficiently in advance that it may be fairly considered in a decision to pursue trial, plea, or other dispositions.

(b) When defense counsel knows that a consequence is particularly important to the client, counsel should advise the client as to whether there are procedures for avoiding, mitigating or later removing the consequence, and if so, how to best pursue or prepare for them.

(c) Defense counsel should include consideration of potential collateral consequences in negotiations with the prosecutor regarding possible dispositions, and in communications with the judge or court personnel regarding the appropriate sentence or conditions, if any, to be imposed.
(a) Defense counsel should determine a client’s citizenship and immigration status, assuring the client that such information is important for effective legal representation and that it should be protected by the attorney-client privilege. Counsel should avoid any actions that might alert the government to information that could adversely affect the client.

(b) If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions. Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances. Public and appointed defenders should develop, or seek funding for, such immigration expertise within their offices.

c) After determining the client’s immigration status and potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client’s immediate family, counsel should advise the client of all such potential consequences and determine with the client the best course of action for the client’s interests and how to pursue it.

d) If a client is convicted of a removable offense, defense counsel should advise the client of the serious consequences if the client illegally returns to the United States.
PART VI
DISPOSITION WITHOUT TRIAL

Standard 4-6.1 Duty to Explore Disposition Without Trial
(a) Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. Counsel should be knowledgeable about possible dispositions that are alternatives to trial or imprisonment, including diversion from the criminal process.

(b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution’s evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client’s best interest.
Negotiated Disposition Discussions

(a) As early as practicable, and preferably before engaging in disposition discussions with the prosecutor, defense counsel should discuss with and advise the client about possible disposition options.

(b) Once discussions with the prosecutor begin, defense counsel should keep the accused advised of relevant developments. Defense counsel should promptly communicate and explain to the client any disposition proposals made by the prosecutor, while explaining that presenting the prosecution’s offer does not indicate counsel’s unwillingness to go to trial.

(c) Defense counsel should ensure that the client understands any proposed disposition agreement, including its direct and possible collateral consequences.

(d) Defense counsel should not recommend to a defendant acceptance of a disposition without appropriate investigation. Before accepting or advising a disposition, defense counsel should request that the prosecution disclose any information that tends to negate guilt, mitigates the offense or is likely to reduce punishment.

(e) Defense counsel may make a recommendation to the client regarding disposition proposals, but should not unduly pressure the client to make any particular decision.

(f) Defense counsel should not knowingly make false statements of fact or law in the course of disposition discussions.

(g) Defense counsel should be aware of possible benefits from early cooperation with the government, but should also consider possible disadvantages. Counsel should fully advise the client about the client’s overall interests before recommending any cooperation-dependent disposition.

(h) Defense counsel should not negotiate an aggregate disposition for multiple clients, even if joint representation was initially appropriate under applicable conflict provisions.

(i) Defense counsel should not recommend concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case, unless both clients give their fully-informed consent.
Plea Agreements and Other Negotiated Dispositions

(a) Defense counsel should ensure that any written disposition agreement accurately and completely reflects the precise terms of the agreement, including the prosecution’s promises and the client’s obligations and whether any dismissal of charges will be with or without prejudice to later reinstatement.

(b) During any court hearing regarding a negotiated disposition, defense counsel should ensure that all relevant details of the negotiated agreement are placed on the record, and that the record fully reflects any factors necessary to protect the client’s best interests. Although the presumption is that the record will be public, in some cases the record (or a portion) may be sealed for good cause or as required by applicable rule or statute.

(c) Defense counsel should fully prepare the client for any hearing before a court related to entering or accepting a negotiated disposition, and for any pre-disposition or post-disposition interview conducted by the prosecution or by court agents such as presentence investigators or probation officers. Counsel should ordinarily be present at any such interview to protect the client’s interests there.

(d) In appropriate cases counsel should consider, and with the consent of the client seek, entry of a disposition without a presentence investigation.

(e) Defense counsel should investigate and be knowledgeable about sentencing procedures, law, and alternatives, collateral consequences and likely outcomes, and the practices of the sentencing judge, and advise the client on these topics before permitting the client to enter a negotiated disposition. Counsel should also consider and explain to the client how specific terms of an agreement are likely to be implemented.

(f) If defense counsel believes that prosecutorial conduct or conditions (such as unreasonably speedy deadlines or refusal to provide discovery) have unfairly influenced the client’s disposition decision, defense counsel should bring the circumstances to the attention of the court on the record, unless after consultation with the client, it is agreed that the risk of losing the negotiated disposition outweighs other considerations.

(g) If defense counsel believes that prosecutorial conduct or conditions (such as unreasonably speedy deadlines or refusal to provide discovery) have unfairly influenced the client’s disposition decision, defense counsel should bring the circumstances to the attention of the court on the record, unless after consultation with the client, it is agreed that the risk of losing the negotiated disposition outweighs other considerations.
Opposing Waivers of Rights in Disposition Agreements

(a) Defense counsel should not accept disposition agreement waivers of post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence, unless such claims are based on past instances of such conduct that are specifically identified in the agreement or in the transcript of proceedings that address the agreement. If a proposed disposition agreement contains such a waiver regarding ineffective assistance of counsel, defense counsel should ensure that the defendant has consulted with independent counsel regarding the waiver before agreeing to the disposition.

(b) In addition to claims addressed in (a), defense counsel should ordinarily not agree to waivers of any other important defense rights such as the right to appeal (including sentencing appeals), to receive Brady discovery, or to contest the conviction or sentence in collateral proceedings. In negotiations, counsel should request the prosecution to provide specific, individualized reasons for their inclusion. Counsel should also consult with the client about whether to object to such waivers in court.

(c) Counsel should not recommend acceptance of any disposition agreement waivers without fully assessing and discussing with the client the impact of any waiver on the defendant’s individualized circumstances. Defense counsel should demand that any such waiver include at the very least an exception for a subsequent showing of manifest injustice based on newly discovered evidence, or actual innocence.

(d) Even if the client wishes to agree to such waivers after fully informed consultation, defense counsel should consider challenging the legitimacy of any such waiver if the challenge can be made without harming the client’s interests.
PART VII

COURT HEARINGS AND TRIAL

Standard 4-7.1 Scheduling Court Hearings

Final control over the scheduling of court appearances, hearings and trials in criminal matters should rest with the court rather than the parties. When defense counsel is aware of facts that would affect scheduling, defense counsel should advise the court and, if the facts are case-specific, the prosecutor.
(a) As an officer of the court, defense counsel should support the authority and dignity of the court by adherence to codes of professionalism and by manifesting a courteous and professional attitude toward the judge, opposing counsel, witnesses, jurors, courtroom staff and others. In court as elsewhere, the defense counsel should not display or act out of any improper or unlawful bias.

(b) In all contacts with judges, defense counsel should maintain a professional and independent relationship. Defense counsel should not engage in unauthorized ex parte discussions with, or submission of material to, a judge relating to a particular matter which is, or is likely to be, before the judge. With regard to generalized matters requiring judicial discussion (for example, case-management or administrative matters), defense counsel should invite a representative prosecutor to join in the discussion to the extent practicable.

(c) When ex parte communications or submissions are authorized, defense counsel should inform the court of material facts known to counsel (other than those protected by a valid privilege), including facts that are adverse, sufficient to enable the court to make an informed decision. Except when non-disclosure is authorized, counsel should notify opposing counsel that an ex parte contact has occurred, without disclosing its content unless permitted.

(d) When court is in session, unless otherwise permitted by the court, defense counsel should address the court and should not address other counsel directly on any matter relating to the case.

(e) In written filings, defense counsel should respectfully evaluate and respond in an appropriate manner to opposing counsel’s arguments and representations, and avoid unnecessary personalized disparagement.

(f) Defense counsel should ordinarily comply promptly and civilly with a court’s orders. If defense counsel considers an order to be significantly erroneous or prejudicial, counsel should ensure that the record adequately reflects the events. Defense counsel has a right to make respectful objections and reasonable requests for reconsideration, and to seek other relief as the law permits. If a judge prohibits making an adequate objection, proffer, or record, counsel may take other lawful steps to protect the client’s rights.

(g) Defense counsel should develop and maintain courteous and civil working relationships with judges and prosecutors, and should cooperate with them in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system. Defense counsel should cooperate with courts and organized bar associations in developing codes of professionalism and civility, and should abide by such codes that apply in their jurisdiction.
Standard 4-7.3 Selection of Jurors

(a) Defense counsel should be aware of legal standards that govern the selection of jurors, and be prepared to discharge effectively the defense function in the selection of the jury, including raising appropriate issues concerning the method by which the jury panel was selected and exercising challenges for cause and peremptory challenges.

(b) Defense counsel should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, or applicable rules of the jurisdiction or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity. Defense counsel should consider challenging a prosecutor’s peremptory challenges that appear to be based on such criteria.

(c) In cases in which defense counsel conducts a pretrial investigation of the background of potential jurors, the investigative methods used should not harass, intimidate, unduly embarrass, or invade the privacy of potential jurors. Absent special circumstances, such investigation should be restricted to review of records and sources of information already in existence and to which access is lawfully allowed.

(d) The opportunity to question jurors personally should be used solely to obtain information relevant to the well-informed exercise of challenges. Defense counsel should not seek to commit jurors on factual issues likely to arise in the case, or to suggest facts or arguments that the defense counsel reasonably should know are likely to be barred at trial. Voir dire should not be used to argue counsel’s case to the jury, or to unduly ingratiate counsel with the jurors.

(e) During voir dire, defense counsel should seek to minimize any undue embarrassment or invasion of privacy of potential jurors, for example by seeking to inquire into sensitive matters outside the presence of other potential jurors, while still enabling fair and efficient juror selection.

(f) If the court does not permit voir dire by counsel, defense counsel should provide the court with suggested questions in advance if possible, and request specific follow-up questions during the selection process when necessary to ensure fair juror selection.

(g) If defense counsel has reliable information that conflicts with a potential juror’s responses, or that reasonably would support a “for cause” challenge by any party, defense counsel should inform the court and, unless the court orders otherwise, the prosecutor.

(h) If defense counsel has reliable information that conflicts with a potential juror’s responses, or that reasonably would support a “for cause” challenge by any party, defense counsel should inform the court and, unless the court orders otherwise, the prosecutor.
Standard 4-7.4 Relationship With Jurors

(a) Defense counsel should not communicate with persons counsel knows to be summoned for jury duty or impaneled as jurors, prior to or during trial, other than in the lawful conduct of courtroom proceedings. Defense counsel should avoid even the appearance of improper communications with jurors, and minimize any out-of-court proximity to or contact with jurors. Where out-of-court contact cannot be avoided, counsel should not communicate about or refer to the specific case.

(b) Defense counsel should treat jurors with courtesy and respect, while avoiding a show of undue solicitude for their comfort or convenience.

(c) After discharge of a juror, defense counsel should avoid contacts that may harass or embarrass the juror, that criticize the jury’s actions or verdict, or that express views that could otherwise adversely influence a juror’s future jury service. Defense counsel should know and comply with applicable rules and law governing the subject.

(d) After a jury is discharged, defense counsel may, if no statute, rule or order prohibits such action, communicate with jurors to investigate whether a verdict may be subject to legal challenge, or to evaluate counsel’s performance for improvements in the future. Counsel should consider requesting the court to instruct the jury that, if it is not prohibited by law, it is not improper for jurors to discuss the case with the lawyers, although they are not required to do so. Any post-discharge communication with a juror should not disparage the criminal justice system and the jury trial process, and should not express criticism of the jury’s actions or verdict.

(e) Defense counsel who learns reasonably reliable information that there was a problem with jury deliberations or conduct that could support an attack on the client’s judgment of conviction and that is recognized as potentially valid in the jurisdiction, should promptly report that information to the appropriate judicial officer and, unless the court orders otherwise, to the prosecution.

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Standard 4-7.5 Opening Statement at Trial

(a) Defense counsel should be aware of the importance of an opening statement, and should ordinarily give an opening statement immediately after the prosecution’s, before the presentation of evidence begins. Any decision to defer the opening statement should be fully discussed with the client, and a record of the reasons for such decision should be made for the file.

(b) Defense counsel’s opening statement at trial should be confined to a fair statement of the case from defense counsel’s perspective, and discussion of evidence that defense counsel reasonably believes in good faith will be available, offered, and admitted. A deferred opening should focus on the defense evidence and theory of the case and not be a closing argument.

(c) Defense counsel’s opening statement should be made without expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion, or personal attacks on opposing counsel.

(d) When defense counsel has reason to believe that a portion of the opening statement may be objectionable, counsel should raise that point with opposing counsel and, if necessary, the court, in advance. Similarly, visual aids or exhibits that defense counsel intends to use during opening statement should be shown to the prosecutor in advance.

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Standard 4-7.6 Presentation of Evidence

(a) Defense counsel has no obligation to present evidence, and should always consider, in consultation with the client, whether a decision not to present evidence may be in the client’s best interest. In making this decision, defense counsel should consider the impact of any evidence the defense would present and the potential damage that prosecution cross-examination or a rebuttal case could do, as well as the quality of the prosecution’s evidence.

(b) Defense counsel should not knowingly offer false evidence for its truth, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of material falsity in evidence offered by the defense, unless the court or specific authority in the jurisdiction otherwise permits.

(c) If defense counsel reasonably believes that there has been misconduct by opposing counsel, a witness, the court or other persons that affects the fair presentation of the evidence, defense counsel should challenge the perceived misconduct by appealing or objecting to the court or through other appropriate avenues, and not by engaging in retaliatory conduct that defense counsel knows is improper.

(d) Defense counsel should not bring to the attention of the trier of fact matters that defense counsel knows to be inadmissible, whether by offering or displaying inadmissible evidence, asking legally objectionable questions, or making impermissible comments or arguments. If defense counsel is uncertain about the admissibility of evidence, counsel should seek and obtain resolution from the court before the hearing or trial if possible, and reasonably in advance of the time for proffering the evidence before a jury.

(e) Defense counsel should exercise strategic judgment regarding whether to object or take exception to evidentiary rulings that are materially adverse to the client, and not make every possible objection. Defense counsel should not make objections without a reasonable basis, or for improper reasons such as to harass or to break the flow of opposing counsel’s presentation. Defense counsel should make an adequate record for appeal, and consider the possibility of an interlocutory appeal regarding significant adverse rulings if available.

(f) Defense counsel should not display tangible evidence (and should object to such display by the prosecutor), until it is admitted into evidence, except insofar as its display is necessarily incidental to its tender, although counsel may seek permission to display admissible evidence during opening statement. Defense counsel should avoid displaying even admitted evidence in a manner that is unduly prejudicial.
(a) Defense counsel should conduct the examination of witnesses fairly and with due regard for dignity and legitimate privacy concerns, and without seeking to intimidate or humiliate a witness unnecessarily.

(b) Defense counsel’s belief or knowledge that a witness is telling the truth does not preclude vigorous cross-examination, even though defense counsel’s cross-examination may cast doubt on the testimony.

(c) Defense counsel should not call a witness in the presence of the jury when counsel knows the witness will claim a valid privilege not to testify. If defense counsel is unsure whether a particular witness will claim a privilege to not testify, counsel should alert the court and the prosecutor in advance and outside the presence of the jury.

(d) Defense counsel should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.
Standard 4.7.8  Closing Argument to the Trier of Fact

(a) In closing argument to a jury (or to a judge sitting as trier of fact), defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should, to the extent time permits, review the evidence in the record before presenting closing argument. Defense counsel should not knowingly misstate the evidence in the record, or argue inferences that counsel knows have no good-faith support in the record.

(b) Defense counsel should not argue in terms of counsel’s personal opinion, and should not imply special or secret knowledge of the truth or of witness credibility.

(c) Defense counsel should not make arguments calculated to appeal to improper prejudices of the jury.

(d) Defense counsel should not argue to the jury that the jury should not follow its oath to consider the evidence and follow the law.

(e) Defense counsel may respond fairly to arguments made in the prosecution’s initial closing argument. Defense counsel should object and request relief from the court regarding prosecution arguments it believes are improper, rather than responding with arguments that counsel knows are improper.

(f) If the prosecution is permitted a rebuttal argument, defense counsel should craft the defense closing argument to anticipate the government’s rebuttal. If defense counsel believes the prosecution’s rebuttal closing argument is or was improper, defense counsel should timely object and consider requesting relief from the court, including an instruction that the jury disregard the improper portion of the argument or an opportunity to reopen argument and respond before the factfinder.
When before a jury, defense counsel should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience or are matters of which a court clearly may take judicial notice, or are facts that counsel reasonably believes will be entered into the record at that proceeding. In a nonjury context counsel may refer to extra-record facts relevant to issues about which the court specifically inquires, but should note that they are outside the record.
Comments by Defense Counsel After Verdict or Ruling

(a) Defense counsel may publicly express respectful disagreement with an adverse court ruling or jury verdict, and may indicate that the defendant maintains innocence and intends to pursue lawful options for review. Defense counsel should refrain from public criticism of any participant. Public comments after a verdict or ruling should be respectful of the legal system and process.

(b) Defense counsel may publicly praise a favorable court verdict or ruling, compliment participants, supporters, and others who aided in the matter, and note the social value of the ruling or event. Defense counsel should not publicly gloat or seek personal aggrandizement regarding a verdict or ruling.
Defense counsel should move, outside the presence of the jury, for acquittal after the close of the prosecution’s evidence and at the close of all evidence, and be aware of applicable rules regarding waiver and preservation of issues when no or an inadequate motion is made.
PART VIII
POST-TRIAL MOTIONS AND SENTENCING

Standard 4-8.1 Post-Trial Motions

(a) Defense counsel should know the relevant rules governing post-trial motions and, if the trier of fact renders a judgment of guilty, timely present all motions necessary to protect the client’s rights, including the defendant’s right to appeal all aspects of the case. This should ordinarily include a motion for acquittal notwithstanding a verdict, and counsel should consider the strategic value of a motion for a new trial. Defense counsel should file only those motions that have a non-frivolous legal basis.

(b) Unless otherwise agreed or provided by law, defense counsel should ordinarily continue to represent the client in post-trial proceedings in the trial court. Defense counsel should also consider, however, whether the client’s best interests would be served by substitution of new counsel for post-trial motions.

(c) If a post-trial motion is based on ineffective assistance of counsel, defense counsel should seek to withdraw in accordance with the law regarding withdrawal and aid the client in obtaining substitute counsel.
After a guilty verdict and before sentencing, defense counsel should, in consultation with the client, reassess prior decisions made in the case, whether by counsel or others, in light of all changed circumstances, and pursue options that now seem appropriate, including possible motions to set or reduce bail or conditions, and possible cooperation with the prosecution if in the client’s best interests.
Standard 4-8.3  
(a) Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. Defense counsel should become familiar with the client’s background, applicable sentencing laws and rules, and what options might be available as well as what consequences might arise if the client is convicted. Defense counsel should be fully informed regarding available sentencing alternatives and with community and other resources which may be of assistance in formulating a plan for meeting the client’s needs. Defense counsel should also consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate.

(b) Defense counsel’s preparation before sentencing should include:

1. Learning the court’s practices in exercising sentencing discretion; the collateral consequences of different sentences; and the normal pattern of sentences for the offense involved.
2. Including any guidelines applicable for either sentencing and, when applicable, parole.
3. The consequences (including reasonably foreseeable collateral consequences) of potential dispositions should be explained fully by defense counsel to the client.

(c) Defense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused. Defense counsel should ensure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Defense counsel should cooperate with court presentence officers unless, after consideration and consultation, it appears not to be in the best interests of the client. Unless prohibited, defense counsel should attend the probation officer’s interview with the accused, and in any case, defense counsel should ordinarily seek to meet in person with the probation officer to discuss the case.

(d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, counsel should suggest alternative programs of service or rehabilitation or other non-imprisonment options, based on defense counsel’s exploration of employment, educational, and other opportunities made available by community services.

(e) If a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary. Defense counsel should either provide the client with a copy or (if copying is not allowed) discuss counsel’s knowledge of its contents with the client. In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the court’s presentence report, and should seek discovery or relevant information from governmental agencies or other third-parties if necessary.

(f) Defense counsel should alert the accused to the right of allocution. Counsel should consider with the client the potential benefits of the judge hearing a personal

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statement from the defendants as contrasted with the possible dangers of making a statement that could adversely impact the sentencing judge’s decision or the merits of an appeal.

(g) If a sentence of imprisonment is imposed, defense counsel should seek the court’s assistance, including an on-the-record statement by the court if possible, recommending the appropriate place of confinement and types of treatment, programming and counseling that should be provided for the defendant in confinement.

(h) Once the sentence has been announced, defense counsel should make any objections necessary for the record, seek clarification of any unclear terms, and advise the client of the meaning and effects of the judgment, including any known collateral consequences. Counsel should also note on the record the intention to appeal, if that decision has already been made with the client.

(i) If the client has received an imprisonment sentence and an appeal will be taken, defense counsel should determine whether bail pending appeal is appropriate and, if so, request it.

(j) If a sentence of imprisonment is imposed, defense counsel should seek the court’s assistance, including an on-the-record statement by the court if possible, recommending the appropriate place of confinement and types of treatment, programming and counseling that should be provided for the defendant in confinement.

(k) Once the sentence has been announced, defense counsel should make any objections necessary for the record, seek clarification of any unclear terms, and advise the client of the meaning and effects of the judgment, including any known collateral consequences. Counsel should also note on the record the intention to appeal, if that decision has already been made with the client.

(l) If the client has received an imprisonment sentence and an appeal will be taken, defense counsel should determine whether bail pending appeal is appropriate and, if so, request it.
PART IX

APPEALS AND POST-CONVICTION REMEDIES

Standard 4-9.1 Preparing to Appeal

(a) If a client is convicted, defense counsel should explain to the client the meaning and consequences of the court’s judgment and the client’s rights regarding appeal. Defense counsel should provide the client with counsel’s professional judgment as to whether there are meritorious grounds for appeal and the possible, and likely, results of an appeal. Defense counsel should also explain to the client the advantages and disadvantages of an appeal including the possibility that the government might cross-appeal, and the possibility that if the client prevails on appeal, a remand could result in a less favorable disposition. Counsel should also be familiar with, and discuss with the client, possible interactions with other post-conviction procedures such as habeas corpus rules and actions.

(b) The ultimate decision whether to appeal should be the client’s. Defense counsel should consider engaging or consulting with an expert in criminal appeals in order to determine issues related to making a decision to appeal.

(c) Defense counsel should take whatever steps are necessary to protect the client’s rights of appeal, including filing a timely notice of appeal in the trial court, even if counsel does not expect to continue as counsel on appeal.

(d) Defense counsel should explain to the client that the client has a right to counsel on appeal (appointed, if the client is indigent), and that there are lawyers who specialize in criminal appeals. Defense counsel should candidly explore with the client whether trial counsel is the appropriate lawyer to represent the client on appeal, or whether a lawyer specializing in appellate work should be consulted, added or substituted.

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Standard 4-9.2  Counsel on Appeal

(a) Appellate defense counsel should seek the cooperation of the client’s trial counsel in the evaluation of potential appellate issues. A client’s trial counsel should provide such assistance as is possible, including promptly providing the file of the case to appellate counsel.

(b) When evaluating the case for appeal, appellate defense counsel should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a trial court. Counsel should consider raising on appeal even issues not objected to below or waived or forfeited, if in the best interests of the client.

(c) After examining the record and the relevant law, counsel should provide counsel’s best professional evaluation of the issues that might be presented on appeal. Counsel should advise the client about the probable and possible outcomes and consequences of a challenge to the conviction or sentence.

(d) Even if a client has agreed to a waiver of appeal, counsel should follow a client’s direction to file an appeal if there are non-frivolous grounds to argue that the waiver is not binding or that the appeal should otherwise be heard.

(e) Appellate defense counsel should not file a brief that counsel reasonably believes is devoid of merit. However, counsel should not conclude that a defense appeal lacks merit until counsel has fully examined the trial court record and the relevant legal authorities. If appellate counsel does so conclude, counsel should fully discuss that conclusion with the client, and explain the “no merit” briefing process applicable in the jurisdiction if available. Counsel should endeavor to persuade the client to abandon a frivolous appeal, and to eliminate appellate contentions lacking in substance. If the client ultimately demands that a no-merit brief not be filed, defense counsel should seek to withdraw.

(f) If the client chooses to proceed with a non-frivolous appeal against the advice of counsel, counsel should present the appeal. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

(g) Appellate counsel should discuss with the client the arguments to present in appellate briefing and at argument, and should diligently attempt to accommodate the client’s wishes. If the client desires to raise an argument that is colorable, counsel should work with the client to an acceptable resolution regarding the argument. If appellate counsel decides not to brief all of the issues that the client wishes to include, appellate counsel should inform the client of pro se briefing rights and consider providing the appellate court with a list of additional issues the client would like to present.

(h) In a jurisdiction that has an intermediate appellate court, appellate defense counsel should ordinarily continue to represent the client after the intermediate court
renders a decision if further appeals are likely, unless a retainer agreement provides otherwise, new counsel is substituted, or a court permits counsel to withdraw. Similarly, unless a retainer agreement provides otherwise, new counsel is substituted, or a court permits counsel to withdraw, appellate counsel should ordinarily continue to represent the client through all stages of a direct appeal, including review in the United States Supreme Court.

(i) If trial defense counsel will not remain as appellate counsel, trial counsel should notify the client of any applicable time limits, act to preserve the client’s appellate rights if possible, and cooperate and assist in securing qualified appellate counsel. If appellate counsel’s representation ends but further appellate review is possible, appellate counsel should advise the client of further options and deadlines, such as for a petition for certiorari.

(j) When the prosecution appeals a ruling that was favorable to the client, defense counsel should analyze the issues and possible implications for the client and act to zealously protect the client’s interests. If the prosecution is appealing, defense counsel should consider adding or consulting with an appellate expert about the matter.

(k) When the law permits the filing of interlocutory appeals or writs to challenge adverse trial court rulings, defense counsel should consider whether to file an interlocutory appeal and, after consultation with the client, vigorously pursue such an appeal if in the client’s interest. If the prosecution files an interlocutory appeal, defense counsel should act in accordance with the foregoing paragraphs.

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Standard 4-9.3 Conduct of Appeal

(a) Before filing an appellate brief, appellate defense counsel should consult with
the client about the appeal, and seek to meet with the client unless impractical.

(b) Appellate counsel should be aware of opportunities to favorably affect or
resolve a defendant’s appeal by motions filed in the appellate court, before filing a merits
brief.

(c) Counsel should understand the complex rules that govern whether arguments
listed or omitted on direct appeal can limit issues available in later collateral proceedings,
and not unnecessarily or unknowingly abandon arguments that should be preserved.
Counsel should explicitly label federal constitutional arguments as such, in order to
preserve later federal litigation options.

(d) Appellate counsel should be aware of applicable rules relating to securing all
necessary record documents, transcripts, and exhibits, and ensure that all such items
necessary to effectively prosecute the appeal are properly and timely ordered. Before
filing the brief, appellate counsel should ordinarily examine the docket sheet, all
transcripts, trial exhibits and record documents, not just those designated by another
lawyer or the client. Counsel should consider whether, and how appropriately, to
augment the record with any other matters, documents or evidence relevant to effective
prosecution of the client’s appeal. Appellate counsel should seek, by appropriate motion,
filed in either the trial or the appellate court, to make available for the appeal any
necessary, relevant extra-record matters.

(e) Appellate counsel should be diligent in perfecting appeals and expediting
their prompt submission to appellate courts, and be familiar with and follow all
applicable appellate rules, while also protecting the client’s best interests on appeal.

(f) Appellate counsel should be accurate in referring to the record and the
authorities upon which counsel relies in the presentation to the court of briefs and oral
argument. Appellate counsel should present directly adverse authority in the controlling
jurisdiction of which counsel is aware and that has not been presented by other counsel in
the appeal.

(g) Appellate counsel should not intentionally refer to or argue on the basis of
facts outside the record on appeal, unless such facts are matters of common public
knowledge based on ordinary human experience or are other matters of which the court
properly may take judicial notice.

(h) If the appeal is set for oral argument, appellate counsel should explain to an
out-of-custody client that the client is permitted to attend, and that attending the argument
may have certain strategic advantages and disadvantages. If after consultation the client
desires to attend the argument, counsel should help the client to be present. If the client

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facts outside the record on appeal, unless such facts are matters of common public
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out-of-custody client that the client is permitted to attend, and that attending the argument
may have certain strategic advantages and disadvantages. If after consultation the client
desires to attend the argument, counsel should help the client to be present. If the client
is in custody, counsel should request a tape or transcript of the oral argument, and consider filing a motion for the government to transport client to the argument.

(i) Appellate counsel should be aware of local rules and practices that may apply to oral arguments, including, for example, rules that apply to the submission of subsequent authorities or the use of demonstrative aids or exhibits during argument.

(j) If appellate counsel’s study of the record reveals that an ineffective assistance of trial counsel claim should be made, appellate counsel should weigh the advantages and disadvantages of raising an ineffective assistance claim on the existing record versus pursuing such a claim in the trial court either before, or after, the appeal is heard.

Counsel should also learn the rules, if any, of the particular jurisdiction regarding this issue.

(k) Appellate counsel should consider, in preparing the appellate briefing, whether there might be any potential grounds for relief using other post-conviction remedies (such as habeas corpus), and consult with the client regarding timing and who might represent the client in such actions.
(a) When defense counsel becomes aware of evidence or law tending to show actual innocence of a client or former client, or unlawfulness of such client’s conviction or sentence, counsel has a duty to act. This duty applies even after counsel’s representation is ended. Counsel must consider, and act in accordance with, duties of confidentiality. If such a former client currently has counsel, former counsel may discharge the duty by alerting the client’s current counsel.

(b) If newly discovered evidence or law (whether due to a change in the law or not) relevant to the validity of the client’s conviction or sentence, or evidence or law tending to show actual innocence of the client, comes to the attention of the client’s current defense counsel at any time after trial, counsel should promptly:

(i) evaluate the information, investigate if necessary, and determine what potential remedies are available;

(ii) advise and consult with the client; and

(iii) determine what action if any to take.

(c) Counsel should determine applicable deadlines for the effective use of such evidence or law, including federal habeas corpus deadlines, and timely act to preserve the client’s rights. Counsel should determine whether -- and if so, how best -- to notify the prosecution and court of such evidence.
Standard 4-9.5 Post-Appellate Remedies

(a) Once a defendant’s direct appellate avenues have been exhausted, appellate counsel is not obligated to represent the defendant in a post-appellate collateral proceeding unless counsel has agreed, or has been appointed, to do so. But counsel should still reasonably advise and act to protect the client’s possible collateral options.

(b) If appellate counsel believes there is a reasonable prospect of a favorable result if collateral proceedings are pursued, counsel should explain to the client the advantages and disadvantages of pursuing collateral proceedings, and any timing deadlines that apply. Appellate defense counsel should assist the client to the extent practicable in locating competent counsel for any post-appellate collateral proceedings.

(c) Post-appellate counsel should seek the cooperation of the client’s prior counsel in the evaluation and briefing of potential post-conviction issues. Prior counsel should provide such assistance as is possible, including providing the file or copies of the file to post-appellate counsel.
Standard 4-9.6 Challenges to the Effectiveness of Counsel

(a) If appellate or post-appellate counsel is satisfied after appropriate investigation and legal research that another defense counsel who served in an earlier phase of the case did not provide effective assistance, new counsel should not hesitate to seek relief for the client.

(b) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, counsel should explain this conclusion to the client. Unless the client clearly wants counsel to continue, counsel in this situation should seek to withdraw from further representation of the client with an explanation to the court of the reason, consistent with the duty of confidentiality to the client. Counsel should recommend that the client consult with independent counsel if the client desires counsel to continue with the representation. Counsel should continue with the representation only if the client so desires after informed consent and such further representation is consistent with applicable conflict of interest rules.

(c) Defense counsel whose conduct in a criminal case is drawn into question is permitted to testify concerning the matters at issue, and is not precluded from disclosing the truth concerning the matters raised by his former client, even though this involves revealing matters which were given in confidence. Former counsel must act consistently with applicable confidentiality rules, and ordinarily may not reveal confidences unless necessary for the purposes of the proceeding and under judicial supervision.

(d) In a proceeding challenging counsel’s performance, counsel should not rely on the prosecutor to act as counsel’s lawyer in the proceeding, and should continue to consider the former client’s best interests.

-- END of Proposed Revisions to the DEFENSE FUNCTION Standards --
The idea of developing the *ABA Standards for Criminal Justice* was formulated in 1963. The various chapters in the first edition of the Standards were approved by the ABA House of Delegates between 1968 and 1973. They were described by Chief Justice Warren Burger as the “single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history”.

Beginning in 1978, the ABA House of Delegates approved revisions to the Standards. Publications of its second edition occurred in 1980. Since that time, periodic changes have been made to the Standards and publication of these Prosecution Function and Defense Function Standards would begin the Fourth edition of the Standards.

**Overview of the Recommended Changes**

It has been over 20 years since the third edition of the Prosecution Function and Defense Function Standards were passed by the ABA House of Delegates. In that time there have been many changes in the way that criminal cases are tried. These updated Standards reflect these changes and create best practices in consideration of those changes. In addition to several new Standards noted in the Table of Contents, every Standard has been revised since the previous edition.


These chapters covers the function of prosecutors and defense counsel. The recommended revisions represent a comprehensive examination of Chapter Three and Four of the *ABA Standards for Criminal Justice*, Third Edition, now more than two decades old.

**Background**

The proposed black letter standards in these chapters emerge from an effort of more than eight years, begun with the work of an updating task force in March 2006. The Task Force was appointed by the Criminal Justice Standards Committee, a Standing Committee of the Criminal Justice Section. The Task Force, which focused on the standards relating to the prosecution and defense function first met in March 2006 to chart direction. After 11 meetings the Task Force submitted a draft to the Criminal Justice Section Standards Committee in May 2009. After 13 Standards Committee meetings, the draft was submitted to the Criminal Justice Section Council for review at the Spring 2013 Meeting. After four Council meetings the Criminal Justice Section Council approved these revised Standards at its April 2014 meeting.

The final proposed standards are, accordingly, the result of careful drafting and extensive review by representatives of all segments of the criminal justice system—judges, prosecutors, defense counsel, court personnel and academics active in criminal justice teaching and research. Circulation of the standards to a wide range of outside expertise also produced a rich array of comment and criticism which has greatly strengthened the final product.

**Proposed Amendments**
Since these chapters were last amended, there have been dramatic developments in the area of legal ethics. Thousands of new judicial decisions have been handed down. Hundreds of new books and articles touching upon the ethics of our profession have been published. Indeed, the proper role and function of prosecutors and defense counsel has been a particularly topical focus of discussion, debate and controversy in recent years.


For a comparison of these proposed standards with the current Prosecution and Defense Function Standards please see:
http://www.americanbar.org/groups/criminal_justice/StandardsComparison­Prosecution.html

**Conclusion**

The Criminal Justice Section urges that the House of Delegates adopt the proposed amendments to the Standards on Prosecution Function, which will be published as the Fourth Edition of Chapter Three of the *ABA Standards for Criminal Justice*.

Respectfully submitted,

Mathias H. Heck, Jr.
Criminal Justice Section
February 2014
1. **Summary of Resolution(s):** The Criminal Justice Section recommends that the ABA adopt the black letter standards, dated August 2014, including chapter three “The Prosecution Function” and chapter 4, “The Defense Function” of the *American Bar Association Standards for Criminal Justice*.

2. **Approval by Submitting Entity.** This resolution was approved by the Criminal Justice Section Council at its Spring meeting on April 12, 2014.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** Approval of this resolution would supplant resolutions 104DMidyear 1991 and 101A Midyear 1992.

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

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

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

8. **Cost to the Association.** (Both direct and indirect costs) No cost to the Association is anticipated.

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

10. **Referrals.**
At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2014 Annual Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

**Standing Committees**
- Ethics and Professional Responsibility
- Federal Judicial Improvements
- Federal Judiciary
- Governmental Affairs
- Judicial Independence
- Law and National Security
- Legal Aid and Indigent Defendants

**Special Committees and Commissions**
- Center for Human Rights
- Center for Racial and Ethnic Diversity
- Coalition on Racial and Ethnic Justice
- Commission on Domestic and Sexual Violence
- Commission on Immigration
- Commission on Youth at Risk
- Death Penalty Representation Project

**Sections, Divisions**
- Government and Public Sector Lawyers Division
- Individual Rights and Responsibilities
- Judicial Division
- Law Student Division
- Litigation
- Solo, Small Firm and General Practice Division
- State and Local Government Law
- Young Lawyers Division

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

Kevin Scruggs  
Director, Criminal Justice Standards Project  
American Bar Association  
1050 Connecticut Ave. NW, Suite 400  
Washington, DC 20036  
Phone: 202-662-1503  
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Email: kevin.scruggs@americanbar.org
12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Stephen A. Salzburg, Section Delegate
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Email: neslaw@sonnett.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Criminal Justice Section recommends that the ABA adopt the black letter standards, dated August 2014, to chapter three "The Prosecution Function" and chapter 4, "The Defense Function" of the American Bar Association Standards for Criminal Justice.

2. Summary of the Issue that the Resolution Addresses

Since these chapters were last amended, there have been dramatic developments in the area of legal ethics. Thousands of new judicial decisions have been handed down. Hundreds of new books and articles touching upon the ethics of our profession have been published. Indeed, the proper role and function of defense counsel has been a particularly topical focus of discussion, debate and controversy in recent years.

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

The Fourth Edition of the Standards substantively revises all of the Standards in the previous edition. In addition, this edition proposes 21 new Prosecution Function Standards including standards handling incriminating evidence, plea agreements and improper bias. This edition also proposes 21 new Defense Function Standards including standards on handling incriminating evidence, plea agreements and improper bias.

The Criminal Justice Section urges prompt consideration of the proposed Standards by the House due to the ABA’s continuing obligation to see to it that the ABA Standards for Criminal Justice reflect current developments in the law.

4. Summary of Minority Views

None are known.
RESOLVED, That the American Bar Association adopts amendments to the 2012 ABA Civil Immigration Detention Standards, dated August 2014.
This resolution amends the ABA Standards to include provisions that: 1) limit the use of segregation, and particularly solitary confinement, except as a last resort where no other alternative is available; 2) restrict segregation to the shortest time necessary; 3) urge DHS/ICE to refrain from contracting with facilities whose only means of segregation is solitary confinement; 4) require that a resident not be placed in separation based only on age, gender identity, sexual orientation, mental health status or condition, pregnancy, or disability; 5) limit the duration of administrative and disciplinary segregation to 15 days except in extraordinary circumstances; and 6) require and make publicly available an annual report to Congress on each incidence of use, reasons for, and duration of segregation in all immigration detention facilities and whether a timely assessment by ICE as to its suitability was made.

XIII.
ADMINISTRATIVE AND DISCIPLINARY SEPARATION

This section incorporates by reference all protections afforded by the ABA Standards on the Treatment of Prisoners Standard 23-2.7 ("Rationales for long-term segregated housing"), and Standard 23-2.9 ("Procedures for placement and retention in long-term segregated housing"). The subsections below supplement those Standards. In cases where the provisions of those Standards conflict with the subsections below, the subsections below should be followed.

A. Separation Generally

1. DHS/ICE should ensure that facilities have the capacity to separate residents from the general population appropriately for administrative and disciplinary reasons.

2. Separation should be utilized as a last resort, only after consideration of release on recognizance or reassignment into alternatives to detention and all other alternatives to separation, and should be restricted to the shortest time necessary. Solitary confinement, as the most extreme form of separation, should be used only in extraordinary circumstances where no other alternatives are viable. ICE should refrain from contracting with facilities whose only means of separation is solitary confinement.

3. The due process protections available to residents should be proportionate to the frequency with which the resident has been placed previously in separation and the anticipated time in separation.

B. Administrative Separation

1. Administrative separation status is a non-punitive status in which restricted conditions of confinement are required only to ensure the safety of residents or others, the protection of property, or the security or good order of the facility.
2. Residents in administrative separation should not be commingled with residents in disciplinary separation.

3. DHS/ICE should develop and follow written procedures, consistent with this standard, governing the separation of residents. Facilities should provide detailed reasons for placement of an individual in administrative separation. Residents and their attorneys should be provided prompt written notice of administrative separation decisions.

4. Prior to the resident's placement in administrative separation, a facility supervisor should review the case in order to determine whether administrative separation is warranted.

5. Reasons for Placement in Administrative Separation
   a. A resident should be placed in administrative separation when the resident's continued presence in the general population poses a threat to life, property, self, staff, or other residents; for medical reasons; or under other circumstances set forth below. Examples of incidents warranting a resident's assignment to administrative separation may include, but are not limited to, the following:
      i. A resident is awaiting an investigation or a hearing for a violation of facility rules, but only as necessary to protect the security and orderly operation of the facility.
      ii. A resident is a threat to the security of the facility.
      iii. A resident requires protection. Separation may be initiated at the resident's request or by staff in order to protect the resident from harm.
   b. A resident should not be placed in separation based only on age, gender identity, sexual orientation, mental health status or condition, pregnancy, or disability.

6. Duration
   a. The maximum stay in administrative separation while in ICE custody is a total of 15 days, except in extraordinary circumstances. When extraordinary circumstances necessitate the separation of a resident for more than 15 days, the facility shall electronically transmit a written justification to ICE prior to the expiration of the 15-day period.
b. Any situation that warrants extended or repeated placement of the resident in administrative segregation shall be addressed by releasing the resident on recognizance or reassigning the resident to an alternative to detention placement or to another facility that will address the resident’s administrative needs.

7. Review of Resident Status in Administrative Separation

a. DHS/ICE should develop written procedures for the regular review of all residents held in administrative separation, consistent with the procedures specified below.

b. A facility supervisor should conduct a review within 24 hours of the resident’s placement in administrative separation to determine whether separation is still warranted. The review should include an interview with the resident.

c. A written record should be made of the decision and its rationale.

d. A supervisor should conduct an identical review after the resident has spent a total of seven days in administrative separation and every week thereafter, at a minimum.

e. The review should include an interview with the resident, and a written record should be made of the decision and its rationale.

f. A copy of the decision and rationale for each review should be provided to the resident unless, in exceptional circumstances, this provision would jeopardize the facility’s safety, security, or orderly operations. The resident should also be afforded an opportunity to appeal a review decision to DHS/ICE. The appeal should take into account the resident’s views and should result in a written record of the decision and its rationale.

g. A daily report should be kept and reviewed monthly by DHS/ICE that explains decisions to keep a resident in administrative separation.

h. When a resident has been held in administrative separation for more than 15 days cumulatively, the facility should notify DHS/ICE in writing.

C. Disciplinary Separation

1. A resident may be placed in disciplinary separation only by order of the facility administrator, after a hearing in which the resident has been found to have committed a crime or a serious violation of a facility rule, and when alternative dispositions would inadequately regulate the resident’s behavior.

2. Duration
The maximum stay in disciplinary separation is a total of 15 days except in extraordinary circumstances. If facility staff wishes to separate a resident for more than 15 days, the facility staff shall electronically transmit a written justification to ICE prior to expiration of the 15-day period.

3. Review of Resident Status in Disciplinary Separation
   a. DHS/ICE should implement written procedures for the regular review of all disciplinary separation cases, consistent with subsection b:
   b. A security supervisor, or the equivalent, should interview the resident and ascertain the necessity for continued placement in disciplinary separation every seven days.
   c. A security supervisor or the equivalent, should interview the resident daily to determine whether the resident is provided showers, meals, visitation, recreation, law library access, and appropriate treatment in accordance with these standards.

4. The supervisor should document his or her findings after every review.

5. The supervisor should recommend the termination of disciplinary separation upon finding that it is no longer necessary to regulate a resident's behavior.

6. The supervisor may shorten, but not extend, the original term of separation.

7. All review documents should be placed in the resident's detention file.

8. After each formal review regarding continued separation, the resident and his or her attorney should be given a written copy of the reviewing officer's decision and the basis for his or her finding, unless this step would compromise institutional security. If a written copy cannot be delivered, the resident should be advised of the decision orally, and the detention file should so note, identifying the reasons why the notice was not provided in writing.

D. Requirements for Administrative and Disciplinary Separation

1. Requirements generally
   a. Conditions of separation should be based on the amount of supervision required to control a resident and to safeguard the resident, other residents and facility staff.
   b. Residents should be evaluated by a medical professional, including for mental health, prior to placement in separation.

3. Review of Resident Status in Disciplinary Separation
   a. DHS/ICE should implement written procedures for the regular review of all disciplinary separation cases, consistent with subsection b:
   b. A security supervisor, or the equivalent, should interview the resident and ascertain the necessity for continued placement in disciplinary separation every seven days.
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c. Separated residents should be permitted as much time out of their rooms as possible, consistent with good security practices.

d. In every instance, any exceptions to these requirements should be:

i. Made only for the purpose of ensuring resident and staff safety (i.e., not for purposes of punishment);

ii. Approved by a DHS/ICE supervisor;

iii. On a temporary and situational basis, continued only for as long as is justified by threat to the safety or security of the facility, its staff, or resident population; and

iv. Documented in both the facility’s records and the individual resident’s detention file.

2. Special Needs

a. Separated residents should be provided appropriate accommodations and professional assistance for special conditions as needed (e.g., translation and interpretation services; and medical, therapeutic, or mental health treatment), on an equal basis as residents in the general population.

3. Rooms

a. Rooms used for purposes of separation must be appropriately sized, well ventilated, adequately lit, heated/cooled as necessary, and maintained in a sanitary condition at all times in accordance with the standards for general population.

b. Residents should be able to exercise control over lighting in their rooms and should have access to natural light, if the physical plant allows it.

4. Privileges

a. Administrative Separation

i. Residents in administrative separation should receive the same privileges available to residents in the general population, consistent with safety and security considerations for residents and facility staff. They should be provided opportunities to spend time outside their rooms (in addition to the required recreation periods), in order to socialize, watch television and pursue other activities.

b. Disciplinary Separation

i. Residents in disciplinary separation may be subject to more stringent controls, particularly as relates to personal property.
E. Supervisory and Staff Visits

In addition to the direct supervision performed by facility staff:

1. Shift supervisors should review each unit in which separated residents are held and see each resident on a daily basis, including on weekends and holidays.

2. Program staff may visit a separated resident upon the resident’s request.

F. Health Care

This subsection incorporates by reference the provisions of the ABA Standards on the Treatment of Prisoners Standard 23-2.8 (“Segregated housing and mental health”) that pertain to the monitoring of the mental health of residents in segregated housing.

1. Health care personnel should conduct face-to-face medical assessments at least once each day for separated residents. When an assessment creates cause for concern, it should be followed up with a complete evaluation by a qualified medical or mental health professional, and indicated treatment.

2. Residents with serious mental illness should be placed in a setting within or outside of the facility in which appropriate treatment can be provided.

3. Separation should not be viewed or used as treatment for mental health issues.

4. Residents with serious mental illness should not be placed in solitary confinement.

5. Residents with serious mental illness who are separated should be evaluated outside of their cells by a mental health provider at least once every seven days for routine care as well as to determine whether or not continued separation is or will be detrimental to their mental health.

6. Medical visits should be recorded, and any action taken should be documented in a separate logbook and in the individual resident’s detention file.

G. Communications

1. Separated residents should be permitted to write, send and receive letters and other correspondence, in a manner similar to those housed in the facility’s general population.

2. Separated residents should have access to telephones in a manner that is consistent with safety and security requirements. They should be permitted to place calls to attorneys, other legal representatives, courts, embassies,
consulates, and government offices, including the DHS OIG, DHS CRCL, ICE Joint Intake Center, and ICE’s Public Advocate. Telephone access may be denied only as necessary to protect the security of the resident, other residents, or the security or orderly operation of the facility. Denials of telephone use should be documented.

II. Access to Legal Services

1. Separated residents should have access to legal services in accordance with Standard VII. Access to Legal Services, subject only to restrictions necessary to ensure the safety and security of the resident, visitor, or facility staff. A resident’s attorney of record should be notified of any separation within 24 hours.

2. Residents separated for their own protection should be provided access to legal research tools and materials. Such residents may be required to use the law library at separate times from the general population. If such residents do not have equal or equivalent access to the law library, legal materials should be brought to them upon request.

3. Denial of access to the law library should be supported by compelling security concerns; for the shortest period required for security; and fully documented in the facility logbook.

4. The facility administrator should notify DHS/ICE every time access is denied, and documentation, including the rationale for denial, should be placed in the detention file.

5. DHS/ICE and facility staff should notify separated residents in advance of legal orientation presentations and provide these residents an opportunity to attend, except when a particular resident’s attendance poses a security risk. If a separated resident cannot attend for this reason, designated facility staff should make alternative arrangements to offer a separate presentation and individual consultation to the resident.

I. Visitation

1. Separated residents should retain visiting privileges.

2. Separated residents should ordinarily be able to use the visiting room during normal visiting hours. The facility may restrict or disallow visits for separated residents only as necessary to protect the security of the resident or to ensure the security or orderly operation of the facility.

3. When visits are restricted or disallowed, a report should be filed with the facility administrator and DHS/ICE, and made part of the resident’s file.
4. Separated residents in need of protection, as well as violent and disruptive residents, may be prohibited from using the visitation room during normal visitation hours as necessary to protect the resident(s) or the security or orderly operation of the facility. Visits may be disallowed only as necessary to protect the security of the resident(s) or the security or orderly operation of the facility.

J. Access to Religious Services

Separated residents should be permitted to participate in religious practices in accordance with Standard IX. Access to Religious Services, subject to restrictions necessary to protect the safety and security of the resident, visitor, or facility staff, or to ensure the orderly operation of the facility.

K. Reading Materials (Non-Legal)

Separated residents should have access to reading materials, including religious materials.

L. Recreation

1. Separated residents should be offered at least two hours of recreation and exercise per day, outside their rooms and with other residents, scheduled at a reasonable time, at least seven days per week. Such residents should also have access to radio and television.

2. Separated residents should be provided with weather-appropriate equipment and attire where cover is not provided to mitigate inclement weather.

3. Recreation should be denied or suspended only if the resident’s recreational activity may unreasonably endanger safety or security.

4. When a separated resident is deprived of recreation (or any usual authorized items or activity), a written report of the action should be forwarded to the facility administrator. Denial of recreation must be evaluated daily by a shift supervisor.

5. A resident in disciplinary separation may temporarily lose recreation privileges upon a written determination that he or she poses an unreasonable risk to the facility, to himself or herself, or to others.

6. When recreation privileges are suspended, the disciplinary panel or facility administrator should provide the resident with written notification, including the reason(s) for the suspension, any conditions that must be met before restoration of privileges, and the duration of the suspension provided the requisite conditions are met for its restoration.

7. The denial of recreation privileges should be included as part of the regular reviews required for all separated residents. The reviewer(s) should state, in
writing, whether the resident continues to pose a threat to self, others, or facility security and, if so, how.

8. Recreation privileges should be denied for more than seven days only in extreme circumstances and with the written concurrence of the facility administrator and a health care professional.

9. The facility should notify DHS/ICE in writing when a resident is denied recreation privileges for more than seven days.

M. Reporting

1. DHS/ICE should collect and compile information regarding each incidence of use, reasons for, and duration of separation in all immigration detention facilities and whether ICE made a timely suitability assessment.

2. DHS/ICE should submit to Congress, and make available to the public, an annual report containing such information no more than 30 days after the end of the reporting period.
"On any given day, approximately 300 immigrants are held in segregation at the 50 largest detention facilities" in the United States. Although the purpose of immigration detention is not punishment—detainees are simply being held pending hearing before an immigration judge or removal—immigration detention facilities routinely put detainees into segregation. Segregation is defined as confinement separate from the general population, for administrative or disciplinary reasons. It frequently takes the form of solitary confinement, in which immigration detainees are held in an individual or double cell isolated from the general population for 23 hours a day. In a report published in September 2012 by the National Immigrant Justice Center, investigators found that many immigration detention centers and county jails put immigration detainees in segregation without any meaningful avenue for appeal. Although facility administrators often describe segregation as a ‘protective’ status for vulnerable populations, more often it is actually used as improper punishment. As Dr. Lisa Guenther of Vanderbilt University observes: “There are many ways to destroy a person, but the simplest and most devastating might be segregation.”

Background

Immigrants are held in immigration detention during the pendency of their immigration court proceedings or to effectuate removal if it is ordered. The purpose of detention is administrative, not punitive. The Department of Homeland Security (DHS) and its sub-agency Immigration and Customs Enforcement (ICE), which is tasked with interior immigration enforcement, oversees immigrant detention in the United States. Immigrants are held in federal facilities under contract with private companies; county jails either county-run or contracted out; or privately owned and privately operated facilities. Most immigration centers are not dedicated facilities, meaning they hold both immigrants and individuals in the criminal justice system. Immigration detention facilities hold a wide range of individuals including asylum seekers; lawful permanent residents; people with mental health conditions; families with minor children; lesbian, gay, bisexual, and transgender (LGBT) individuals; elderly immigrants; and survivors of human trafficking, the majority of which have no criminal record.

1 Ian Urbina & Catherine Rentz, Immigrants Held in Solitary Cells, Often for Weeks, N.Y. TIMES, Mar. 24, 2013, § 1, at 1.
2 ABA Civil Detention Standards, at 51.
4 Id; see also Immigrants in Solitary, N.Y. TIMES, Apr. 2, 2013, at A18 (editorial)(describing solitary confinement as “arbitrary cruelty” and noting that ICE has used solitary confinement for the “detainees’ own protection, if they are as [being] vulnerable to abuse, perhaps for being gay”).
The American Bar Association (ABA) has been a longstanding advocate for ensuring access to justice for immigrant detainees and in promoting fair and humane treatment for persons in custody. Most recently, the ABA House of Delegates approved the adoption of Civil Immigration Detention Standards ("ABA Standards") to help DHS/ICE transition to a model of civil rather than criminal detention.\(^7\)

The ABA Standards provide guidelines for immigrant detention and segregation.\(^8\) Importantly, the ABA Standards provide that at no time should segregation limit or deny access to healthcare, nutrition, visitation rights, or access to outdoor recreation.\(^9\) The ABA Standards further provide that a detainee placed in administrative or disciplinary segregation should be provided with a written review and reason for the placement, and when segregated, must receive health assessments at least once per day.\(^10\)

DHS/ICE has also developed Performance-Based National Detention Standards (PBNDS), which set the national standards for DHS/ICE-operated facilities. Like the ABA Standards, the 2011 PBNDS mandate daily face-to-face health assessments for individuals in segregation.\(^11\) Unfortunately, the 2011 PBNDS are not in place in the majority of facilities used by ICE and where they are in place, they are not enforced. In addition, although current standards are an improvement over prior guidelines, they are not comprehensive enough to protect vulnerable populations from abuse.\(^12\)

In addition, DHS/ICE released a new directive on segregation in September 2013 (the Segregation Directive).\(^13\) The Segregation Directive requires all detention facilities that contract with ICE to report cases in which individuals are held in segregation within a specified time period. The directive explicitly states that segregation should be used only as a last resort, and that release from detention should be considered for individuals who are not subject to mandatory custody laws. In addition, the directive includes special reporting requirements for vulnerable populations, including people with mental illness; severe medical illnesses or disabilities; pregnant or nursing women; elderly individuals; and those susceptible to harm due to segregation.\(^14\)

7 ABA House of Delegates, Report 102 at 1 (Fall 2012).
8 Id.
9 Id.
10 Id., 48-49.
11 Id. at 52-56.
13 Id.
14 Id.

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their sexual orientation, gender identity, or because they have been victims of sexual assault. This directive is a step in the right direction but does not by itself represent greater protections. The reporting requirements establish an important review process for segregation. However, the ICE Segregation Directive does not prevent individuals from remaining in segregation for the approved limited purposes of either punitive or administrative segregation, for stretches of time extending beyond 15 days while their cases are being reviewed, or for any length of time to address special needs. Strict implementation of the policy will be required in order to avoid lengthy placements in segregation while evaluation processes take place.

Further relevant guidance is found in the Prison Rape Elimination Act (PREA) of 2003, which passed Congress unanimously. DHS released final regulations for the Act on March 7, 2014, which will become effective on May 6, 2014.15 The purpose of the legislation was to prevent prison rape through the implementation of a zero-tolerance policy and create guidelines to hold correctional facilities accountable for protecting inmates. The final regulations require that an assessment of all available placement alternatives, including alternatives to detention (ATD) be considered before placing a detainee in protective custody for concern of sexual abuse or assault. The final rule also requires that a facility notify the appropriate ICE director within 72 hours if a detainee is placed in segregation.

Furthermore, incarcerated persons who are classified as having a disability under the Americans with Disabilities Act (ADA) are entitled to the protections of the ADA and The Rehabilitation Act.16 Several courts have recognized such ADA protections to include equal access to facilities, programs, and services, which may be affected by the use of segregation.17

The widespread use of segregation in immigrant detention is a two-fold problem. First, many detention facilities have not adopted the 2011 Performance-Based National Detention Standards (PBNOs) that strictly limit the use of segregation and do not adhere to the ABA Standards and other guidance. Second, segregation is accepted among jail staff, because detention facilities are often virtually identical to jails despite their non-punitive function.18

The Nature of Segregation

Segregation is known by many names. DHS/ICE and the ABA refer to the practice as segregation or separation. Segregation sometimes takes the form of solitary confinement, in which:

17 See Love v. Westville Correctional Center, 103 F. 3d 558 (7th Cir. 1996) (holding that it was a violation of handicapped inmate’s rights under the ADA to be held in isolation, because he could not attend substance abuse programs and other facilities).
Individuals are held in total or near-total isolation . . . in small cells for 23 hours a day… These cells can be located in dedicated segregation units, within either administrative or disciplinary segregation, but individuals may also be locked in their cells in their assigned housing unit. Segregation is sometimes referred to as “isolation,” “the hole,” “Supermax,” “Secure Housing Unit (SHU),” or other terms. 19

Detainees may be placed in two different types of segregation:

1. Administrative Segregation

Administrative segregation is a non-punitive status in which the individual is confined only to ensure the safety of residents or others, the protection of property, or the security or good order of the facility. Administrative segregation may be used for pre-hearing detention pending adjudication of disciplinary matters, after a disciplinary matter has been satisfied when the individual is deemed to be inappropriate for return to general population, and for medical reasons or in cases where a detainee requires protection (“protective custody”).

2. Disciplinary Segregation

Disciplinary segregation for a fixed, and relatively brief, period of time is used to separate individuals who have violated a facility rule of some consequence. DHS/ICE standards state that individuals are only to be placed in disciplinary segregation after a hearing has been conducted and the detainee has been found to have committed a violation.

Segregation as a Last Resort

Even though the reasons for individual placement in segregation may vary, the conditions tend to be the same in immigration detention. In most immigration facilities, there is no meaningful difference in the conditions used to house individuals in “protective” administrative segregation and those used for disciplinary segregation. Segregation of any kind must be used as a last resort.

The use of disciplinary segregation must be proportional to the infraction and only used in exceptional circumstances. Administrative segregation should not be used based only on an individual’s status as a sexual minority, mental health status or condition, race, religion, or other such characteristics. In some cases, segregation may be initiated at the detainee’s request or by staff to protect the resident from harm. In these cases, segregation should not be viewed as an answer to the problem. Alternatives should be explored before resorting to segregation. For vulnerable populations that cannot be held safely in the general population, such as those who may be subjected to sexual assault in detention, DHS/ICE should consider placement into a program that can be used for protection from harm and when these programs are not feasible, the housing of like- immgrants in detention based on their status or population. 20 Where administrative segregation is used in exceptional

19 Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention at 2.
20 Id. at 36.
circumstances, conditions in administrative segregation should be the same as for the general population.

The Duration of Segregation

The use of segregation should be limited to 15 days except in extraordinary circumstances. The U.N. Special Rapporteur on Torture and Other Forms of Cruel, Inhuman, or Degrading Punishment found that the limit of "prolonged" segregation is 15 days, at which point some of the harmful psychological effects of segregation may become irreversible. In addition, recent medical studies have shown that segregation in the form of solitary confinement can cause hallucinations, paranoia, memory loss, and random violence and self-harm, and creates severe, harmful psychological and physiological effects in persons detained. Electroencephalogram (EEG) studies dating back to the 1960s demonstrate that "diffuse slowing" of brain waves in prisoners occurs after a week or more of placement in solitary confinement. One study found that prisoners placed in solitary confinement developed psychopathologies at higher rates than people in the general population (28 percent vs. 15 percent). Similarly, other research has found that prisoners in segregation engage in self-mutilation at higher rates than in the general population. Individuals who are denied sustained social interaction may experience brain impairment comparable to those who have incurred a traumatic injury. According to the psychiatrist Terry Kupers of The Wright Institute, prisoners in solitary confinement comprise only five percent of the total prison population, but account for almost half of the prison system's suicides. Even a "short, defined period of segregation" can be "disastrous."

Despite the growing body of knowledge about the harmful effects of segregation, many immigrants continue to be put into solitary confinement for prolonged or indefinite periods. And others disregard the written guidance that is in place. The 2011 PBNDs require detention

21 Id. at 13; see also Ian Urbina & Catherine Rentz, Immigrants Held in Solitary Cells. Often for Weeks, N.Y. Times, Mar. 24, 2013, § 1, at 1-18.
26 Gawande 2009.
28 Id.
29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
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102 Id.
103 Id.
104 Id.
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106 Id.
107 Id.
108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
facilities to notify DHS/ICE when they place a detainee in segregation for more than 30 days.30 However, many facilities avoid this requirement by releasing the individual into the general population after 29 days of segregation, only to return him/her to segregation the next day.31 Moreover, investigators have found instances where immigrants have been held in segregation for much longer periods.32 For example:

- At a Nevada jail, there were at least 10 separate examples where immigration detainees were placed in segregation for more than 15 days. One detainee was placed in segregation for 54 and then again for 23 days.33
- At an Ohio jail, there were at least 12 separate instances where immigration detainees were placed in segregation for more than 30 days.34

Vulnerable Populations

The need for this resolution arises from the fact that large and vulnerable portions of the immigrant population are still subjected to segregation, often arbitrarily and with little justification or review. While the ABA Standards greatly improve on protections given to immigrant detainees, the standards do not specifically address the disparate impact that the use of segregation can have on some vulnerable populations. This resolution offers an opportunity for the ABA to address this gap and to advance its work to ensure the safety of all immigrant detainees.

1. LGBT Individuals

People who identify as LGBT are often placed in segregation for their own “protection.”35 However, such placement requires little justification and many times is used against the will of the detainee.36 Specific examples of abuse and harassment of LGBT persons have been documented.37

- A detainee at a California facility asked a corrections officer why he had reduced the recreation time for the LGBT detainees from two hours to only 45 minutes. The officer said: “Because you need to learn not to be faggots.”38

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- A detainee at a California facility asked a corrections officer why he had reduced the recreation time for the LGBT detainees from two hours to only 45 minutes. The officer said: “Because you need to learn not to be faggots.”38
• A transgender detainee at a Georgia facility reported that a guard grabbed her while she was in the bathroom. The guard attempted to handcuff her while her pants were still around her ankles, and the detainee urinated on herself and the floor. The detainee “asked to clean herself up but the guard refused and told her to keep quiet about what happened.”

2. People with Mental Disabilities/Mental Health Issues

The ABA Standards prohibit the use of “prolonged segregation” for residents with “serious mental illness.” However, regardless of the length of segregation, it is problematic when people with mental disabilities are put in segregation “because jail staff is unwilling to deal with their unique circumstances.” Individuals with mental health conditions are particularly vulnerable to the adverse effects of solitary confinement and should not be placed in such confinement.

3. Other Vulnerable Populations

Other vulnerable populations in detention include women, pregnant women, and other minorities. Women, in particular, are more vulnerable to sexual harassment and abuse in detention. Also, pregnant women, nursing or post-partum mothers, and women in labor or delivery may be placed in segregation—and in some cases restraints are used—due to their status. In addition, it is important to ensure that religious minorities are protected from discrimination without resorting to the use of segregation except in exceptional circumstances.

Reporting Requirements

While the current ABA Standards and recent DHS/ICE guidance require regular review and written reports regarding instances of the use of segregation, it is important that DHS/ICE be required to report regularly to an independent institution on the use of segregation in detention facilities. Senator Richard Blumenthal (D-CT) proposed an amendment to the Senate’s 2013 immigration reform bill (S. 744) that would limit segregation. We recommend adopting his amendment language requiring that DHS/ICE:

• Collect and compile information regarding the prevalence, reasons for, and duration of segregation in all immigration detention facilities and if a timely assessment by ICE as to its suitability was made;
• Submit an annual report containing the information described above to Congress no later than 30 days after the end of the reporting period; and

40 ABA Civil Immigration Detention Standards, at 57.
41 Id.
42 Id.
43 ABA Civil Immigration Detention Standards, at 57.
44 Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention.
ABA MUST ACT TO LIMIT AND ENSURE ACCOUNTABILITY IN IMMIGRANT SEGREGATION

The number of immigrant detainees subjected to segregation was previously unknown to officials, and it was only in response to Freedom of Information Act requests that DHS/ICE began seriously to consider this issue.\(^\text{46}\) Greater accountability and transparency in connection with the use of segregation is required. Immigration detainees are not being punished, but are simply being held pending administrative hearings before an immigration judge or for removal. Putting them in segregation, except as a last resort and for the shortest time possible, is an injustice that must end immediately.

This resolution amending the ABA Standards to increase the limitations on the use of segregation in the immigration detention context and to require reporting of all instances of the use of segregation to Congress will enhance the ABA’s ability to advocate for the curtailment of segregation and promote immigrant detention as civil detention with the necessary protections.

Respectfully submitted,

Christina Fiflis, Chair
Commission on Immigration
August 2014

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\(^{46}\) Id. at 8.
1. Summary of Resolution

This resolution amends the ABA Civil Immigration Detention Standards to: 1) limit the use of segregation, and particularly solitary confinement, except as a last resort where no other alternative is available; 2) restrict segregation to the shortest time necessary; 3) urge DHS/ICE to refrain from contracting with facilities whose only means of segregation is solitary confinement; 4) require that a resident not be placed in separation based only on age, gender identity, sexual orientation, mental health status or condition, pregnancy, or disability; 5) limit the duration of administrative and disciplinary segregation to 15 days; and 6) require and make publicly available an annual report to Congress containing each incidence of use, reasons for, and duration of segregation in all immigration detention facilities and whether a timely assessment by ICE as to its suitability was made.

2. Approval by Submitting Entities

The Commission on Immigration approved this resolution on May 5, 2014.

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

No.

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

The resolution builds on the following existing Association policies and would further the Association’s longstanding commitment to providing legal protections and due process rights to noncitizens in detention.

- Civil Detention Standards: Adopted the ABA Civil Immigration Detention Standards (12A102).
- Detention Standards: Supports the issuance of federal regulations that codify the Department of Homeland Security Immigration and Customs Enforcement National Detention Standards, and supports improvement, periodic review, and increased oversight of detention standards implementation to ensure that detained noncitizens and their
families are treated humanely and have meaningful access to counsel and the legal process (08M111B).

- Detention: Opposes detention of noncitizens in removal proceedings except in extraordinary circumstances. Supports use of humane alternatives to detention; the provision of prompt hearing for aliens denied release; mechanisms to ensure complete and accurate information for administrative review and judicial oversight; mechanisms to ensure full compliance with two U.S. Supreme Court decisions on indefinite detention (06M107E).

- Detention: Urges protection of the constitutional and statutory rights of detainees, and supports promulgating into regulation ICE’s four detention standards relating to access to counsel and legal information and permitting independent organizations to visit detention facilities and meet privately with detainees to monitor compliance (02A115B).

- Improving Asylum Process: Asylum seekers should be detained only in extraordinary circumstances, and in the least restrictive environment necessary to ensure appearance at court proceedings; encourages DHS/ICE to explore alternative means to ensure appearance at court proceedings, such as supervised pretrial release or bond (2/90).

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

Immigration detainees are not being punished, but are simply being held pending hearings before an immigration judge or for removal. The use of segregation in immigration detention imposes permanent harm to those detained. The expanded use of immigration detention also increases the likelihood that some of those detained may be placed into segregation. Adoption of the resolution will allow the ABA to urge an end to the use of segregation in immigration detention except as a last resort and in compliance with stringent protections and time limitations.


Not applicable

7. Brief explanation regarding plans to implement the policy, if adopted by the House of Delegates.

The Commission will advocate for Congress, the Department of Homeland Security, and Immigration and Customs Enforcement to end the use of segregation in immigration detention except as a last resort and with strict limitations, and to implement policies more appropriate to civil detention.


Existing Commission and Governmental Affairs staff will undertake the Association’s promotion of this recommendation, as is the case with other Association policies.

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No known conflict of interest exists.

10. Referrals.
This recommendation is being circulated to Association entities and Affiliated Organizations including:
Commission on Sexual Orientation and Gender Identity
Criminal Justice Section
Section of Individual Rights and Responsibilities
Hispanic Commission

11. Contact Name and Address Information (Prior to the meeting)
Meredith Linsky
Director, Commission on Immigration
American Bar Association
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Christina Fiflis, Chair
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Email: christina@fiflis.com

12. Contact Name and Address Information, (who will present the report to the House)
Christina Fiflis, Chair
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution amends the ABA Civil Immigration Detention Standards to: 1) limit the use of segregation, and particularly solitary confinement, except as a last resort where no other alternative is available; 2) restrict segregation to the shortest time necessary; 3) urge DHS/ICE to refrain from contracting with facilities whose only means of segregation is solitary confinement; 4) require that a resident not be placed in separation based only on age, gender identity, sexual orientation, mental health status or condition, pregnancy, or disability; 5) limit the duration of administrative and disciplinary segregation to 15 days; and 6) require and make publicly available an annual report to Congress containing each incidence of use, reasons for, and duration of segregation in all immigration detention facilities and whether a timely assessment by ICE as to its suitability was made.

2. Summary of the Issue that the Resolution Addresses

Segregation, including solitary confinement, is currently used in the immigration detention context without adequate limitations and transparency. The U.S. Supreme Court has held that the purpose of civil detention is not punitive. The ABA condemns the use of solitary confinement except in extraordinary circumstances. The ABA urges DHS and ICE to (a) strictly limit the use of segregation in immigration detention; (b) use segregation only as a last resort in exceptional circumstances when no other alternatives are available; and (c) where segregation is used, restrict such confinement to the shortest time necessary to ensure the safety of the detained population or others, the protection of property, or the security, or good order of the facility.

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

The proposed policy would enable the ABA to encourage Congress and DHS/ICE to use segregation for immigration detention only as a last resort for a limited time period and in compliance with other limitations. It is consistent with international expectations for the management of civil detainees.

4. Summary of Minority Views

No minority views have been expressed.

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48 ABA House of Delegates, Civil Immigration Detention Standards, XIII Administrative and Disciplinary Separation, p 51 (2012) [hereinafter ABA Civil Detention Standards].

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REPORT TO THE HOUSE OF DELEGATES

RESOLUTION


FURTHER RESOLVED, That the American Bar Association encourages all employers, public and private, including governments, law schools and the legal profession, to enact formal policies on the workplace responses to domestic violence, dating violence, sexual violence, and/or stalking violence that address prevention, provide assistance to employees who experience violence, and which hold employees who perpetrate violence accountable, using the Model Policy as a guide.
MODEL WORKPLACE POLICY ON EMPLOYER RESPONSES TO
DOMESTIC VIOLENCE, SEXUAL VIOLENCE, DATING VIOLENCE AND STALKING
AUGUST 2014

The model policy set forth below outlines guidelines for workplace responses to victims/survivors of violence and perpetrators of violence. An employer can adopt a workplace policy as part of its commitment to a healthy, safe organizational climate and to the prevention and reduction of the incidence and effects of domestic violence, sexual violence, dating violence, and stalking.

1. Statement of Purpose

[Employer] institutes this policy as part of its commitment to a healthy, safe organizational climate and to the prevention and reduction of the incidence and effects of domestic violence, sexual violence, dating violence, and stalking [hereinafter “violence”]. [Employer] recognizes that domestic violence, sexual violence, dating violence, and stalking are workplace issues and impact the workplace even if the incidents occur elsewhere. Incidents of domestic violence, sexual violence, dating violence, and stalking cross economic, educational, cultural, age, gender, racial, and religious lines. They can occur in heterosexual and same sex intimate relationships, including marital, cohabiting, or dating relationships, as well as in non-intimate heterosexual or same sex relationships such as between coworkers or perpetrated by supervisors, and can occur between strangers.

The purposes of this policy are to:
• Enhance workplace awareness and capacity to create a supportive and safe work environment for victims of violence and fellow employees;
• Institutionalize responsive policies and procedures to assist employees who are impacted by violence, including the provision of training on this policy to employees and management;
• Provide immediate assistance to victims, especially information and referrals to community resources;
• Provide assistance and/or disciplinary action to employees who are perpetrators of violence.

II. Definitions

1. Survivor or victim: an individual who is currently subject to, or has in the past been subjected to, domestic or sexual violence, dating violence, or stalking.
2. Perpetrator: the individual who commits or threatens to commit an act of domestic violence, sexual violence, dating violence, and stalking.
3. Domestic violence: a pattern of coercive behavior, including acts or threatened acts, that is used by a perpetrator to gain power and control over a current or former spouse, family member, intimate partner, or person with whom the perpetrator shares a child in common. It occurs in heterosexual and same sex relationships and impacts individuals from all economic, educational, cultural, age, gender, racial, and religious demographics.
Domestic violence includes, but is not limited to, physical or sexual violence, emotional and/or psychological intimidation, verbal abuse, stalking, economic control, harassment, physical intimidation, or injury.

4. Sexual violence: a range of behaviors, including but not limited to, sexual harassment, a completed nonconsensual sex act (i.e., rape), an attempted nonconsensual sex act, abusive sexual contact (i.e., unwanted touching), and non-contact sexual abuse (e.g., threatened sexual violence, exhibitionism, verbal harassment). Some or all of these acts may also be addressed in [Employer]'s Sexual Harassment Policy. Sexual violence is any sexual act or behavior that is perpetrated against someone's will when someone does not or cannot consent. Victims of sexual violence may know the perpetrator(s), such as a coworker or a supervisor, and/or may be involved in a dating or marital relationship with the perpetrator, or the perpetrator may be unknown to the victim. A person of any age or gender may be a victim of sexual violence. Consent is not given when a perpetrator uses force, harassment, threat of force, threat of adverse personnel action, coercion, or when the victim is asleep, incapacitated, or unconscious.

5. Dating violence: an act of violence threatened or committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of a “romantic or intimate” relationship is determined based upon the victim’s perspective and in consideration of the following factors: the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

6. Stalking: acts of harassing, unwanted or threatening conduct that cause the victim to fear for his or her safety or the safety of a family member, or would cause a reasonable person in a similar situation to fear for his or her safety. Stalking conduct includes, but is not limited to: following or spying on a person, appearing at a person's home or work, appearing in a place where the perpetrator has no reason to be, waiting at places in order to make unwanted contact with the victim or to monitor the victim, leaving unwanted items, presents, or flowers for the victim, and posting information or spreading rumors about the victim on the internet, in a public place, or by word of mouth. Stalking may occur through use of technology including, but not limited to, e-mail, voice-mail, text messaging, and use of GPS and social networking sites.

7. Protection Order or Restraining Order: protection orders, sometimes called restraining orders or stay away orders, are a mechanism where a victim can petition the court for protection from a perpetrator, as well as establish custody and visitation guidelines and provide for other forms of economic security, like rent or mortgage payments, which last for the duration of the order. Protection orders may also issue in criminal cases as a condition of probation or condition of release, particularly in a domestic violence, sexual violence, dating violence, or stalking related crime.

8. Workplace-Related Incidents: workplace-related incidents of domestic violence, sexual violence, dating violence, and stalking include acts, attempted acts, or threatened acts by or against employees, and/or against employees' families or property, that occur in the workplace.
workplace or that occur outside the workplace but have an impact on the workplace. An employee is considered to be in the workplace while in, or utilizing the resources of the employer. A workplace includes but is not limited to employer facilities, work sites, equipment, or vehicles, or while an employee is on work-related travel.

9. Workplace Safety Plan: a strategy developed in collaboration with a victim to implement workplace safety options, including but not limited to handling of court protection orders, procedures for alerting security personnel, temporary or permanent adjustments to work schedules and locations, changes in parking spots, and requests for escorts to and from workplace facilities.

III. Persons Covered by this Policy
Persons covered by this policy include full and part time employees, interns, contractors, volunteers, or temporary workers engaged by [Employer] in any workplace location.

IV. Statement of Confidentiality
[Employer] recognizes and respects an employee's right to privacy and the need for confidentiality and autonomy. [Employer] shall maintain the confidentiality of an employee's disclosure regarding violence to the extent permitted by law unless to do so would result in physical harm to any person and/or jeopardize safety within the workplace. When information must be disclosed to protect the safety of individuals within the workplace, [Employer] shall limit the breadth and content of such disclosure to information reasonably necessary to protect the safety of the disclosing employee and others and to comply with the law. [Employer] shall make every effort to provide advance notice to the employee who disclosed information if the disclosure must be shared with other parties in order to maintain safety in the workplace or elsewhere. [Employer] shall also notify the employee of the name and title of the person with whom [Employer] intends to share the employee's statements, and shall explain the necessity for and purpose of said disclosure.

V. Employer Responses to Violence
A. Responses to Victims
1. Nondiscrimination and Non-Retaliation
[Employer] shall not discriminate in hiring, staffing, or conditions of employment against any employee for disclosing his or her status as a victim of violence or for submitting a complaint or disclosing concerns about violence to [Employer]. [Employer] shall not retaliate or take adverse employment actions against any employee for submitting a complaint pursuant to this policy, for disclosing his or her status as a victim, or for actions of violence perpetrated by another against an employee that occur in or have an impact on the workplace.

2. Leave and Other Workplace Assistance
[Employer] recognizes that victims of domestic violence, sexual violence, dating violence, and stalking may need time off to secure medical assistance, legal assistance, counseling, or to attend to other matters related to the violence, such as court proceedings, relocation, or safety planning for them or for a family member. [Employer]
will make every reasonable effort to assist an employee to maintain employment when
the employee is experiencing or has experienced violence in the workplace, or has
experienced violence outside the workplace, or is assisting a family member who has
experienced domestic violence, sexual assault, dating violence or stalking. [Employer]
will work in collaboration with the employee to provide reasonable and flexible leave
options when an employee, a child, spouse, or parent of an employee, is a victim of
domestic violence, sexual violence, dating violence, or stalking. [Employer] will work
with employee to provide paid leave first before requiring an employee to utilize unpaid
leave. When the need for time off is foreseeable, an employee must provide reasonable
advance notice to the employer unless advance notice is not feasible. To request Leave,
employee should contact. [Employer] will also work with employee to determine if other non-leave-related assistance will facilitate employee’s ability to
remain safe and maintain his or her work performance, such as, but not limited to,
modifying work schedules, changing employee’s location within the workplace or
location of a parking spot, changing phone numbers, arranging telecommuting options,
etc. [Employer] will assist employee to enforce his or her protection order, if applicable.

3. Access to Unemployment Insurance Benefits
[Employer] recognizes that in certain situations it is no longer feasible for employee who
is a victim of violence to continue working for [Employer]. In such circumstances,
[Employer] shall provide to employee information regarding access to unemployment
insurance benefits and shall not contest immediate commencement of benefits.

4. Work Performance
[Employer] recognizes that employees who are victims of violence may experience
temporary difficulty fulfilling job responsibilities. If [Employer] becomes aware that an
employee’s work performance or conduct has been impacted by domestic violence,
sexual violence, dating violence, or stalking, [Employer] will offer support to the
employee and work in collaboration with the employee to address the issues, in
accordance with established policies within the workplace. [Employer] may develop a
work plan with employee, provide leave and other accommodations as specified in
(IV)(A)(ii), provide referrals to support or advocacy agencies, advise employee of his or
her rights regarding unemployment benefits as specified in (IV)(A)(iii), and maintain a
separate and confidential record of employee’s status as a victim of domestic violence,
sexual violence, dating violence, or stalking to ensure to victim that his or her rights and
privileges of employment are not impacted or compromised as a result of the violence.

5. Protection and Restraining Orders
[Employer] recognizes that a victim of violence may seek an order of protection, or may
receive a restraining order, as part of his or her efforts to become safe and as part of his or
her workplace safety plan. [Employer] recognizes that the workplace may or may not be
included on an order as a location from which a perpetrator must remain away. If an
employee chooses to disclose the existence of a protection or restraining order to
[Employer], [Employer] may, wherever possible, assist the employee to enforce his or
B. Responses to Employees Concerned About Violence

Employees who suspect or witness acts of violence in the workplace, or who suspect or witness violence against an employee or perpetrated by an employee, are encouraged to report their concerns to the authorized person within [Employer]. [Employer] shall not retaliate against, terminate, or discipline any employee for reporting concerns about workplace related incidents of violence pursuant to this policy, including an allegation that the act was perpetrated by a fellow employee or person in a management capacity. Prohibited acts of retaliation include, but are not limited to, demotion or withholding of earned pay, as well as acts of personal retaliation, such as those related to an employee’s immigration status or sexual orientation, for example.

Any employee who believes he or she has been subjected to adverse action as a result of making a report pursuant to this policy should contact [Employer]. Any allegations of violations of this policy will be promptly investigated.

C. Responses to Employees Who Commit Violence

If an employee discloses that he or she has committed a workplace-related incident of violence, as defined in (11)(H), or if a supervisor becomes aware that an employee may have committed such incident, the supervisor shall conduct or refer the employee to the designated individual as specified in Section VI below to conduct appropriate investigations, interventions, and referrals. [Employer] shall investigate immediately and take disciplinary action, up to and including termination, against any employee who threatens to commit or who commits workplace-related incidents of domestic violence, sexual assault, dating violence, or stalking. Employees are prohibited from utilizing any workplace resources, such as work time, phones, email, computers, fax machines or other means to threaten, harass, intimidate, embarrass or otherwise harm another person. An employee who is subject to a protection or restraining order, or a named defendant in a criminal action as a result of a threat or act of domestic violence, sexual violence, dating violence, or stalking, must disclose the existence of such criminal or civil action if the conditions of such actions interfere with the employee’s ability to perform his or her job, impact another employee at [Employer], or specifically relate or name [Employer]. Failure to disclose the existence of such criminal or civil actions in these circumstances will result in disciplinary action, up to and including termination from employment.

VI. Reporting and Referrals

Employees who are victims of domestic violence, sexual violence, dating violence, and stalking, and employees who are concerned about coworkers who are victims or who have witnessed acts or threatened acts of violence are encouraged to provide a report to [Employer]. [Employer] has designated the office in the office as the person to whom such reports should be made. [Employer]’s designated employee shall provide community referrals and resources to employees in order to assist employees with their concerns or experiences regarding violence.
An employee should also contact [Employer] at [contact information] if he or she wishes to report a violation of this policy. As stated in (V)(A)(i), [Employer] will not subject employees who report violence or report a violation of this policy to work-related or personal retaliation.
INTRODUCTION: HIGH RATES OF PREVALENCE OF VIOLENCE

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.

By conservative estimates, 2,800,000 people are victimized by intimate partners annually. A recent study which looked to current and lifetime victimization rates determined that "29% of

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1 The ABA Commission on Domestic Violence defined these terms in its 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) as follows:

"Domestic Violence": Physical abuse, alone or in combination with sexual, economic or emotional abuse, stalking, or other forms of coercive control, by an intimate partner or household member, often for the purpose of establishing and maintaining power and control over the victim.

"Sexual Assault": Any type of non-consensual touching or sexual penetration, however slight. Sexual assault may be perpetrated by an intimate partner (including a spouse), a non-intimate person known to the victim, or a stranger.

"Stalking": A course of conduct directed at a specific person that would cause a reasonable person to experience fear.

"Dating Violence": Physical abuse, alone or in combination with sexual, economic or emotional abuse, stalking, or other forms of coercive control, by a person who is or has been in a romantic or intimate relationship with the victim, often for the purpose of establishing and maintaining power and control over the victim.

See also 42 U.S.C. 13925 §§ (8), (9), (10), (29), (30). "Domestic violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

(9) Dating partner.— The term "dating partner" refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuse, and where the existence of such a relationship shall be determined based on a consideration of—

(A) the length of the relationship;
(B) the type of relationship; and
(C) the frequency of interaction between the persons involved in the relationship;

(10) Dating violence.— The term "dating violence" means violence committed by a person—

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
(B) where the existence of such a relationship shall be determined based on consideration of the following factors:
  (i) the length of the relationship;
  (ii) the type of relationship;
  (iii) the frequency of interaction between the persons involved in the relationship;

(29) Sexual assault.— The term "sexual assault" means any non-consensual sexual act prescribed by Federal, tribal or State law, including when the victim lacks capacity to consent;

(30) Stalking.— The term "stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

(A) fear for his or her safety or the safety of others; or
(B) suffer substantial emotional distress.


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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. Nearly 1 in 5 women aged 18 and older report having been raped in their lifetime (18.3%), with almost half of all women having experienced some other form of sexual violence in their lifetime (44.6%). Nearly a quarter (22.2%) of men aged 18 and older report experiencing some form of sexual violence over the course of their lifetime. 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, many perpetrators are not intimate partners.

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.

Additionally, 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 cisgender people.

These dramatic statistics are likely higher in reality, as all of these crimes are underreported.


2 Id. at 45 (Survivors require economic autonomy and stability to leave or stay safe following abuse or an assault).


4 Id.


6 This may include, inter alia, supervisors, coworkers, and classroom peers.


9 See Patricia Tjaden & Nancy Thomsen, 2000, National Violence Against Women Survey, U.S. Department of Justice < http://www.ncjrs.gov/txtfiles/I83781.txt> (last visited February 21, 2014) (For example, around 83 percent of all rapes committed by an intimate partner are not reported to law enforcement).
EMPLOYERS NEED TO PROACTIVELY ADDRESS DSV

Domestic, dating, sexual and stalking violence are workplace issues that do not stay at home when victims and perpetrators go to work. DSV can compromise the safety of employees and directly interfere with the work of an organization, by decreasing morale and productivity, as well as by increasing absenteeism and health costs. The CDC estimated that the cost of intimate partner rape, physical assault and stalking totaled $5.8 billion each year for direct medical and mental health care services and lost productivity from paid work and household chores. Of this, total productivity losses accounted for nearly $1.8 billion in the United States in 1995. When updated to 2003 dollars, the cost of intimate partner rape, physical assault and stalking is more than $8.3 billion.

Proactively addressing DSV is a good practice for employers. “94% of corporate security and safety directors at companies nationwide ranked domestic violence as a high security concern.” In addition, 55% of senior executives believe domestic violence hurts their businesses’ productivity, 61% indicated that their insurance and health costs increased due to domestic violence, 70% found their worker attendance affected by domestic violence, and 55% found domestic violence to be a cause of employee turnover.

In addition, employers have legal obligations to address DSV, which implicate a broad range of existing federal and state labor and employment laws. For example, perpetrators of sexual assault may be supervisors, managers, co-workers, customers or clients. As a result, an employer’s legal obligations to respond to and remedy sexual harassment claims pursuant to Title VII of the Civil Rights Act of 1964 may be triggered by acts of DSV. Furthermore, an employer may also need to meet its Americans with Disabilities Act obligations to accommodate victims with disabilities as a result of the violence.

Looking at DSV from a business perspective, employers have financial, in addition to ethical and legal, incentives to proactively address the needs of employee-victims and employee-perpetrators.

18 Id.
19 Id.
20 Id.
22 Id.
Domestic violence intersects with employment in myriad ways. A 2006 national survey found that 21% of full-time employed adult respondents (women and men) identified themselves as victims of intimate partner violence. The same study reported that 64% of domestic violence victims found that their ability to work was impacted by abuse; 40% experienced "harassment by an intimate partner at work (either by phone or in person)," and 34% reported that "fear of intimate partner’s unexpected visit" caused reduced productivity. Batterers undermine their victims’ work by preventing them from getting to work on time or at all, disabling their car, hiding or taking their car keys, slashing their tires, taking or hiding their cash, or sabotaging childcare. Another study found that 56% of battered women arrived at work one hour late five times per month because of the abuse. A different survey found that 74% of working female domestic violence victims were harassed at work by their partner. Female victims of rape or sexual assault report diminished work functioning for up to eight months following the attack.

According to a 2006 study from the U.S. Bureau of Labor Statistics, nearly one in four large private industry establishments (with more than 1,000 employees) reported at least one onsite incidence of domestic violence, including threats and assaults, in the past year, and the U.S. Department of Justice estimates that eight percent of rapes occur while the victim is working. Also very troubling is the fact that nearly 33% of women killed in U.S. workplaces between 2003 and 2008 were killed by a current or former intimate partner.

According to the CDC, domestic violence victims lose a total of nearly 8 million days of paid work, the equivalent of more than 32,000 full-time jobs, and nearly 5.6 million days of household productivity as a result of abuse. In 2000, 36% of rape/sexual assault victims lost more than 10

24 Id. According to one study, 74% of victims are harassed at work by their abuser. Id. at 12 (citing Victim Services of New York, Report on Costs of Domestic Violence, 1997).
25 Weiser, Wendy R. & Widiss, Deborah A., supra n. 15, at n. 3. (See McFarlane, J., Malecha, A. Gin; J. Schrith, P. et al., Indicators Of Intimate Partner Violence In Women’s Employment: Implications For Workplace Action, AAOHN Journal (2000) 48(5), 215 (64% of domestic violence victims surveyed were left without transportation to get to work when their abuser disabled their car or hid their car keys).
26 Weiser, Wendy R. & Widiss, Deborah A., supra n. 12, at n. 3. (See McFarlane, J., Malecha, A. Gin; J. Schrith, P. et al., Indicators Of Intimate Partner Violence In Women’s Employment: Implications For Workplace Action, AAOHN Journal (2000) 48(5), 215 (64% of domestic violence victims surveyed were left without transportation to get to work when their abuser disabled their car or hid their car keys).
34 Corporate Alliance to End Partner Violence, Facts and Statistics: Workplace Statistics, supra n. 12 (citing U.S. Centers for Disease Control, Costs of Intimate Partner Violence Against Women in the United States (Apr. 28, 2003)).
35 Corporate Alliance to End Partner Violence, Facts and Statistics: Workplace Statistics, supra n. 12 (citing U.S. Centers for Disease Control, Costs of Intimate Partner Violence Against Women in the United States (Apr. 28, 2003)).
days of work after their victimization. Two recent studies of partner stalking of survivors found that between 15.2 and 27.6% of women reported that they lost a job due, at least in part, to domestic violence. Similarly, almost 50% of sexual assault survivors lose their jobs or are forced to quit in the aftermath of the assaults. A recent U.S. DOJ study reveals that more than half of the stalking survivors surveyed lost five or more days from work, and 130,000 survivors reported being fired from or asked to leave their jobs because of stalking. A U.S. General Accounting Office study found that close to 50% of sexual assault victims lost their jobs or were forced to quit following their assault.

The Workplace Consequences of Employees Who Are DSV Perpetrators

One overlooked element of DSV and the workplace is that employees may be perpetrators of violence. People who perpetrate abuse often use workplace time, resources and property (company telephone and computer, company car, etc.) to do so. One study found that 78% of abusers reported using employer resources in connection with an abusive relationship. In addition, 48% of abusers reported having difficulty concentrating at work and 42% reported being late to work. Perpetrators of violence may also present with absenteeism and may cause accidents or endanger their colleagues. A 2012 study of domestic violence perpetrators in Vermont found that 80% of the perpetrators said their own job performance was negatively affected by their perpetration of domestic violence. Of the perpetrators surveyed, 19% caused or almost caused an accident at work. In many cases supervisors were aware of the perpetrator’s behavior but failed to confront/admonish the employee about it.

Establishing a Formal Workplace Policy is a Good Business Practice

DSV, whether it occurs at work or away from it, has workplace consequences that affect not only employees who are victims, but also co-workers, managers, employees who perpetrate violence.

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and customers or clients. Yet over 70% of workplaces in the U.S. have no formal workplace violence program or policy, and only 4% of employers actually train their workforce on domestic violence. Although many organizations may have “workplace violence” policies or protocols in place that they assume are adequate for addressing DV, domestic, dating, sexual and stalking violence have unique features that require dedicated employer attention. Additionally, employees who are victims may not recognize that their employer has policies and protocols in place that address their workplace needs. A workplace policy that addresses DSV and its workplace impacts provides a guide for employers, supervisors and employees not only to respond to DSV in supportive, safe and effective ways, but also to engage in prevention as well.

U.S. DEPARTMENT OF JUSTICE POLICY STATEMENT: FEDERAL WORKPLACE RESPONSES TO DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING

On April 18, 2012, U.S. President Barack Obama issued a Presidential Memorandum “Establishing Policies for Addressing Domestic Violence in the Federal Workforce.” The memorandum requires federal agencies to take the following steps to address the workplace impacts of violence: (1) Develop and issue a guidance to federal agencies related to domestic violence and its effects on the Federal workforce; (2) Establish a technical assistance process for federal agencies related to these issues, (3) Determine if further guidance was necessary as related to sexual assault and stalking; and, inter alia, (4) Require each federal agency to develop or modify policies for addressing the effects of domestic violence on the workplace. The Office of Personnel Management subsequently issued a guidance for federal agencies to develop policies addressing these issues.

In November 2013, the U.S. Department of Justice (DOJ) was the first major federal agency to release a final policy in accordance with this Presidential Memorandum. DOJ has over 150,000 employees, and thus the policy will impact thousands of employees and federal contractors. The


See the Surveys for Human Resource Management (that was commissioned by Futures Without Violence, 53% of organizations indicated that they did not provide training on domestic violence, sexual violence and stalking because they were “covered in sexual harassment training or other training.” Society for Human Resource Management, The Workplace Impact of Domestic and Sexual Violence and Stalking, January 29, 2013.

See Workplace and Domestic Violence Survey, supra N.17 (72% of executives say their companies offer programs and services that address domestic violence but less than half of employees (47%) are even aware of this fact).


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DOJ policy is an example of a well-structured workplace DSV policy. The DOJ policy includes a comprehensive definitions section, which broadly defines “domestic violence” to include “emotional and/or psychological intimidation, verbal abuse, stalking, economic control, harassment, threats,” as well as “actual or threatened physical violence.” Importantly, the policy addresses not only domestic violence, but also focuses on sexual assault, including sexual harassment, and stalking.

The DOJ policy also establishes a wide jurisdictional scope, defining the “workplace” to include “not only federal offices or facilities, or use of federal resources, but anywhere that a DOJ employee is conducting DOJ business.” This recognizes how DSV may intersect with telecommuting, work-related travel, a contractor’s functions, and how DSV that takes place outside of a workplace affects an employee’s employment.

Also, the DOJ policy is employee-victim centered, meaning that it purports to support employees who are DSV victims, and specifically does so by supporting the “victim’s autonomy, assessment of danger, confidentiality, and right to privacy, to the extent possible.” One example of this is that supervisors are to take into account an employee’s experience of DSV when engaging in performance appraisals and reviews.

Finally, the DOJ policy takes a strong stance on perpetrator accountability, by clearly enumerating disciplinary actions and potential legal implications for employees who perpetrate DSV within and outside of the workplace (where a causal connection to employment performance is present), up to and including termination from employment.

**ESSENTIAL COMPONENTS OF A WORKPLACE DSV POLICY**

A strong workplace DSV policy must be tailored to the size, industry and culture of each workplace. Even so, there are several essential components of a policy for the policy to safely and effectively address both the needs of employers and those of employees. These elements include:

- **Definitions**
- **Anti-Discrimination and Retaliation language**
- **Description of Persons Covered by the Policy**
- **Confidentiality Provisions of the Policy**
- **Outlining of Employer Responses to DSV to employees, contractors and/or students who are victims or perpetrators**

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Id. at 5.

Id. at 6.

Id. at 7.

Policy Statement, Supra n.50 at 9-10, 17.

Id. at 19.
ABA SUPPORT

The ABA has a long history of supporting legislation (1) addressing domestic, dating, sexual and stalking violence; (2) addressing the workplace consequences of domestic, dating, sexual and stalking violence; (3) addressing workplace violence; (4) addressing gender bias in the legal profession; and (5) addressing discrimination against Lesbian, Gay, Bisexual and/or Transgender persons. This resolution is a natural extension of these preexisting policies and provides a concrete model policy that promotes enacted ABA policy.

CONCLUSION

Rates of domestic violence, dating violence, sexual violence, and/or stalking violence are epidemic and have profound effects on people’s lives and workplaces. The vast majority of workplaces do not have policies or protocols in place to support employee victims in the workplace and to hold employee offenders accountable. It is critical that employers proactively address these crimes to ensure the safety of their workforce and to promote the productivity of their organizations.

Respectfully Submitted,

Angela Vigil, Chair
ABA Commission on Domestic & Sexual Violence
August 2014


64 See generally ABA, Recommendation, Report No. 121.2.2 (Aug. 1996) (condemning lawyers or judges who engage in professional behavior which would constitute or condone domestic violence, urging judges and lawyers to institute workplace protocols to address domestic violence, and encouraging continuing education).

65 See generally ABA, Recommendations Report No. 122.2 (August 1998) (urging employers to address workplace violence by adopting policies and practices to help them better prevent and manage on-site violence and threats).

66 See generally, ABA, Recommendation, Report No. 121 (Jun. 1998) (recommendation the ABA recognize the persistence of barriers to women’s advancement in the profession; affirm the principle that there is no place in the profession for such barriers; and call upon members of the profession to eliminate these barriers by refusing to participate in, acquiesce in or condone barriers to women’s full integration and participation in the profession); Recommendation, Report No. 117.2.2 (Feb. 1992) (condemning sexual harassment).

67 See generally, ABA, Recommendation, Report No. 8 (Feb. 1989) (urges the Federal government, the states and local governments to enact legislation prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations); Recommendation, Report No. 108 (Aug. 1996) (recommends that state and local bar associations study bias in their community against gays and lesbians within the legal profession and justice system); Recommendation, Report No. 127B (Aug. 2006) (urges federal, state, local, and territorial governments to enact legislation prohibiting discrimination on the basis of actual or perceived gender identity or expression, in employment, housing and public accommodations).
1. SUMMARY OF RESOLUTION(S).
The Resolution encourages all employers, public and private, including governments, law schools and the legal profession, to enact formal policies on the workplace impacts of domestic violence, dating violence, sexual violence, and/or stalking violence, that address prevention, provide assistance to employees who experience violence, and which hold employees who perpetrate violence accountable. The Resolution also presents a model policy from which employers may develop their own workplace protocols and procedures.

2. APPROVAL BY SUBMITTING ENTITY.
The Commission voted to support the resolution and report on April 22, 2014

3. HAS THIS OR A SIMILAR RESOLUTION BEEN SUBMITTED TO THE HOUSE OR BOARD PREVIOUSLY?
No.

4. WHAT EXISTING ASSOCIATION POLICIES ARE RELEVANT TO THIS RESOLUTION AND HOW WOULD THEY BE AFFECTED BY ITS ADOPTION?
- Recommendation, Report No. 115 (Feb. 2010) (urging Congress to re-authorize and fully fund VAWA)
- Report No. 109 (Aug. 2008) (urging federal, state, and tribal governments to strengthen protection and assistance for victims of gender-based violence);
  ABA Section of Criminal Justice, Recommendation, Volume 103 (Feb. 1978)
  (supporting efforts to combat family violence).
- Recommendation, Report No. 121.2.2 (Aug. 1996) (condemning lawyers or judges who engage in professional behavior which would constitute or condone domestic violence, urging judges and lawyers to institute workplace protocols to address domestic violence, and encouraging continuing education).
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Recommendation, Report No. 10A (Aug. 1996) (recommends that state and local bar associations study bias in their community against gays and lesbians within the legal profession and justice system)

Recommendation, Report No. 122B (Aug. 2006) (urges federal, state, local, and territorial governments to enact legislation prohibiting discrimination on the basis of actual or perceived gender identity or expression, in employment, housing and public accommodations).

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

5. **WHAT URGENCY EXISTS WHICH REQUIRES ACTION AT THIS MEETING OF THE HOUSE?**

Domestic violence, dating violence, sexual violence, and/or stalking violence have profound effects on workplaces, and in particular, for employees who are victims of these crimes. The vast majority of workplaces do not have policies or protocols in place to support employee victims in the workplace and to hold employee offenders accountable. It is critical that employers address these crimes to ensure the safety and productivity of their workplaces.

6. **STATUS OF LEGISLATION.**

There is no legislation related to this resolution.

7. **BRIEF EXPLANATION REGARDING PLANS FOR IMPLEMENTATION OF THE POLICY, IF ADOPTED BY THE HOUSE OF DELEGATES.**

Upon adoption, the Commission on Domestic & Sexual Violence will encourage ABA members and others to adopt some version of the proposed workplace policy in their own workplaces.

8. **COST TO THE ASSOCIATION.**

None.

9. **DISCLOSURE OF INTEREST.**

N/A

10. **REFERRALS.**

Labor and Employment Law
Family Law
Business Law
Individual Rights and Responsibilities
Criminal Law
Women in the Profession

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Recommendation, Report No. 8 (Feb. 1989) (urges the Federal government, the states and local governments to enact legislation prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations)

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8. **COST TO THE ASSOCIATION.**

None.

9. **DISCLOSURE OF INTEREST.**

N/A

10. **REFERRALS.**

Labor and Employment Law
Family Law
Business Law
Individual Rights and Responsibilities
Criminal Law
Women in the Profession
11. CONTACT NAME AND ADDRESS INFORMATION.
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EXECUTIVE SUMMARY

1. SUMMARY OF THE RESOLUTION.
The Resolution encourages all employers, public and private, including
governments, law schools and the legal profession, to enact formal policies on the
workplace impacts of domestic violence, dating violence, sexual violence, and/or
stalking violence, that address prevention, provide assistance to employees who
experience violence, and which hold employees who perpetrate violence
accountable. The Resolution also presents a model policy from which employers
may develop their own workplace protocols and procedures.

2. SUMMARY OF THE ISSUE THAT THE RESOLUTION ADDRESSES.
Domestic violence, dating violence, sexual violence, and/or stalking violence
have profound effects on workplaces, and in particular, for employees who are
victims of these crimes. The vast majority of workplaces do not have policies or
protocols in place to support employee victims in the workplace and to hold
employee offenders accountable.

3. PLEASE EXPLAIN HOW THE PROPOSED POLICY POSITION WILL ADDRESS THE
ISSUE.
The proposed policy position will encourage all employers, public and private,
including governments, law schools and the legal profession, to promulgate
workplace policies that address the workplace consequences of domestic dating,
sexual and/or stalking violence and presents a model policy from which
employers may develop their own workplace protocols and procedures.

4. SUMMARY OF ANY MINORITY VIEWS.
None to date.

112A
RESOLVED, That the American Bar Association condemns forced marriage as a fundamental human rights violation and a form of family violence and of violence against women;

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial, local and tribal governments to amend existing laws, or to enact new laws, to prevent forced marriages in the United States or involving U.S. citizens or residents and to protect and support individuals threatened by forced marriage; and

FURTHER RESOLVED, That the American Bar Association urges governments to collaborate with legal, social services and advocacy organizations with expertise in forced marriage to develop victim-centered legal remedies, and to promote training for judges, prosecutors, law enforcement, child protection authorities, victim-witness advocates, and attorneys.
Introduction

A forced marriage lacks the consent of one or both parties, and typically involves one or more elements of force, fraud, or coercion. Some individuals may choose to have their marriages arranged, asking their families to take the lead in finding their future spouse but retaining the ultimate right to decide whether, when and whom to marry. In a forced marriage, however, parents or other family members may not even consult the parties as to their wishes, let alone seek their consent. The individual to be married feels they have no meaningful say in the matter, and that they cannot say “no” to the marriage without risking serious consequences. Families often have mixed motivations, and family motivations may vary widely. Their reasons may even include thinking that the marriage is in an individual’s best interests. Regardless, the impact on an individual can be devastating. While individuals of either gender can be a victim, the majority are women and girls.

Forced marriage often involves a parent or other family member’s abuse of power and control over an individual to ensure that the marriage occurs. Physical, psychological, sexual, financial and emotional abuse can be leveraged against the individual to coerce them to marry, and domestic violence, rape, and other harms—including serious health complications such as increased risks in pregnancy and childbirth—can occur within the forced marriage itself. An individual’s freedom to determine their life’s course, including future education and employment opportunities, can also be cut short by a forced marriage.

1 A lack of consent can result from a lack of capacity to consent—for example, when an individual is a minor or has a developmental disability that prevents a mature understanding of what marriage is. See US Department of State, Foreign Affairs Manual 7 FAM 1740, US Department of State, http://www.state.gov/documents/organization/68622.pdf (a forced marriage is one in which “at least one party does not consent or is unable to give informed consent to the marriage, and some element of duress is generally present”).

A number of Western countries are beginning to realize that forced marriage is not only a global problem, but also a domestic problem with transnational dimensions. Several have taken specific steps to address forced marriage when it involves their citizens and residents. Practical responses include promulgating multi-pronged national plans of action, issuing detailed sector-by-sector best practices guidance, promoting national awareness-raising campaigns, establishing national helplines, and creating a dedicated government unit to develop and implement effective policy and provide expert assistance in particular cases. Legal responses include changes to immigration laws and processes, such as raising the age to sponsor or be sponsored on a marriage-based visa; changes to marriage laws, such as raising the legal age of marriage or making it easier to invalidate marriages that lack consent; to criminal laws, such as establishing a separate criminal offense of forced marriage; and changes to civil laws, such as creating a special “forced marriage protection order.”

The United States lags far behind its Western counterparts, despite an increasing number of research reports and media accounts that document that forced marriage is a serious problem in the United States impacting many different communities.

5 The UK, for example, has estimated that 5000-8000 forced marriage cases are annually reported across the country. See Forced Marriage - Prevalence and Service Response, Research Note No. DCFS-RR128 (July 2009), available at https://www.education.gov.uk/policypapers/OrdersDownload/DCFS-RR128.pdf. See also “Forced Marriages in Germany More Prevalent than Thought,” Spiegel Online (November 09, 2011) (study found that 3,443 individuals sought help at counselling and information centers in 2008 because of forced marriages), available at http://www.spiegel.de/international/germany/3443-individuals-sought-help-at-counselling-and-information-centers-in-2008-because-of-forced-marriages,6. The Western countries that have taken some action against forced marriage within their borders include Australia, Austria, Belgium, Canada, Denmark, France, Germany, the Netherlands, Norway, Sweden, Switzerland and the UK. The UK’s establishment in 2005 of a specialized “Forced Marriage Unit” (FMU), a joint operation of its Home Office and Foreign and Commonwealth Office, has been a unique and pivotal part of the government’s response. The FMU acts as the government’s one-stop-shop for combating forced marriage and assisting victims. In 2013 the FMU assisted in 1302 cases involving forced marriage. Supra note 2.


The Scope of Forced Marriage in the United States is Significant, and Cases Can Involve Severe, Even Life-Threatening Abuse

Thousands of individuals across the United States may be threatened by forced marriage every year. In 2011, the Tahirih Justice Center, a national legal services and advocacy organization serving immigrant women survivors of violence, conducted a first-of-its-kind National Survey on Forced Marriage in Immigrant Communities in the United States (Tahirih Survey). Over 500 respondents (including legal and social service providers, advocates, community leaders, educators, medical and mental health professionals, child protection and law enforcement officers, and other professionals) from 47 states reported encountering as many as 3,000 cases of known or suspected forced marriage in the prior two years.11

Encountering forced marriage cases is a not a rare phenomenon for many frontlines service providers in the United States: 41% of respondents to the Tahirih Survey had come across at least one such case.12 Another striking finding of the Tahirih Survey was the incredibly diverse impact of forced marriage. Respondents reported cases among families originating from at least 56 different countries of origin (including India, Pakistan, Bangladesh, Yemen, the Philippines, Afghanistan, Somalia and Mexico) and among families from varied religious backgrounds (including Muslim, Christian, Hindu, Sikh, Buddhist, Jewish, and others).13 While not the focus of the survey, some respondents also reported encountering victims who were “American” or “from the United States,” presumably implying that they were not from immigrant backgrounds.

11 Tahirih Report, supra at 2. Given that two-thirds felt there were cases of forced marriage not being identified in the populations with which they work, these findings suggest only the tip of the iceberg on the scope of the problem in the United States. Id., at p. 3. Evidence that the problem is significant and widespread is also supported by other community-based research. See, e.g., Gangashakti Report (analyzing 524 surveys from college students, domestic violence professionals and refugee service providers to find 531 cases of suspected and confirmed forced marriage); Sauti Yetu Report (reflecting findings of a study conducted through focus groups and interviews with 30 young women aged 16-21, that “all but 2 faced pressures to marry or were already married before the age of 18”); and Manavi Paper (surveying frontline advocates at 12 South Asian community organizations across the country that address violence against women, and finding that 83% of these agencies had worked with women in the prior 5 years who faced the issue of forced marriage and the consequences of those marriages, such as domestic violence or sexual assault).

12 See also Gangashakti Report, Executive Summary (finding that three out of five all respondents reported encountering at least one such case).

communities. Respondents also reported that victims can be both US citizens and those with other citizenship or immigration statuses who are living in the United States, and that the marriage ceremony can take place either in the United States or in another country. The Tahirih Survey also confirmed that forced marriage affects both genders and all ages.

Families may employ a wide range of tactics to force the marriages to occur. Emotional blackmail and abuse, shaming, isolation (including restricting or monitoring movements or communications, or preventing an individual from going to school or work), threats (including threats of physical violence or other harm, and of being cut off from or disinherited by the family or ostracized by the community), are common points of leverage. Individuals can also be subjected to beatings or other physical violence. They can be deceived or tricked (for example, they may be told that a family trip abroad is just to visit relatives, when in truth a wedding awaits them). They may also be harassed and stalked; kidnapped; taken to their parents' country of origin and then abandoned there; have their money, phone, or identity documents confiscated; or be held captive in the United States or abroad. Individuals can also be subjected to death threats or may actually be killed if they resist. Domestic violence, sexual violence, and emotional violence often follow in the wake of a forced marriage. Victims' feelings of despair and betrayal can also manifest in severe depression, stress-related illnesses, declining work and academic performance and excessive absences, acting out, alcohol and substance abuse, and self-harm, including attempted suicide and suicide.

Existing US Laws and Protection Structures Are Not Being Fully Utilized to Protect Forced Marriage Victims and Are Not Designed to Address Forced Marriage Situations

State-level legal responses to forced marriage are limited, and while existing laws can be tools to prevent forced marriages or protect victims in some cases, they are not widely used or may offer inadequate protections. To begin with, almost all states set the minimum legal age to marry at 18 but permit parental waivers to lower that age to 16, or in some states, even younger. Such

14 Id. at 8. While much of the research and media focus to date has been on immigrant communities, it is clear no community is immune from the problem. For example, a recent NPR show featured a survivor from an Orthodox Jewish community, and a caller shared that when he attended college in Kentucky he was forced to marry a girl as young as 16. See "Shedding light on forced marriage in America," On Point with Tom Ashbrook (NPR Radio, February 3, 2014). See also Julita Alman, Shattering the Silence Surrounding Forced and Early Marriage in the United States, CHILDREN'S LEGAL RIGHTS JOURNAL Vol. 32, No.2, Summer 2012, at p.7 (citing additional non-immigrant examples).

15 Tahirih Report, supra at 8.

16 Id. at 3.

17 Emotional blackmail and abuse, isolation and control tactics, making threats, and manipulating fears of being rejected by family or community were reported in the Tahirih Survey as very common tactics. Nearly half of respondents who answered the question also reported that victims had been subjected to physical violence; one-quarter said victims had been threatened with death. Id. at 8-9. For further details on the broad range of coercive tactics that families employ, please see also Gangashakti Report at 20-25.

18 See Gangashakti Report, supra at 14. About half of all respondents who encountered known cases reported emotional, domestic, and physical violence as a consequence of the forced marriage. One-third of students who had encountered known cases also reported rape as a consequence.

19 Id. at 14, 21-22. Half of all respondents who encountered known cases reported depression as a consequence of a forced marriage. Id. at 14. See also Tahirih Report at 9 (noting that 42 respondents knew victims who had contemplated or attempted suicide).

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communities. Respondents also reported that victims can be both US citizens and those with other citizenship or immigration statuses who are living in the United States, and that the marriage ceremony can take place either in the United States or in another country. The Tahirih Survey also confirmed that forced marriage affects both genders and all ages.

Families may employ a wide range of tactics to force the marriages to occur. Emotional blackmail and abuse, shaming, isolation (including restricting or monitoring movements or communications, or preventing an individual from going to school or work), threats (including threats of physical violence or other harm, and of being cut off from or disowned by the family or ostracized by the community), are common points of leverage. Individuals can also be subjected to beatings or other physical violence. They can be deceived or tricked (for example, they may be told that a family trip abroad is just to visit relatives, when in truth a wedding awaits them). They may also be harassed and stalked; kidnapped; taken to their parents' country of origin and then abandoned there; have their money, phone, or identity documents confiscated; or be held captive in the United States or abroad. Individuals can also be subjected to death threats or may actually be killed if they resist. Domestic violence, sexual violence, and emotional violence often follow in the wake of a forced marriage. Victims' feelings of despair and betrayal can also manifest in severe depression, stress-related illnesses, declining work and academic performance and excessive absences, acting out, alcohol and substance abuse, and self-harm, including attempted suicide and suicide.

Existing US Laws and Protection Structures Are Not Being Fully Utilized to Protect Forced Marriage Victims and Are Not Designed to Address Forced Marriage Situations

State-level legal responses to forced marriage are limited, and while existing laws can be tools to prevent forced marriages or protect victims in some cases, they are not widely used or may offer inadequate protections. To begin with, almost all states set the minimum legal age to marry at 18 but permit parental waivers to lower that age to 16, or in some states, even younger. Such

14 Id. at 8. While much of the research and media focus to date has been on immigrant communities, it is clear no community is immune from the problem. For example, a recent NPR show featured a survivor from an Orthodox Jewish community, and a caller shared that when he attended college in Kentucky he was forced to marry a girl as young as 16. See "Shedding light on forced marriage in America," On Point with Tom Ashbrook (NPR Radio, February 3, 2014). See also Julita Alman, Shattering the Silence Surrounding Forced and Early Marriage in the United States, CHILDREN'S LEGAL RIGHTS JOURNAL Vol. 32, No.2, Summer 2012, at p.7 (citing additional non-immigrant examples).

15 Tahirih Report, supra at 8.

16 Id. at 3.

17 Emotional blackmail and abuse, isolation and control tactics, making threats, and manipulating fears of being rejected by family or community were reported in the Tahirih Survey as very common tactics. Nearly half of respondents who answered the question also reported that victims had been subjected to physical violence; one-quarter said victims had been threatened with death. Id. at 8-9. For further details on the broad range of coercive tactics that families employ, please see also Gangashakti Report at 20-25.

18 See Gangashakti Report, supra at 14. About half of all respondents who encountered known cases reported emotional, domestic, and physical violence as a consequence of the forced marriage. One-third of students who had encountered known cases also reported rape as a consequence.

19 Id. at 14, 21-22. Half of all respondents who encountered known cases reported depression as a consequence of a forced marriage. Id. at 14. See also Tahirih Report at 9 (noting that 42 respondents knew victims who had contemplated or attempted suicide).
provisions can conceal situations in which the underage parties themselves do not consent.20 State laws and processes regarding terminating or annulling/voiding a marriage also may not appreciate the particular circumstances of forced marriage victims.

Many elements that can be involved in forced marriage cases constitute criminal actions (such as assault, battery, kidnapping, and false imprisonment) and so could be investigated, charged and prosecuted as such.21 However, victims, police and prosecutors alike may be unwilling to pursue such charges except in the most extreme cases. Eight states, as well as the District of Columbia and the US Virgin Islands, also have specific statutes that criminalize forcing someone into marriage in certain circumstances.22 Again, however, their utility may be limited. The majority arise in the context of laws against abduction, prostitution, and/or “defilement,” and some are nearly a century old; some address forced marriage in the context of human trafficking. Overall, these laws had other scenarios of abuse and exploitation in mind, and were clearly not designed to deter parents from强迫ing their own children into marriage.23 Some of the statutes also expressly limit the scope of their protection to female victims only, or only to individuals above or below certain ages.24 To date, no forced marriage prosecutions have ever been brought under these specific criminal statutes, against a parent or anyone else.

Civil protection orders could provide another potential legal option. Such orders have proven to be an accessible and effective tool for many victims in domestic violence situations, offering

23 In at least one state, Minnesota, arguably the criminal statute cannot be leveraged against parents who are themselves the perpetrators of the forced marriage, insofar the crime can only be charged against someone who takes a person under age 18 for the purpose of marriage “without the consent of the persons, guardians, or other person having legal custody of such person” (emphasis added). Minn. Stat. Ann. § 609.265.
24 For example, three statutes expressly protect “women”: California, Oklahoma and the Virgin Islands, and Mississippi’s statute only protects victims over age 14, while Minnesota’s statute would only reach those under age 18 (and as noted above, only where the parents have not consented). See “Criminal Laws Addressing Forced Marriage in the United States,” Tahirih Justice Center (July 2013), available at http://www.tahirih.org/sites/tp-uploads/2014/02/Tahirih-MEMO-State-Cons-Gender-Specific-Forced-Marriage-07-29-12.pdf.

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Civil protection orders could provide another potential legal option. Such orders have proven to be an accessible and effective tool for many victims in domestic violence situations, offering
them a way to protect themselves that does not automatically result in criminal consequences for abusers who are also loved ones. For several reasons, however, domestic violence civil protection orders are often neither available nor adequate to protect victims in forced marriage situations.

State definitions of domestic violence and child abuse are often not expansive enough to encompass the dynamics of forced marriage. Some states’ statutes focus on physical injury, rather than facing the full range of coercive threats and emotional abuse common in forced marriage cases, or are predicated on a level or imminence of harm that may be hard for victims to show, especially if they are being kept deliberately in the dark as to their family’s future plans. Most states also limit the circumstances in which a protection order may be sought by or on behalf of a minor, and many rely on a parent to bring the petition. The range of potential respondents is also often too limited, failing to encompass extended family members who may be directly involved in forced marriage situations. Finally, the kind of relief that can be ordered under domestic violence civil protective orders is often not broad or flexible enough to enable the instrument to be tailored to forced marriage victims’ unique needs. 10 states’ statutes do not even include a “catch-all” provision that enables the judge to order whatever relief is necessary and appropriate, and in any event, to realize the protective potential of such provisions, judges would need specialized training or guidance on forced marriage.

All these limitations pose special problems for minors. Without a clear legal basis to intervene, child protection authorities may not even see forced marriage as falling within their mandate. Youth who are older than 16 but who have not yet reached the age of majority can also often fall between the cracks of child protection, even as that age group can be at high-risk of forced marriage. Even when child protection authorities do get involved, their investigation protocols do not factor in the acute flight risk in these cases: at the first sign of inquiry, families may simply expedite their plans and take a child out of the country. A priority placed on keeping families together may fail to appreciate the potential risks posed by extended family, who may agree to foster a victim in order to continue to pressure them.

26 See, e.g., Connecticut’s domestic violence civil protection order statute at Conn. Gen. Stat. §46b-15(a)(providing relief to a victim “who has been subjected to a continuous threat of present physical pain or physical injury by the other person”). Child endangerment statutes provide another example of how current laws can be a misfit with forced marriage situations. Some state statutes are broadly applicable (e.g., New York’s, which extends to any knowing acts “likely to be injurious to the physical, mental or moral welfare of a child”), while others are more limited and set much higher bars. See National Center for Prosecution of Child Abuse, National District Attorneys’ Association, Child Endangerment Laws (September 2012), at least 17 states, a petitioner cannot seek a protection order against any relative, but only based on a more limited set of relationships. ABA CDSV Chart, supra. Forced marriage situations can involve multiple perpetrators and facilities within the immediate and extended family.

In at least 17 states, a petitioner cannot seek a protection order against any relative, but only based on a more limited set of relationships. ABA CDSV Chart, supra. Forced marriage situations can involve multiple perpetrators and facilitators within the immediate and extended family.

27 These include Georgia, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, North Dakota, and Rhode Island, id.

28 40% of the cases handled by the UK’s FMU in 2013 involved victims younger than 18. See supra note 2.
A host of other state laws and policies fail to adequately address forced marriage situations or may even make it more difficult for minor victims to access help. For example, state laws setting licensing or reporting requirements that bar shelters from accommodating minors, limit the time they can remain in the shelter, or require parents to be notified within hours of the minor’s whereabouts, can also limit the options a minor has to avoid or escape a forced marriage. Many states also have laws that expressly prohibit the “harboring” of runaway youth by any individual or organization not holding legal custody, and some have related criminal charges that parents could pursue against someone trying to help a minor victim, such as “interference with custodial rights”. Some states also require parental consent for emancipation.29

At a federal level, little effort has been made to address forced marriages involving US citizens or residents. Federal action is needed particularly in cases in which women and girls have been taken out of the United States to force them into marriages abroad. The State Department’s Bureau of Consular Affairs website contains some general travel advisories and selected country-specific information for individuals who fear they may be at risk and the Foreign Affairs Manual includes basic guidance for consular officers handling forced marriage cases abroad.30 Importantly, the State Department has limitations as to what it can do on its own. It does not engage in domestic efforts to prevent forced marriage (either in general or in particular cases), and it can only step in after a victim has already been taken abroad, when the risks and stakes increase considerably. The State Department can also typically only assist US citizens, and consular officers may have limited diplomatic or practical options (e.g., in the case of dual nationals, or depending on where the victim has been taken). Some other federal agencies are just beginning to take notice of the problem,31 but also suffer from similar scope limitations. Without a concerted and coordinated multi-agency approach—ideally, a joint operation like the UK’s Forced Marriage Unit—victims will continue to fall between the narrow mandates and authority of particular offices and agencies.

**Victim-Centered Legal Reforms That Appreciate the Unique Dynamics and Risks in Forced Marriage Cases Are Urgently Needed**

More engagement by the government and legal community is overdue and critically needed. To date, the vast majority of efforts to galvanize a national movement to address forced marriage in the United States have been driven by non-profit advocates, both community-based agencies and national advocacy organizations.

The dynamics of forced marriage pose challenges to protecting victims and deterring perpetrators. Like domestic violence, forced marriage is a problem often hidden from view, but

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30 See http://travel.state.gov/content/passports/english/emergencies/forced.html.

31 See supra note 1.

32 Offices within the Departments of Justice (DOJ) and Health and Human Services (HHS), for example, are helping facilitate outreach and education to certain DOJ and HHS grantees nationwide. The National Institute of Justice, DOJ’s research arm, is also partially funding a study to examine the intersection of forced marriage, intimate partner violence and sexual violence among young South Asian women and men in the Washington, D.C. metropolitan area.


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forced marriage cases may pose particular obstacles to detection, prevention, and protection. Forced marriage victims may be especially reluctant to seek help from anyone, let alone the authorities. They may not be aware of their legal rights and in particular, that they have the right to say “no” to the marriage; they may be raised to keep such matters private and speak of them only within the family or not at all; they often face considerable pressure to put the family’s wishes and welfare before their own; and they may be especially fearful of the possible criminal (and potentially, immigration) consequences to their families if they seek help from the police, the courts, or other elements of the legal system. Detection, prevention and protection is also complicated in forced marriage cases because the problem often happens in insular families and communities; may manifest with an outward appearance of legitimacy (a marriage); and may result from a longstanding pattern of coercive and controlling behavior and entail primarily emotional abuse, rather than unfold through particular violent incidents. Forced marriage cases also often involve the risk that victims may be taken and potentially left abroad, removed from help. Finally, law enforcement, service-providers and others encountering victims may refrain from asking the right questions, or any questions, for fear of being perceived as culturally insensitive, or may decline to get involved at all in what they see as a “cultural matter.”

Mindful of these obstacles, the United States should proceed carefully and prioritize victim-centered legal solutions that encourage help-seeking. A package of solutions at both the federal and state levels that is well-vetted for unintended consequences, and that gives law enforcement (police, prosecutors, judges, child protection officers) not only the clear authority but also the undeniable mandate to assist victims who ask for help, is critical. Informing and infusing all legal responses with a nuanced understanding of forced marriage is also essential. Adopting one solution alone, for example, will be a disservice to victims, since families’ motivations are varied and thus they may not be deterred by a particular tack. A single-pronged approach may also actually leave victims more vulnerable, if family workarounds further conceal the forced marriage or isolate the victim.

Legal reform alone will be insufficient. It must be made part of a thoughtful implementation and awareness-raising strategy and accompanied by a strong parallel investment in community-based outreach and engagement.

Ultimately, ending forced marriage in the United States will require a change in community norms and values that condone and perpetuate this form of abuse, but the law is a crucial and as-yet-un tapped tool to reach that vital goal.

Respectfully Submitted,

Angela Vigil, Chair
ABA Commission on Domestic & Sexual Violence
August 2014
1. **SUMMARY OF RESOLUTION(S).**
The Resolution condemns forced marriage as a fundamental human rights violation and form of family violence and violence against women, and urges federal, state, territorial, local, and tribal governments to amend existing laws, or to enact new laws, to prevent forced marriages and protect and support individuals threatened by forced marriage. The Resolution further urges governments to collaborate with legal, social services and advocacy organizations with expertise in forced marriage to develop these victim-centered legal remedies, and to promote training for judges, prosecutors, law enforcement, child protection authorities, victim-witness advocates, and attorneys.

2. **APPROVAL BY SUBMITTING ENTITY.**
The Commission voted to support the resolution and report on May 6, 2014

3. **HAS THIS OR A SIMILAR RESOLUTION BEEN SUBMITTED TO THE HOUSE OR BOARD PREVIOUSLY?**
No.

4. **WHAT EXISTING ASSOCIATION POLICIES ARE RELEVANT TO THIS RESOLUTION AND HOW WOULD THEY BE AFFECTED BY ITS ADOPTION?**
- Recommendation, Report No. 115 (Feb. 2010) (urging Congress to re-authorize and fully fund VAWA)
- Report No. 109 (Aug. 2008) (urging federal, state, and tribal governments to strengthen protection and assistance for victims of gender-based violence);
- ABA Section of Criminal Justice, Recommendation, Volume 103 (Feb. 1978) (supporting efforts to combat family violence).

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

5. **WHAT URGENCY EXISTS WHICH REQUIRES ACTION AT THIS MEETING OF THE HOUSE?**
A number of Western countries are beginning to realize that forced marriage is not only a global problem, but also a domestic problem with transnational dimensions. The United States lags far behind its Western counterparts, despite an increasing number of research reports and media accounts that document that forced marriage is a serious problem in the United States. Domestic violence, sexual violence, and emotional violence often follow in the wake of a forced marriage. Victims’ feelings of despair and betrayal can also manifest in severe depression, stress-related illnesses, declining work and academic performance and excessive absences, alcohol and substance abuse, and self-harm, including attempted suicide and suicide. State-level
legal responses to forced marriage are limited, and while existing laws can be tools to prevent forced marriages or protect victims in some cases, they are not widely used or may offer inadequate protections. More engagement by the government and legal community is overdue and critically needed.

6. **Status of Legislation.**
   There is currently no legislation related to this resolution.

7. **Brief Explanation Regarding Plans for Implementation of the Policy, If Adopted by the House of Delegates.**
   Upon adoption, the Commission on Domestic & Sexual Violence will work with other national organizations to address forced marriage as a human rights concern, striving to develop appropriate, victim-centered legal responses.

8. **Cost to the Association.**
   None.

9. **Disclosure of Interest.**
   N/A

10. **Referrals.**
    Center for Human Rights
    Individual Rights and Responsibilities
    Family Law
    Criminal Law
    Commission on Immigration
    SCLAID

11. **Contact Name and Address Information.**
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12. **Contact Name and Address Information.**
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EXECUTIVE SUMMARY

1. SUMMARY OF THE RESOLUTION.
The Resolution condemns forced marriage as a fundamental human rights violation and form of family violence and violence against women, and urges federal, state, territorial, local, and tribal governments to amend existing laws, or to enact new laws, to prevent forced marriages and protect and support individuals threatened by forced marriage. The Resolution further urges governments to collaborate with legal, social services and advocacy organizations with expertise in forced marriage to develop these victim-centered legal remedies, and to promote training for judges, prosecutors, law enforcement, child protection authorities, victim-witness advocates, and attorneys.

2. SUMMARY OF THE ISSUE THAT THE RESOLUTION ADDRESSES.
A number of Western countries are beginning to realize that forced marriage is not only a global problem, but also a domestic problem with transnational dimensions. The United States lags far behind its Western counterparts, despite an increasing number of research reports and media accounts that document that forced marriage is a serious problem in the United States. Domestic violence, sexual violence, and emotional violence often follow in the wake of a forced marriage. Victims’ feelings of despair and betrayal can also manifest in severe depression, stress-related illnesses, declining work and academic performance and excessive absences, alcohol and substance abuse, and self-harm, including attempted suicide and suicide. State-level legal responses to forced marriage are limited, and while existing laws can be tools to prevent forced marriages or protect victims in some cases, they are not widely used or may offer inadequate protections. More engagement by the government and legal community is overdue and critically needed.

3. PLEASE EXPLAIN HOW THE PROPOSED POLICY POSITION WILL ADDRESS THE ISSUE.
The proposed policy position urges federal, state, territorial, local, and tribal governments to amend existing laws, or to enact new laws, to prevent forced marriages and protect and support individuals threatened by forced marriage. The Resolution further urges governments to collaborate with legal, social services and advocacy organizations with expertise in forced marriage to develop these victim-centered legal remedies, and to promote training for judges, prosecutors, law enforcement, child protection authorities, victim-witness advocates, and attorneys.

4. SUMMARY OF ANY MINORITY VIEWS.
None to date.
RESOLVED, That the American Bar Association urges states, localities, and territories to develop written contingency plans to preserve the election process in the event of an emergency. Such plans should include, at a minimum:

1) designation of alternative locations and times for conducting elections;
2) provision for the back-up and preservation of election and voter data;
3) storage and testing of back-up voting equipment to be used in an emergency;
4) establishment of systems that will assure continued reliable communication between election administrators and poll workers;
5) development of effective plans for communicating with voters during emergencies; and
6) recruitment and training of poll workers in the event of an emergency.

FURTHER RESOLVED, That the American Bar Association urges federal, state, and local officials to enact measures to ensure that voters assisting in recovery efforts are able to vote by absentee ballot or otherwise, including those who travel outside their state of residence to assist in recovery.
PART I: INTRODUCTION AND OVERVIEW OF RECOMMENDATION

In every election, federal, state, or municipal, general or primary, voters must make their way to the polls or receive and send ballots by mail to vote for the candidates of their choosing. Unfortunately, unforeseen disasters can make voting not just difficult, but impossible. These disasters come in all shapes and sizes—from snowstorms to hurricanes to even terrorist attacks—and can cause significant disruption, including power outages, gasoline shortages, flooding, or other widespread destruction. Disasters often force those affected to seek refuge in communities far from home, while bringing emergency responders such as police and firefighters, utility and construction workers, and insurance adjusters to the affected area and away from their home jurisdictions. Because those impacted by these events and those assisting in recovery are rarely focused on voting until it may be too late, the onus falls on election officials to ensure that unforeseen emergencies do not threaten the right to vote of those they serve and those who assist their communities with recovery.

This resolution and report focus on the impact of unforeseen disasters on elections and offers recommendations to assist communities responding to emergency situations. The American Bar Association ("ABA") recommends the following:

First, the ABA urges states, localities, and territories to develop written contingency plans detailing what should be done to protect the election process in the event of an emergency. The plans should address the major elements of elections likely to be affected by an emergency. Specifically, the ABA recommends that the plans designate alternative locations and times for conducting elections, implement sufficient back-up measures to ensure that election and voter data is preserved, delineate proper storage and testing procedures for back-up voting equipment to be used in the event of an emergency, ensure reliable communication methods between election administrators, poll workers, and voters in the event of an emergency, and anticipate additional recruitment and training of poll workers.

Second, the ABA urges federal, state, and local officials to enact measures to ensure that voters assisting in recovery efforts are able to vote by absentee ballot or otherwise. These measures should address the needs of individuals such as emergency first responders, repair crews, and aid workers, including those who travel outside of their state of residence to assist in recovery.

PART II: HISTORY OF EMERGENCY-RELATED ELECTION DAY PROBLEMS

Unforeseen disasters can impact the electoral process in innumerable ways, both large and small, including: delaying absentee ballots, causing poll worker shortages, damaging or destroying polling places, and decreasing turnout.¹ Although Superstorm Sandy, discussed at length later in this Report, focused attention on the havoc wrought on elections by unexpected emergencies, disasters on or near Election Day are nothing new. Indeed, and as discussed below, both national and regional disasters have disrupted or threatened to disrupt elections across the United States.

Although the most recent emergency to broadly impact Election Day was a natural disaster, Election Day emergencies can also be man-made. The terrorist attacks of September 11, 2001 occurred on the same day as New York’s municipal primary election. Although a

primary election is smaller in scale than a general election, the 9/11 attacks provide insight into how election officials might handle a terrorist attack on or near Election Day.

Although the municipal election scheduled for September 11, 2011 was not the first focus of federal, state, and local officials that day, following the attacks on the World Trade Center and the collapse of the South Tower at 9:59 am, then-Governor Pataki quickly acted to halt the election. The Governor took three major steps to ensure that voters would not be disenfranchised as a result of the terrorist attack: first, by noon that day, he signed an executive order halting the election statewide; second, he ordered that all votes already cast (excluding absentee ballots) would not count; and third, he rescheduled the primary for approximately two weeks later, on September 24, and declared that if a polling place were still closed on September 24, affected voters could vote by absentee ballot. Governor Pataki’s response to 9/11 highlights a number of important considerations for election officials, including whether to cancel an election locally or statewide, whether to count votes already cast, and when to hold any rescheduled election.

Mass power outages pose another threat to an orderly electoral process. For example, on August 14, 2003, 50 million people across eight different states found themselves in the dark due to a blackout, and many were without power for days. The impact of a comparable blackout on Election Day would be significant, for reasons including limiting mass transit, impairing the ability of voters to schedule time to reach the polls, and shuttering polling locations altogether. As an increasing number of states utilize touch screen voting machines and optical scan ballots, any significant power outage can interrupt the electoral process. All jurisdictions, but especially those that use these types of machines, must be prepared for any such loss of power.

In 2012, the State of Connecticut implemented regulations aimed at addressing the problems posed by a wide-scale power outage. These regulations include seven steps that polling place monitors must take in the event of a blackout: (1) alert everyone to the situation, (2) contact the power supply company, (3) contact the facility management staff, (4) find an alternate source of light such as a flashlight, (5) use an area of the building where natural light is available, (6) connect a generator if the backup power supply for the voting machines has been depleted, and (7) vote using paper ballots if a generator is unavailable. Such regulations will prove critical if a significant power outage threatens a Connecticut election. Hurricanes Katrina and Rita in August and September 2005 devastated the Gulf Coast, including Alabama, Louisiana, Mississippi, and Texas. In addition to widespread loss of life and property damage, the hurricanes destroyed electoral infrastructure, limiting available poll workers, damaging buildings and voting equipment, and displacing voters. Hurricane Katrina displaced over half of New Orleans residents.

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Hurricanes Katrina and Rita in August and September 2005 devastated the Gulf Coast, including Alabama, Louisiana, Mississippi, and Texas. In addition to widespread loss of life and property damage, the hurricanes destroyed electoral infrastructure, limiting available poll workers, damaging buildings and voting equipment, and displacing voters. Hurricane Katrina displaced over half of New Orleans residents.

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1 September 11 Attack Timeline, 9/11 Memorial, http://timeline.national911memorial.org/#/Explore/2. See also Fischer, supra note 1 at 2.
2 Id.
3 Id.
5 Conn. Agencies Regs. § 9-174a-27.
6 Id.
7 Id.
8 Id.
9 Id.
In an attempt to respond to the disasters, then-Governor Blanco of Louisiana postponed and then rescheduled the mayoral and city council elections that had been scheduled for February 4 and March 6, 2006.11 Displaced voters were given "three options: to vote absentee, travel to an early voting location in one of the ten Louisiana parishes outside New Orleans before election day, or travel to the city on election day and vote in person".12 The Louisiana State Senate also considered a bill that would have set up polling places in states where many of the displaced Louisiana voters were living at the time, although that bill never passed.13 Election officials should consider Louisiana’s efforts to address the problems faced by displaced voters as they develop contingency plans for any disaster.

Earthquakes can also cripple large parts of a region. For example, on October 17, 1989, approximately three weeks before Election Day, Earthquake Loma Prieta rocked California’s San Francisco Bay Area.14 The election proceeded, but faced numerous problems. In particular, San Francisco’s Marina District lacked water and electricity, forcing many voting precincts to be relocated, with others combined into the Marina Middle School, which also served as an evacuation center and the headquarters for emergency work.15 The city also took steps to contact thousands of poll workers and voters to inform them of their new assignments and to ensure that equipment was delivered to the correct location.16

PART III: SURVEY OF CURRENT STATE PRACTICES REGARDING EMERGENCY PLANNING

1. Provisions of Federal Law Affecting States’ Authority to Address Election Emergencies

The Elections Clause of the United States Constitution provides that states have the authority to regulate the time, place, and manner of Congressional elections subject to Congress’s authority to make or alter those regulations.17 The Supreme Court recently held that Congress has plenary authority over regulating elections:

"The power of Congress over the ‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.”18

To elect the President, the Constitution requires Congress to set a uniform time for choosing Presidential electors.19
As it pertains to emergencies and contingency planning, federal legislation has the greatest impact on timing. Congress set the regular time for elections for President, Senate, and House of Representatives as the Tuesday after the first Monday in November in even-numbered years (every fourth year for President). Federal statutes leave open, however, the possibility for states to hold an election at a later date under certain circumstances. The governing statute for choosing Presidential electors reads: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." For electing members of Congress, 2 U.S.C. § 8 provides: "[T]he time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively." These statutes, and relevant caselaw, seem to allow a state to postpone and reschedule a federal election in the event of an emergency under some circumstances. This issue, however, is not definitively settled, and it would be preferable to have a federal law explicitly addressing whether, and under what circumstances, federal elections can be postponed because of an emergency. In Busbee v. Smith, a three-judge federal district court rescheduled a Congressional election when it held that Georgia’s redistricting plan was racially discriminatory. The court found that 2 U.S.C. § 8 permitted Congressional elections to be rescheduled in exigent circumstances and specifically referenced natural disasters as among those circumstances: “Congress did not expressly anticipate that a natural disaster might necessitate a postponement, yet no one would seriously contend that [2 U.S.C. § 7] would prevent a state from rescheduling its congressional elections under such circumstances.” Similarly, 3 U.S.C. § 2 may allow a Presidential election to be postponed if a large-scale emergency occurs on Election Day and prevents a state from choosing its Presidential electors. Authority to postpone a Presidential election is more ambiguous if the emergency occurs prior to Election Day because the statutory language is conditioned on the election having been held. Nonetheless, there is one reasonable interpretation that states the discretion to reschedule in the event of a large-scale emergency given the state’s default authority under the Elections Clause to set the time, place, and manner of elections. The bigger challenge is to determine the threshold

20 2 U.S.C. § 1 (Senate); 2 U.S.C. § 7 (House of Representatives); 3 U.S.C. § 1 (President).
22 2 U.S.C. § 8 (emphasis in original); 2 U.S.C. § 1 (applying rules for voting members of House of Representatives to Senate).
25 Id. at 526.
26 There is one case, not involving an emergency arising on or before Election Day, where a state court held that there cannot be a revote in a Presidential election under any circumstances. In Fladell v. Elections Canvassing Comm’r, No. 5169-OH965 (Fla. Cir. Ct. Nov. 20, 2000), the so-called butterfly ballot case, the trial court held, inter alia, that 3 U.S.C. § 2 did not allow for a re-vote under any circumstances because Presidential elections must occur on the same day in the United States. On appeal, the Florida Supreme Court decided the case on other grounds and held that the statute is not limited to the occurrence of the election in the territory. 772 So. 2d 1240 (Fla. 2000). The Fladell trial court did not address an earlier decision in Donahue v. State Board of Elections, 435 F. Supp. 977 (E.D.N.Y.), where a federal district court held that federal courts had the equitable authority to order a re-vote of the Presidential election in New York under certain extreme circumstances but that the plaintiffs’ allegations did not meet the threshold.
29 Id. at 526.
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33 Id. at 526.
for postponing an election. For example, if Superstorm Sandy had hit New Jersey and New York one or two days before the November 2012 election, rather than one week before, would affected states have had the authority to postpone the election when large portions of those states were underwater? In addition, postponing an election in a state or in some states has practical implications that should not be taken lightly, including the effect on voter turnout in the affected state(s) if the result of regularly scheduled elections in other states is already known.

Generally, federal laws set a floor for regulating elections. For example, in elections for President and Vice President, Section 202 of the Voting Rights Act requires states to provide absentee voting for all citizens provided the citizen applies for the absentee ballot no later than seven days before the election and returns the ballot on or before Election Day.

Most states allow broader absentee voting. In addition, the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), which was most recently amended in 2009 by the Military and Overseas Voter Empowerment Act (“MOVE Act”), contains certain requirements for federal elections that state and local election officials must follow for eligible voters serving in the military or living outside the United States that enable such voters to register and vote remotely.

Among other things, states are required to create and implement procedures that permit these voters to request and return absentee ballots by mail or electronically. The ballots must be processed and counted, if otherwise valid, as long as they are postmarked or transmitted by Election Day. The procedures required by UOCAVA, as amended by the MOVE Act, require state and local election officials to create the sort of infrastructure, including acceptance of absentee ballot applications and absentee ballots transmitted electronically, that could also be used for voters assisting in recovery efforts.

2. State Law Governing Postponement of Elections and Relocation of Polling Places

Only eight states have a statutory provision allowing for the postponement of elections (Florida, Georgia, Hawaii, Iowa, Louisiana, Maryland, New York, and Virginia). In Florida, “[t]he election must be held within 10 days after the date of the suspended or delayed election, or as soon thereafter as practicable.” In Georgia, “the Secretary of State is authorized to postpone or extend candidate qualification period, and the date of an election in the affected area.” In Hawaii, officials “may postpone the election in the affected precinct for no more than 21 days, provided that the postponement does not affect the conduct of the election, tabulation, or distribution of results for those precincts, districts, or counties not designated for the postponement.” In Iowa, the “county commissioner of elections must consult with the state commissioner of elections to develop a plan to conduct the election under the emergency failed to meet that threshold. In addition, the Fladell trial court’s ruling does not address the language of 3 U.S.C. § 2 which would seem to permit a re-vote under some circumstances.

32 Md. Elec. Law § 3-103.
33 N.Y. Elec. Law § 3-108.
36 Id.

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32 Md. Elec. Law § 3-103.
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conditions" before an election may be postponed. Iowa only allows postponement if there are no federal races on the ballot. In Louisiana, the Governor may suspend or delay any qualifying of candidates, early voting, or elections only upon the certification of the Secretary of State that an emergency exists. In Maryland, the Governor’s declaration of emergency may “provide for the postponement, until a specific date, of the election in part or all of the State.” In New York, “the state board of election...must notify the relevant county board of elections that an additional day of voting must be held” and “[t]he county board of elections must set a date for an additional day of voting in the affected areas, which must take place no more than 20 days after the original date of the general election.” In Virginia, “the Governor may postpone an election by executive order in areas affected by the emergency to a date not to exceed 14 days from the original date of the election. If a local governing body determines that a longer postponement is required, it may petition a three-judge panel of the Virginia Supreme Court for an extension.”

Several states allow polling locations to be relocated in the event of an emergency. In Connecticut, municipal clerks must create a contingency plan for elections, including a plan for alternate polling locations in the event of an emergency. In Florida, election officials may designate additional polling places if existing polling places are deemed unsafe. Hawaii allows registrars to consolidate precincts within a representative district. Iowa provides that polling places may be relocated as part of an emergency plan created by election officials. In Maryland, the Governor’s emergency proclamation may include moving polling locations.

3. State and Local Practices Regarding Contingency Planning

Several states have enacted formal, written contingency plans for major emergencies affecting the conduct of elections. At least eighteen states and the District of Columbia either have written statewide contingency plans, require that local jurisdictions create such plans, or provide model plans or guidelines to local jurisdictions. Additionally, in a recent survey of 37 states, the National Association of Secretaries of State (“NASS”) reports that many states offer other formal or informal guidelines and planning.

Four states—California, Kentucky, Maryland, and Oklahoma—are statutorily required to create statewide election disaster contingency plans or guidelines. In California, the Secretary of State is required to consult with county elections officials to “establish the procedures and guidelines for voting in the event of a natural disaster or other state of emergency. In Kentucky, the state board of elections must set a date for an additional day of voting in the affected areas, which must take place no more than 20 days after the original date of the general election.” In Maryland, the Governor may postpone an election by executive order in areas affected by the emergency to a date not to exceed 14 days from the original date of the election. If a local governing body determines that a longer postponement is required, it may petition a three-judge panel of the Virginia Supreme Court for an extension.

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emergency" and to post those procedures online. In Kentucky, the State Board of Elections must establish procedures for election officials to follow in the event of a disaster. Those procedures are laid out in administrative regulations. In Maryland, the State Board of Elections is tasked with developing "guidelines concerning methods for addressing possible emergency situations," while in Oklahoma the secretary of the State Election Board and the adjutant general of the Oklahoma National Guard are required to develop a contingency plan to deal with disasters.

Five states require local jurisdictions to create election disaster contingency plans: Connecticut, Iowa, Kentucky, Nevada, and Ohio. Connecticut requires that each municipal registrar of voters create a plan to deal with disasters such as a "loss of power [or] a fire or the sounding of an alarm within a polling place,... a weather or other natural disaster [and] disorder in and around the polling place." Furthermore, the Secretary of State is required to draft a model plan whose use is required of any municipality that fails to create its own plan.

In Iowa, the Secretary of State, as the state commissioner of elections, is authorized by statute to exercise emergency powers, but is required to adopt rules describing the powers and the emergency situations that give rise to them. The rules function as a contingency plan, laying out what actions the secretary will take in particular situations.

In Kentucky, the regulations which lay out the state election disaster procedures also require county boards of election to create local contingency plans and file them with the state board.

New York requires county election boards to adopt a contingency plan that "addresses how an election shall be configured, tested, conducted, and tabulated, in the event of an anticipated or unavoidable event." In Ohio, per a settlement following League of Women Voters v. Brunner, 548 F. 3d 463 (6th Cir. 2008), the Secretary of State requires county boards of election to draft an election administration plan which contains a contingency plan.

Some states have also taken a purely administrative route to planning for election disaster contingencies. The District of Columbia and Virginia have developed administrative,
statewide contingency plans. Colorado, Connecticut, Montana, North Carolina, and Wisconsin each offer a model plan or guide to assist local jurisdictions in drafting contingency plans, while Kansas issues items for counties to consider when they are developing their contingency plans. Louisiana and Wisconsin both offer election emergency training to local election officials. Additionally, in responding to a NASS survey on election disaster preparedness:

“A number of states identified other policies and procedures relevant to the administration of an election impacted by an emergency situation, including administrative authority to implement special procedures, business continuity plans for the state elections office, extension of deadlines for returning mail/absentee ballots, expanded availability of absentee ballots, alternative methods for distribution of ballots, use of unofficial ballots, extension of polling place hours, procedures for hand counting of ballots, maintaining a copy of the voter registration list at an alternative location and an emergency text and email system to communicate with counties in an emergency situation.”

4. State Emergency Worker Statutes

Surprisingly few states have adopted statutes that specifically protect the voting rights of emergency workers during a disaster. Only nine states (Alabama, California, Colorado, Kansas, Louisiana, Maine, New Hampshire, Oklahoma, and Rhode Island) have statutes that specifically protect emergency workers, while ten more (Delaware, Illinois, Indiana, Iowa, Maryland, Mississippi, Missouri, North Carolina, Virginia, and Wisconsin) offer election emergency training to local election officials.

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West Virginia’s grant authority to state election officials to change voting procedures during an emergency. Many states have emergency voting statutes in place, but these only apply to those that have been hospitalized or have a family illness or death before an election.

When adopting an emergency worker statute, policymakers must keep several factors in mind. The first is how narrowly to define “emergency worker.” Firefighters, police officers, and medical personnel are the first workers that come to mind, but there are many other people in a variety of occupations that find themselves called away when disaster strikes. Utility and construction workers, aid workers, insurance adjusters, and others serve important roles in responding to disasters. Generally, states with specific emergency worker statutes have defined the term broadly to include any voter who is called to respond to an emergency. For example, Alabama defines this group as “qualified voters who respond to an emergency.”104 The second factor to consider is whether deadlines can or should be adjusted to allow extra time for emergency workers to return their ballots. Almost all states with specific emergency worker statutes specify that ballots must be returned either by the time the polls close or by mid-afternoon on Election Day. Maine grants emergency workers the same latitude as UOCAV voters.105 A goal of many emergency worker statutes is to protect the voting rights of emergency workers without having to extend the ballot receipt deadline.

Election administrators should consider numerous questions when considering how to accommodate emergency worker voters: How many emergency workers will need ballots during a disaster? How will they know who needs an emergency ballot, and how will emergency workers know that these ballots are available? How will they get ballots from point A to point B and back? How will they ensure that the correct ballot reaches the voter? What happens if the voter’s home state has also declared an emergency? Many states, like Kansas,106 grant power to the Secretary of the State or election officials to designate alternate methods for sending and receiving ballots during a declared emergency, which may mean that a state will use the relaxed standards of UOCAV voting when dealing with emergency ballots (many states allow UOCAV voters to fax or e-mail an image of their ballot to their registrars when air mail is not sufficient to guarantee the return of ballots).107 Perhaps the most pressing question, however, is what happens when the voter’s home state is also in a state of emergency, as a region-wide disaster may require a state to coordinate with other states or the federal government to protect voting rights.

PART IV: CASE STUDY: SUPERSTORM SANDY

1. Introduction

Superstorm Sandy ravaged the Northeast in the days leading up to the 2012 General Election. The storm hit New York and New Jersey particularly hard, resulting in at least 147 direct deaths across the Atlantic basin, including forty-eight in New York alone.108 More than 650,000 houses were damaged or destroyed as a result of the storm, with over 8.5

103 Va. Code § 24.2-713.
104 W. Va. Code § 3-1A-6.
109 National Hurricane Center, http://www.nhc.noaa.gov/data/td/AL182012_Sandy.pdf. Deaths occurring as a direct result of the forces of the storm are referred to as “direct” deaths, including those who drowned in the storm surge, rough seas, rip currents, flash floods, lightning, or wind-related deaths.

106 Va. Code § 24.2-713.
112 Eric S. Blake et al., Tropical Cyclone Report: Hurricane Sandy (AL182012), 22-29 October 2012 at 1, National Hurricane Center, http://www.nhc.noaa.gov/data/td/AL182012_Sandy.pdf. Deaths occurring as a direct result of the forces of the storm are referred to as “direct” deaths, including those who drowned in the storm surge, rough seas, rip currents, flash floods, lightning, or wind-related deaths.
million customers losing power, some for weeks or even months. The total cost of damage from the storm is estimated at over $65 billion.

The widespread decimation of both New York and New Jersey’s infrastructure, including utilities, communications, roads, and public transportation, along with a crippling combination of flooding, power outages, and gasoline shortages, threatened to prevent voters from getting to the polls for the General Election. Further complicating the situation, the New York City Board of Elections (“NYCBOE”) headquarters were completely flooded by the storm. Both New York and New Jersey instituted ad hoc remedial measures in an attempt to respond to the difficulties facing voters and the obstacles that threatened each state’s voting infrastructure. Both states issued emergency orders that relaxed normal voting laws and allowed displaced voters to vote by extraordinary means, and also attempted to equip election officials and volunteers with the means to carry out their duties under compromised circumstances.

Despite these efforts, many problems persisted; neither state was fully prepared to deal with the emergency situation each faced during the 2012 General Election. This section examines New Jersey and New York as case studies in an effort to help develop appropriate emergency planning provisions for states to adopt for the future.

New Jersey

In response to the storm, Governor Chris Christie, Lieutenant Governor Kim Guadagno, and other New Jersey state executives issued a number of emergency directives aimed at enabling every registered voter in the state to cast a vote in the 2012 General Election. As discussed below, while some of the provisions were successful, others were not. Many of the resulting problems, however, stemmed from a weakened infrastructure that was ill-equipped to handle the overload caused by many of the ad hoc remedial measures. Additional planning could have eliminated or reduced many of the problems.

(a) New Jersey Declares a State of Emergency and Issues Voting-Related Directives

In anticipation of the storm, Governor Christie issued Executive Order No. 104 on October 27, 2012, declaring a state of emergency in New Jersey. Following the storm, Lieutenant Governor Guadagno issued six voting-related directives from November 1 through November 9, 2012. These directives were aimed at easing numerous voting restrictions to make it easier for New Jersey residents to cast their votes.

The first directive, issued on November 1, 2012, was aimed primarily at easing voting restrictions. The directive: (1) extended the deadline by which county clerks could receive mailed applications for mail-in ballots; (2) required all county clerks and election offices to remain open during business hours every day, including Saturday and Sunday, through Monday, November 5, 2012 (the day before the election); (3) required county clerks and election officials to take all reasonable measures to notify voters of extended office hours; (4) required county boards of election to ascertain and report on which polling places were likely to be inaccessible

109 Id. at 14-15.
on Election Day and to identify alternative sites; (5) relaxed the requirement that an authorized messenger of mail-in ballots could serve as such only for ten or fewer voters; (6) waived the requirement that members of a district’s board of election reside in the county where the district is located; and (7) allowed polling places to be located more than 1,000 feet from an election district’s boundary line.113

Three more directives were issued on November 3, 2012. The first allowed email voting and mail-in ballots for displaced voters and extended the deadline for election boards’ receipt of marked mail-in ballots.114 The second required county boards of election to make all efforts to inform voters of polling place changes by posting the information on county and municipal websites, arranging for reverse 9-1-1 phone calls, making public service announcements on local media outlets, and posting notices at closed polling places advising voters where they could vote.115 The third directive expanded voting for displaced voters by allowing them to vote by provisional ballot at any polling place in the state. The directive also required county boards of election to count ballots in the voter’s county of registration even if cast outside of the county. Finally, it instructed the county boards to count all “eligible voters,” meaning those whose voter was qualified to cast, thus excluding voters from participating in local races and on local initiatives if the displaced voter used an out-of-district ballot.116

On November 6, Lieutenant Governor Guadagno issued a fifth directive requiring county clerks to continue processing until noon on November 9 all mail-in ballot applications received by email or fax by 5:00 P.M. on Election Day (November 6). It also extended the time for voters to cast the ballots they received in response to their applications to 8:00 P.M. on November 9, three days after the Election.117

The final directive, issued on November 9, extended various election-related deadlines, including the certification of county election results, the certification of federal and state elections, the filing of election contest petitions, and the impoundment of voting machines.118 Although New Jersey does not regularly operate a system of early, in-person voting, the November 1 directive encouraged voters to take advantage of early voting options. A preexisting provision of New Jersey law permitted voters to apply in person for mail-in ballots at the county clerks’ offices up to 3:00 P.M. on the day before the election.119 County clerks throughout the state responded by allowing voters to apply for and then cast mail-in ballots in person from November 2 to November 5.120

(b) Measures of Success

113 N.J. Directive Easing Restrictions on Voters, supra note 127.
119 N.J. Directive Easing Restrictions on Voters, supra note 137.
120 N.J.S.A. § 19:63-3(d).
121 N.J. Directive Regarding Email Voting and Mail-in Ballots, supra note 139.
113 N.J. Directive Easing Restrictions on Voters, supra note 127.
119 N.J. Directive Easing Restrictions on Voters, supra note 137.
120 N.J.S.A. § 19:63-3(d).
121 N.J. Directive Regarding Email Voting and Mail-in Ballots, supra note 139.
In response to the widespread damage created by the storm, New Jersey relocated many polling places throughout the state and created mobile polling places, installing voting machines in buses to shelters so that displaced voters could exercise their right to vote.

While county officials were instructed to assess the extra demand and ensure an adequate supply of paper ballots, fulfilling the directive proved more difficult. County officials resorted to using personal cell phones to arrange emergency deliveries of hundreds of boxes of paper ballots that had to be transported through a maze of obstructed roads.

Ultimately, the storm did not greatly impact New Jersey's voter turnout compared to previous years. In fact, turnout was marginally higher than the national average, consistent with prior years. The combination of directives aimed at improving voter participation and the scrambled efforts of election workers afforded countless New Jersey residents the opportunity to vote in an otherwise compromised situation.

Despite New Jersey's significant efforts to relieve the pressure on voters and its election system, problems persisted. The ad hoc remedial measures overloaded the state's already compromised infrastructure, which was simply ill-equipped to handle the changes on such short notice.

For example, many of New Jersey's polling places were closed due to storm damage and had to be relocated. While voters ordinarily could look up their polling place online, New Jersey's system was overloaded by the sheer volume of voters seeking the information. Even when a specific municipality's polling place lookup worked, it often did not reflect the relocated polling place information, or the information was not readily accessible to or easily digestible by the average voter.

Other remedial provisions similarly overloaded New Jersey's systems. Although the emergency directives enabled voters to utilize email and fax balloting, the state lacked the resources and infrastructure necessary for this option to function smoothly. Email and fax requests for ballots were repeatedly rejected by overloaded systems, and individual counties lacked the staff and the technological capacity to process the thousands of requests received in the days leading up to, and including, Election Day.

In an attempt to relieve the overloaded systems, Lieutenant Governor Guadagno issued the November 6 directive, instructing county clerks to process until November 9 all mail-in ballot applications received by email or fax by 5:00 P.M. on Election Day and allowing voters to vote their ballot by email or fax until 8:00 P.M. on November 9. This directive, however, proved insufficient, as the election outcome was determined the night of Election Day, frustrating voters' desire to vote in an open election.

As noted above, postponement of a Presidential election in only some states could have a similar effect.

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As noted above, postponement of a Presidential election in only some states could have a similar effect.
The November 6 directive also raised the issue discussed above regarding state authority to allow voters to vote after Election Day in the event of an emergency. As detailed above, this document takes the position that states have authority, under some circumstances, to postpone federal elections in the event of an emergency that prevents voters from voting, but this issue is not firmly settled.

3. New York

Similar to New Jersey, New York instituted a number of emergency measures to provide greater access to polling places amidst the damage caused by the storm.

(a) Governor Cuomo Declares a State of Emergency and Issues Executive Orders

New York Governor Andrew Cuomo issued Executive Order 47 on October 26, 2012, formally declaring a state of emergency for New York State. Among other things, the order enabled the Governor to issue executive orders concerning the 2012 General Election.129

On the evening of November 5, 2012—the evening before Election Day—Governor Cuomo issued Executive Order 62, permitting all eligible voters residing in a federally declared disaster area to cast provisional ballots at any polling place in New York State.130 The order was necessarily broad with universal application to avoid any issues that might result from asking election officials to determine who was a displaced person. Further, the order directed the New York State Board of Elections to require county boards of elections to instruct poll workers to provide provisional ballots, and to provide “notice and guidance” to voters on who may use the provisional ballots and how to use them. These directions included informing voters that if they used provisional ballots, their votes would count for President and Vice President, and any other candidate or ballot initiative that appears on the official ballot in the voter’s home district.

Governor Cuomo further directed the county boards of elections to “use all available means” to disseminate his executive order to election inspectors and voters, including ordering that the text be conspicuously displayed on all county boards’ websites and at polling places.

(b) Measures of Success

Executive Order 62 certainly preserved thousands of New Yorkers’ ability to vote: the New York City Board of Elections alone received more than 300,000 provisional ballots for the 2012 General Election, almost double the amount received in the prior 2008 General Election despite an overall greater voter turnout in 2008.131 More than sixty polling places in New York City were relocated by using city buildings that were close to usual polling places as temporary polling places.132 The New York City Board of Elections also successfully moved all voting equipment from its Staten Island facility to the Staten Island Armory, preventing significant problems in deploying necessary voting machines on Election Day.133

Anticipating loss of access to computer files, paper ballots, and other necessary materials, the New York City Board of Elections made backups of all necessary election materials,134 and


130 This included the five boroughs of New York City, and Nassau, Rockland, Suffolk, and Westchester Counties. Emergency workers who resided outside these areas could not take advantage of the Executive Order.

131 Data is taken from a presentation titled “Super Storm Sandy Contingency Plan” that was given by staff members of the NYCBOE to the Election Center Special Workshop on April 24-28, 2013, in Minneapolis, MN (“NYC Board of Elections Presentation”).

132 Id.

133 Id.

134 Id.
including lists of polling places and voter databases, and implemented a backup email system in case normal communications malfunctioned.\textsuperscript{113A} In response to Executive Order 62, the New York City Board of Elections printed 1.3 million ballots, equal to 250 affidavit ballots for each of the City’s more than 5,200 election districts. These ballots proved insufficient, however, and the New York City Board of Elections scrambled to print an additional 60,000 affidavit ballots in-house on Election Day.\textsuperscript{135}

\textbf{(c) Areas To Be Improved}

Although New York election officials raced to mitigate damage, the storm’s crippling impact proved too overwhelming. The 1.3 million affidavit ballots that the New York City Board of Elections printed were insufficient to adequately serve the number of displaced voters who sought to utilize such ballots, and many polling places in New York ran out of the ballots as Election Day progressed.\textsuperscript{134} Some polling places did not receive any additional ballots before the polls closed. As a result, countless voters were turned away from the polls, unable to cast a vote in the 2012 General Election.

The situation was only exacerbated by the confusion that ensued following Executive Order 62. Issued the evening before Election Day, there was little time for poll workers and volunteers—let alone the voters themselves—to fully digest and understand the impact of the Executive Order. As a result, ill-informed poll workers were unable to properly and effectively assist voters. Local boards of election also proved unhelpful, with some unresponsive due to damaged communications systems and others equally ill-informed about the Executive Order. For example, one group of students in Fulton County was turned away by poll workers and then by the Fulton County Board of Elections, even though the students were residents of a federally-declared disaster area and were therefore entitled to vote by provisional ballot under the Executive Order.\textsuperscript{136}

Even when poll workers and voters were properly informed about the details of the Executive Order, polling places were simply unprepared to handle the sheer volume of voters who sought to cast their votes. Thousands of displaced voters strained an already crippled election infrastructure. Relocated polling places did not have enough ballots to meet demands of displaced and properly-situated voters, resulting in long lines and hours of wait time. Some polling places lost power and electricity due to the storm and were operating on generators, and some even operated via flashlight, further adding to the general confusion and disorder.\textsuperscript{138}

For voters, polling place confusion added to the frustration and difficulty of voting. Displaced voters had to find polling places, and they had to find polling places that would allow them to vote using provisional ballots. Even then, many polling places did not have sufficient ballots to meet voters’ needs.

\textsuperscript{113A} Id.
Voters who were not displaced faced similar problems. Many had to contend with relocated polling places. Some were unaware that their polling places were relocated, and those who were aware that their polling places were relocated often did not know where. Many voters were confused about the Executive Order and thought they could vote at any polling place in New York State even though they were not from one of the affected counties. This added to the confusion and long lines.

Problems also extended beyond the polling places. A severe gasoline shortage impaired many voters’ ability to travel to their polling places.\textsuperscript{139} Those who were able to travel to their polling places faced significant obstacles because many roads were closed due to storm damage. For some, the road closures and transportation obstacles proved too difficult. One individual reported that her polling place was changed due to the storm and, although she was aware of the new location, she was disabled and could not travel to the new polling place to cast her vote. While her usual polling place was near enough to her home that she could vote, the relocated site was too distant for her given her disability.\textsuperscript{140}

4. Summary

Lack of advanced planning resulted in the unnecessary disenfranchisement of thousands of voters in both New Jersey and New York. Without an established contingency plan, displaced voters were left scrambling, unsure of how or where to vote, with some denied the opportunity to vote. Voters who were not displaced faced similar difficulties with confusing relocation information, long lines, impassable roads, or the inability to travel to a polling place due to a gasoline shortage. Poll workers and election volunteers were often ill-informed about the states’ last-minute remedial measures, resulting in further misinformation. Boards of Election were not prepared to adequately respond to these needs and overloaded infrastructures. Had there been an established contingency plan available in advance of the storm with which election officials, poll workers, and voters could have familiarized themselves, many of the problems that faced both New Jersey and New York could have been avoided. The Recommendations contained in this report are intended to help state and local jurisdictions develop the plans necessary to minimize these types of problems in the future.

PART V: CONCLUSION

The right to vote is fundamental. Because a large-scale emergency that occurs on or right before Election Day can make voting impracticable or impossible for those affected by the emergency and those assisting in recovery efforts, state and local governments should take appropriate steps to develop and implement emergency contingency plans to enable these individuals to vote.

Respectfully Submitted,

John Hardin Young
Chair
Standing Committee on Election Law
August 2014

\textsuperscript{139} Expecting the Unexpected, supra note 161.
\textsuperscript{140} Id.

\textsuperscript{15}
GENERAL INFORMATION FORM

1. Summary of Resolution(s).

This resolution urges states, localities, and territories to develop written contingency plans detailing what should be done to preserve the election process in the event of an emergency. The resolution also urges federal, state, and local officials to enact measures to ensure that voters assisting in recovery efforts are able to vote by absentee ballot or otherwise.

2. Approval by Submitting Entity.

The Standing Committee on Election Law approved the resolution on 26 April 2014.

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

No.

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

The ABA has adopted numerous policies on disaster preparedness in varying circumstances, as well as one specifically related to the need to develop special election procedures for the United States House of Representatives in the event of a catastrophe, sponsored by the Standing Committee and adopted at the 2004 Annual Meeting. The proposed resolution does not affect any existing policy and will only serve to enhance the Association’s policy on emergency preparedness.

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

N/A

6. Status of Legislation. (If applicable)

N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, the policy can be used to encourage federal, state, local, and territorial governments to develop contingency plans for elections.

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

9. Disclosure of Interest. (If applicable)
   There are no known conflicts of interest with this resolution.

10. Referrals.
    In early May 2014, the proposed report and resolution was circulated to the following entities:
    Section of State and Local Government Law
    Section of Administrative Law
    Section of Individual Rights and Responsibilities
    Section of State and Local Government Law
    Young Lawyers Division
    Committee on Disaster Response and Preparedness

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
    John Hardin Young, Chair
    Sandler Reiff Lamb Rosenstein & Birkenstock, P.C.
    1025 Vermont Avenue NW
    Suite 300
    Washington, DC 20005
    (202) 479-1111 office
    young@sandlerreiff.com
12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

John Hardin Young, Chair  
Sandler Reiff Lamb Rosenstein & Birkenstock, P.C.  
1025 Vermont Avenue NW  
Suite 300  
Washington, DC 20005  
(202) 479-1111 office  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges states, localities, and territories to develop written contingency plans detailing what should be done to preserve the election process in the event of an emergency. The resolution also urges federal, state, and local officials to enact measures to ensure that voters assisting in recovery efforts are able to vote by absentee ballot or otherwise.

2. Summary of the Issue that the Resolution Addresses

In every election, federal, state, or municipal, general or primary, voters must make their way to the polls or receive and send ballots by mail to vote for the candidates of their choosing. Unfortunately, unforeseen disasters can make voting not just difficult, but impossible. These disasters come in all shapes and sizes—from snowstorms to hurricanes to even terrorist attacks—and can cause significant disruption, including power outages, gasoline shortages, flooding, or other widespread destruction. Disasters often force those affected to seek refuge in communities far from home, while bringing emergency responders such as police and firefighters, utility and construction workers, and insurance adjusters to the affected area and away from their home jurisdictions. Because those impacted by these events and those assisting in recovery are rarely focused on voting until it may be too late, the onus falls on election officials to ensure that unforeseen emergencies do not threaten the right to vote of those they serve and those who assist their communities with recovery. This resolution and report focus on the impact of unforeseen disasters on elections and offers recommendations to assist communities responding to emergency situations.

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

This resolution calls on the federal, state, local, and territorial governments, as those responsible for administering elections, develop disaster contingency plans for elections for residents in locations affected by emergencies, as well as for first responders whose ability to vote in person is affected as well.

4. Summary of Minority Views

None to date.

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4. Summary of Minority Views

None to date.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal
governments and the courts to ensure that the electoral process and voting methods are accessible
to persons with disabilities and that polling places are free of physical, technological, and
administrative barriers.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
territorial and tribal governments to use all appropriate means to improve enforcement of voting
rights for persons with disabilities.

FURTHER RESOLVED, That the American Bar Association urges all election officials to
ensure that election personnel and volunteers receive accessibility training and that persons with
disabilities are actively encouraged to serve as election officials and volunteers.
I. INTRODUCTION

The right to vote is a cornerstone of democracy and is among our most fundamental rights as citizens. Approximately one in seven (35 to 46 million) Americans who are of voting age have accessibility needs. As the population ages, the number of voters with disabilities is expected to grow substantially.

In 2002, Congress enacted the Help America Vote Act (HAVA). HAVA requires voting systems to be accessible to individuals with disabilities, including those who are blind and have visual impairments. Accessibility means that individuals with disabilities must be provided with the same opportunity for access and participation (including privacy and independence) as for other voters. In particular, there must be “at least one direct electronic recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.”

Additionally, under HAVA states and units of local governments that receive payments to assure access for persons with disabilities must make “polling places, including the path of travel, entrances, exits, and voting areas of each polling facility, accessible to persons with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” Persons with disabilities must also be provided with information about the accessibility of polling places, including outreach programs to inform the individuals about the availability of accessible polling places and training election officials, poll workers, and election volunteers on how best to promote the access and participation of individuals with disabilities in elections for Federal office.

Despite the improvements HAVA has made to the accessibility of the electoral process for persons with disabilities, significant barriers remain. The National Council on Disability (NCD), an independent federal agency, surveyed nearly 900 voters with disabilities to learn about their experiences during the 2012 election cycle and issued a report in fall 2013. Among the NCD’s key findings were:

1. See, e.g., Evans v. Common, 398 U.S. 419, 423 (1970) (“Moreover, the right to vote, as the citizen’s link to his laws and government, is protective of all fundamental rights and privileges.”); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.”).
4. 42 U.S.C. § 15301; at seq.
5. Id. § 1548(a)(3)(A).
6. Id.
7. Id. § 1548(a)(3)(B).
8. Id. § 1542(b)(1).
9. Id. § 1542(b)(2).
• Nearly 40% of respondents encountered physical barriers at their polling places.
• Forty-five percent reported barriers that involved voting machines.
• Nearly 54% encountered barriers inside the polling place.
• Twenty percent stated that they were prevented from exercising a private and independent vote.

In January 2014, the President’s Commission on Election Administration (PCEA) issued The American Voting Experience: Report and Recommendations of the President’s Commission on Election Administration, a report that examines some of the problems that hinder the efficient administration of elections and sets forth recommendations and best practices. The PCEA Report identified many of the same accessibility barriers as the NCD Report.11

In 2007, the ABA House of Delegates adopted a policy on the voting rights of persons with disabilities. In 2007, the ABA House of Delegates adopted a policy on the voting rights of persons with disabilities. That resolution urged federal, state, local, and territorial governments to, among other things:

- Improve the administration of elections to facilitate voting by all individuals with disabilities, including those with cognitive impairments;
- Ensure that no governmental entity excludes any otherwise qualified person from voting on the basis of medical diagnosis, disability status, or type of residence;
- Clarify that people who provide assistance in voting lack the authority to determine capacity to vote, and that assistance in voting is limited to assisting voters to express the voter’s intent;
- Require and fund the development of voting systems that achieve universal design, so that voters can cast ballots privately and independently on the same voting machine, adaptable to accommodate any impairment, including physical, sensory, cognitive, intellectual, or mental; and
- Recruit and train election workers to address the needs of voters with disabilities, including physical, sensory, cognitive, intellectual, or mental disabilities.12

In 2013, the ABA’s Standing Committee on Election Law (StCEL) undertook an examination of the experience of voters with disabilities in the years since the adoption of the 2007 policy. The StCEL found that persons with disabilities continue to encounter accessibility barriers in exercising their right to vote. It approached the ABA Commission on Disability Rights (CDR) to explore further steps by which the Association can promote access for voters with disabilities.

The StCEL and CDR have proposed this resolution with two objectives in mind: first, to increase awareness of the significant accessibility barriers that persons with disabilities continue to encounter in the electoral process, specifically physical barriers at polling places, and second, to propose concrete recommendations for eliminating these barriers.

11 PCEA REPORT, supra note 3, at 51.
12 ABA HOUSE OF DELEGATES, ABA RESOLUTION 121 (AUG. 13-14, 2007).
II. Recommendations

A. Accessibility of the Electoral Process and Voting Methods

The first clause of the resolution urges governments to ensure that the electoral process and voting methods are accessible to persons with disabilities and that polling places are free of physical, technological, and administrative barriers.

1. Physical Barriers

Physical accessibility of polling places—getting to, entering, and using the polling place—is essential for persons with disabilities to exercise their right to vote. Because polling places are temporary facilities located in such structures as schools, libraries, and churches, ensuring accessibility is a challenge. The NCD Report cataloged physical barriers encountered by voters with disabilities in the 2012 election. Common barriers to getting to polling places included a lack of accessible parking; poorly maintained sidewalks; unimproved walkways; no curb cuts; and inadequate directions to accessible entrances and elevators. Common barriers to entering polling places included inaccessible, locked, or separate entrances; narrow doorways; doors that were hard to open and lacked automatic openers; stairs; poor signage; and inadequate ramps; cluttered floors and objects along paths of travel; narrow hallways; and inaccessible restrooms.13

The PCEA Report identified as barriers parking lots and spaces located far from polling places, a lack of navigable space between the parking lot and the polling place entrance, and long walking distances.14 Common barriers to using the polling place included: small rooms; lack of signage; voting machines situated in locations difficult to access or that compromised privacy; a lack of seating at voting stations; voting machines, booths, and tables that could not be adjusted for height; and insufficient numbers of poll workers to manage and assist voters.15

In United Spinal Association v. Board of Elections,16 a federal district court ruled that, due to barriers at polling sites, voters with vision and mobility impairments were denied a meaningful opportunity to participate in and benefit from the city board of election’s voting program by reason of their disabilities, in violation of Title II of the ADA and Section 504 of the Rehabilitation Act. The recurring barriers included unsafe or missing ramps, missing signage, and improper placement of voting equipment and furniture in voting areas.17 These barriers not only impede access at the moment someone is voting, but also discourage people with disabilities from participating in future elections.18 The Second Circuit affirmed.19

2. Technological Barriers

As noted above, the NCD Report found that 45 percent of respondents reported barriers that involved voting machines. Twenty-five percent identified inadequately trained polling personnel

13 NCD REPORT, supra note 10, at 58.
14 PCEA REPORT, supra note 3, at 51.
15 NCD REPORT, supra note 10, at 58; PCEA REPORT, supra note 3, at 51.
17 Id.
18 Id. at 618.
as a barrier. In particular, personnel were unfamiliar with the operation of accessible voting machines or unable to troubleshoot malfunctions. In addition, machines were broken or malfunctioned. When a machine malfunctions, voters are often asked to wait while the machine is being repaired or are told to return later in the day, which may not be an option for them.

Similarly, the National Federation of the Blind (NFB), in its online survey of the voting experiences of more than 500 voters who are blind or have low vision, found that the percentage of blind voters who were able to cast their vote on an accessible machine with no problems decreased from 87 percent in 2008 to 62 percent in 2012. The percentage of blind voters who reported problems with poll workers in setting up or activating the machine increased from 19 percent in 2008 to 33 percent in 2012. Twenty-one percent of blind voters stated that the poll workers failed to provide them with instructions on how to use the machine, up from 16 percent in 2008.

In California Council of the Blind v. County of Alameda, blind plaintiffs had to vote with the assistance of a third party, because poll workers were unable to operate the accessible voting machines. The federal district court concluded that requiring plaintiffs to vote with the assistance of third parties did not provide them with a voting experience that was equal to that afforded to others.

3. Administrative Barriers

Administrative barriers also create obstacles for voters with disabilities. Such barriers include long lines and excessive waits with no seating; lack of training and awareness among poll workers about how to assist voters with disabilities; and unclear registration and voting requirements. NCD reported that lengthy standing caused voters with disabilities and older voters to leave the polls without voting.

Some NCD survey respondents reported that poll workers were condescending or rude, or exhibited pejorative attitudes. Others reported that poll workers made assumptions that they needed help to vote even though they had not requested help. Respondents also stated that poll workers were unwilling to set up accessible machines or demonstrate their use.

Other Voting Methods

Voting by mail is an important option for persons with disabilities. Voters with disabilities are more likely than other voters to vote by mail. According to data from a 2012 survey by the U.S.
Census Bureau of 94,321 citizens, 28.4 percent of persons with disabilities voted by mail, compared to 17.3 percent of voters without disabilities. Yet persons with disabilities may encounter accessibility barriers even when voting by mail. For example, those with visual impairments may have difficulty seeing mail ballots. Moreover, persons who have cognitive impairments may experience difficulty following complex written instructions on the ballot. In addition, persons whose fine motor skills are limited may have trouble marking their vote on the ballot.

A national household telephone survey of 3,022 citizens who were eligible to vote in the 2012 elections was conducted in 48 states by the Survey Research and Technology and overseen by researchers at Rutgers and Syracuse Universities. Of the 2,000 citizens who self-identified as having a disability, 13.3 percent reported difficulties voting by mail, compared to 2.2 percent of 1,022 mail voters without disabilities. Moreover, 11.3 percent of mail voters with disabilities reported needing assistance in filling out or sending in their mail ballots, compared to 0.4 percent of mail voters without disabilities. The majority of the problems reported concerned the inability of voters with visual impairments to read the ballots due to small print or of voters with cognitive impairments to understand the written materials because of their complexity. Several respondents with hand tremors reported difficulty checking the squares on the ballot.

Lack of accessibility in voting by mail has several adverse effects. Persons with disabilities may choose not to vote at all. Or, they may be forced to rely on family members or caregivers to vote, rather than voting privately and independently, with the risk of coercion or undue influence that this may entail.

To address these problems, some states provide persons with disabilities with alternative voting methods that are accessible. For example, in Oregon, voters with disabilities can use a screen reader and other technology to access a ballot at home, or call the county elections office and ask for assistance. Voters can request that election officials bring an electronic tablet and a portable printer to the voter’s home to assist with voting. Such technology helps voters with limited vision and mobility, difficulty reading, and cognitive disabilities.

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31 Id.
32 Id.
34 Id.
35 Id. at 8-9.
36 Id. at 9.
37 Lisa Schur, supra note 2, at 6.
B. Enforcement of Voting Rights for Persons with Disabilities

The second clause of the resolution urges governments to improve enforcement of voting rights for persons with disabilities.

Section 401 of HAVA charges the U.S. Department of Justice (DOJ) with responsibility to bring a civil action against any political jurisdiction for declaratory and/or injunctive relief “to carry out the uniform and nondiscriminatory election technology and administration requirements of [HAVA].” With several circuits finding no private right of action under HAVA, it is critical that DOJ continue to monitor, oversee, and enforce accessibility for voters with disabilities under HAVA, the ADA, and Section 504.

DOJ has entered into several consent decrees with states to address accessibility issues. For example, in July 2006 DOJ filed a complaint against the State of Maine, alleging that it violated Section 301 of HAVA, 42 U.S.C. § 15481, by not having in place on January 1, 2006, voting systems for use in federal elections that comply with the accessible voting system standards set forth in that section. A month later, the federal district court approved a consent decree between DOJ and the state. The consent decree required the state to: (1) become compliant with HAVA Sections 301 and 303 before the 2006 general election; (2) finalize a contract with a voting machine supplier to provide the required accessible voting machines and ancillary equipment needed for its functioning; (3) train election officials regarding proper set-up, function, and use of the accessible equipment; (4) train local election officials regarding accessible machines; and (5) develop and implement a voter education program for individuals who would be using the accessible machines.

In February 2014, the DOJ reached a settlement with Blair County, Pennsylvania, following the department’s finding that many of the county’s polling places during the November 2012 election contained barriers to access for persons with disabilities, in violation of Title II of the ADA and its implementing regulations. Among other things, beginning with the November 2014 election, the county must ensure that all polling places are accessible, and must either relocate inaccessible polling places to accessible facilities or use reasonable temporary measures such as portable ramps, signs, traffic cones and door stops to make otherwise inaccessible places temporarily accessible.

HAVA established the Election Assistance Commission (EAC) to serve as a national clearinghouse and resource of information on election administration, provide funds to states to...


48 UNITED STATES OF AM. v. STATE OF ME., No. 06-86-6-B-W (D. Me. July 28, 2006).

improve election administration, and create minimum standards for states in key areas of election administration. However, the EAC has become an essentially nonfunctional agency. It has no Commissioners, no Executive Director, and no General Counsel. If the federal government is to carry out its responsibility to improve accessibility for voters with disabilities, the EAC should be restored or an alternative provided.

States and localities play a critical role in ensuring accessibility for voters with disabilities. They should create accessibility checklists, conduct accessibility compliance reviews, and hold accessibility trainings for poll workers. The EAC has a guide on accessibility that states can use.

C. Training and Recruitment of Election Workers

The third clause of the resolution urges election officials to ensure that election workers receive accessibility training and that persons with disabilities are actively encouraged to serve as election officials and volunteers.

As previously discussed, NCD identified poor training of the election workforce and their lack of awareness as accessibility barriers for voters with disabilities. Some poll workers were reportedly unable to operate accessible voting machines or troubleshoot malfunctioning equipment and were unwilling to set up or demonstrate the use of accessible machines. Some exhibited condescending and rude attitudes, while others made assumptions about the competency of voters with disabilities. NCD recommended that election personnel and volunteers receive training on, among other things, how to set up, operate, troubleshoot, fix, and demonstrate the use of accessible voting machines; disability awareness and etiquette; and compliance with the federal and state laws that protect the voting rights of persons with disabilities. Such training efforts should involve collaboration with persons with disabilities, national disability organizations, and disability-related entities.

Similarly, the PCEA stressed the importance of training poll workers on how to interact with voters with disabilities and configure and operate voting equipment. It recommended, as a reference, a video guide on educating poll workers about disabilities developed by the Pennsylvania Department of State. PCEA also emphasized the importance of ensuring that election officials work with advisory groups from the disability community in order to understand the needs of voters with disabilities, communicate to voters with accessibility needs

\footnote{U.S. ELECTION COMMISSION, QUICK START MANAGEMENT GUIDE, ACCESSIBILITY (APRIL 2010), available at http://www.eac.gov/assets/US/AssetManager/Quick%20Start/Accessibility.pdf.}
\footnote{NCD REPORT, supra note 10, at 63.}
\footnote{Id.}
\footnote{Id. at 14.}
\footnote{Id. at 15.}

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\footnote{NCD REPORT, supra note 10, at 63.}
\footnote{Id.}
\footnote{Id. at 14.}
\footnote{Id. at 15.}
the resources available, and provide recommendations for training poll workers and managing polling places.52

The active recruitment of election officials and volunteers with disabilities will give voters with disabilities greater confidence in the integrity and credibility of the election process. By making them more comfortable and more receptive to offers of assistance, it ultimately will increase voter turnout as well.

CONCLUSION

A free and fair electoral process is fundamental to the successful functioning of our democracy. By adopting the resolution, the American Bar Association will lend its voice to efforts to ensure that all voters, including the 35 to 46 million eligible voters with disabilities, can participate in that process on full and equal terms.

We urge the House to approve the resolution.

Respectfully submitted,

John Hardin Young
Chair
Standing Committee on Election Law

Judge Adrienne Nelson
Commissioner
Commission on Disability Rights

August 2014

52 Id. at 50.
1. Summary of Resolution(s).

This resolution urges that the electoral process and voting methods are accessible to persons with disabilities and that polling places are free of physical, technological, and administrative barriers. The resolution also urges governments to improve enforcement of voting rights for persons with disabilities and further urges election officials to ensure that election personnel and volunteers receive accessibility training and that persons with disabilities are actively encouraged to serve as election officials and volunteers.

2. Approval by Submitting Entity.

The Standing Committee on Election Law approved the resolution on 26 April 2014. The Commission on Disability Rights approved the resolution on 10 April 2014.

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

No.

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

In August 2007, the Association adopted policy urging federal, state, local and territorial governments to improve the administration of elections to facilitate voting by all individuals with disabilities, including people with cognitive impairments that increase in frequency with age. The policy would not be adversely affected by the proposed resolution. The resolution expands upon the previously adopted policy and also urges enforcement of voting rights for persons with disabilities and encourages their participation in the process as election officials and volunteers.

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

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

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, the policy can be used to encourage federal, state, local, and territorial governments to ensure the right to a private and independent vote by all individual, qualified to vote, as well as encouraging the development universal design of voting machinery in existing machines and for new machinery going forward.

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

9. Disclosure of Interest. (If applicable)
   There are no known conflicts of interest with this resolution.

10. Referrals.
   On 26 April 2014, the Section of Individual Rights and Responsibilities joined the resolution and report as a Supporter.
   In early May 2014, the proposed report and resolution was circulated to the following entities:
   Section of State and Local Government Law
   Section of Administrative Law
   Section of Science and Technology Law
   Commission on Law and Aging
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges that the electoral process and voting methods are accessible to persons with disabilities and that polling places are free of physical, technological, and administrative barriers. The resolution also urges governments to improve enforcement of voting rights for persons with disabilities and further urges election officials to ensure that election personnel and volunteers receive accessibility training and that persons with disabilities are actively encouraged to serve as election officials and volunteers.

2. Summary of the Issue that the Resolution Addresses

The right to vote is a cornerstone of democracy and is among our most fundamental rights as citizens. Approximately one in seven (35 to 46 million) Americans who are of voting age have accessibility needs. As the population ages, the number of voters with disabilities is expected to grow substantially. In 2002, Congress enacted the Help America Vote Act (HAVA). HAVA requires voting systems to be accessible to individuals with disabilities, including those who are blind and have visual impairments. Additionally, under HAVA states and units of local governments that receive payments to assure access for persons with disabilities must make access to polling places in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters. Persons with disabilities must also be provided with information about polling place accessibility. Despite the improvements HAVA has made to the accessibility of the electoral process for persons with disabilities, significant barriers remain. The resolution addresses the necessary improvements, in the development of new technology and enforcement of existing laws, which will enhance accessibility.

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

This resolution will enhance accessibility to the fundamental right to vote by urging that the electoral process, voting methods, and polling places are free of physical, technological, and administrative barriers; as well as urging the enforcement of voting rights for persons with disabilities and also urging accessibility training for poll workers and that persons with disabilities are actively encouraged to serve as election officials and volunteers.

4. Summary of Minority Views

None to date.
RESOLVED, That the American Bar Association supports modernization and simplification of the requirements, procedures, laws and regulations related to verification of signatures in cross-border contexts in order to increase reciprocal recognition among jurisdictions, taking into account relevant levels of service, new technologies and associated costs, as well as the need for appropriate privacy, data security and fraud prevention.
This resolution supports modernization and simplification of the requirements and procedures related to verification and authentication of signatures and their recognition in cross-border contexts, i.e., verification of signatures affixed to documents signed in one country for use outside that country's borders.

The increasingly transnational global marketplace for goods and services does not confine itself to the established mechanisms of verification of signatures, and the attestation of such verification through public authorities. Moreover, in the current globalized economy, the existing restrictions related to attestation and verification of signatures increasingly seem to burden economic activity, restrain trade, and restrict access to the benefits of legal institutions and mechanisms.

This resolution is advanced on the premise that the current transnational marketplace merits a technology-neutral legal framework for cross-border e-signature interoperability, with careful consideration of issues affecting privacy, data security and fraud prevention associated with the use of new technologies and electronic communications.

In today’s 21st century marketplace, the existing formulations of requirements and procedures derive from treaties concluded in 1961 and 1963, as well as statutory frameworks not of current vintage, that do not fully take into account modern developments in best practices, particularly new technologies and the use of electronic communications. Whatever may have been the historical justifications related to restricted communications, isolated legal systems, and limited cross-border experience, even among merchants, that influenced the elaborations of various of these texts, current needs and challenges merit updated legal frameworks.

For practical reasons associated with timelines for implementation and the priorities of state actors, treaty revision is unlikely to be the preferred path forward. Yet, the regulation of signature verification and notarial attestation touches on territorial sovereignty (particularly as to countries which accord territorial monopolies for signature verification in designated contexts), and reciprocal recognition of modernized and simplified procedures may be a key element of successful and appropriate reform. One key aspect of this resolution is to assure cross-border recognition, while avoiding placing those involved in the verification process in jeopardy of infringing foreign territorial sovereignty.

NEED FOR REFORM

More than 50 years have passed since the ratification of the two seminal treaties: the Hague Convention of October 5, 1961, Abolishing the Requirement of Legalisation for Foreign Public Documents—the “Hague Apostille Convention”, and the Vienna Convention on Consular Relations of April 24, 1963—the “Vienna Convention on Consular Relations”. Since then, the emergence of the internet, new technologies and electronic communications, and the acceptance of electronic signatures admitted by best business practices, warrant the modernization and simplification of the requirements and procedures related to verification of signatures in cross-border contexts even beyond the emerging developments with respect to electronic signatures in commercial matters. UNCITRAL acknowledges that this remains an open problem to be
resolved. A basic example of the need for modernization, in addition to the challenges of goods and services, commercial, property and family matters, arises from the service outside the United States ("U.S.") of American legal interns in need of a notarized certification of their service for purposes of bar admission in the U.S. The cost barrier and the absence of a viable, or at least timely, alternative to secure notarized certifications from functionaries of the multilateral entities that they have served highlight an "access to justice" issue for persons endeavoring to serve these multilateral entities.

BACKGROUND

National legal systems have long accounted for the need to verify the authenticity of signatures issued in one country for use in another. These systems rely on verifying the identity (and sometimes capacity) of a signatory through a notary public or other individual similarly exercising governmental authority to witness and attest to the act of one affixing one's signature. These systems of verification, witnessing and attestation increase public trust in the authenticity of the act and reduce the risk of another governmental authority questioning the legitimacy of the act.

Within the U.S., this verification, witnessing and attestation process is implemented through a notary public, under frameworks established generally by state law. Within civil law systems, the role of attestation is merely one aspect of a civil law notary's function. In the civil law countries, as well as in some common law countries, the responsibilities of notaries are much greater than those of a U.S. notary public, such notaries being subject to greater regulation, having higher educational qualifications, and charging substantial professional fees. Accessing a notary in a civil law jurisdiction for simple verification and attestation of a signature may require significantly greater formality and cost than the equivalent access to a notary public in the U.S. Whether in civil or common law jurisdictions, the verification of identity is accomplished not only by the witnessing person's examination of identity documents but also by the examination of corporate documents necessary to establish the signatory is the person who he or she claims to be. In many countries, the notary may also be asked to examine corporate documents necessary to establish the signatory's power and capacity to execute the instrument.

I See United Nations Commission on International Trade Law, PROMOTING CONFIDENCE IN ELECTRONIC COMMERCE: LEGAL ISSUES ON INTERNATIONAL USE OF ELECTRONIC AUTHENTICATION AND SIGNATURE METHODS (United Nations, 2009). The Council of Bars and Law Societies of Europe (CCBE), which represents around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer member countries, has also recognized the need for change, in its policy paper " CCBE Position on electronic identification, authentication and signatures, which may be found at http://www.ccbce.eu/fileadmin/user_upload/NTC_document/EN_02052011_CCBE_Polit_130434446.pdf." When a law student who has interned with an international organization applies for admission to practice in a state of the U.S., the relevant authority typically requires the applicant to obtain an affidavit from a representative of the organization attesting to the internship experience. Applicants to the New York State Bar, for example, are required to have such an affidavit "notarized," consistent with the U.S. understanding of a "notary's" function. Considering that a multilateral institution such as an international tribunal may have as many as 80 to 90 interns rotating every three months, the "notarial" burden is significant. Adding to this burden is a cost charged by a local notarius (for attestation in the Netherlands) of between €50 and €300, far exceeding the budgetary constraints of a publicly-funded institution, its individual staff attorneys or the volunteer interns. The problem worsens as some publicly-funded entities report that on occasions, due to security restrictions or workload limitations, they are unable to obtain appointments with U.S. consular officials to perform the attestation. 2

2 See United Nations Commission on International Trade Law, PROMOTING CONFIDENCE IN ELECTRONIC COMMERCE: LEGAL ISSUES ON INTERNATIONAL USE OF ELECTRONIC AUTHENTICATION AND SIGNATURE METHODS (United Nations, 2009). The Council of Bars and Law Societies of Europe (CCBE), which represents around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer member countries, has also recognized the need for change, in its policy paper " CCBE Position on electronic identification, authentication and signatures, which may be found at http://www.ccbce.eu/fileadmin/user_upload/NTC_document/EN_02052011_CCBE_Polit_130434446.pdf." When a law student who has interned with an international organization applies for admission to practice in a state of the U.S., the relevant authority typically requires the applicant to obtain an affidavit from a representative of the organization attesting to the internship experience. Applicants to the New York State Bar, for example, are required to have such an affidavit "notarized," consistent with the U.S. understanding of a "notary's" function. Considering that a multilateral institution such as an international tribunal may have as many as 80 to 90 interns rotating every three months, the "notarial" burden is significant. Adding to this burden is a cost charged by a local notarius (for attestation in the Netherlands) of between €50 and €300, far exceeding the budgetary constraints of a publicly-funded institution, its individual staff attorneys or the volunteer interns. The problem worsens as some publicly-funded entities report that on occasions, due to security restrictions or workload limitations, they are unable to obtain appointments with U.S. consular officials to perform the attestation.
National legal systems vary in determining when signatures must be verified through exercise of public authority. In the U.S., verified and authenticated signatures are typically required in connection with conveyances of real property interests to be recorded in public records and in connection with transactions requiring sworn oaths, as well as in a variety of commercial, regulatory and other contexts. Various civil law jurisdictions require verification and authentication for these acts and for various others, including formation of corporate entities, donations and the giving of a security interest, even over collateral that is not real property.²

EXISTING INTERNATIONAL AGREEMENTS

Two treaties provide widely-used frameworks in connection with the cross-border recognition of attestation and verification of a signatory to a document: the Hague Apostille Convention, and the Vienna Convention on Consular Relations. Both of these treaties predate the widespread use of electronic signatures and, as a result, their current application does not yet embrace fully the opportunities afforded by widely accepted technological developments of the global market economy. Note, however, that the Hague Conference on Private International Law’s e-APP program, implemented in part in over 150 jurisdictions, provides for the issuance of electronic apostilles and online registers. This program was undertaken based on the conclusion of the 2003 Special Commission of The Hague Conference recognizing that the Apostille Convention could be applied to electronic media without amendment.⁴

The Hague Apostille Convention is currently in force in 104 countries. The treaty provides for the recognition of public documents, including the attestation of signatures if defined as such in the law of the state in which they are executed, by means of an apostille, a certification issued by a governmental authority which authenticates the public nature of the seal and signature of the person executing the document. Through The Hague Apostille Convention, an attestation of a signature by a California notary public, for example, shall be recognized in any country party to the Convention and the apostille issued in connection with the relevant document pursuant to which an apostille completed in accordance with Convention requirements, pursuant to which a recognized authority affirms the authenticity of the seal and signature of the California notary public that executed the document.

Non-treaty mechanisms predate The Hague Apostille Convention with respect to the recognition of extraterritorial attestations of signatures. The so-called “legalization” of a signature may be accomplished outside the Conventions by the certification of an attestation by an official of the country in which the signature is given and attested, subsequently authenticated by a consular official from the country in which the attestation is to be used. As an example, if a document is witnessed by a notary in Canada, which is not party to The Hague Apostille Convention, for use in Mexico, the attestation would require an attestation by a Canadian official within its foreign ministry, followed by “legalization” of a Mexican consular official in Canada.

The Vienna Convention on Consular Relations defines a framework for consular relations between independent countries. The treaty, in force in 176 countries, defines permissible consular intercourse as part of its objective to further business and economic relations between countries.¹

¹ See Patrick Del Duca, CHOOSING THE LANGUAGE OF TRANSNATIONAL DEALS: PRACTICALITIES, POLICY AND LAW REFORM (American Bar Association, 2010).
countries. Consistent with that goal, consular officials may, within the consular district in which they exercise their functions, attest to the validity of signatures for purposes of their country's legal system. In general, within the legal systems of countries in which this treaty is in force, the provisions of domestic law that would otherwise accord a monopoly to the domestic attestation process do not apply to consular officials in the exercise of their functions. The Vienna Convention does not expressly deal with cross-border recognition of notarial acts; rather, it merely provides that the performance of notarial acts is a recognized consular function. It is the law of the state in which the document is to be used that gives effect to a notarial act performed by one of its consular officials. In the U.S., that is generally a matter for state codes and rules of evidence, e.g. California Civil Code §1183.5

EMERGING FRAMEWORKS FOR ELECTRONIC SIGNATURE VERIFICATION

Secure electronic signatures and other types of e-signatures are increasingly employed for the conclusion of contracts of many types. The United Nations Convention on the Use of Electronic Communications in International Contracts (2006), which applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different countries, seeks to overcome barriers in domestic legislation and international treaties to the use of electronic signatures. The American Bar Association (“ABA”) adopted resolutions urging U.S. ratification of this convention in 2006 and 2008.6 Private sector, for-profit businesses and services such as DocuSign, Echosign (Adobe), McAfee, Rightsignature, Serfii, Silanis Technology, Symantec, VeriSign and others, provide various technical and operational frameworks for various levels of the validity of an electronic signature. U.S. accession to this convention would be compatible with this report’s advocacy of embracing a technology-neutral legal framework that modernizes and simplifies signature verification.

The United Nations Centre for Trade Facilitation and Electronic Business (“UN/CEFACT”), part of the Economic Commission for Europe (“ECE”), has recently updated its Recommendation 14, “Authentication of Trade Documents”, to promote elimination of unnecessary signature requirements in trade documents or, in the alternative, conversion to electronic signatures. And, the International Telecommunications Union (“ITU”) has been engaging in an EU-funded project to enact a wide variety of electronic commerce (including e-signature) laws in countries in the Caribbean, Africa, and the Pacific.

Increasingly, domestic legislation contemplates recognition of such electronically signed documents for legal purposes within a country. UNCTTRAL’s two model laws, the 1996 Model Law on Electronic Commerce and the 2001 Model Law on Electronic Signatures, have been adopted in a limited, but growing number of countries.

In the U.S., the Uniform Electronic Transaction Act (“UETA”), promulgated by the Uniform Commercial Code, has been adopted in a limited, but growing number of countries.

For discussion of law and practices, including current developments, pertaining to verification of signatures in jurisdictions including the United States, England and Wales, France, Germany, Italy, German, Mexico, Scotland, and Switzerland, see Cross-Border Signature Verification – Civil Law Notaries & Notaries Public – Hague Apostille Convention – Vienna Convention on Consular Relations, EUROPE UPDATE, Issue no. 4 (March 2013), available at http://apps.americanbar.org/docs/committees/cfn/com/IC828900.

5 For discussion of law and practices, including current developments, pertaining to verification of signatures in jurisdictions including the United States, England and Wales, France, Germany, Italy, German, Mexico, Scotland, and Switzerland, see Cross-Border Signature Verification – Civil Law Notaries & Notaries Public – Hague Apostille Convention – Vienna Convention on Consular Relations, EUROPE UPDATE, Issue no. 4 (March 2013), available at http://apps.americanbar.org/docs/committees/cfn/com/IC828900.

6 See 2006 ABA 302 and 2008 ABA 108.
Law Commission in 1999 and building on path-breaking legislation of Illinois and Utah and regulation in New York, has already been the basis of legislation in 47 states, the District of Columbia and Puerto Rico. UETA applies only where the parties agree to conduct a transaction by electronic means, and provides for the legal equivalence of electronic records and signature to their paper counterparts. As to the required activity of a notary public, UETA provides that “[i]f a law requires that a signature be notarized, the requirement is satisfied with respect to an electronic signature if an electronic record includes, in addition to the electronic signature to be notarized, the electronic signature of a notary public together with all other information required to be included in a notarization by other applicable law.” It does not eliminate the other requirements of notarization, such as presence of the notary in the room with the person signing the document or verification of the person’s identity.

The federal Electronic Signatures in Global and National Commerce Act (“E-SIGN”), enacted in the U.S. in 2000, also includes the following provision on notarization and acknowledgement:

“If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.”

(This E-SIGN provision is superseded by state law for states that have adopted the 1999 version of UETA.) In addition to promoting the use of e-signatures, contracts and records domestically, E-SIGN requires the U.S. Secretary of Commerce to promote the acceptance and use of electronic signatures internationally, and to take a nondiscriminatory approach to electronic signatures and authentication methods from other jurisdictions.

ILLUSTRATIVE PATHS FORWARD

Within the U.S., the Revised Uniform Law on Notarial Acts of the Uniform Law Commission and the Model Civil Law Notary Act of the National Association of Civil Law Notaries would serve as foci of normative modernization and simplification. The goals of this Resolution could be achieved in part by the ABA and other interested parties conferring with the Uniform Law Commission to explore how the Revised Uniform Law on Notarial Acts might be modified to modernize and simplify cross-border notarization of documents for use in the U.S. Other approaches to signature verification would also be explored.

On an international level, the modernization and simplification of norms pertaining to the attestation and verification of signatures might, if member states approve, be undertaken through negotiations at the Hague Conference on Private International Law, with a view toward complementing the work currently underway in respect of implementing electronic apostilles. Other international fora that present opportunities for useful normative development and reform include supranational and regional organizations, such as the European Union, the Organisation pour l’Harmonisation en Afrique du Droit de Affairs (“OHADA”), the South African Development Community (“SADAC”), the InterAmerican Juridical Committee, the Organization of American States (“OAS”), the Association of Southeast Asia Nations Law Commission in 1999 and building on path-breaking legislation of Illinois and Utah and regulation in New York, has already been the basis of legislation in 47 states, the District of Columbia and Puerto Rico. UETA applies only where the parties agree to conduct a transaction by electronic means, and provides for the legal equivalence of electronic records and signature to their paper counterparts. As to the required activity of a notary public, UETA provides that “[i]f a law requires that a signature be notarized, the requirement is satisfied with respect to an electronic signature if an electronic record includes, in addition to the electronic signature to be notarized, the electronic signature of a notary public together with all other information required to be included in a notarization by other applicable law.” It does not eliminate the other requirements of notarization, such as presence of the notary in the room with the person signing the document or verification of the person’s identity.

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On an international level, the modernization and simplification of norms pertaining to the attestation and verification of signatures might, if member states approve, be undertaken through negotiations at the Hague Conference on Private International Law, with a view toward complementing the work currently underway in respect of implementing electronic apostilles. Other international fora that present opportunities for useful normative development and reform include supranational and regional organizations, such as the European Union, the Organisation pour l’Harmonisation en Afrique du Droit de Affairs (“OHADA”), the South African Development Community (“SADAC”), the InterAmerican Juridical Committee, the Organization of American States (“OAS”), the Association of Southeast Asia Nations
"ASEAN"), and the United Nations Economic and Social Commission for Asia and the Pacific ("UNESCAP").

Any attempts to modernize and simplify the authentication and verification of signatures would be to incorporate concepts such as mutual recognition of the work of anyone authorized under domestic law to attest and verify signatures, and to develop new concepts to update the authentication and verification process.

EXISTING ABA POLICY:
This Resolution provides the opportunity to support the update of the legal frameworks for the verification and attestation of signatures across borders, and supports the existing ABA policies in this respect.

UNIFORM LAW COMMISSION'S REVISED UNIFORM LAW ON NOTARIAL ACTS
The ABA House of Delegates ("HOD") recognized the value of re-examination of the legal frameworks supporting verification and attestation in 2011 when it endorsed the Uniform Law Commission’s Revised Uniform Law on Notarial Acts promulgated for consideration by state legislatures in 2010.

SECURED LENDING
Similarly, in 2011, the ABA HOD adopted a policy for the promotion of efforts to improve the legal frameworks globally for the conduct of secured lending, a subject matter with respect to which the formalities in many jurisdictions dealing with the identity of a signer can obstruct the efficient conduct of secured lending, particularly in countries that have adopted frameworks for secured lending inspired by Uniform Commercial Code Article 9.

CONCLUSION
The traditional concepts of notarial verification and attestation of signatures under domestic and international law merit modernization and simplification to recognize new technology and electronic communications and advances in transnational commercial practices. Modernization and simplification of the procedures for cost-effective and timely verification and authentication of signatures will reduce the outmoded impediments to economic activity.

Respectfully Submitted,
Gabrielle M. Buckley
Chair, Section of International Law
Hugh Butler Wellons
Chair, Section of Science & Technology Law
August 2014
GENERAL INFORMATION FORM

Submitting Entities: Section of International Law and Section of Science & Technology Law

Submitted By: Gabrielle M. Buckley, Chair, Section of International Law
Hugh Butler Wellons, Chair, Section of Science & Technology Law

1. Summary of Resolution(s).
   The Resolution calls for the ABA to support modernization and simplification of the requirements and procedures related to verification of signatures in cross-border contexts, for example, by scrutinizing and, where desirable, modifying uniform and model laws to create a technology-neutral legal framework reflecting technological progress and by increasing reciprocal recognition among jurisdictions.

2. Approval by Submitting Entity.

3. Has this or a similar resolution been submitted to the House or Board previously? Yes.
   A predecessor Resolution and Report (Resolution 105) was submitted for the January 2014 midyear meeting of the House of Delegates, but was withdrawn prior to the meeting to allow the Section of International Law, the Section of Science & Technology Law and the Section of Business Law Cyber Law Committee to collaborate and to revise the proposed Resolution.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?
   The Report notes the previous adoption by the ABA House of Delegates of Resolutions 2006 AM 303 and 2008 AM 100. These two resolutions reflected the ABA’s support of The United Nations Convention on the Use of Electronic Communications in International Contracts (2006) which is referenced in the Report and Resolution.

   The report further notes that the ABA House of Delegates recognized the value of re-examination of the legal frameworks supporting verification and attestation in 2011 when it endorsed the Uniform Law Commission’s Revised Uniform Law on Notarial Acts promulgated for consideration by state legislatures in 2010. The proposed resolution supports further update of the Revised Uniform Law on Notarial Acts.

   The report further notes that in 2011, the ABA HOD adopted a policy for the promotion of efforts to improve the legal frameworks globally for the conduct of secured lending, a subject matter with respect to which the formalities in many jurisdictions dealing with the identity of a signer can obstruct the efficient conduct of secured lending. The proposed Resolution provides the opportunity to support the update of the legal frameworks for the
verification and attestation of signatures across borders and supports the existing ABA policies in this respect.

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

The issue of international transactions as they relate to the authentication and notarization of signatures impacts the legal community and other stakeholders invested in the rule of law on a daily basis. The current practices do not reflect the advances in the electronic and digital channels through which business is routinely conducted today. Therefore, modernizing the authentication and notarization practices will improve the ability of lawyers globally to serve clients more effectively.

6. Status of Legislation. (If applicable)

The law and practices of many countries pertaining to the requirements and procedures related to verification of signatures in cross-border contexts are evolving.


As an example of a broadening approach to the verification and attestation of signatures, French Law no. 2011-331 of March 28, 2011, introduces the notion of an act of lawyer (acte d’avocat) as a document drafted and signed by the parties and countersigned by a lawyer. The law accords such an act enhanced probative value compared to a private agreement between parties. Such an act enjoys probative value concerning the identity of the parties and is opposable to persons whose rights derive from the rights of the parties to the act, although it is not opposable to third parties generally.

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

If the policy is implemented, stakeholders interested in implementing modernization of the processes will collaborate with appropriate entities to work toward updating the authentication and notarization practices.

Within the United States, the Revised Uniform Law on Notarial Acts of the Uniform Law Commission and the Model Civil Law Notary Act of the National Association of Civil Law Notaries would serve as foci of normative modernization and simplification. The goals of this Resolution could be achieved in part by the ABA and other interested parties conferring with the Uniform Law Commission to explore how the Revised Uniform Law on Notarial Acts might be modified to modernize and simplify cross-border notarization of documents for use in the United States. Other approaches to signature verification would also be explored.

8
On an international level, the modernization and simplification of norms pertaining to the attestation and verification of signatures might, if member states approve, be undertaken through negotiations at the Hague Conference on Private International Law, with a view toward complementing the work currently underway in respect of implementing electronic apostilles. Other international fora that present opportunities for useful normative development and reform include supranational and regional organizations, such as the European Union, the Organisation pour l’Harmonisation en Afrique du Droit de Affaires (“OHADA”), the South African Development Community (“SADC”), the InterAmerican Juridical Committee, the Organization of American States (“OAS”), the Association of Southeast Asia Nations (“ASEAN”), and the United Nations Economic and Social Commission for Asia and the Pacific (“UNESCAP”).

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


10. Referrals.
This recommendation and report will be referred to all ABA Sections and Divisions.

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None.


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EXECUTIVE SUMMARY

1. Summary of the Resolution
The Resolution calls for the ABA to support modernization and simplification of the requirements, procedures, laws and regulations related to verification of signatures in cross-border contexts, in order to increase reciprocal recognition among jurisdictions, and taking into account relevant levels of service, new technologies and associated costs, as well as the need for appropriate privacy, data security and fraud prevention.

2. Summary of the Issue that the Resolution Addresses
The existing requirements and procedures are based on treaties concluded in 1961 and 1963, as well as statutory frameworks, that do not take fully into account modern developments in best practices, particularly the use of electronic communications. For practical reasons associated with timelines for implementation and the priorities of state actors, treaty revision is unlikely to be the preferred path forward. Yet, the regulation of signature verification and notarial practice touches on territorial sovereignty, and reciprocal recognition of modernized and simplified procedures may be a key element of successful and appropriate reform. A key aspect of this resolution is to assure cross-border recognition, while avoiding placing those involved in the verification process in jeopardy of infringing foreign territorial sovereignty.

3. Please Explain How the Proposed Policy Position will address the issue
The proposed policy reflects the ABA’s support for simplification and modernization of the procedures related to verification of signatures in cross-border contexts. With the passage of the policy, the ABA can engage with relevant stakeholders to address the areas in which technology has outmoded existing signature verification practices. The report accompanying the resolution provides several possible solutions that ABA members and leaders can explore with stakeholders in the United States and elsewhere based upon the American Bar Association’s support of the need to modernize the process in line with 21st century business practices.

For example, within the United States, in order to achieve modernization and simplification of the procedures for cost-effective and timely verification and authentication of signatures, further revision of the Revised Uniform Law on Notarial Acts of the Uniform Law Commission, which is promulgated for consideration by state legislatures, appears desirable.

4. Summary of Minority Views
No minority views were recorded during the final discussion of the Recommendation and Report.

EXECUTIVE SUMMARY

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For example, within the United States, in order to achieve modernization and simplification of the procedures for cost-effective and timely verification and authentication of signatures, further revision of the Revised Uniform Law on Notarial Acts of the Uniform Law Commission, which is promulgated for consideration by state legislatures, appears desirable.

4. Summary of Minority Views
No minority views were recorded during the final discussion of the Recommendation and Report.
RESOLVED, That the American Bar Association recognizes that lesbian, gay, bisexual and transgender (LGBT) people have a human right to be free from discrimination, threats and violence based on their LGBT status and condemns all laws, regulations and rules or practices that discriminate on the basis that an individual is a LGBT person;

FURTHER RESOLVED, That the American Bar Association urges the governments of countries where such discriminatory laws, regulations, and practices exist to repeal them with all deliberate speed and ensure the safety and equal protection under the law of all LGBT people;

FURTHER RESOLVED, That the American Bar Association urges other bar associations and attorneys in jurisdictions where there are such discriminatory laws or incidents of targeting of LGBT people to work to defend victims of anti-LGBT discrimination or conduct, and to recognize and support their colleagues who take these cases as human rights advocates; and

FURTHER RESOLVED, That the American Bar Association urges the United States Government, through bilateral and multilateral channels, to work to end discrimination against LGBT people and to ensure that the rights of LGBT people receive equal protection under the law.
The American Bar Association (“ABA”) has a long history of actively opposing and combating discrimination on the basis of natural status – race, gender, national origin, disability, age, and sexual orientation. The ABA has been a leader in opposing and eradicating bigotry and prejudice against LGBT people. It has adopted policies urging the repeal of all laws that criminalize private, non-commercial sexual conduct between consenting adults (1973); condemning hate crimes, including those based on sexual orientation, and urging vigorous prosecution of the perpetrators of such crimes (1987), among other things.

Although major advances have been made in recent years, and especially in 2013, in legal protections and rights afforded to LGBT People, i.e., ending discrimination by the U.S. Government, as a result of United States v. Windsor, passage of laws or other steps enabling same-sex marriage in 17 US states and the District of Columbia, ending of discrimination against LGBT People from serving in the US Armed Forces, legalization of same-sex marriage in many European countries (Belgium, England and Wales, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain, Sweden), Argentina, Canada, New Zealand, South Africa, Uruguay, and parts of Mexico and the United States, the same is not true in many other parts of the world.

A Human Rights Issue

Protecting the rights of LGBT People around the world is first and foremost an issue of human rights. These rights are articulated in fundamental documents to which almost all nations of the Earth subscribe and that set forth rights belonging to all, regardless of race, national origin, language, gender, or sexual orientation. They are the heritage of all people on the planet.

A sampling of the relevant texts follows.

Universal Declaration of Human Rights

The Preamble to the Universal Declaration of Human Rights states (the “Declaration”):

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

“Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, [...]”

1 U.N. T.S. XVI (1945).
“Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

“Whereas Member States have pledged themselves to achieve...the promotion of universal respect for and observance of human rights and fundamental freedoms,

[...]

Article 1 of the Declaration provides:

“All human beings are born free and equal in dignity and rights. [...]

Article 2 of the Declaration provides:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]

Article 3 of the Declaration provides:

“Everyone has the right to life, liberty and security of person.”

Article 5 of the Declaration provides:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 6 of the Declaration provides:

“Everyone has the right to recognition everywhere as a person before the law.”

Article 7 of the Declaration provides:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Article 8 of the Declaration provides:

“Everyone has the right to an effective remedy ... for acts violating the fundamental rights granted him by the constitution or by law.”
Article 12 of the Declaration provides:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

Article 20 of the Declaration provides:

“(1) Everyone has the right to freedom of peaceful assembly and association.” (emphasis added)

Additional international conventions articulating basic human rights and supporting the view that protection of the rights of LGBT People is a fundamental human right are set forth below:

2 African Charter on Human and Peoples’ Rights (the “Banjul Charter”), adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 L.L.M. 58 (1982), entered into force 21 October 1986. The Preamble to the Banjul Charter refers specifically to the Charter of the Organization of African Unity, which stipulates that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.” Article 2 provides: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status” (emphasis added). Article 3 provides: “1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.” (emphasis added) Article 6 provides: “Every individual shall have the right to liberty and to the security of his person.” (emphasis added)

International Covenant on Civil and Political Rights (“ICCPR”), 999 U.N.T.S. 171 (December 18, 1966) (available at: http://treaties.un.org). The Preamble to the ICCPR specifically refers to “recognition of the inherent dignify and of the equal and inalienable rights of all members of the human family” as being “the foundation of freedom, justice and peace in the world.” Article 3 of the ICCPR provides: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”

American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S., entered into force July 18, 1978. The Preamble states, inter alia: “Recognizing that the essential rights of man are not derived from one’s being a national of a certain state, but are based on attributes of the human personality.” (emphasis added) Article 1, “Obligation to Respect Rights”, provides: “1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” (emphasis added) Article 24, “Eight to Equal Protection”, provides: “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.” (emphasis added)
In addition to the basic international covenants articulating the fundamental right to protection against discrimination on grounds of status, other sources of international law relevant to this issue include the International Covenant on Economic, Social and Cultural Rights and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, and the Draft Policy Paper on Sexual and Gender Based Crimes of the International Criminal Court (February 2014). These sources make it clear that discrimination against LGBT People is viewed as a form of impermissible discrimination and denial of human dignity and equality before the law and as a violation of a fundamental human right under generally accepted norms of international human rights law and potentially a crime against humanity.

The Problem
According to a report of the International Lesbian Gay Bisexual Trans and Intersex Association (“ILGA”), in 2013 76 countries made homosexual acts illegal; recent


Article 14, “Prohibition of Discrimination”, provides: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” (emphasis added) 3 (249 U.N.T.S. 13 (December 18, 1979) (available at: http://treaties.un.org))
5 Paragraph 26 of the Draft Policy Paper states, among other things: “The inclusion of article 21(3) in the Statute of the ICJ is particularly important as it mandates the interpretation of and the relationship between the Statute, the Rules of Court and the human rights and be without any adverse distinction founded, among others, on gender, or generally ‘other status’. The Office of the Prosecutor will take into account the evolution of internationally recognized human rights. This provision requires the Office […] to

- consider not only acts of violence and discrimination based on sex, but also those related to socially constructed gender roles;
- apply in understanding of the intersection of factors such as sex, gender, race, colour, class, age, ethnicity, nationality, disability, other identities and factors which may give rise to multiple forms of discrimination and social inequalities; […]” (emphasis added)

The last bullet point supra specifically refers, in footnote 16, to the “efforts of the UN High Commissioner for Human Rights (OHCHR) to put an end to violence and discrimination on the basis of sexual orientation and gender identity: The Free & Equal Initiative of the OHCHR at https://www.un.org/ and statement of 26 September 2013 by the High Commissioner for Human Rights Navi Pillay and several world leaders to end violence and discrimination against lesbian, gay, bisexual and transgender (LGBT) persons at https://www.un.org/en/action/ministerial-meeting.” (emphasis added)


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The Problem
According to a report of the International Lesbian Gay Bisexual Trans and Intersex Association (“ILGA”), in 2013 76 countries made homosexual acts illegal; recent
developments have added India to that list; and homosexual acts are unofficially proscribed in Iraq and numerous other jurisdictions. Those countries retain the laws regarding the prohibition of homosexuality or homosexual acts, with penalties ranging from jail time and fines to life imprisonment with hard labor or capital punishment. Although some of the laws involved may be an unfortunate legacy of colonial times, more recently new laws and legal developments targeting rights to expression and association as well as conduct have been considered or implemented.

The following is a list, by region, of such countries where homosexual acts or identity are prohibited, for members of at least one gender:

**Africa/Indian Ocean area:**

- Algeria
- Angola
- Botswana
- Burundi
- Cameroon
- Comoros
- Egypt
- Eritrea
- Ethiopia
- Gambia
- Ghana
- Guinea
- Kenya
- Lesotho
- Liberia
- Libya
- Malawi
- Mauritania
- Mauritius
- Morocco
- Mozambique
- Namibia
- Nigeria
- São Tomé and Príncipe
- Senegal
- The Seychelles
- Sierra Leone
- Somalia
- South Africa

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8 Itaborahy and Zhu, supra n.8, at 22.
11 Botswana: Penal Code, Chapter 8:01, §§ 164-165.
12 Burundi: Law No. 135 of 22 April 2009 concerning the revision of the Penal Code.
15 See Law 10/1961 (to combat prostitution); Penal Code art. 98w (contempt for religion); Penal Code art. 278 (harmless public acts).
22 Itaborahy and Zhu, supra n.8, at 50.
25 Malawi Penal Code Cap. 7.01; Laws of Malawi, § 153.
27 Mauritian Criminal Code of 1838, § 250.
29 Arts. 70, 71, Mozambique Penal Code of September 16, 1886, as amended in 1954.
30 Itaborahy and Zhu, supra n.8, at 54.
32 Arts. 70, 71, Penal Code of September 16, 1886, as amended in 1954.
33 Art. 319; Penal Code of 1965.
34 Seychelles Criminal Code of 1955, § 151.
35 Offences against the Person Act 1861, § 61.

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8 Itaborahy and Zhu, supra n.8, at 22.
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29 Arts. 70, 71, Mozambique Penal Code of September 16, 1886, as amended in 1954.
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32 Arts. 70, 71, Penal Code of September 16, 1886, as amended in 1954.
33 Art. 319; Penal Code of 1965.
34 Seychelles Criminal Code of 1955, § 151.
35 Offences against the Person Act 1861, § 61.
The Americas and Caribbean:
Antigua and Barbuda [46], Barbados [47], Belize [48], Dominica [49], Grenada [50], Guyana [51], Jamaica [52], Saint Kitts and Nevis [53], Saint Lucia [54], Saint Vincent and the Grenadines [55], Trinidad and Tobago [56],

Asia/Middle East:
Afghanistan [57], Bangladesh [58], Bhutan [59], Brunei [60], GazaiPalestinian Territories [61], India [62], Iran [63], Kuwait [64], Lebanon [65], Malaysia [66], Maldives [67], Myanmar [68], Oman [69], Pakistan [70], Qatar [71], Saudi Arabia [72], Singapore [73], Sri Lanka [74], Syria [75], Turkmenistan [76], United Arab Emirates [77], Uzbekistan [78], Yemen [79].

39 Itaborahy and Zhu, supra n. 8, at 59.
43 Uganda Penal Code Act of 1950 (Chapter 120) (as amended), §§ 145, 146, 148. See also Anti-Homosexuality Bill 2009, supra n. 1, which would add the death penalty for homosexual acts.
45 Zimbabwe Criminal Law (Codification and Reform) Act (Effective July 8, 2006), § 73.
46 Sexual Offences Act of 1995 (Act No. 9).
48 Criminal Code of Belize, § 53, as revised in 2000.
52 Arts. 76-79, The Offences Against the Person Act.
54 Criminal Code, No. 9 of 2004, §§ 132-133.
59 Penal Code 2004, Chapter 14, §§ 213-214; Chapter 2, § 3.
60 Penal Code, Chapter 22, § 377, as revised in 2001.
61 British Mandate Criminal Code Ordinance, No. 74 of 1936, § 152(2).
62 Indian Penal Code, § 377.
65 Art. 534, Penal Code of 1943.
67 Itaborahy and Zhu, supra n.8, at 74 (noting that uncodified Islamic Sharia law regulates sexual conduct).
70 Penal Code (Act XLV of 1860), § 377.
71 The Penal Code (Law No. II) of 2004.
72 Itaborahy and Zhu, supra n.8, at 75 (noting that Saudi Arabia applies strict Islamic Sharia Law).
Europe:
Turkish Republic of Northern Cyprus (unrecognized state)\(^{80}\).
Russia\(^{81}\).

Oceania:
Cook Islands (New Zealand Associate)\(^{82}\), Kiribati\(^{83}\), Nauru\(^{84}\), Palau\(^{85}\), Papua New Guinea\(^{86}\), Samoa\(^{87}\), Solomon Islands\(^{88}\), Tonga\(^{89}\), Tuvalu\(^{90}\).

Conclusion

The rights of LGBT people are, and must be treated as, basic human rights deserving of the same sort of dignity, respect, and enforcement as any other human right defined, for example, in the Universal Declaration of Human Rights.

Secretary of State Hillary Clinton, in June 2010, went on record, saying: “Gay rights are human rights, and human rights are gay rights, once and for all.”\(^{91}\)

The purpose of the proposed Resolution is to put the American Bar Association on record as recognizing such rights as basic human rights and opposing such laws, regulations, customs, and practices that infringe upon these rights, and urging an end to them. It would also put the Association on record, perhaps for the first time, as supporting the rights of LGBT people all over the world to live securely, safely, without fear and able to exercise their full human potential.

81 Itaborahy and Zhu, supra n.8, at 78 (noting that all sexual acts outside of heterosexual marriage are illegal, and that different laws apply in various Emirates states).
82 Art. 120, Criminal Code of 1994.
84 Arts. 171, 173, Criminal Code, Chapter 154.
85 The Russian Federation adopted a law, just prior to the Olympic Games staged there this year, outlawing “gay propaganda”. We do not have a citation for this law. Technically this law does not fall within the purview of this Recommendation and Report, because it does not outlaw or criminalize same-sex relations. But by outlawing “propaganda” for “non-traditional” relationships, it clearly aims at stigmatizing LGBT People.
88 Criminal Code of Queensland in its application to Nauru on 1 July 1921, §§ 208-209, 211.
89 Palau National Code; Penal Code, § 2803.
96 As stated in a U.S. Department of State Bulletin, “Diplomacy in Action” (December 6, 2011): “U.S. leadership in advancing human rights for LGBT people is consistent with the Obama Administration’s policy of principled engagement with the world and our commitment to uphold universal standards that apply to everyone. By supporting the inherent dignity of each person we help to foster a just world for all people and we lead by example, enhancing U.S. strategic interests as we advance our values.”
the rights, privileges, and immunities of any other citizen without regard to their sexual orientation or gender identity. It also urges the US Government to take steps through diplomatic channels to support such rights.

Respectfully Submitted

Gabrielle M. Buckley, Chair
Section of International Law

Myles V. Lynk, Chair
Section of Individual Rights and Responsibilities

James J. S. Holmes, Chair
Commission on Sexual Orientation and Gender Identity
1. **Summary of Resolution(s).** The proposed Resolution is to put the American Bar Association on record as recognizing the rights of LGBT people as basic human rights and opposing laws, regulations, customs, and practices that discriminate against them, because of their sexual orientation and urging an end to them. It would also put the Association on record as supporting the right of LGBT people to live securely, safely, without fear, and able to exercise the rights, privileges, and immunities of any other citizen without regard to their sexual orientation. It urges peer associations of lawyers and individual colleagues at the Bar to help LGBT people vindicate their rights through legal redress and support those of their colleagues at the Bar that do so. It also urges the US Government to take steps through diplomatic channels to support such rights.

2. **Approval by Submitting Entities.** The Council of the Section of International Law approved this recommendation and resolution at its Meeting on April 5, 2014; the Council of the Section of Individual Rights and Responsibilities approved this recommendation and resolution at its Meeting held April 26, 2014; the ABA Center for Human Rights is due to meet and vote on its support for this recommendation and resolution in May 2014; the Sexual Orientation and Gender Identity Commission is expected to vote to support this recommendation and resolution on April 10, 2014.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** Existing Association policies regarding non-discrimination on the basis of sexual orientation would be strengthened by this recommendation. Among them are the overwhelming approval by the House of Delegates in February 1989 of a policy urging the enactment by federal, state, and local governments of legislation prohibiting discrimination on the basis of sexual orientation; of a policy in 1973 urging repeal of all laws criminalizing private, non-commercial sexual conduct between consenting adults; of a policy in 1987 condemning hate crimes, including those based on sexual orientation, and urging vigorous prosecution of the perpetrators of such crimes. This Association has also taken concrete steps in recent years to reach out to like associations and colleagues at the Bar to support furtherance and extension of respect for human rights and dignity.
around the world and application of the basic human rights and freedoms set forth in the Universal Declaration of Human Rights. As the foremost association speaking for the organized Bar in the United States, the motto of which is “Defending Liberty, Pursuing Justice”, it is appropriate for this Association to take a stance and go on record as supporting the human rights of LGBT people around the world as a basic human right.

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

6. Status of Legislation. (If applicable) NA

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If this recommendation and resolution are approved by the House of Delegates, the sponsors will use that approval to help work with groups around the world to promote the rule of law and respect for the human rights of LGBT people around the world. The approval of this recommendation and resolution will greatly enhance the ABA’s and the Sponsors’ credibility in reaching out to, and contacting, peer associations and groups and individual practitioners in other countries active in this difficult area. It will also greatly strengthen the position and resolve of our colleagues at the Bar working in isolation in this sensitive and vulnerable area outside the “developed West” to know that one of the premier associations of lawyers in the world supports them.

8. Cost to the Association. (Both direct and indirect costs) The adoption of this recommendation and resolution may result in minor indirect costs associated with staff time devoted to receiving reports and disseminating them to interested groups

9. Disclosure of Interest. (If applicable) There are no conflicts of interest.

10. Referrals. This recommendation and resolution has been referred to all Sections and Divisions.
II. Contact Names and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address):


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- Paul E. Johnson, Esq., Robert Half Legal, 1401 I Street NW, Suite 400, Washington, DC 20005, email: pejohnson2@gmail.com

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

- Glenn P. Hendrix, Arnall Golden Gregory LLP, Suite 2100, 171 17th Street, N.W., Atlanta, GA 30363, 404/873-8692, glenn.hendrix@agg.com

- Jeffrey B. Golden, London School of Economics, Houghton Street, London, WC2A 2AE, +44 (77) 85500811, j.b.golden@lse.ac.uk
EXECUTIVE SUMMARY

1. Summary of the Resolution

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2. Summary of the Issue that the Resolution Addresses

This proposed Resolution addresses the issue of the violation of the human rights of LGBT people in many countries around the world where their sexual orientation has been criminalized and punished, thereby turning an entire class of people into criminals just for being who and what they are. The criminalization of homosexuality and advocacy and defense of rights of LGBT people is now a criminal offense in 76 countries around the world (carrying the death penalty in some cases). The enactment of such laws has led to an upsurge in violence against LGBT people.92

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

The proposed Resolution would put the ABA on record as opposing such treatment of LGBT people and as recognizing the right of LGBT people to live in security, safety, and peace openly and freely as a basic human right entitled to the same kind of protection as is afforded the rights set forth in the Universal Declaration of Human Rights in countries that promote the rule of law. Oppressed people, along with those who represent them and fight for their rights, still look to the United States as a beacon of human rights and the rule of law. The adoption of this Resolution by the ABA House of Delegates would send a strong message to LGBT people around the world who suffer from such discrimination and live in fear for their lives just because of who they are, that this Association has not forgotten them. It would also send a strong message to our colleagues at the Bar who represent such people and try to obtain protection for their rights that they are not alone, and that the organized Bar in the United States supports and admires their courageous defense and advocacy of the rights of an oppressed minority.

4. Summary of Minority Views

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to reallocate payroll tax revenues between the Old-Age and Survivors Insurance Trust Fund (OASI) and the Disability Insurance Trust Fund (DI), as needed to prevent depletion of the reserves of either Trust Fund.
Without congressional action, it is projected that the Social Security Disability Insurance Trust Fund will fall below the level necessary to continue to pay full benefits to all beneficiaries, sometime in 2016. The Social Security Trust fund comprises two trusts, the Old-Age and Survivors Insurance (OASI) trust fund and the Disability Insurance (DI) trust fund. Both are funded through the Social Security payroll tax and employer match. The formula for allocating incoming revenues between the OASI and DI trust funds has been adjusted eleven times in the past, changing the allocation in both directions. If Congress fails to act, the Social Security Administration would be forced to cut DI benefits to less than 80% of current levels, sometime in 2016. Congress has repeatedly approved reallocations and has never allowed a reduction in benefits to occur. However, opposition to reallocation has arisen in some quarters. This resolution supports reallocation as needed, continuing the American Bar Association’s consistent support of the integrity and solvency of the Social Security system as a vital social insurance program.

I. Overview of the Disability Insurance System

Nearly 57 million, or 1 in 5, Americans live with disabilities. About 38 million, or 1 in 10, have a serious disability. Fewer than 9 million disabled Americans receive benefits from Social Security Disability Insurance. Social Security Disability Insurance (DI) is funded through payroll tax contributions. Social Security DI provides benefits to workers who have contributed enough via payroll taxes to be insured, and who become disabled to the extent that they are unable to work, before reaching full retirement age. Most DI beneficiaries are older Americans: seventy percent are over age 50, and thirty percent are over age 60. DI provides important economic security for this population, as many have no other source of income. DI benefits are paid to fewer than two million.

2 Id.
3 Id. at 2
4 Id. at 2
5 Id. at 1.
6 Id. at 5

Without congressional action, it is projected that the Social Security Disability Insurance Trust Fund will fall below the level necessary to continue to pay full benefits to all beneficiaries, sometime in 2016. The Social Security Trust fund comprises two trusts, the Old-Age and Survivors Insurance (OASI) trust fund and the Disability Insurance (DI) trust fund. Both are funded through the Social Security payroll tax and employer match. The formula for allocating incoming revenues between the OASI and DI trust funds has been adjusted eleven times in the past, changing the allocation in both directions. If Congress fails to act, the Social Security Administration would be forced to cut DI benefits to less than 80% of current levels, sometime in 2016. Congress has repeatedly approved reallocations and has never allowed a reduction in benefits to occur. However, opposition to reallocation has arisen in some quarters. This resolution supports reallocation as needed, continuing the American Bar Association’s consistent support of the integrity and solvency of the Social Security system as a vital social insurance program.

I. Overview of the Disability Insurance System

Nearly 57 million, or 1 in 5, Americans live with disabilities. About 38 million, or 1 in 10, have a serious disability. Fewer than 9 million disabled Americans receive benefits from Social Security Disability Insurance. Social Security Disability Insurance (DI) is funded through payroll tax contributions. Social Security DI provides benefits to workers who have contributed enough via payroll taxes to be insured, and who become disabled to the extent that they are unable to work, before reaching full retirement age. Most DI beneficiaries are older Americans: seventy percent are over age 50, and thirty percent are over age 60. DI provides important economic security for this population, as many have no other source of income. DI benefits are paid to fewer than two million.

2 Id.
3 Id. at 2
4 Id. at 2
5 Id. at 1.
6 Id. at 5
American children, who receive the benefits as a result of their parent’s disability.14 The average DI benefit for a disabled worker is about $1,140 per month, or $35 per day.15 This figure is just above the federal poverty line for a single person.16 For most DI beneficiaries, DI benefits constitute all or most of their income.17 DI keeps millions of Americans with disabilities and their families from deep poverty and homelessness.18 Poverty rates are substantially higher among Americans with significant disabilities that do not receive DI than for those who have been receiving DI for at least five years.19 Even with benefits, one in five DI beneficiaries live in poverty, and the majority of recipients are low-income.20

The Social Security Act’s disability standard is one of the strictest in the developed world.21 According to the Organization for Economic Co-operation and Development (OECD), the U.S. has the most restrictive and least generous disability benefit system of all OECD member countries, with the exception of Korea.22 Most applicants are denied benefits; fewer than 4 in 10 are approved, even after all stages of appeal.23

Those that satisfy the Social Security Act’s strict standards have severe impairments and conditions such as cancers, kidney failure, congestive heart failure, emphysema, and multiple sclerosis.24 Many are terminally ill: 1 in 5 male DI beneficiaries and nearly 1 in 6 female DI beneficiaries die within 5 years of receiving benefits.25 DI beneficiaries are also three times as likely to die as other people their age.26 Despite their impairments, many beneficiaries report eagerness to work, and some do work part-time.27 But research

16 Id. at 11-12.
21 Id.
22 Id.
23 Id.
25 Id.
27 Id.
indicates that the average earning potential of beneficiaries with “work capacity” is a few thousand dollars per year—clearly insufficient to support oneself.28

II. Trends and Adjustments in Disability Insurance

Since the program’s establishment, the number of disabled workers receiving DI benefits has grown significantly. This growth was expected and projected as far back as 1994.29 Ninety-four percent of the growth in DI beneficiaries between 1980 and 2010 was the result of three factors: substantial growth in the U.S. population; the baby boomers aging into their high-disability years; and women entering the workforce in large numbers.30 A smaller driver of growth in DI benefit recipients was the increase in the Social Security retirement age.31 As a result of the retirement age increase, disabled workers qualify for retirement benefits later, causing them to require DI benefits for a longer period of time.32

It is important to note that many experts, including Social Security’s Chief Actuary, caution against overstating the recent economic downturn’s role in DI benefit growth.33 The Chief Actuary estimated that the recession was responsible for just 5% of the program’s growth.34 While economic downturns tend to boost applications for benefits, research finds that they have a much smaller effect on benefit awards.35 The recent economic downturn was no exception.36

In fact, the percentage of applicants awarded benefits has declined significantly during the recent economic recession, from 39% in 2007 to just 33% in 2011.37 These statistics suggest that applicants for benefits who did not meet the Social Security Act’s strict disability standard were screened out.38 The drop in the percentage of applicants found eligible at the Administrative Law Judge (ALJ) hearing level has been even more

28 Id.
30 Id. at 6. In the 1970s and 1980s, women entered the workforce in large numbers, increasing the number of women that qualified for DI benefits based on their own work records, and the total number of Americans qualifying for DI benefits. Id. at 7.
31 Id. at 8.
32 Id., see also Severe Impairments, supra note 16; see also Kathy Ruffing, Disability Benefits Are Hard to Get – Even in Recession, OFF THE CHARTS BLOG (Sept. 3, 2013, 2:14 PM) [hereinafter Benefits Are Hard to Get], www.offthechartsblog.org/disability-benefits-are-hard-to-get-even-in-recessions/.
33 Goss Testimony, supra note 20, at 8-9.
34 Severe Impairments, supra note 16, at 6.
35 Severe Impairments, supra note 16, at 6.
37 Id.; Benefits Are Hard to Get, supra note 32.
dramatic, falling by more than 10% between 2007 and 2012. Additionally, as the baby boomers age into retirement, growth in DI has already begun to level off and is projected to decline further in the coming years.

The DI trust fund’s projected shortfall in 2016 is not a new development, or an unprecedented one. Since Social Security was enacted, Congress has “reallocated” payroll tax revenues between the OASI (retirement) and DI (disability) trust funds, to account for demographic shifts, eleven times. In 1994, the last time such reallocation occurred, Social Security Administration actuaries accurately projected that a similar reallocation would next be required in 2016.

As it has in the past, Congress will likely enact a modest reallocation of the 6.2% tax rate between OASI and DI. Of the current allocation of the 6.2% payroll tax, 5.3% goes to OASI and 0.9% goes to the DI trust fund. Shifting the allocation to 4.8% and 1.4%, respectively, for two years, and then tapering back to the current distribution over the next twelve years, would provide sufficient funding to pay full benefits in both programs through 2033. Income after 2033 would cover approximately three-quarters of Social Security benefits due thereafter. Experts at the Center on Budget and Policy Priorities, the National Academy of Social Insurance, and SSA’s Chief Actuary have urged Congress to take action to ensure the long-term solvency of both trust funds. Extending the solvency of the DI trust fund through reallocation will have two-year impact on the projected insolvency date of the OASI trust fund, moving the date from 2035 to 2033.

Another way to ensure solvency of the DI trust fund, without reallocating the payroll tax, would be to increase the payroll tax by 0.2%, and allocating the additional funds to the DI trust fund. This one change would ensure solvency of the DI trust fund for 75 years.

Long-term solutions to the solvency of the combined Social Security Trust funds include

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49 Social Sec. Primer, supra note 44, at 22.

50 Social Sec. Primer, supra note 44, at 22.


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54 Social Sec. Primer, supra note 44, at 22.

55 Serious Impairments, supra note 16, at 23.

56 Soc. Sec. Primer, supra note 44, at 41.
eliminating the earnings cap on taxable earnings and gradually increasing the payroll tax from 6.2% to 7.2%. These long-term solutions would be politically difficult to achieve, and therefore, Congress is unlikely to seriously consider adopting them in the immediate future. If and when Congress does consider these solutions, the existing ABA policy supporting the "preservation of the Social Security Trust Funds and long term solvency of the program" may serve as the basis for ABA action.

The stability of Social Security benefits is critical for the majority of older Americans. For more than 40% of retirees, Social Security constitutes more than 80% of household income. For 8 out of 10 Social Security beneficiaries, Social Security benefits are more than 40% of household income.

III. What this Resolution Does

Through this resolution, the American Bar Association urges that action be taken to avoid the DI trust fund solvency crisis and to ensure payment of critical Social Security benefits. Assuming that Congress will take action, this resolution outlines the strongest method for strengthening the Social Security trust funds. This resolution urges Congress to adjust the allocation of incoming payroll tax between the Social Security DI trust fund and the OASI trust fund, as it has done 11 times before.

IV. Need for ABA Action

Ensuring the solvency of the Social Security DI trust fund will become critical over the next two years, as the 2016 projected insolvency date approaches. Social Security solvency will continue to be an important social issue in coming decades, and changes are needed to ensure the solvency of both the DI and OASI trust funds. The policy recommended by this resolution will enable the American Bar Association to answer questions, take positions, and urge action to ensure that taxpayers continue to receive the Social Security benefits they have earned. As with many issues, different opinions exist as to the best solution for Social Security solvency. Some argue that the best solution would be to make it harder to qualify for DI. Others suggest replacing Social Security DI with private insurance. Opposition to reallocation is to be expected.

52 Id.

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52 Id.
However, this resolution and adoption of this policy by the American Bar Association will provide support to the strongest solution to Social Security insolvency. When Congress introduces legislation proposing solutions to the solvency issue, the American Bar Association must be prepared to urge action to ensure financial security for the vast majority of older Americans.

V. Related ABA Policy

The American Bar Association has a long history of adopting policies supporting Social Security, having enacted 15 policies on Social Security, dating back to 1979. This resolution does not change, amend or alter existing policy. Rather, this resolution provides additional detail needed to clearly support the most likely courses of action, over the few years.

Of the American Bar Association’s 15 Social Security policies, 12 address issues of eligibility and appeals (2/96, 10/79, 2/89, 8/93, 2/96, 7/85, 2/90, 408BCG2.1, 00M1113B, 09M100B, 8/91, 2/88), one addresses representative payees (02M100), and two address funding issues (05A1113A and 2/90). The last two are relevant to this proposal.

- Social Security Act. Supports continuation of the federal Old Age, Survivors, and Disability Insurance (OASDI) program, commonly known as Social Security and authorized by Title II of the Social Security Act, 42 U.S.C. § 401 et seq., as a national system of social insurance. Supports preservation of the Social Security Trust Funds and long-term solvency of the program. Identifies hallmarks of the existing system by which to measure future proposals. 05A113A

- Social Security Tax Rates. Oppose legislation, which would cut significantly current social security tax rates and return the financing of social security to a “pay-as-you-go” system; recognizing that the federal deficit is being misrepresented by including the social security trust fund, support legislation to remove the trust fund from the federal government’s operating budget. 2/90

These two funding policies address the importance of funding and the long-term solvency of the Social Security Trust Funds. However, these policies do not address the reallocation of payroll tax revenues, between the OASDI and DI trust funds, which is specifically addressed by this resolution. The proposed policy builds upon and strengthens existing policies without changing them.

56 Id.
57 Id. at 291.
58 Id. at 198, 292, 364.
59 Id.
60 Id. at 291.
61 Id. at 198, 292.
62 Id. at 291.
63 Id. at 364.
VI. Conclusion

Social Security is the primary source of income for the vast majority of retired Americans, and an essential source of income for persons unable to work due to severe disabilities. The funding for disability insurance will reach a crisis point in the next few years, requiring action to ensure the solvency of this critical program. This policy proposal will allow the American Bar Association to take a position on this critical issue and to urge action to ensure the long-term solvency of the Social Security Trust funds. The American Bar Association, through this policy, can help to guarantee that taxpayers receive the critical retirement income that they have earned.

Respectfully submitted,

David M. English, Chair
AUGUST 2014
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Commission on Law and Aging
Submitted By: David English, Chair of the ABA Commission on Law and Aging

1. Summary of Resolution(s). Urges Congress to address rebalancing of the Social Security retirement and disability insurance trust funds and to take action to assure the long-term solvency of Social Security assuring payment of promised benefits.

2. Approval by Submitting Entity. April 11, 2014

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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
   a. Social Security Act. Supports continuation of the federal Old Age, Survivors, and Disability Insurance (OASDI) program, commonly known as Social Security and authorized by Title II of the Social Security Act, 42 U.S.C. § 401 et seq., as a national system of social insurance. Supports preservation of the Social Security Trust Funds and long-term solvency of the program. Identifies hallmarks of the existing system by which to measure future proposals. 05A113A
   b. Social Security Tax Rates. Oppose legislation, which would cut significantly current social security tax rates and return the financing of social security to a "pay-as-you-go" system; recognizing that the federal deficit is being misrepresented by including the social security trust fund, support legislation to remove the trust fund from the federal government's operating budget. 2/90

These two existing policies urge continuation and oppose cuts to funding for Social Security. The proposed policy urges specific action to rebalance the retirement and disability trust funds and urges additional steps to secure the long term solvency of Social Security assuring the ability to pay promised retirement and disability benefits.

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) None had been filed as of this date.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
   We will work through ABA Governmental Affairs to support legislation as it is introduced over the next couple of years.

8. Cost to the Association. (Both direct and indirect costs)
   None, beyond normal Governmental Affairs operation.

9. Disclosure of Interest. (If applicable)
   N/A

10. Referrals.
    This policy resolution will be circulated to:
    Standing Committee on the Delivery of Legal Services
    Standing Committee on Government Affairs
    Standing Committee on Legal aid and Indigent Defendants
    Standing Committee on Pro Bono and Public Service
    Special Committee on Bioethics and the Law
    Commission on Disability Rights
    Commission on Domestic and Sexual Violence
    Commission on Hispanic Legal Rights and Responsibilities
    Commission on Homelessness and Poverty
    Commission on Youth at Risk
    Section of Administrative Law and Regulatory Practice
    Section of Dispute Resolution
    Section of Family Law
    Government and Public Sector Lawyers Division
    Section of Health Law
    Section of Individual Rights and Responsibilities
    Judicial Division
    Section of Litigation
    Section of Real Property, Trust and Estate Law
    Senior Lawyers Division
    Solo, Small Firm and General Practice Division
    Section of State and Local Government Law
    Section of Taxation
    Section of Tort, Trial and Insurance Practice
    Young Lawyers Division
    National Legal Aid & Defender Association
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

   David Godfrey  
   ABA Commission on Law and Aging  
   1050 Connecticut Ave., NW, 4th Floor, Washington DC, 20036  
   202-662-8694  
   david.godfrey@americanbar.org

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

   David M. English, Chair  
   University of Missouri Columbia Law School  
   203 Hulston Hall  
   Columbia, MO 65211-4300  
   (573) 882-6854  
   Cell: 573-489-1407  
   englishda@missouri.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution

Urges Congress to reallocate payroll taxes between the Old Age and Survivors Insurance Fund and the Disability Insurance Trust fund to assure solvency.

2. Summary of the Issue that the Resolution Addresses

Without Congressional action, income and the disability trust fund will be insufficient to pay current benefits sometime in 2016. Congress has reallocated revenues between the trust funds 11 times in the past, reallocation is the most likely method to assure solvency.

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

This proposal urges Congress to undertake reallocation of existing revenues to assure payment of current benefits. Other ABA policies address other, less likely options to assure solvency of the trust funds.

4. Summary of Minority Views

Currently none.
RESOLVED, that the House of Delegates of the American Bar Association, an Illinois not-for-profit corporation ("ABA"), hereby approves the following amendment to the ABA's Articles of Incorporation (the "Amendment"):

Article 5(a) of the ABA Articles of Incorporation is hereby deleted in its entirety and replaced with the following:

Article 5(a)

The Association shall have such classes of members with such qualifications and rights, if any, as set forth in the Association's Constitution and Bylaws.

The proposed amendment of Article 5(a) will alter the current Article 5(a) as depicted below:

Article 5 (a)

The persons who from time to time are members of the Board of Governors of the Association shall have such classes of members, be the members of the incorporated Association with the such qualifications and rights, if any, as set forth in the Association's and privileges of membership prescribed by, or in accordance with the Constitution and Bylaws of the Association.
The proposed amendment to the ABA’s Articles of Incorporation (“Articles”) is offered in order to correct an unintended consequence resulting from a prior amendment to the Articles and to make the Articles consistent with the ABA’s Constitution and Bylaws.

On April 15, 2008, the ABA amended its Articles by filing Articles of Amendment with the Illinois Secretary of State. Among other amendments, Article 5(a) (which currently remains in effect) was amended to read as follows:

Article 5(a). The persons who from time to time are members of the Board of Governors of the Association shall be the members of the incorporated Association with the rights and privileges of membership prescribed by, or in accordance with, the Constitution and Bylaws of the Association. Any person who ceases to be a member of the Board of Governors shall cease to be a member of the corporation.

The 2008 amendment changed the ABA’s membership qualifications and had the unintended and unwanted consequence of reducing the ABA’s membership to only those individuals sitting on the Board of Governors. Further, Article 5(a) is inconsistent with the ABA’s Constitution and Bylaws which include provisions for a robust membership with various membership categories, rights and privileges. The new proposed amendment will correct those issues and restore the ABA’s historic membership. Specifically, the proposed amendment to Article 5(a) will replace the current Article 5(a) with the following:

Article 5(a). The persons who from time to time are members of the Board of Governors of the Association shall have such classes of members be the members of the incorporated Association with such qualifications and rights, if any, as set forth in the Association’s and privileges of membership prescribed by, or in accordance with, the Constitution and Bylaws of the Association.

Pursuant to Article 7 of the ABA’s current Articles, the Articles may be amended upon the vote of at least 2/3 of the members present and voting in the House of Delegates at any annual meeting. Upon approval of the proposed amendment by the
House of Delegates, the ABA will file Articles of Amendment with the Illinois Secretary of State, and take such other action as reasonably necessary to effectuate the amendment.

Respectfully submitted,

Hon. Cara Lee T. Neville
Secretary

August 2014
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Board of Governors
Submitted By: Honorable Cara Lee T. Neville, Secretary

1. Summary of Resolution(s).

Resolution corrects the previous amendment to the Articles of Incorporation and aligns American Bar Association membership with those requirements set forth in the Constitution and Bylaws. This resolution will correct the previous amendment to the Articles of Incorporation and bring them into compliance with the American Bar Association Constitution and Bylaws.

2. Approval by Submitting Entity.

February 7, 2014

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

Yes – the original amendment was submitted August 2008

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

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.

Corrected Articles of Incorporation will be filed with the Secretary of the state of Illinois.
8. Cost to the Association. (Both direct and indirect costs) Modest Filing fees

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

NA

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

Jarisse Sanborn, General Counsel
American Bar Association
321 North Clark Street
Chicago, Illinois 60654
988-312-5215
Jarrise.Sanborn@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.)

Honorable Cara Lee T. Neville
American Bar Association
321 North Clark Street
Chicago, Illinois 60652
612-584-7378
Neville@BenchmarkNationalADR.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

Amends the Articles of Incorporation of the American Bar Association to align the membership qualifications of the American Bar Association with those set forth in its Constitution and Bylaws.

2. Summary of the Issue that the Resolution Addresses

The previous amendment to the Articles of Incorporation inadvertently limited the American Bar Association’s membership to members of the Board of Governors.

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

The resolution will correct the limitation and align the Articles of Incorporation without the American Bar Association’s membership qualifications as set forth in the Constitution and Bylaws.

4. Summary of Minority Views

None
RESOLVED, That the American Bar Association urges Congress to enact legislation to prevent and punish crimes against humanity.

FURTHER RESOLVED, That the American Bar Association urges the United States government to take an active role in the negotiation and adoption of a new global convention for the prevention and punishment of crimes against humanity.
REPORT

I. Introduction

“Less than 1 percent of the perpetrators of international crimes have been brought to justice.”

Almost 70 years have passed since the first prosecutions for crimes against humanity at the Nuremberg tribunal. They have been called the “most serious crimes of concern to the international community as a whole.” Yet their commission continues. Examples include ethnic cleansing in the former Yugoslavia, Cambodia’s killing fields, apartheid South Africa and, more recently, the system of forced labor in North Korea. More than half of states worldwide, including the United States, have yet to adopt legislation proscribing crimes against humanity. Further, while recognized as a core international crime by international courts and national courts and tribunals (including international efforts strongly supported by the United States), there is no multilateral treaty that comprehensively addresses this category of offenses. This arguably creates serious hurdles to prosecution.

The following report demonstrates the existence and negative consequences of gaps in both domestic and international legal regimes concerning crimes against humanity. It also demonstrates both a strong legal foundation for and a growing momentum toward comprehensive policies. By encouraging the United States government to implement domestic legislation as well as support a comprehensive international convention, the ABA would (1)

1 See M. Cherif Bassiouni, Crimes Against Humanity: Historical Evolution and Contemporary Application 650 (2011)).

2 The Rome Statute defines a “crime against humanity” as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” including, but not limited to, murder, extermination, enslavement, deportation or forcible transfer of a population, torture, rape and other forms of sexual violence, and apartheid. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90, available at http://unctr.une.org/cod/icc statute/rome.htm


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encourage clarity, consistency and enforceability of established legal principles; (2) promote international dialogue and cooperation; and (3) strengthen human rights globally.

II. United States Federal Legislation Concerning Crimes Against Humanity

None of the 50 U.S. states nor the federal government has legislation penalizing crimes against humanity.6 The United States therefore can serve as a "safe haven from prosecution,"7 for perpetrators.

Although prosecutions for specific acts, such as murder or rape, "may provide a measure of justice," these individual crimes "fall far short of what a successful prosecution of a crime against humanity, with multiple victims (sometimes in the tens of thousands), would entail and what it would signify as America's commitment to the rule of law."8 Further, lack of extraterritorial jurisdiction provisions and existing statutes of limitations found in existing law9 add significant hurdles to prosecution.

The United States has adopted laws criminalizing genocide and the recruitment or use of child soldiers. The United States' Genocide Convention Implementation Act of 1987 (the Proxmire Act) criminalizes genocide.10 The Genocide Accountability Act of 2007 strengthens it by expanding jurisdiction over, inter alia, an "alleged offender" who "is brought into, or found in, the United States, even if [the] conduct occurred outside the United States."

8 Scheffer, supra note 5, at 37.
9 The American Bar Association’s Resolution 107A "urges all countries, consistent with international law, not to apply statutes of limitation with respect to (1) genocide, (2) crimes against humanity, and (3) serious war crimes."


6 Puerto Rico enacted a statute defining and penalizing crimes against humanity. See P.R. LAWS ANN. tit. 33, §4934 (Westlaw through 2011). See also Carrillo & Nelson, supra note 5, at 8, 9, annex B at 38, annex F at 44.

7 Scheffer, supra note 5, at 30. But see Universal Jurisdiction: A Preliminary Survey of Legislation Around the World—2012 Update, AMNESTY INT’L, 120 (Oct. 9, 2012) [hereinafter Amnesty Int’l Survey] (citation omitted), available at http://www.amnesty.org/en/library/asset/IOB553919/2012/en/7b7eb0e5-1667-6d67-badb-99fa4a92a52e/t5090010m.pdf (last visited Nov. 26, 2013) (noting that "US military courts and commissions tried former Axis nationals directly under international law for crimes against humanity; it is not clear if they would exercise such jurisdiction today."). At 344–61 (discussing the capture of Pol Pot and efforts to bring him to justice in the United States); Scheffer, supra note 5, at 34 n.14 ("[W]e had wanted to have the option of bringing [Pol Pot] to the United States to stand trial for crimes against humanity and genocide in Cambodia from 1975 to 1979 in the event he could have been apprehended prior to his death in 1998. The Department of Justice advised that U.S. courts probably would have no jurisdiction over Pol Pot, and thus we had to seek a foreign jurisdiction, which proved very time-consuming, where he could be transported if captured. In the end, time spent trying to overcome U.S. jurisdictional prejudices enhanced Pol Pot’s chances of avoiding imminent capture and the opportunity to move more decisively against him.").

8 Scheffer, supra note 5, at 37.

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4 Scheffer, supra note 5, at 37.
5 The American Bar Association’s Resolution 107A "urges all countries, consistent with international law, not to apply statutes of limitation with respect to (1) genocide, (2) crimes against humanity, and (3) serious war crimes."

8 Scheffer, supra note 5, at 30. But see Universal Jurisdiction: A Preliminary Survey of Legislation Around the World—2012 Update, AMNESTY INT’L, 120 (Oct. 9, 2012) [hereinafter Amnesty Int’l Survey] (citation omitted), available at http://www.amnesty.org/en/library/asset/IOB553919/2012/en/7b7eb0e5-1667-6d67-badb-99fa4a92a52e/t5090010m.pdf (last visited Nov. 26, 2013) (noting that "US military courts and commissions tried former Axis nationals directly under international law for crimes against humanity; it is not clear if they would exercise such jurisdiction today."). At 344–61 (discussing the capture of Pol Pot and efforts to bring him to justice in the United States); Scheffer, supra note 5, at 34 n.14 ("[W]e had wanted to have the option of bringing [Pol Pot] to the United States to stand trial for crimes against humanity and genocide in Cambodia from 1975 to 1979 in the event he could have been apprehended prior to his death in 1998. The Department of Justice advised that U.S. courts probably would have no jurisdiction over Pol Pot, and thus we had to seek a foreign jurisdiction, which proved very time-consuming, where he could be transported if captured. In the end, time spent trying to overcome U.S. jurisdictional prejudices enhanced Pol Pot’s chances of avoiding imminent capture and the opportunity to move more decisively against him.").

9 Scheffer, supra note 5, at 37.

Rights Enforcement Act of 2009 rewrote 18 U.S.C. §1091 to cover offenses if, "regardless of where the offense is committed, the alleged offender is . . . present in the United States." In addition, 18 U.S.C. §1091(f) eliminates the statute of limitations as a defense to prosecution.

The Child Soldiers Accountability Act of 2008 permits the prosecution of someone who recruits or uses child soldiers under 18 U.S.C. §2442 and provides, inter alia, extraterritorial jurisdiction when "the alleged offender is present in the United States, irrespective of the nationality of the alleged offender." However, the Act's ten-year statute of limitations restricts its application. For instance, a non-national who commits these offenses abroad could evade federal prosecution if found in the United States after this time period has elapsed.

New federal law proscribing crimes against humanity would be consistent with existing law. Providing extraterritorial jurisdiction and eliminating the statute of limitations would strengthen enforcement by ensuring that atrocity perpetrators can be tried in federal court regardless of where and when the atrocities occurred. More generally, enacting a separate statute criminalizing crimes against humanity would cover offenses not included in existing legislation.

III. International Law Concerning the Prevention and Punishment of Crimes Against Humanity

Firm precedent and norms have developed in various international courts and tribunals concerning crimes against humanity. However, there is no comprehensive convention requiring the prevention and punishment of all crimes against humanity.

Civilians are frequently the victims of atrocities which may not be considered war crimes when committed during peacetime and often do not meet the definition of genocide.

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Crimes against humanity is "often ... the only offense chargeable in a particular case." Due to these gaps, "the need for a Convention is both essential and urgent."

Multilateral treaties currently prohibit genocide and war crimes but do not adequately address crimes against humanity. The Genocide Convention narrowly applies to acts specifically intended "to destroy, in whole or in part, a national, ethnical, racial or religious group." War crimes, codified by the Hague Conventions, the Geneva Conventions and the two Additional Protocols, can occur only in "armed conflict." International treaties prohibit certain, but not all, of the underlying offenses in crimes against humanity, such as torture and apartheid. Offenses most notably absent from current treaties include the mass killing of civilians based on their membership in a political or social group. The need for a Convention is both essential and urgent.

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Special tribunals\(^{25}\), such as the International Criminal Tribunal for the former Yugoslavia, included crimes against humanity within their jurisdiction.\(^{26}\) These tribunals have established firm jurisprudence over several decades. They have, however, provided different definitions and interpretations of crimes against humanity.\(^{27}\) This inconsistency makes it difficult for prosecutors and others to reliably use these precedents.

In 1998, the Rome Statute of the International Criminal Court (ICC) codified crimes against humanity in a multilateral convention which is now widely considered customary international law,\(^{28}\) although this view is not uniform.\(^{29}\) However, the definition is limited to cases brought before the ICC,\(^{30}\) which provides only a “vertical” method of enforcement between States and the Court.\(^{31}\) There is no “horizontal” instrument for direct cooperation between States.\(^{32}\) The ICC is considered an exceptional system of enforcement, typically prosecuting only high-level defendants in a limited number of “situation” countries.\(^{33}\) It “is predicated on the notion that national jurisdiction is, in the first instance, the proper place for prosecution, in the

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\(^{25}\) Including the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia


\(^{27}\) See Sadat, supra note 4, at 342–50.

\(^{28}\) Sadat, supra note 4, at 373, 373 n.268.

\(^{29}\) See Sadat, supra note 24, app. III at 463 (footnote omitted) (noting the existence of “thoughtful arguments contending that the Rome Statute was not a codification of custom, but treaty law applicable only before the International Criminal Court.”).

\(^{30}\) Sadat, supra note Error! Bookmark not defined., at xxii. See Rome Statute art. 7, supra note 2. For a discussion on the structure and elements of Article 7, see Kai Ambos, Crimes Against Humanity and the International Criminal Court, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, supra note Error! Bookmark not defined., 279, 282–92.


\(^{32}\) See supra note 31.

\(^{33}\) ILC 65th Session Report, supra note 22, annex B at 143. See Ambos, supra note 30, at 296.
event appropriate national laws are in place]. The Rome Statute also “does not explicitly obligate States Parties to prosecute crimes against humanity.”

This limitation has practical consequences. A recent study from the George Washington University Law School’s International Human Rights Clinic notes that “the fact that a substantial number of Rome Statute parties (by one secondary source, more than 50 percent) have not enacted such legislation strongly suggests that not all Rome Statute States feel obligated to implement measures prohibiting the crimes covered by the Rome Statute.” The study further suggests that “only a quarter of States worldwide have some form of universal jurisdiction over [these crimes] per se.” There is also a lack of uniformity between existing national definitions of crimes against humanity. Finally, without an extradition treaty, international law does not require a State to surrender individuals to a requesting State. In the United States, extradition may only take place under the authority of a treaty or a statute.

A comprehensive convention thus would increase consistency, encourage national jurisdictions to prohibit and punish crimes against humanity, and prompt collaboration between States.

IV. Momentum Exists for New International and Domestic Law

In 1994, Professor M. Cherif Bassiouni called for the negotiation of a new convention on crimes against humanity. More recently, in 2008, a group of international experts launched the
Crimes Against Humanity Initiative to carry out this objective,43 Their Committee has finalized a Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity.44 This model treaty is available in seven languages. The Initiative’s work has involved hundreds of experts from around the world, and has been publicly supported by more than 75 judges, international prosecutors, former United Nations and government officials, and academics.45

In 1996, the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind included “a formulation [of crimes against humanity] that would heavily influence the incorporation of the crime within the 1998 Rome Statute.”46 In 2013, the Commission placed the topic of a crimes against humanity convention on its Long-term Work Program,47 and may “move this topic to the active agenda” and appoint a Special Rapporteur in its sixty-sixth session in 2014.48 The proposal states that “the Commission may be able to adopt a full set of draft articles on first reading before the end of the current quinquennium.”49 As the expert treaty-drafting body of the United Nations,50 the Commission’s recent interest suggests a growing international consensus on the need for this convention.

In the United States, the federal Crimes Against Humanity Act was introduced in June 2009 and promised to be “a significant advancement in closing the impunity gap in U.S. law for

43 Sadat, supra note 24, app. III, at 455. International Steering Committee members include Professor Leila Sadat, Professor M. Cherif Bassiouni, Ambassador Hans Corell, Justice Richard Goldstone, Professor Juan Mendez, Professor William Schabas, and Judge Christine Van Den Wyngaert. FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, supra note Error! Bookmark not defined., at viii.


45 See Washington Declaration on Crimes Against Humanity, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, supra note Error! Bookmark not defined., at 533. See also ILC 65th Session Report, supra note 22, annex B at 144 (citing FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, supra note Error! Bookmark not defined.).


47 ILC 65th Session Report, supra note 22, at 22, 169-70 (footnote omitted). For the proposal, see id. at annex B based on a proposal by Commission member Sean D. Murphy.


49 ILC 65th Session Report, supra note 22, annex B at 144.

atrocity crimes\textsuperscript{53}, including addressing the fact that “over 1,000 war criminals have found safe haven in the United States.”\textsuperscript{54} Twenty-nine organizations, representing “a broad coalition of human rights and religious groups,” wrote a letter supporting the bill.\textsuperscript{55} They included a list of crimes “distinct” from genocide and requiring “separate legislation.”\textsuperscript{56} Further, in 2011 the Obama Administration released the Presidential Study Directive on Mass Atrocities (PSD-10), which prompted the creation of the interagency Atrocities Prevention Board.\textsuperscript{57} The Board is designed “to coordinate a whole of government approach to preventing mass atrocities and genocide”\textsuperscript{58} and provides the U.S. government with a ready-made forum to discuss and negotiate a renewed federal crimes against humanity statute.

V. New Crimes Against Humanity Law is Consistent With Established U.S. and ABA Policy and Practice

Respect for the rule of law and human rights is a core American value.\textsuperscript{59} A new crimes against humanity convention is consistent with established U.S. and international policy and efforts to prevent and punish human rights atrocities.


\textsuperscript{54} Id. at 16046.


The United States has generally supported the negotiation of international human rights treaties and instruments.58 The United States voted for the Universal Declaration of Human Rights more than 60 years ago, a testament of its support for fundamental rights.59 It played an integral role in the establishment and conduct of the Nuremberg Trials and the UN ad hoc and hybrid international criminal tribunals, as well as providing support for the International Criminal Court (despite its current non-membership).60 Although the United States initially had an uneasy relationship with the ICC, it has progressively developed a more cooperative stance, even as a non-State Party.61 Leading the elaboration and negotiation of a crimes against humanity convention is consistent with historic and current cooperation between the United States and the ICC. The U.S. delegation was "one of the largest" at the United Nations Conferences on International Criminal Court in 1998, "and was omnipresent in virtually every negotiation concerning the [Rome] Statute’s text."62 The United States actively participated at the 2010 Review Conference in Kampala63 and has attended meetings of the ICC Assembly of States Parties since 2009.64


61 See 155 CONG. REC. 16044 (2009) (describing how "[f]or generations, the U.S. has led the struggle for human rights around the world and has supported holding perpetrators of crimes against humanity accountable" and providing examples of these efforts in Senator Durbin’s statement introducing the Crimes Against Humanity Act).


63 Review Conference of the Rome Statute in Kampala, Uganda, 11 June 2010


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70 Review Conference of the Rome Statute in Kampala, Uganda, 11 June 2010

Supporting a new crimes against humanity convention is also consistent with recent strategies employed by the United States to prevent atrocities. A May 2013 fact sheet issued by the White House describes these activities, including efforts to obtain information about human rights abusers on U.S. territory, the removal of individuals suspected of committing atrocities, and U.S. assistance with Bosco Ntaganda's voluntary surrender to the International Criminal Court.

The American Bar Association has adopted policies addressing international atrocity crimes and promoting the prosecution of perpetrators who commit these offenses. In 2004, Recommendation 103A recognized the principle of universal criminal jurisdiction in order to "ensure that persons who perpetrate grave international crimes are brought to justice." In the same year, Recommendation 10-B condemned using torture or other cruel, inhuman or degrading treatment or punishment on individuals within the U.S. government's custody or under its physical control. Recommendation 110 in 2009 endorsed portions of the 2005 World Summit Outcome Document on the Responsibility to Protect doctrine, as well as the recommendations in the Genocide Prevention Task Force's 2008 report. In 2013, Resolution 107A urged nations to apply statutes of limitation to genocide, crimes against humanity, and serious war crimes.

The negotiation of a new crimes against humanity convention that incorporates the definition of crimes against humanity in the Rome Statute would also reinforce the work of the International Criminal Court. The American Bar Association has consistently supported the ICC.

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67 May 2013 Fact Sheet, supra note 65, at 3–4.


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67 May 2013 Fact Sheet, supra note 65, at 3–4.


both during the Rome Statute negotiations in 1998 (Recommendation 118B),\textsuperscript{73} and following its establishment. In 2001, Recommendation 105C recommended that the United States accede to the Rome Statute\textsuperscript{74} and, in 2008, Recommendation 108A urged the U.S. government "to expand and broaden United States interaction with the International Criminal Court."\textsuperscript{75}

VI. Conclusion

Weaknesses in the legal framework governing crimes against humanity have resulted in continued impunity for the perpetrators of these crimes. It is a logical and timely extension of its mission and policies for the American Bar Association to urge the United States to enact federal legislation on crimes against humanity and to actively participate in the negotiation and adoption of a multilateral convention for the prevention and punishment of these offenses.

Respectfully submitted,

Deborah Enix-Ross
Chair, ABA Center for Human Rights

\textsuperscript{73} Recommendation 118B, AM. BAR ASS'N (1998).

\textsuperscript{74} Recommendation 105C, AM. BAR ASS'N (2001).

\textsuperscript{75} Recommendation 108A, AM. BAR ASS'N (2008).
1. Summary of Resolution(s).

RESOLVED, That the American Bar Association urges Congress to enact legislation to prevent and punish crimes against humanity.

FURTHER RESOLVED, That the American Bar Association urges the United States government to take an active role in the negotiation and adoption of a new global convention for the prevention and punishment of crimes against humanity.

2. Approval by Submitting Entity.

Approved by the Center for Human Rights Executive Board, June 9, 2014

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

No.

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

Association policies on the International Criminal Court, other human rights treaties, and related human rights issues would be enhanced by the proposed policy, as they all support the rule of law globally, accountability under the law, and the promotion of the legal profession.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? The United Nations International Law Commission and the U.S. Atrocity Prevention Board just recently took up drafting a Crimes Against Humanity convention and legislation, respectively. The ABA’s support of such a convention and legislation now will permit the Association to influence their development.

6. Status of Legislation. Crimes Against Humanity legislation is expected to be forthcoming in the next several months and is a priority of the Atrocity Prevention Board.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, the Center for Human Rights would be well-positioned to advocate and educate on the ABA’s position on Crimes Against Humanity through its International Criminal Court Project, Justice Defenders Program, Business and Human Rights Project, and general work of the Center. The policy position is consistent with the Center’s work and mission.


Passage of the policy will incur no direct or indirect cost to the Association.


None known at this time.

10. Referrals.

The Center will disseminate the policy proposal to all interested ABA entities, including the Sections of International Law, Individual Rights and Responsibilities, and the Rule of Law Initiative (ROLI), among others.

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

Michael Pates, Director, Center for Human Rights, 1050 Connecticut Ave., NW, Washington, DC 20036; 202.662.1025; michael.pates@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)

Deborah Enix-Ross, Chair, Center for Human Rights, c/o Debevoise & Plimpton, 919 Third Avenue, New York, NY 10022; 212.909.6310; denixross@debevoise.com
EXECUTIVE SUMMARY

1. Summary of the Resolution
RESOLVED, That the American Bar Association urges Congress to enact legislation to prevent and punish crimes against humanity.

FURTHER RESOLVED, That the American Bar Association urges the United States government to take an active role in the negotiation and adoption of a new global convention for the prevention and punishment of crimes against humanity.

2. Summary of the issue that the Resolution Addresses
Due to the absence of domestic law on the topic, the U.S. can serve as a safe haven for perpetrators of Crimes Against Humanity (CAH), which encompasses a widespread and systematic attack on a civilian population with knowledge of the attack, and includes enumerated offenses of murder, extermination, torture, enslavement, rape and other sexual offenses, apartheid, persecution, and others. While individuals can be prosecuted in the U.S. for genocide and war crimes, they cannot be prosecuted for the commission of CAH per se, which is the most common atrocity crime. The lack of a comprehensive convention on CAH undermines the enforcement and cooperation of states in this regard, thus allowing impunity to continue. The lack of domestic law on this topic undermines U.S. leadership on the rule of law internationally and the enforcement of CAH domestically. Likewise, the lack of an international treaty creates large gaps in the international community's ability to prevent and punish the commission of CAH.

3. Please Explain How the Proposed Policy Position will address the issue
By urging the creation of domestic and international convention law on the subject, the law will 'catch up' to the proliferation of CAH and help create a better system of enforcement, domestically and internationally. Domestically, this policy (if heeded) will give jurisdiction to U.S. prosecutors to charge and try alleged perpetrators of CAH, if found in the U.S., for these offenses, rather than rely on some other, lesser charge such as immigration fraud. At the international level, a CAH treaty would, for example, obligate all ratifying states to pass domestic legislation as well as set down rules for cooperation, extradition, and mutual legal assistance in the investigation and prosecution of such crimes.

4. Summary of Minority Views
No minority views are known at this time.
RESOLUTION

RESOLVED, That the Association policies set forth in Attachment 1 to Report 400A, dated August 2014, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such.

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such.

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.
Attachment 1
Policies to be Archived

5. ABA Model Guidelines for the Utilization of Paralegal Services
   Standing Committee on Paralegals
   February, 2004

7. Rule of Law for International Criminals
   Section of Individual Rights and Responsibilities STC on Law and National Security,
   Section of International Law, Center for Human Rights and Criminal Justice Section
   February, 2004 Report 103

17. Retirement Plan for Federal Administrative Law Judges
    Judicial Division
    February, 2004

31. ABA Commission on State Court Funding
    Judicial Division, Standing Committee on Judicial Independence
    August, 2004

54. Provisional Approval Florida International University College of Law
    Section of Legal Education and Admissions to the Bar
    August, 2004

55. Provisional Approval of Florida A & M University School of Law
    Section of Legal Education and Admissions to the Bar
    August, 2004
RESOLVED, That the American Bar Association adopts the amendments to the ABA Model Guidelines for the Utilization of Paralegal Services dated February 2004.

FURTHER RESOLVED, That subject to such other limitations as may be imposed by international law, universal criminal jurisdiction should be exercised only (a) for serious international crimes that clearly are recognized by treaty or customary international law authorizing such jurisdiction, (b) where there are facts supporting a reasonable belief that such a crime may have been committed by the suspect, and (c) when exercised in accordance with international norms on the protection of human rights in the context of criminal proceedings;

FURTHER RESOLVED, That in exercising their jurisdiction whether to prosecute in such cases, nations should not prosecute a citizen or lawful permanent resident of another nation where (a) the case is being investigated or prosecuted by that nation, unless that nation is unwilling or unable genuinely to carry out the investigation or prosecution and to do so in accordance with international human rights norms or (b) the case has been investigated by that nation and that nation has decided not to prosecute the person concerned, unless the decision resulted from an unwillingness or inability of that nation genuinely to prosecute and to do so in accordance with such international human rights norms;

FURTHER RESOLVED, That since the United States has adequate procedures to investigate and prosecute serious international crimes in both its federal and military courts and to do so in accordance with international human rights norms, so long as the United States Government uses those procedures in the fashion set forth here, no other nation should prosecute U. S. citizens or lawful permanent residents for crimes on the basis of universal criminal jurisdiction, and

FURTHER RESOLVED, That the American Bar Association urges the United States Government to work with governments of other nations to take all reasonable steps to ensure that the application of universal criminal jurisdiction by all nations is uniform and consistent with the foregoing.
RESOLVED, That the American Bar Association encourages Congress to establish a retirement plan for federal administrative law judges that is appropriate to their judicial status and functions and that is separate from retirement plans of other career civil servants.

RESOLVED, That the American Bar Association urges states and territories to support quality and accessible justice by adopting judicial branch budget procedures that will ensure adequate, stable, long-term funding of their courts under all economic conditions.

FURTHER RESOLVED, That the American Bar Association adopts the black-letter recommendations of the ABA Commission on State Court Funding, dated August 2004.

RESOLVED, That the House of Delegates of the American Bar Association concurs with the decision of the Council of the Section of Legal Education and Admissions to the Bar that Florida International University College of Law, in Miami, Florida, be granted provisional approval.

RESOLVED, That the House of Delegates of the American Bar Association concurs with the decision of the Council of the Section of Legal Education and Admissions to the Bar that Florida A & M University School of Law, in Orlando, Florida, be granted provisional approval.

RESOLVED, That the House of Delegates of the American Bar Association concurs with the decision of the Council of the Section of Legal Education and Admissions to the Bar that Florida A & M University School of Law, in Orlando, Florida, be granted provisional approval.
At the 1996 Annual Meeting, the House of Delegates adopted a set of Recommendations establishing a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant and is to be presented to the House at the Annual Meeting. See Report 400 attached as Appendix A. The Resolution now before the House affects policies 10 years old or older. The Board of Governors or House of Delegates adopted these policies in 2004.

To accomplish this objective, the Division for Policy Administration compiled an index of such policies set forth in either the ABA Policy and Procedures Handbook or the American Bar Association Legislative Issues list maintained by the Governmental Affairs Office. Some 58 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 36 entities to which the policies were sent are listed in Appendix B.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received.

In adopting Recommendation 400 in 1996, the House realized that there might be old and outdated policies which would not be identified through this process. The House, therefore, included a provision to deal with this issue by providing that such policies would also be archived. See Appendix A, paragraph 6. The second Resolved clause in this Resolution implements that provision with respect to all policies 20 years old or older.

Policies that are archived pursuant to the Resolution are not considered to be rescinded. Rather, the Association will retain them for historical purposes, however, they cannot be expressed as ABA policy. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in Appendix C.

Respectfully submitted,

Honorable Cara Lee Neville, Secretary
American Bar Association
August 2014
APPENDIX A
Approved by the House of Delegates, August, 1996

The resolution was approved as amended as follows:

RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED, That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.

2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.

3. Prior to each Annual meeting, a list of affected policies will be complied and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.

4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.

5. Those policies which are not archived will be subject to review every ten years thereafter.

6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.

7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be...
placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.
The entities below reviewed and recommended disposition of the policies contained in the report:

**Sections and Divisions**
- Administrative Law and Regulatory Practice
- Antitrust Law
- Business Law
- Dispute Resolution
- Family Law
- Health Law
- Individual Rights and Responsibilities
- Intellectual Property Law
- International Law
- Judicial Division
- Labor and Employment Law
- Legal Education and Admission to the Bar
- Litigation
- Senior Lawyers Division
- Taxation
- Tort Trial and Insurance Practice Section
- Young Lawyers Division

**Standing Committees**
- Client Protection
- Continuing Legal Education
- Election Law
- Gun Violence
- Judicial Independence
- Law and National Security
- Paralegals
- Pro Bono and Public Service
- Public Education
- Specialization

**Special Committees and Commissions**
- Domestic and Sexual Violence
- Homelessness and Poverty
- Human Rights
- Lawyers Assistance Program
- Racial and Ethnic Diversity

**State, Local and Territorial Bar Associations**
- Louisiana Bar Association
- New York Bar Association
- Ohio State Bar Association

**Individuals**
- Robert L. Weinberg
1. Videotaping Criminals in Custody  
   New York County Lawyers Association, Criminal Justice Section  
   February, 2004

2. Public Disclosure of All Contributions in Independent Campaigns  
   Ohio State Bar Association  
   February, 2004

3. Internal Revenue Code of 1986  
   Section of Taxation  
   February, 2004

4. Grant Approval and Denial of Legal Assistant Programs  
   Standing Committee on Paralegals  
   February, 2004

6. Accreditation of Specialty Certification Programs  
   Standing Committee on Specialization  
   February, 2004

8. United Nations Declaration of Commitment on HIV/AIDS  
   Section of Individual Rights and Responsibilities  
   February, 2004

9. Indian Health Care Improvement Act  
   Section of Individual Rights and Responsibilities  
   February, 2004

10. Qualifications for Civil Marriage  
    Section of Individual Rights and Responsibilities, Section of Family Law  
    February, 2004

11. Criminalization of Civil Violations of Immigration Law  
    Section of Litigation  
    February, 2004

12. United Nations Democracy Caucus within the United Nations  
    Section of International Law  
    February, 2004

13. Code of Ethics for Arbitrators in Commercial Disputes  
    Section of Dispute Resolution, International Law, Business Law, Labor and Employment Law, Litigation, Tort Trial and Insurance Practice, and Senior Lawyers Division  
    February, 2004
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39. Criminal Justice Standards on Speedy Trial in Criminal Cases  
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40. Eliminate Public Benefit Discrimination  
   Commission on Lawyer Assistance Programs, Individual Rights and Responsibilities  
   August, 2004

41. Uninterrupted Educational Access for Homeless Children  
   Commission on Homelessness and Poverty  
   August, 2004

42. Monetary Penalties  
   Section of Administrative Law and Regulatory Practice  
   August, 2004

43. Enforcement of Gun Laws  
   Special Committee on Gun Violence, Commission on Domestic Violence  
   August, 2004

44. Amending the Code of Ethics for Arbitrators in Commercial Disputes  
   Sections of Dispute Resolution, International Law, Business Law, Labor and Employment Law, Litigation, Tort Trial and Insurance Practice, and Senior Lawyers Division  
   August, 2004

45. Black Letter ABA Standards  
   Commission on Immigration, Pro Bono and Public Service  
   August, 2004

46. Filling Vacancies in the United States House of Representatives  
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   August, 2004

47. Alternative Minimum Tax  
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48. Guidelines in Sentencing System  
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49. Eliminate Actual and Perceived Racial Discrimination  
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50. Standards for Prisoner Sentencing Reduction  
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51. Prisoner Safety
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52. Civic Mission
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   August, 2004

53. Standards for Approval of Law Schools
   Section of Legal Education and Admissions to the Bar
   August, 2004

56. Enforcement of Title IX
   Section of Individual Rights and Responsibilities
   August, 2004

57. Principles in Interpreting Claim Terms in Patents
   Section of Intellectual Property Law
   August, 2004

58. United States Congress Proposed Amendments to the Sentencing Guidelines for Organizations
   Section of Antitrust Law
   August, 2004
GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association
Submitted By: Cara Lee Neville

1. **Summary of Resolution:**
   
   In an ongoing effort to bring the Association’s policies up to date, this resolution consists of policies 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. **Approval by Submitting Entity:**
   
   The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors of the House of Delegates on the dates they were adopted.

3. **Has this or a similar resolution been submitted to the House for Board previously?**
   
   Although the Association has from time to time culled its records, the policies on the archival list have not been subject to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

4. **What existing Association policies are relevant to this resolution and how would they be affected?**
   
   The archiving of any policy would have no affect on existing policies.

5. **What urgency exists which requires action at this meeting of the House?**
   
   Resolution 400 adopted August 1996 mandates the review of policies 10 years old or older.

6. **Status of Legislation:**
   
   N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

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

Cost of Printing.

9. Disclosure of Interest:

10. Referrals.

The policies identified in the Resolution with Report have been circulated to 36 entities as noted in Appendix B and also will be sent to the Government Affairs Office.

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

Honorable Cara Lee Neville, Secretary
300 S. 6th Street
#1859
Minneapolis, MN 55487
612-348-8901
caralee.neville@courts.state.mn.us

Richard Collins
American Bar Association
321 North Clark Street
Chicago, Illinois 60610
312/988-5162
Richard.Collins@americanbar.org

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

The Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

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EXECUTIVE SUMMARY

1. Summary of the resolution
   This resolution archives Association Policies that are 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. Summary of the issue which the recommendation addresses
   The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association's positions were adopted decades ago and are no longer relevant or effective.

3. An explanation of how the proposed policy will address the issue
   The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

4. A summary of any minority views or opposition which have been identified
   None at this time.
RESOLVED. That the Association policies dated through 1994 as set forth in Attachment 1 to Report 400B dated August 2014, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such.

FURTHER RESOLVED. That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such.

FURTHER RESOLVED. That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.
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   Standing Committee on Paralegals
   August, 1975

34. Guidelines for the Approval of Legal Assistant Education Programs
   Standing Committee on Paralegals
   August, 1977

39. Criminal Justice Standards
   Criminal Justice Section
   August, 1978

43. Criminal Justice Standards
   Criminal Justice Section
   February, 1979

45. Criminal Justice Standards
   Criminal Justice Section
   August, 1979

47. Social Security Benefits
   Commission on Law and Aging
   October 19, 1979

51. Discovery Abuse
   Standing Committees on Ethics and Professional Responsibility, Standing Committee on Professional Discipline and Section of Litigation
   February 3, 1981

53. Generation Skipping
   Illinois State Bar Association and Chicago Bar Association
   August, 1981

63. Judges, Liability
   National Conference of Federal Trial Judges
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76. Visa Denials
   Section of Individual Rights and Responsibilities, Standing Committee on Law and National Security
   February, 1986

84. Internal Revenue Service Funding
   Section of Taxation
   February, 1986

97. Chile
   Section of International Law; Standing Committee on Law and National Security; Section of Individual Rights and Responsibilities
   August, 1987

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102. Resolution Concerning Legal Representation for Indigent Parents and Child Protection Proceedings
Young Lawyers Division
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104. Standards Relating to Appellate Courts
Appellate Judges Conference
February, 1988

128. Guidelines for the Approval of Legal Assistant Education Programs
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February, 1990

135. Amending Investment Advisor Act
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February, 1991

136. CERCLA
Section of Real Property, Trust and Estate Law
February, 1991

140. Amend Fair Trial Free Press Standards
Criminal Justice Section
February, 1991

150. Community Reinvestment Programs
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February, 1991

166. Establish Commissions on Drug Crisis
Boston Bar Association; the Maryland State Bar Association, Inc.; the San Diego County Bar Association; the Bar Association of Baltimore City; the Rhode Island Bar Association; the Cleveland Bar Association; The Bar Association of Metropolitan St Louis; Cincinnati Bar Association and the Commission on Lawyers Assistance Programs
August, 1991

177. Firearms and Children
Young Lawyers Division
August, 1991

184. Nuremberg Principles
Standing Committee on Law and National Security; Section of International Law, Section of Environment, Energy, and Resources
August, 1991

187. Guardianship/Conservatorship Legislation
Section of Real Property, Trust and Estate Law
August, 1991
101. Retirement Earnings Test in Social Security
   Senior Lawyers Division
   August, 1991

201. Organ Donation
   Section of Real Property, Trust and Estate Law
   February, 1992

205. Amendments to Standards Imposing Lawyer Sanctions
   Standing Committee on Professional Discipline
   February, 1992

227. Accreditation of Specialization Programs
   Kansas Bar Association; State Bar of Michigan; the South Carolina Bar; the North
   Carolina State Bar; the Hawaii State Bar Association; the Maryland State Bar
   Association, Inc.; the Maine State Bar Association; the Massachusetts Bar
   Association; The Mississippi Bar; the Alabama State Bar; and the State Bar of Nevada.
   August, 1992

242. Amendments to ERISA and IRC
   Section of Real Property, Trust and Estate Law
   August, 1992

247. Funding for Public Housing
   Forum on Affordable Housing & Community Development
   August, 1992

252. Federal Judiciary Control over Space and Facilities
   Judicial Division, Appellate Judges Conference
   August, 1992

253. Judicial Abstention on ABA Policy
   Judicial Division, Appellate Judges Conference
   August, 1992

293. Model Federal Acquisition Regulation -Compatible Provisions
   Section of Public Contract Law
   February, 1993

294. Critical Technologies Developments
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   February, 1993

302. Community Service Programs
   Commission on Lawyers Assistance Programs
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327. Federal Rules of Civil Procedure
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334. Drug Crisis  
Commission on Lawyers Assistance Programs  
February, 1994

338. Drug Crisis  
Commission on Lawyers Assistance Programs  
February, 1994

356. Prevention  
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August, 1994

357. Juvenile Justice in Unified Children and Family Courts  
Center on Children and the Law, Government and Public Sector Division, the Young Lawyers Division, Individual Rights and Responsibilities and Litigation, the Hawaii State Bar Association  
August, 1994

367. Federal Investment Advisors Act  
Section of Real Property, Trust and Estate Law  
August, 1994

373. Mental Health and Treatment  
Commission on Disability Rights  
August, 1994

That the Standards Relating to Post-Conviction Remedies as set forth in the Tentative Draft of January, 1967, recommended by the Advisory Committee on Sentencing and Review, be adopted by the House of Delegates.

That the Standards Relating to Appellate Review of Sentences as set forth in the Tentative Draft of April, 1967, recommended by the Advisory Committee on Sentencing and Review, be adopted by the House of Delegates with amendments to Part III recommended by the Special Committee on Minimum Standards for the Administration of Criminal Justice as set forth in the Proposed Revisions of Tentative Draft, dated December, 1967.


That the Standards Relating to Speedy Trial as set forth in the Tentative Draft of May, 1967, recommended by the Advisory Committee on the Criminal Trial, be adopted by the House of Delegates.


That the Standards Relating to Post-Conviction Remedies as set forth in the Tentative Draft of January, 1967, recommended by the Advisory Committee on Sentencing and Review, be adopted by the House of Delegates.

That the Standards Relating to Appellate Review of Sentences as set forth in the Tentative Draft of April, 1967, recommended by the Advisory Committee on Sentencing and Review, be adopted by the House of Delegates with amendments to Part III recommended by the Special Committee on Minimum Standards for the Administration of Criminal Justice as set forth in the Proposed Revisions of Tentative Draft, dated December, 1967.


That the Standards Relating to Speedy Trial as set forth in the Tentative Draft of May, 1967, recommended by the Advisory Committee on the Criminal Trial, be adopted by the House of Delegates.

7. Criminal Justice Standards
Criminal Justice Section
February, 1968 Report 13.4


8. Criminal Justice Standards
Criminal Justice Section
February, 1968 Report 13.5

That the Standards Relating to Speedy Trial as set forth in the Tentative Draft of May, 1967, recommended by the Advisory Committee on the Criminal Trial, be adopted by the House of Delegates.

9. Criminal Justice Standards
Criminal Justice Section
February, 1968, Report 13.6


12. Criminal Justice Standards
Criminal Justice Section
August, 1970 Report 20

RESOLVED: That the Standards Relating to Criminal Appeals as set forth in the Tentative Draft of March, 1969, recommended by the Advisory Committee on Sentencing and Review, with amendment of Sections 1.4, 2.3, 3.2 and 3.3 and the addition of Section 2.5 as set forth in Appendix A of its report, be adopted by the House of Delegates; and

That the Standards Relating to Probation as set forth in the Tentative Draft of February, 1970, recommended by the Advisory Committee on Sentencing and Review, be adopted by the House of Delegates; and

That the Standards Relating to Discovery and Procedure Before Trial as set forth in the Tentative Draft of May, 1969, recommended by the Advisory Committee on Pretrial Proceedings, with amendment of Sections 2.1, 3.2, 5.3 and 5.4 and the addition of Section 3.3 as set forth in Appendix B of its report, be adopted by the House of Delegates.

7. Criminal Justice Standards
Criminal Justice Section
February, 1968 Report 13.4


8. Criminal Justice Standards
Criminal Justice Section
February, 1968 Report 13.5

That the Standards Relating to Speedy Trial as set forth in the Tentative Draft of May, 1967, recommended by the Advisory Committee on the Criminal Trial, be adopted by the House of Delegates.

9. Criminal Justice Standards
Criminal Justice Section
February, 1968, Report 13.6


12. Criminal Justice Standards
Criminal Justice Section
August, 1970 Report 20

RESOLVED: That the Standards Relating to Criminal Appeals as set forth in the Tentative Draft of March, 1969, recommended by the Advisory Committee on Sentencing and Review, with amendment of Sections 1.4, 2.3, 3.2 and 3.3 and the addition of Section 2.5 as set forth in Appendix A of its report, be adopted by the House of Delegates; and

That the Standards Relating to Probation as set forth in the Tentative Draft of February, 1970, recommended by the Advisory Committee on Sentencing and Review, be adopted by the House of Delegates; and

That the Standards Relating to Discovery and Procedure Before Trial as set forth in the Tentative Draft of May, 1969, recommended by the Advisory Committee on Pretrial Proceedings, with amendment of Sections 2.1, 3.2, 5.3 and 5.4 and the addition of Section 3.3 as set forth in Appendix B of its report, be adopted by the House of Delegates.
14. Criminal Justice Standards
Criminal Justice Section

RESOLVED, That the Standards Relating to the Prosecution Function and the Standards Relating to the Defense Function as set forth in the Tentative Draft of March, 1970, recommended by the Advisory Committee on the Prosecution and Defense Functions, with amendment of Sections 1.1, 1.2, 1.3, 2.3, 2.6, 2.9, 3.1, 3.6, 3.9, 3.11, 5.6 and 5.7 of the Prosecution Function and with amendment of Sections 1.1, 1.2, 1.3, 2.3, 3.3, 3.4, 3.5, 3.7, 4.2, 4.3, 7.5 and 7.7 of, and the addition of Section 2.4 to, the Defense Function, as set forth in Appendix A of this report, be adopted by the House of Delegates.

15. Criminal Justice Standards
Criminal Justice Section
February, 1971 Report 13.II


20. Criminal Justice Standards
Criminal Justice Section
August, 1972 Report 12.I

RESOLVED, That the Standards Relating to the Function of the Trial Judge as set forth in the tentative draft of June, 1972, recommended by the Advisory Committee on The Judge's Function, be adopted.

21. Supreme Court's Mandate, in Argersinger v. Hamlin
Standing Committee on Legal Aid and Indigent Defendants
August, 1972 Report 16

WHEREAS, In the recent case of Argersinger v. Hamlin, The United States Supreme Court handed down a momentous decision requiring that all misdemeanants be represented by counsel whenever imprisonment may be involved; and

WHEREAS, This decision places upon the legal profession a greatly enlarged responsibility in providing counsel to the indigent accused, and also represents a challenge to the organized bar to help meet that responsibility promptly and adequately; and

WHEREAS, A careful and thorough study is required to assess the extent of the need and also steps through which the bar can meet this further significant obligation of public service.

BE IT RESOLVED, That the ABA Standing Committee on Legal Aid and Indigent Defendants, in cooperation with other Association Committees and Sections and national organizations concerned about the issue, recommend appropriate steps to provide an affirmative response to the Supreme Court's mandate and report back to the Association as soon as possible.
27. Guidelines for the Approval of Legal Assistant Education Programs  
Standing Committee on Paralegals  
August, 1973 Report 126

RESOLVED, That the statement set forth in the Committee's Report as to the Guidelines for the Approval of Legal Assistant Education Programs be approved, as amended. The amendments to the report were to change "Standards" to "Guidelines," to add law schools to those institutions listed in paragraph 206 to be considered for approval, and to add a paragraph stating the Committee's intention to continue its consultation with interested and affected organizations.

32. Clinical Legal Education  
Standing Committee on Paralegals  
August, 1975 Report 128.2

RESOLVED, That the Special Committee on Legal Assistants, or its successor, be granted authority to establish contact with appropriate associations of legal assistants or any other such organization as it deems appropriate, in order to work towards the establishment of a permanent, broadly based body to assume responsibility for the accreditation of formal educational programs for legal assistants, and to report its findings and recommendations to the House of Delegates by February, 1976.

34. Guidelines for the Approval of Legal Assistant Education Programs  
Standing Committee on Paralegals  
August, 1977 Report 126

BE IT RESOLVED, That the Guidelines for the Approval of Legal Assistant Education Programs be amended as they pertain to educational programs and faculty, respectively, as follows:

G-303 The program of education for legal assistants shall be: (a)...
  (b) at least sixty semester or ninety quarter hours or the equivalent of which at least thirty semester or forty-five quarter hours must be comprised of general education and law-related courses with at least fifteen semester or twenty-two and one-half quarter hours comprised of legal specialty courses;
  (c) offered by an institution accredited or eligible for accreditation by an agency recognized by the Council on Post-Secondary Accreditation (COPA), the U.S. Office of Education, or by a nationally recognized institutional accrediting agency acceptable to the Committee;
  (d) Delete.
G-402 A full-time member of the faculty or the administration of the institution shall be responsible for the direction of the program.

39. Criminal Justice Standards  
Criminal Justice Section  
August, 1978 Report 108A


RESOLVED, That the American Bar Association Standards Relating to Speedy Trial, originally adopted by the Association in February, 1968, be and hereby are reaffirmed as set out in the Tentative Draft of a proposed second edition thereof dated Summer /78.

RESOLVED, That the American Bar Association Standards Relating to the Function of the Trial Judge, originally adopted by the Association in August, 1972, be and hereby are revised as set out in the Tentative Draft of a proposed second edition thereof dated Summer /78.

RESOLVED, That the American Bar Association Standards Relating to Electronic Surveillance, originally adopted by the Association in February, 1971, be and hereby are amended as set out in the Tentative Draft of a proposed second edition thereof dated Summer /78.

RESOLVED, That the American Bar Association Standards Relating to the Function of the Trial Judge, originally adopted by the Association in August, 1972, be and hereby are revised as set out in the Tentative Draft of a proposed second edition thereof dated Summer /78.

RESOLVED, That the American Bar Association Standards Relating to Providing Defense Services, originally adopted by the Association in February, 1968, be and hereby are amended as set out in the Tentative Draft of a proposed second edition thereof dated Fall 1978.

RESOLVED, That the American Bar Association Standards Relating to Pretrial Release, originally adopted by the Association in 1968, be and hereby are amended as set out in the Tentative Draft of a proposed second edition thereof dated Fall 1978.


RESOLVED, That the American Bar Association Standards Relating to Pleas of Guilty, originally adopted by the Association in February, 1968, be and hereby are amended as set out in the Tentative Draft of a proposed second edition thereof dated Fall 1978.

RESOLVED, That the American Bar Association Standards Relating to Prosecution Function, originally adopted by the Association in February, 1971, be and hereby are amended as set out in the Tentative Draft of a proposed second edition thereof dated Fall 1978; and

RESOLVED, That the American Bar Association Standards Relating to Defense Function, originally adopted by the Association in 1971, be and hereby are amended as set out in the Tentative Draft of a proposed second edition thereof dated Fall 1978.
45. Criminal Justice Standards
Criminal Justice Section
August, 1979 Report 199

RESOLVED, That the American Bar Association Standards Relating to Sentencing Alternatives and Procedures, which incorporate the Standards Relating to Probation, be and hereby are amended as set out in the Tentative Draft of a proposed second edition thereof dated Summer / 1979.

47. Social Security Benefits
Commission on Law and Aging
October 19, 1979 - October 20, 1979; p.8; Exhibit 2.5

RECOMMENDATION BY: Standing Committee on Lawyer's Retirement
The Standing Committee on Retirement of Lawyers requested approval of a recommendation that the ABA support the enactment of legislation which would eliminate income earned by self-employed persons before retirement and received after retirement from the Social Security earnings test, and permit every beneficiary to apply the monthly earnings test for at least one year after 1977. The action requested in the recommendation would support legislation to help eliminate the inequities between the way the retired self-employed are treated and the way retired employees are treated under the Social Security earnings test of the Social Security Act.

UPON MOTION DULY MADE, SECONDED AND CARRIED:

The Board approved the following recommendation of the Standing Committee on Retirement of Lawyers:

RESOLVED, that the American Bar Association supports the enactment of legislation that Amends Title II of the Social Security Act to: (1) provide that income attributable to services performed before initial benefit eligibility by an individual entitled to old-age insurance benefits may not be taken into account in determining his or her net earnings from self-employment for purposes of the earnings test; and (2) make it clear that every beneficiary is entitled to apply the monthly earnings test for at least one year after 1977.

51. Discovery Abuse
Standing Committees on Ethics and Professional Responsibility, Standing Committee on Professional Discipline and Section of Litigation
February 3, 1981 - February 6, 1981; Board of Governors Minutes, p.05, Agenda Exhibit 2.6

At its November, 1980 meeting, the Board approved the recommendation of the Section of Litigation that the ABA support amendments to the Federal Rules of Civil Procedure regarding discovery as provided in the report of the Section's Special Committee for the Study of Discovery Abuse, deleting, however, references in the report and in the amending language of the Rules to special disciplinary action against attorneys. These references were referred to the Standing Committees on Ethics and Professional Responsibility and Professional Discipline for study with the request that the Committees report back to the Board. At this meeting, the Board received the reports of the Standing Committees on Ethics and Professional Responsibility and Professional Discipline as presented under Exhibit 2.6 of the Board's February 3, 1981, February 5, 1981 - February 6, 1981 agenda book.

RESOLVED, That the American Bar Association Standards Relating to Sentencing Alternatives and Procedures, which incorporate the Standards Relating to Probation, be and hereby are amended as set out in the Tentative Draft of a proposed second edition thereof dated Summer / 1979.
53. **Generation Skipping**  
Illinois State Bar Association and Chicago Bar Association  
August, 1981 Report 10

RESOLVED, That the American Bar Association recommends the repeal of Chapter 13, Section 303(d), Section 691(c)(3), and Section 2013(g) of the Internal Revenue Code of 1954, as amended, relating to the tax on certain generation - skipping transfers, with appropriate conforming amendments.

63. **Judges, Liability**  
National Conference of Federal Trial Judges  
June 3, 1983 - June 4, 1983; BOG Minutes, pp.07-08, Agenda Exhibit 2.10

The National Conference of State Trial Judges recommended that the Association support exclusion of state and federal judges acting in a judicial capacity from liability for attorneys fees under the Civil Rights Attorneys' Fees Awards Act of 1976. The issue was whether the doctrine of judicial immunity barred award of attorneys fees under 42 U.S.C. Section 1988 against a member of the judiciary acting in his judicial capacity. The question was presently before the U.S. Supreme Court in Pullian v. Allen. Since the Association had no policy on this issue, the Board was requested first to establish a policy supporting judicial immunity from attorneys' fees thus protecting judges from personal liability for official acts, and second to authorize the National Conference to file a brief as amicus curiae on behalf of the Association in the U.S. Supreme Court in Pullian v. Allen. The Board was advised that the Special Committee on Amicus Curiae Briefs supported the request to file the brief.

UPON MOTION DULY MADE, SECONDED AND CARRIED: The Board approved the following resolution:

BE IT RESOLVED, That the American Bar Association supports exclusion of state and federal judges acting in a judicial capacity from liability for attorneys' fees under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. Section 1988.

BE IT FURTHER RESOLVED, That the Board at the request of the National Conference of State Trial Judges authorized the filing of a brief on behalf of the Association as amicus curiae in the U.S. Supreme Court in Pullian v. Allen, subject to approval of the final draft of the brief by the President of the Association.
BE IT RESOLVED, That the American Bar Association recommends that United States law concerning visa denials should conform to the following standard:

An alien invited to the United States to speak or otherwise participate in an exchange of ideas should not be denied a visa solely on the basis of past or current political beliefs or political associations or on the basis of the expected content of the person's statements in the United States.

However, this principle would not preclude visa denial or exclusion from admission of persons invited to the United States if their admission to the United States, their presence in the country, or activity in which the government believes they intend to engage, would harm the interests of the United States, including the foreign relations of the United States. This principle would also not preclude visa denials for the purpose of seeking reciprocity for the entry of Americans into a foreign country, nor the maintenance of the existing power of the President to deny entry to any aliens or class of aliens by proclamation, nor of the government to deny entry to aliens when the United States is at war or during the existence of a national emergency proclaimed by the President. Adoption of this principle would require modification of 8 U.S.C. Section 1182(a) (28).

BE IT RESOLVED, That the American Bar Association recommends to the Executive Branch and to the Congress that the Internal Revenue Service be provided with adequate funding and personnel to assure quality performance by the Internal Revenue Service of each of the functions comprising its mission without undue intrusiveness; and

RESOLVED, That the Section of Taxation is authorized and directed to urge the appropriate agencies of the Executive Branch and the appropriate committees of the Congress to provide the Internal Revenue Service on a continuing basis with funding and personnel adequate to those ends.

BE IT RESOLVED, That the American Bar Association, in furtherance of its Goal Eight to advance the rule of law, and its long-standing commitment to the independence of judges and lawyers in all countries, deplores the interference by the Government of the Republic of Chile with the independence of judges and lawyers, in particular, the sanctioning of Appeals Court Judge Carlos Cerda Fernandez for attempting to conduct an independent investigation of “disappeared” Chilean citizens, and the arrest, prosecution, detention without charge and attempted assassination of lawyers who represent individual clients in human rights cases.

BE IT FURTHER RESOLVED, That the American Bar Association calls upon the Government of the Republic of Chile to honor any extradition request made by the United States.
Government in connection with the 1976 assassination of former Chilean Foreign Minister Orlando Letelier and Ronni Karpen Moffitt, a United States citizen, in Washington, D.C., and to investigate fully and bring to justice all persons responsible for violation of fundamental human rights, including the 1986 killing in Chile of Rodrigo Rojas, a Chilean national and resident of the United States.

BE IT FURTHER RESOLVED, That the American Bar Association further calls upon the Government of the Republic of Chile to restore basic human rights by eliminating the practices of vigilante assassinations, arbitrary detention, and torture, and by restoring the full jurisdiction of the civilian courts and the independence of judges and lawyers.

BE IT FURTHER RESOLVED, That the American Bar Association send a delegation of five to seven lawyers and judges to Chile to discuss with counterparts there the role of the independent judiciary, military courts, and the intimidation of lawyers who represent politically unpopular clients.

The Young Lawyers Division recommended that the Board approve a resolution that the Association urges state and local judicial systems and bar associations to work to ensure that competent attorneys be appointed for every indigent at all stages of child protection proceedings, and that all attorneys receiving such appointments have sufficient training or experience to provide effective legal representation to parents.

The YLD believes that the resolution will aid the ABA’s efforts in this area. Without the active intervention of judicial systems and bar associations, it has been difficult to stimulate systematic methods of selection and appointment of attorneys and to provide clearer expectations regarding the experience, preparation and performance of such attorneys. The YLD Resource Center has received a grant from the Edna McConnell-Clark Foundation to work with bar groups and courts, to strengthen legal presentation for parents in child protection cases and believes that the adoption of this policy statement will be of material assistance in persuading bar associations and courts to launch their own projects in this area.

UPON MOTION DULY MADE, SECONDED AND CARRIED: The Board approved the following resolution:

BE IT RESOLVED THAT the American Bar Association urges that state and local judicial systems and bar associations work to ensure that competent attorneys be appointed for every indigent parent at all stages of child protection proceedings, and that all attorneys receiving such appointments have sufficient training or experience to provide effective legal representation to parents.

The Young Lawyers Division recommended that the Board approve a resolution that the Association urges state and local judicial systems and bar associations to work to ensure that competent attorneys be appointed for every indigent at all stages of child protection proceedings, and that all attorneys receiving such appointments have sufficient training or experience to provide effective legal representation to parents.

UPON MOTION DULY MADE, SECONDED AND CARRIED: The Board approved the following resolution:

BE IT RESOLVED THAT the American Bar Association urges that state and local judicial systems and bar associations work to ensure that competent attorneys be appointed for every indigent parent at all stages of child protection proceedings, and that all attorneys receiving such appointments have sufficient training or experience to provide effective legal representation to parents.
The proposed Standards Relating to Appellate Courts were revised by the proponents so that the overall time period for issuing an opinion from the filing of an appeal has been changed from 300 days to 280 days for both intermediate and last resort courts and the time allowed for preparation of a records has been changed from 50 days to 30 days. As revised, the Conference's recommendation was approved by voice vote. It reads:

BE IT RESOLVED, That the Standards Relating to Appellate Courts are amended to reflect revisions in the black letter appellate time standards in accordance with a draft dated August, 1987, as amended.

RESOLVED, That Guideline 303(b) of the Guidelines and Procedures for Obtaining ABA Approval of Legal Assistant Education Programs be amended to read as follows:

THE PROGRAM OF EDUCATION FOR LEGAL ASSISTANTS SHALL BE: * * * (b) AT LEAST 60 SEMESTER HOURS, OR EQUIVALENT, WHICH MUST INCLUDE GENERAL EDUCATION AND LEGAL SPECIALTY COURSES:

RESOLVED, That Guideline 204 be amended to read as follows:

THE INSTITUTION SHALL MAINTAIN EQUALITY OF OPPORTUNITY IN ITS EDUCATION PROGRAM WITHOUT DISCRIMINATION OR SEGREGATION ON THE GROUNDS OF RACE, COLOR, RELIGION, NATIONAL ORIGIN, AGE OR SEX.

RESOLVED, That the American Bar Association urges that any amendment regarding the present lawyers exemption in the Investment Advisers Act of 1940 be consistent with the following principles:

(1) There should continue to be an exemption for lawyers and such other professionals as Congress shall determine, for activities solely incidental to the practice of the profession. (2) If the activity is more than solely incidental to the practice of the profession, then the Professional is an investment adviser under the Act unless the professional (a) does not accept or receive directly or indirectly any commission, payment, referral payment or other form remuneration as the result of the purchase or sale of a specific security or other investment by a client, (b) does not recommend purchase and sale of specific securities or other specific investments other than as bona fide fiduciary in a capacity such as an executor, trustee, personal representative, estate or trust agent guardian, conservator or person serving in a similar fiduciary capacity, and (c) does not have custody of client funds or securities other than in a bona fide fiduciary capacity (3) Compensation does not cause loss of the exemption, except in the case of a commission on a specific purchase or sale by a client. (4) Holding out as a financial planner does not, of itself, cause loss of the exemption if the exemption is otherwise available under the rules stated above. (5) There should not be any requirement for notification of clients that the named professional is not subject to the Investment Advisers Act.
BE IT RESOLVED, That the American Bar Association urges Congress and the Environmental Protection Agency (EPA) to recognize the necessity for clarification of the "security interest" exemption under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and recommends to Congress and the EPA that in order to achieve this clarification:

1. There should be reaffirmation of the principle that innocent parties should not be held liable for cleanup of environmental hazards. 2. EPA should exercise its rulemaking authority to provide further clarification (but not greater than required by statute) regarding the actions which lenders are required to take in order to allow them to be afforded the benefits of the "security interest" exemption from "CERCLA" liability. 3. EPA regulations, by way of definition and guidance, should acknowledge the legislative history behind the "security interest" exemption. In rulemaking, EPA should seek to establish and clarify standards which are capable of consistent and predictable application by borrowers and lenders. 4. EPA regulations and any Congressional legislation should provide clear and predictable guidance with respect to existing loan portfolios, new loans, loan administration, including sufficient time in enforcement and remedies, the secondary mortgage market, and responsibility and liability of entities, court appointed office such as receivers and trustees, the FDIC, RTC and SBA. To the extent that EPA regulations cannot lawfully address CERCLA liabilities incurred by both public and private response and remedial actions, Congress should provide clear legislation and guidance on this subject. 6. As changes are to be made in the CERCLA law and as rules are proposed, they should be made through an orderly legislative administrative process with participation of all concerned parties, including hearings with adequate notice and an opportunity for parties to participate in the formulation of the new regulation law.


BE IT RESOLVED, That the American Bar Association supports the creation of effective community reinvestment programs in all financial institutions to help avoid discrimination and to stabilize housing and businesses in low and moderate income communities by providing credit to residents, small businesses and projects in such communities.

BE IT RESOLVED, That the American Bar Association is committed to placing its accounts in financial institutions that, consistent with financial and fiduciary prudence, have
shown outstanding or satisfactory performance in helping to meet the credit needs of their entire communities, including low and moderate income neighborhoods.

BE IT FURTHER RESOLVED, That the American Bar Association specifically encourages consistent with fiduciary prudence:
1) state and local bar associations and their members to consider as a significant factor in the process of choosing a financial institution, the extent to which the institution has helped to meet the credit needs of its entire community, including low and moderate income neighborhoods; and
2) state and local bar associations and their members to place at least a portion of their deposits in financial institutions that have shown outstanding or satisfactory performance in helping to meet the credit needs of their entire communities, including low and moderate income neighborhoods.

166. Establish Commissions on Drug Crisis
Boston Bar Association; the Maryland State Bar Association, Inc.; the San Diego County Bar Association; the Bar Association of Baltimore City; the Rhode Island Bar Association; The Cleveland Bar Association; The Bar Association of Metropolitan St Louis; and the Cincinnati Bar Association, Commission on Lawyers Assistance Programs
August, 1991 Report 10F

BE IT RESOLVED, That the American Bar Association urges state and local bar associations to establish special committees to inform the bar on all aspects of the drug crisis, to study the impact, consequences and effectiveness of current drug policies on their areas' entire justice system, to participate in an examination and improvement of our nation's drug policies and facilitate the participation by their members in anti-drug programs in their communities.

177. Firearms and Children
Young Lawyers Division
August, 1991 Report 110A

BE IT RESOLVED, That the American Bar Association supports the enactment of federal, state and territorial legislation that: 1) Encourages the establishment of educational programs directed at school children, their parents, and juvenile services professionals on firearm safety for children, including the dangers of the use of such weapons; 2) Provides for stricter regulation of, and manufacturer's warnings on, "BB" guns and air rifles; and 3) Provides criminal penalties for adults' failure to properly safeguard firearms and ammunition they own or control, thereby placing minors at risk of death or injury.
RESOLVED, That the American Bar Association supports efforts to strengthen the rule of law in international affairs by an appropriate investigation and, if found warranted, the apprehension, prosecution, and punishment of individuals with respect to any violations of the 1945 Nuremberg Principles and/or other grave breaches of the laws of war associated with Iraqi aggression against other states.

BE IT FURTHER RESOLVED, That the American Bar Association supports the Nuremberg Principles as a part of customary international law and urges the Government of the United States to support policies which will strengthen these principles and insure that, where possible, present and future war criminals are held criminally accountable for their conduct through judicial procedures in which adequate safeguards are provided to insure the protection of the rights of the accused and the achievement of international justice.

BE IT FURTHER RESOLVED, That the ABA Blue Ribbon Committee on an International Criminal Court take this recommendation into account.

BE IT FURTHER RESOLVED, That a copy of this resolution be provided to the President of the United States, the Secretary of State, the President Pro Tempore of the Senate, the Speaker of the House of Representatives, and the Secretary General of the United Nations.

BE IT RESOLVED, That the American Bar Association supports the initiatives of the Section of Real Property, Trust and Estate Law and the ABA Commission on the Elderly and other organizations, such as the Conference of Chief Judges, the conference of Special Court Judges, the Conference of State Trial Judges, the American College of Probate Judges and the American College of Estate and Trust Counsel to encourage continuing improvement of the guardianship and conservatorship laws and procedures within the several states.

BE IT FURTHER RESOLVED, That in view of these initiatives the Association believes that the enactment of federal legislation is unnecessary at this time.

BE IT RESOLVED, That the American Bar Association urge the Congress to eliminate, or to substantially liberalize the retirement earnings test in Social Security.
RESOLVED, That the American Bar Association supports efforts to educate the public about the critical need for organ and tissue donations, and supports efforts to inform the legal community and clients of the opportunities to make these donations.

BE IT FURTHER RESOLVED, That the American Bar Association urges all attorneys to raise with their clients, when appropriate, the topic of organ and tissue donations and to provide donation forms to those clients who indicate an interest in making a donation.

BE IT FURTHER RESOLVED, That the American Bar Association urges the legal community to coordinate its efforts with respect to organ and tissue donations with the efforts of the medical community, including doctors, nurses, paramedics, hospitals, organ and tissue registries (in particular, The Living Bank, the only national multi-organ and tissue donor registry), and others involved in organ and tissue transplantation.

BE IT FURTHER RESOLVED, That the American Bar Association supports efforts to bring uniformity, comity, and universality to the law and practice of organ and tissue donation and encourages all states to enact the 1987 version of the Uniform Anatomical Gift Act.

BE IT FURTHER RESOLVED, That the American Bar Association recommends that the Uniform Anatomical Gift Act be revised to provide that an agent under a durable power of attorney may be granted authority to effectuate the principal's document of donation.

RESOLVED, That the American Bar Association establish standards for accrediting private organizations which certify lawyers as specialists, and that it establish and maintain a mechanism to accredit such organizations which meet those standards.
RESOLVED, That the American Bar Association supports amendments to the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code") which would enable pension benefit plans as defined in Section 3(2) of ERISA and pension, profit sharing and stock bonus plans which meet the requirements for qualification contained in Code Section 401(a) to honor the terms and provisions of premarital and postmarital agreements between spouses if:

(a) the premarital or postmarital agreement is filed with the plan administrator;

(b) the plan administrator notifies the spouse who is not a participant in the plan of the filing of the premarital or postmarital agreement; and

(c) either:

(i) the nonparticipant spouse confirms to the plan administrator that the agreement is valid and the spouse understands the effect of the agreement; or

(ii) the plan administrator is provided with a qualified domestic relations order to the effect that the agreement is valid.

RESOLVED, That the American Bar Association supports increased funding and development of well-managed, secure public and federally-assisted housing and housing programs which meet the needs of all tenants, particularly those who are low-income, elderly or have disabilities, and which do not violate the intent and principles of the civil rights laws and the goals of our nation's housing programs.

RESOLVED, That the American Bar Association supports in principle legislation which provides the federal judiciary with control over its space and facilities.

RESOLVED, That the American Bar Association should develop policies and procedures by which members may record their abstention from discussion and voting.

RESOLVED, That the American Bar Association supports the concept of establishing mechanisms to stimulate private-sector development or commercialization of technologies that are critical to national security and economic competitiveness.

BE IT RESOLVED, That the American Bar Association urges state, territorial and local bar associations to establish policies in support of community service programs that (1) challenge teens and young adults to develop a sense of purpose and self-worth, (2) revitalize urban areas by fostering civic pride and volunteerism, and (3) join with coalitions to help prevent the erosion of families and communities through drug abuse and related crime and violence.

BE IT FURTHER RESOLVED, That the American Bar Association urges state, territorial and local bar associations to encourage participation in community service programs by bar members, law firms, and law schools.

BE IT RESOLVED, That the American Bar Association urges Congress to reject amendments to Rule 26(a) of the Federal Rules of Civil Procedure approved by the Judicial Conference of the United States, Advisory Committee on Civil Rules, requiring disclosure of discovery materials without specific written requests.

BE IT RESOLVED, That the American Bar Association encourages the adoption of voluntary, pretrial drug testing programs to assist judicial officers in determining appropriate conditions of release, and
BE IT FURTHER RESOLVED, That adequate treatment should be provided to assist individuals in complying with a release order requiring pretrial drug testing; and

BE IT FURTHER RESOLVED, That the framework for conditional release involving pretrial drug testing should include graduated sanctions; and

BE IT FURTHER RESOLVED, That there should be procedures in place to ensure the integrity of the testing program and accuracy of test results; and

BE IT FURTHER RESOLVED, That the results of pretrial drug testing, or refusal to submit to such testing, should not be admissible as evidence of the guilt of a defendant on an underlying charge.

338. Drug Crisis
Commission on Lawyers Assistance Programs
February, 1994 Report 100

BE IT RESOLVED, That the American Bar Association supports the development of a comprehensive, systemic approach to addressing the needs of defendants with drug and alcohol problems through multidisciplinary strategies that include coordination among the criminal justice, health, social service and education systems, and the community.

BE IT FURTHER RESOLVED, That the American Bar Association urges the courts to adopt treatment-oriented, diversionary drug court programs as one component of a comprehensive approach that

(i) intervene with drug-involved defendants immediately after arrest and divert eligible defendants to treatment programs in lieu of criminal prosecution, (ii) provide carefully structured treatment programs with explicit criteria governing the successful and unsuccessful participation of defendants, including the identification of clear expectations as to the defendant's responsibilities for participation in the program, (iii) establish the expected outcomes of the program with periodic evaluation; (iv) require frequent and direct contact with a supervising judge and the courtroom team assigned to the judge; and (v) target carefully the population of defendants with drug-related problems to be served by the program to maximize the program's effectiveness.

...BE IT FURTHER RESOLVED, That the American Bar Association urges state, local and territorial bar associations to facilitate the development of treatment-oriented, diversionary drug court programs that result in dismissal of drug-related charges upon the completion of drug rehabilitation.

356. Prevention
Forum Committee on Affordable Housing and Community Development
August, 1994 Report 10B

BE IT RESOLVED, That the American Bar Association urges state and local bar associations to join it in preventing homelessness by developing, supporting, and leading state and local initiatives, projects and programs which result in:

BE IT FURTHER RESOLVED, That adequate treatment should be provided to assist individuals in complying with a release order requiring pretrial drug testing; and

BE IT FURTHER RESOLVED, That the framework for conditional release involving pretrial drug testing should include graduated sanctions; and

BE IT FURTHER RESOLVED, That there should be procedures in place to ensure the integrity of the testing program and accuracy of test results; and

BE IT FURTHER RESOLVED, That the results of pretrial drug testing, or refusal to submit to such testing, should not be admissible as evidence of the guilt of a defendant on an underlying charge.

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February, 1994 Report 100

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(i) intervene with drug-involved defendants immediately after arrest and divert eligible defendants to treatment programs in lieu of criminal prosecution, (ii) provide carefully structured treatment programs with explicit criteria governing the successful and unsuccessful participation of defendants, including the identification of clear expectations as to the defendant's responsibilities for participation in the program, (iii) establish the expected outcomes of the program with periodic evaluation; (iv) require frequent and direct contact with a supervising judge and the courtroom team assigned to the judge; and (v) target carefully the population of defendants with drug-related problems to be served by the program to maximize the program's effectiveness.

...BE IT FURTHER RESOLVED, That the American Bar Association urges state, local and territorial bar associations to facilitate the development of treatment-oriented, diversionary drug court programs that result in dismissal of drug-related charges upon the completion of drug rehabilitation.

356. Prevention
Forum Committee on Affordable Housing and Community Development
August, 1994 Report 10B

BE IT RESOLVED, That the American Bar Association urges state and local bar associations to join it in preventing homelessness by developing, supporting, and leading state and local initiatives, projects and programs which result in:
a) establishment of state/local coordinating groups composed of public and private agencies, including representation from landlord and tenant groups and lending agencies, to develop ways to prevent residential evictions from leading to homelessness;

b) review and revision, if appropriate, of all statutes and ordinances, court procedures or technology, and other practices which may result in avoidable residential evictions and foreclosures of low-income households;

c) provision of counsel at no cost to low-income persons involved in court proceedings which may result in residential eviction and foreclosure;

d) development of alternative methods, such as mediation, for resolving landlord/tenant disputes and mortgage foreclosures prior to court proceedings;

e) establishment of emergency tenant and homeowner assistance funds through use of state/local and territorial resources and through allocation of federal funds, which are available to local governments through such programs as Community Development Block Grants;

f) education of the public, including governmental agencies, residential landlords and tenants, and nonprofit organizations on homelessness prevention through dissemination of information about (i) early intervention in landlord/tenant problems, (ii) financial assistance programs, (iii) legal rights when faced with eviction or foreclosure, and (iv) options for alternative housing;

g) training programs for low-income tenants and homeowners, for landlords, for pro bono attorneys and other volunteers, and for organizations and agencies assisting low-income households which focus on (i) the responsibilities of landlords and tenants to one another, (ii) methods of ownership preparedness programs, and (iii) the particular skills which lawyers may use to prevent homelessness when representing clients who may lose or have lost residential housing; and

h) involvement of law school faculty and students, where appropriate, in representing persons with housing problems and in assisting with legislative review and evaluation of court practices and procedures in the housing area.

BE IT FURTHER RESOLVED, That the American Bar Association will cooperate in supplying expertise, clearinghouse services, and other assistance to those state and local bar associations which undertake the programs and projects consistent with the intent of this resolution.

357. Juvenile Justice in Unified Children and Family Courts

Center on Children and the Law, Government and Public Sector Division, the Young Lawyers Division, Individual Rights and Responsibilities and Litigation, the Hawaii State Bar Association, the National Conference of Women's Bar Associations

August, 1994 Report 10C

BE IT FURTHER RESOLVED, That the American Bar Association pledges itself to promoting the implementation of unified children and family court systems as described in Standard 1.1 of the Standards Relating to Court Organization and Administration and enunciated below, recognizing that the manner of administering these courts may differ among states and jurisdictions.

a) establishment of state/local coordinating groups composed of public and private agencies, including representation from landlord and tenant groups and lending agencies, to develop ways to prevent residential evictions from leading to homelessness;

b) review and revision, if appropriate, of all statutes and ordinances, court procedures or technology, and other practices which may result in avoidable residential evictions and foreclosures of low-income households;

c) provision of counsel at no cost to low-income persons involved in court proceedings which may result in residential eviction and foreclosure;

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h) involvement of law school faculty and students, where appropriate, in counseling/representing persons with housing problems and in assisting with legislative review and evaluation of court practices and procedures in the housing area.

BE IT FURTHER RESOLVED, That the American Bar Association pledges itself to promoting the implementation of unified children and family court systems as described in Standard 1.1 of the Standards Relating to Court Organization and Administration and enunciated below, recognizing that the manner of administering these courts may differ among states and jurisdictions.
BE IT FURTHER RESOLVED, That the American Bar Association endorses the following clarifications and additions to the components of unified children and family courts:

(1) Intake processes by which families will be initially assisted and expeditiously directed to the appropriate entity in the court system to meet their needs.

(2) Provision and/or integration of comprehensive services and other assistance, as appropriate, for children and families in the courts. Appropriate services can include, but should not be limited to, representation, alternative dispute resolution, guardians ad litem, financial and housing assistance. A unified children and family court must have all authority which is supported by its constitutional, statutory and equitable powers to order other government agencies, e.g., housing authorities, mental health agencies, etc., to provide services to families.

(3) Provision and encouragement of "alternative" dispute resolution techniques such as mediation, where appropriate, or where all parties request such an alternative, to resolve family issues. Such techniques are not meant to compromise legal protections and confidentiality and are subject to the development of standards and guidelines.

(4) Development and enforcement of time standards for cases involving the custody or out of home placement of children, e.g., foster care placement, adoption, etc., to prevent prolonged uncertainty that may adversely affect family members, particularly young children. To ensure speedy resolution of all cases in the children and family courts, sufficient resources should be provided to allow judges and social workers to devote adequate time to each case, including sufficient support personnel so that judges can devote their time to adjudicating adversarial issues while trained court staff review uncontested decrees, perform case management and so forth.

(5) An integrated management information system which includes monitoring, tracking, and coordinating all cases in the division to assure either that one judge be assigned to handle all matters pertaining to one family or that all judges presiding over matters affecting one family are made aware of other pending cases affecting that family and shall coordinate to the greatest extent possible all judicial efforts regarding that family.

(6) Assurance that judges and court personnel who work in the children and family court are adequately prepared for and receive ongoing training in family court issues including, among other things, domestic violence, child psychology, and the value and methods of alternative dispute resolution.

(7) Adequate oversight of the new court system's performance and outcomes while keeping confidential all information which would tend to identify individual children except if the release of such information is necessary to assure provision of appropriate services for those children.
BE IT RESOLVED, That the American Bar Association urge that any state and territorial regulation of investment advisers and financial planners allow a lawyers' exemption consistent with the federal Investment Advisers Act.

BE IT RESOLVED, That the American Bar Association recommends that when making character and fitness determinations for the purpose of bar admission, state and territorial bar examiners, in carrying out their responsibilities to the public to admit only qualified applicants worthy of the public trust, should consider the privacy concerns of bar admission applicants, tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law, and take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so.
Pursuant to Report 400, adopted by the House of Delegates in 1996, the Association is annually required to review policies adopted by the House of Delegates that have been in existence ten years or more. See Report 400 attached as Appendix A. Those policies that are outdated, duplicative, inconsistent with current policy or no longer relevant are to be archived. The review process operates from the premise that any policy on the list will be archived unless there is a request to remove it from the archival list and retain it as current policy. Once archived, it may no longer be cited as current policy. An archived policy is not considered to be rescinded, but rather is retained by the Association for historical purposes only.

The Resolution and Impact Review Committee reviewed the current archiving procedure and determined that it was time to revisit policies that were originally considered for archiving but retained. To date, every policy that is at least ten years old has been considered for archiving once. In the first several years after the procedure was instituted, over 1000 policies were examined. Of those, about one-third were archived. In subsequent years, policies were examined when they became 10 years old. The vast majority of policies that were passed in the last twenty years have been retained at the request of the sponsoring entity, the Office of Governmental Affairs or a member of the House.

This year, the Resolution and Impact Review Committee has reviewed policies through 1994 which were previously considered for archiving but retained. The process of reviewing previously retained policies began in spring of 2012 and will continue over the next year. To accomplish this objective, the Division for Policy Administration compiled an index of such policies set forth in either the ABA Policy and Procedures Handbook or the American Bar Association Legislative Issues list maintained by the Governmental Affairs Office. Some 389 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 54 entities to which the policies were sent are listed in Appendix B.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in Appendix C.

Respectfully submitted,
Honorable Cara Lee Neville, Secretary
American Bar Association
August 2014

Pursuant to Report 400, adopted by the House of Delegates in 1996, the Association is annually required to review policies adopted by the House of Delegates that have been in existence ten years or more. See Report 400 attached as Appendix A. Those policies that are outdated, duplicative, inconsistent with current policy or no longer relevant are to be archived. The review process operates from the premise that any policy on the list will be archived unless there is a request to remove it from the archival list and retain it as current policy. Once archived, it may no longer be cited as current policy. An archived policy is not considered to be rescinded, but rather is retained by the Association for historical purposes only.

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Respectfully submitted,
Honorable Cara Lee Neville, Secretary
American Bar Association
August 2014
RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED, That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.

2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year policies 15 years old or older; in the third year and each year thereafter, policies 10 years old or older.

3. Prior to each Annual meeting, a list of affected policies will be compiled and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.

4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.

5. Those policies which are not archived will be subject to review every ten years thereafter.

6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.

7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.
The entities below reviewed and recommended disposition of the policies contained in the report:

Section and Divisions
Affordable Housing and Community Development
Antitrust Law
Appellate Judges Conference
Business Law
Criminal Justice Section
Family Law
Health Law Section
Individual Rights and Responsibilities
Intellectual Property Law
International Law
Judicial Division
Labor and Employment Law
Law Practice Management Section
Law Student Division
Legal Education and Admission to the Bar
Litigation
Public Contract Law
Real Property, Trust and Estate Law
Solo Small Firm and General Practice Division
Taxation
Young Lawyers Division

Standing Committees
Continuing Legal Education
Federal Judicial Improvements
Federal Judiciary
Judicial Independence
Law and National Security
Lawyer Referral and Information Service
Legal Aid and Indigent Defendants
Legal Assistance for Military Personnel
Pro Bono and Public Service
Professional Discipline
Professionalism
Public Education
Special Committees and Commissions

Center for Professional Responsibility
Center for Racial and Ethnic Diversity
Commission on Governance

State & Local and Territorial Bar Association

Arkansas Bar Association
Bar Association of San Francisco
Boston Bar Association
Chicago Bar Association
Hawaii State Bar Association
Illinois State Bar Association
Los Angeles County Bar Association
Louisiana State Bar Association
Maryland State Bar Association, Inc.
Massachusetts Bar Association
New York City Bar Association
Ohio State Bar Association
Philadelphia Bar Association
State Bar of Arizona
State Bar of Michigan
The State Bar of California
Virgin Islands Bar Association

Affiliated Organizations

American Immigration Lawyers Association
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<th>Title</th>
<th>Organization</th>
<th>Date</th>
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<tr>
<td>1.</td>
<td>Legal Services Corporation</td>
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<td>February, 1965</td>
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<td>United Nations</td>
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<td>Revised Standards and Practices for Civil Legal Aid</td>
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<td>Tax Court Jurisdiction</td>
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<td>Legal Assistance for Servicemen and Dependents</td>
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<tr>
<td>Number</td>
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<td>Special Committee on Standards for the Administration of Criminal Justice</td>
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<td>OEO Legal Services Corporation</td>
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<td>Equal Rights Equally Between Single and Married Person</td>
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<td>Discrimination, Tax</td>
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<td>Criminal Justice Standards</td>
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<td>February 8, 1979</td>
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42. Federal Securities Code
   Section of Business Law
   February, 1979

44. American Convention on Human Rights
   Section of International Law
   August, 1979

46. Specialization in the Legal Profession
   Standing Committee on Specialization
   August, 1979

48. Juvenile Justice Standards
   Commission on Youth at Risk
   February, 1980

49. Discrimination in the Judiciary
   Standing Committee on Judicial Independence
   April 11, 1980

50. Judicial Compensation
    Standing Committee on Judicial Independence
    August, 1980

52. Private Lawyer Involvement
    Standing Committee on Legal Aid and Indigent Defendants
    October 2, 1980

54. Court Costs and Delay
    Judicial Division
    August, 1981

55. Federal Agency Rulemaking Procedures
    Section of Administrative Law and Regulatory Practice
    August, 1981

56. Legal Aid-Adequate Funding to Provide Counsel to Indigent Defendants
    Solo Small Firm and General Practice Division
    August, 1981

57. Free Speech and Press
    Section of International Law
    February, 1982

58. International Court of Justice
    Section of International Law and Practice
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| 59. | Judicial Compensation  
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| 60. | Legal Expenses  
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| 61. | Military Pay  
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| 62. | Attorney-Client Privilege/European Communities  
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| 63. | Model Rules of Professional Conduct  
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August, 1983 |
| 64. | Bail on Appeal  
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| 65. | Model Rule for Advisory Opinion on the Unauthorized Practice of law  
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| 66. | Lawyer Mediators  
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| 67. | Standards for State Judicial Retirement Plans  
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| 69. | Participation in Association  
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| 70. | Criminal Justice Standards  
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| 71. | Foreign Legal Consulting  
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73. Child Witnesses  
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74. Dram Shop and Host Liability  
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75. Lawyer Referral Service  
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77. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment  
Section of International Law  
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78. Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)  
Section of International Law  
February, 1986

79. Arbitration  
Section of International Law  
February, 1986

80. Extradition Treaty with the United Kingdom  
Section of International Law  
February, 1986

81. Suggested Guidelines for Reducing Adverse Effects of Case Continuances and Delays on Crime Victims and Witnesses  
Criminal Justice Section  
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82. Peremptory Challenges  
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83. Standards Relating to Appellate Courts  
Appellate Judges Conference  
February, 1986

85. Rule of Law  
Rule of Law Initiative  
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86. Hearing-Impaired Attorneys  
Young Lawyers Division  
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87. Women and Minorities as Judges
   Standing Committee on Judicial Independence
   August, 1986

88. Peaceful Settlement of Conflict
   Section of International Law
   August, 1986

89. Standards for Lawyers Discipline and Disability Proceedings
   Standing Committee on Professional Discipline
   August, 1986

90. Social Security Court
    Commission on Legal Problems of the Elderly; Commission on Disability Rights
    August, 1986

91. Suggested Guidelines for Reducing Adverse Effects of Case Continuances and Delays
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    Criminal Justice Section
    November 21, 1986

92. Criminal Justice Standards
    Criminal Justice Section
    February 12, 1987

93. Government in the Sunshine Act
    Section of Administrative Law and Regulatory Practice
    February, 1987

94. Cayman Islands
    Section of International Law
    February, 1987

95. Model Rules of Professional Conduct
    Standing Committee on Ethics and Professional Responsibility
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96. Preindictment Review
    Section of Criminal Justice, Section of Taxation
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97. Pretrial Discovery
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98. Criminal Justice Standards
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100. Court of Military Appeals
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101. Peace in Central America
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103. Association Standards for Judicial Education
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105. Model Rule for Trust Account Overdraft Notification
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106. Guidelines Governing Restitution to Victims of Criminal Conduct
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107. Criminal Justice Standards
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108. Guidelines Regarding the Rights of Witnesses in Congressional Proceedings
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109. Model Rule for Minimum Continuing Legal Education
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110. Patent Infringement
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111. Capital Punishment
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112. Terrorism
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113. Model Rule for Minimum Continuing Legal Education
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114. Model Rule for Trust Account Overdraft Notification
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106. Guidelines Governing Restitution to Victims of Criminal Conduct
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107. Criminal Justice Standards
Criminal Justice Section
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109. Model Rule for Minimum Continuing Legal Education
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110. Patent Infringement
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August, 1988

111. Capital Punishment
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112. Terrorism
Section of International Law
February, 1989

113. Model Rule for Minimum Continuing Legal Education
Standing Committee on Continuing Legal Education
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114. Model Rule for Trust Account Overdraft Notification
Standing Committee on Lawyers' Responsibility for Client Protection; Standing Committee on Professional Discipline
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126. Model Rule for Lawyer Disciplinary Enforcement
   Standing Committee on Professional Discipline
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127. Model Rules of Professional Conduct
   State Bar of California, Solo Small Firm and General Practice Division and Law
   Practice Division and STC on Ethics and Professional Responsibility
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129. Model Rules of Professional Conduct
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130. Model Rules of Professional Conduct
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131. Model Rules of Professional Conduct
   STC on Professional Discipline, Standing Committee on Ethics and Professional
   Responsibility, the Standing Committee on Professionalism, Criminal Justice Section,
   The Section of Individual Rights and Responsibilities and the Section of Litigation
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132. Foreign Agents Registration Act of 1938
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133. Judicial Improvement Act of 1990
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134. Creation of International Criminal Court
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137. Membership Benefits to Disabled Members
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138. Funding for Indigent Defense Programs
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139. Civil and Criminal Forfeiture
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141. Amendment to The Defense Function Standards
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142. Oppose Administrative Subpoenas by FBI
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143. Religious Liberty Restoration Act
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144. Attorney Impairment Programs
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145. Legal Assistant Program
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146. Amend House Rules of Procedure
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147. Redistricting Congressional, Legislative and Local government Districts
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   February, 1991

148. Social Security Act
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149. Iraq's Invasion of Kuwait
   Section of International Law
   February, 1991

151. Hong Kong Bill of Rights
   Section of International Law; Section of Individual Rights and Responsibilities
   February, 1991

152. Pacific Rim Economic Agreement
   Section of International Law
   February, 1991

153. Monitoring & Evaluation of Providers of Legal Service
   Standing Committee on Legal Aid and Indigent Defendants
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154. Recycling
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155. Candidates for the Court of Appeals for the Federal Circuit
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156. U.N. Convention on Rights of the Child
   Young Lawyers Division, Section of Family Law, the Section of Individual Rights and
   Responsibilities and the Section of International Law
   February, 1991

157. IOLTA
   Commission on Interest on Lawyers Trust Accounts
   February, 1991

158. Bicentennial of the Bill of Rights
   Standing Committee on Public Education
   February, 1991

159. Cambodia & Vietnam
   Section of International Law
   February, 1991

160. Amend Soldiers and Sailors Civil Relief Act
   Judge Advocates Association
   February, 1991

161. Study of Bar Passage Rate
   Section of Legal Education and Admissions to the Bar
   February, 1991

162. Provisional Law School Approval
   Section of Legal Education and Admissions to the Bar
   February, 1991

163. Megatrials
   Criminal Justice Section, National Conference of Federal Trial Judges; Illinois State
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   August, 1991

164. Protection of the Environment
   Tort Trial & Insurance Practice Section; Section of Business Law; Section of
   International Law; Kansas City Metropolitan Bar Association
   August, 1991

165. Bias in Judicial System
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   August, 1991

166. Rust v. Sullivan
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   August, 1991

156. U.N. Convention on Rights of the Child
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157. IOLTA
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   August, 1994

364. Standards Relating to Appellate Courts
   Judicial Division
   August, 1994

365. Amend Real estate Settlement Procedures Act
   Solo Small Firm and General Practice Division
   August, 1994

351. Intercountry Adoption
   Family Law Section
   February, 1994

352. Multilateral Trade Negotiations
   Section of International Law
   February, 1994

353. Foreign Assistance Program
   Section of International Law
   February, 1994

354. Amend the Rules Enabling Act
   State Bar of Arizona
   August, 1994

355. Client Relations
   Law Practice Division
   August, 1994

358. Merit Selection
   Judicial Division
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359. Prevention and Reduction of Gun Violence
   Standing Committee on Gun Violence
   August, 1994

360. Arbitration Programs
   Arkansas Bar Association
   August, 1994

361. Amending Model Rules of Professional Conduct
   Criminal Justice, Standing Committee on Ethics and Professional Responsibility
   August, 1994

362. Standards for Criminal Justice
   Criminal Justice Section
   August, 1994

363. Victim/Offender Program
   Criminal Justice Section
   August, 1994

364. Standards Relating to Appellate Courts
   Judicial Division
   August, 1994

365. Amend Real estate Settlement Procedures Act
   Solo Small Firm and General Practice Division
   August, 1994
366. Model Rules for Judicial Discipline Enforcement
Standing Committee on Specialization
August, 1994

368. Standards for the Approval of Law Schools
Section of Legal Education and Admissions to the Bar
August, 1994

369. Provisional Law school Approval
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370. Law school Termination
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371. Extension of the Treaty on the Nonproliferation of Nuclear Weapons
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372. Recruitment and Selection of Administrative law
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374. Presidential Stipend
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375. 1986 Amendment to Internal Revenue Code: Penalty on submission of False Tax Returns
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376. 1986 Amendment to Internal Revenue Code: Simplify Rules on Domestic Workers
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377. Internal Revenue Service Non-Filer Program
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379. Jurisdiction of the International Criminal Court
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380. Establishment of an International Criminal Court  
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381. Advancement of international Human Rights  
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382. U.N. Forces  
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383. Antitrust Provisions of NAFTA  
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384. Legal Assistance in the Armed Force  
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385. Children of Workers Compensation Claimants  
Tort Trial & Insurance Practice Section  
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386. Evaluation of Legal Assistant Programs  
Standing Committee on Paralegals  
August, 1994

387. Amendments to the ABA Model Rules of Professional Conduct  
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August, 1994

388. Approval of Law Schools  
Legal Education and Admission to the Bar  
August, 1994

389. U.N. Law of the Sea Convention  
Section of International Law  
August, 1994
GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association
Submitted By: Hon. Cara Lee T. Neville

1. Summary of Resolution:

In an ongoing effort to bring the Association's policies up to date, this resolution consists of the review of policies through 1994. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. Approval by Submitting Entity:

The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors of the House of Delegates on the dates they were adopted.

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

Although the Association has from time to time culled its records, the policies on the archival list have not been subject to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

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

The archiving of any policy would have no affect on existing policies.

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

Resolution 400 mandates the review of policies 10 years old or older.

6. Status of Legislation (If applicable)

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

The Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

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

Costs of Printing.

9. Disclosure of Interest. (If applicable)

10. Referrals.

The policies identified in the Resolution with Report have been circulated to 54 entities as noted in Appendix B, and also will be sent to the Government Affairs Office.

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

Honorable Cara Lee Neville, Secretary
300 S. 6th Street
#1859
Minneapolis, MN 55487
612-348-8901
caralee.neville@courts.mn.us

Richard Collins
American Bar Association
321 North Clark Street
Chicago, Illinois 60610
312/988-5162
Richard.Collins@americanbar.org

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Richard Collins
American Bar Association
321 North Clark Street
Chicago, Illinois 60610
312/988-5162
Richard.Collins@americanbar.org
1. **Summary of the resolution**
   This resolution archives Association Policies dated through 1994. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. **Summary of the issue which the resolution addresses**
   The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association’s positions were adopted decades ago and are no longer relevant or effective.

3. **An explanation of how the proposed policy will address the issue**
   The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

4. **A summary of any minority views or opposition which have been identified**
   None at this time
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