Resolutions with Reports to the House of Delegates
NO RESOLUTION PRESENTED HEREIN REPRESENTS THE POLICY OF THE ASSOCIATION UNTIL IT SHALL HAVE BEEN APPROVED BY THE HOUSE OF DELEGATES. INFORMATIONAL REPORTS, COMMENTS AND SUPPORTING DATA ARE NOT APPROVED BY THE HOUSE IN ITS VOTING AND REPRESENT ONLY THE VIEWS OF THE SECTION OR COMMITTEE SUBMITTING THEM.
# Resolutions with Reports to the House of Delegates

**Hyatt Regency Chicago Hotel**  
Grand Ballroom, Gold Level, East Tower  
Chicago, Illinois  
August 3-4, 2015

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Resolutions with Reports numbered 10A, 100 through 116, 400A and 400B can be found in this book. Proposals to amend the Association's Constitution and Bylaws are numbered 11-1 through 11-6 and also can be found in this book. Any additional Resolutions with Reports submitted by state or local bar associations will be numbered in the "10" series. Late Resolutions with Reports will be numbered in the "300" series. Those reports will be distributed at the opening session of the House of Delegates meeting. Informational Reports can be found on the ABA's website at [http://www.americanbar.org/groups/leadership/house_of_delegates/2015-chicago-annual-meeting.html](http://www.americanbar.org/groups/leadership/house_of_delegates/2015-chicago-annual-meeting.html) (click on Informational Reports).

*This report can be found with the Blue Late Report and Supplemental Materials to be distributed at the opening session of the House of Delegates meeting.*
PRELIMINARY CALENDAR of the
HOUSE OF DELEGATES of the
AMERICAN BAR ASSOCIATION

Hyatt Regency Chicago Hotel
Grand Ballroom, Gold Level, East Tower
Chicago, Illinois

August 3-4, 2015

All sessions of the House of Delegates will be held on Monday, August 3 and Tuesday, August 4, 2015, in the Grand Ballroom, Gold Level, East Tower, at the Hyatt Regency Chicago Hotel, in Chicago, Illinois. It is anticipated that the first session of the House meeting will begin at 9:00 a.m. on Monday morning and will recess at approximately 5:00 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 3. 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 5, 2015 filing deadline. Resolutions with Reports numbered 10A, 100 through 116, 400A and 400B appear in this book. Proposals to amend the Association's Constitution and Bylaws are numbered 11-1 through 11-6 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/2015-chicago-annual-meeting.html (click on Informational Reports).

Any late Resolutions with Reports, those received after May 5, 2015, will be considered by the House if the Committee on Rules and Calendar recommends a waiver of the time requirement and the recommendation is approved by a two-thirds vote of the delegates voting. Late Resolutions with Reports will be distributed at the opening session of the House, along with any additional Resolutions with Reports submitted by state or local bar associations.

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

Invocation

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

   Approval of the Roster

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

   Approval of the Final Calendar

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

   Approval of the Summary of Action

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

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

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

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

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

9. Presentation of Proposals to Amend the Association’s Constitution and Bylaws
   11-1 through 11-6

10. Presentation of Resolutions with Reports of Sections, Committees and Other
    Entities
    100-116    Resolutions with Reports
    300        Late Resolutions with Reports
    400A-B     Resolutions with Reports on Archiving

ADJOURNMENT
**AMERICAN BAR ASSOCIATION**  
**2014-2015**  
**BOARD OF GOVERNORS**

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REPORT OF THE
ABA PRESIDENT
TO THE
HOUSE OF DELEGATES

The report of the President will be presented at the time of the
Annual Meeting of the House of Delegates.
To permit the presentation of current financial data, the written report of the Treasurer will be distributed at the time of the Annual Meeting of the House of Delegates.
REPORT OF THE EXECUTIVE DIRECTOR to the
HOUSE OF DELEGATES
(submitted May 29, 2015)

This report highlights American Bar Association activities from December 12, 2014, to May 29, 2015.

Introduction

A recent letter to the American Bar Association underscores the importance of our work. In late March, Consumer Financial Protection Bureau Director Richard Cordray praised the House of Delegates for its passage of a vital resolution at our Midyear meeting. "I write to commend the American Bar Association for its recent decision to address deceptive or fraudulent loan foreclosure rescue practices," he said of Resolution 111c. "I look forward to working with the ABA on this important issue in every way we can over the months and years ahead."

The House of Delegates ensures the ABA delivers on our motto, to defend liberty and pursue justice. Looking to results from the past several months alone, action taken by the delegates has helped Fortune 500 corporations fight human trafficking within their business and supply chains, guided ABA opposition to proposed cuts to law school debt forgiveness programs, paved the way for the work of the Immigrant Child Advocacy Network, supported innovative efforts to address the justice gap, and much more. The accomplishments shared in this report provide several examples of the ABA’s strength in action.

ABAAction!

Since the Board of Governors approved the initiative at its June meeting two years ago, ABAAction! has provided a focus for staff efforts to improve our membership programs and nondues revenue collections. ABAAction! permeates all we do; following are samples from our current portfolio of 38 active initiatives.

The ABA Academy continues to grow. In January, we established a new certificate program on legal project management, Legal Project Management Boot Camp. The course is part of the Minding Your Business series, which will introduce additional law practice management programs in June. Created with outside content experts, the programs will include webinars on human resources, finance, and law firm real estate concerns. The Academy now offers almost 50 programs under the Minding Your Business banner, with an additional 97 basic-skills webinars offered through the Essentials series.

ABA Leisure is the umbrella concept for a broad group of communities. They provide networking and educational opportunities for ABA members related to the leisure activities they enjoy. The ABA Wine community provides not only a wine club but also is now engaging ABA Wine leaders throughout the country who are organizing a variety of wine related events, from wine tastings to dinners to winery visits. ABA Wine will soon have its own interactive website.
The ABA golf program involves golf leagues in several cities that have been initiated in conjunction with the PGA (the Professional Golfers’ Association of America), featuring organized golf events from meet-ups to tournaments, and a classic member arrangement that provides both discounts and special access rights for members. Its website kicked off just a few weeks ago. We have begun to provide information on early offerings of ABA Travel — planned trips to Peru, Italy and Eastern Europe. Much more will be developed as ABA Leisure grows.

New arrangements to license ABA content to distributors such as American Legal Media and Thomson Reuters have brought in more than $413,000 in new revenue since efforts to establish third-party licensing began in the summer of 2013. Future collaborations are also being developed, including ones with a major legal research platform and a leading publisher of legal academic content.

Our Ankerywche logo continues to raise its profile since the December release of its first title, “Supreme Ambitions.” Several other Ankerywche books have debuted to similar critical acclaim. Among them, “A Triumph of Genius” received favorable reviews in The Economist and Chicago Review of Books, while “Operation Greyword” was highlighted in a Publishers Weekly article of best upcoming books. Our new trade imprint is now accepting pre-orders on Amazon for the first volumes of the Perry Mason book series, which has been out of print for more than 20 years. Ankerywche will publish nine books this fiscal year, as part of our plans to release the entire series of 2 books in a numbered, collectable format.

Our newest business unit, ABA Leverage, launched in February with an exhibit at the Midyear Meeting. A month later, we unveiled a new website alongside with more marketing efforts to explain the meeting and contracting services offered by the Association. This program leverages the capabilities of our Meetings and Travel group to help attorneys get great deals for their meetings. The National Judicial College, American Bar Endowment, and Legal Hackers are among early clients of ABA Leverage.

Among other new programs, by the end of June, we will launch a pilot program to connect Association members with prospective small-business clients through the latest online technology. Additionally, staff continues to work on a business plan to source, manufacture, and distribute a new consumer product, the “Blue Box,” a waterproof, fire-proof storage box designed to hold important documents.

Other Membership and Non-Dues Revenue Initiatives

Efforts are underway to promote the new free membership program for law students at ABA-approved law schools. At the beginning of April, more than 200 law school deans received word of the offer through a letter sent by President Hubbard. Additionally, emails that announced the change were sent to ABA student representatives on campuses, student bar association presidents, and first- and second-year student members. A new video that highlights the benefits of ABA membership was released in April. Staff continues to develop further marketing efforts on behalf of the new initiative.

Our efforts to enhance the member-value proposition remains a critical priority. We’re targeting the new generation of ABA members with such new programs as the ABA National
Institute for New Partners, and through fresh approaches to communication like the Young Lawyers Division’s newly redesigned compilation of its monthly publication, YL, called Evolution. We have also invested in other communication channels that resonate with law students and young lawyers. Since September, the Association’s primary social channels have increased their followers in meaningful ways, with a 14 percent gain on Facebook, 19 percent growth on Twitter, and a 25 percent increase on LinkedIn. Our newly formed Law Practice and Technology Group – which combines the staffs of the Divisions for Law Practice, Law Students, Young Lawyers, and Senior Lawyers, to focus on the profession’s life cycle – will continue to push forward.

With a retention rate of 94 percent, firms enrolled in a group membership program are another recruitment priority. Through May 15, nearly 500 additional firms have agreed to join the Group Billing Program this year, bringing the total number of Group billed firms to nearly 2,100. Among other large-firm recruitment efforts since April 2014, we have secured seven new firms and converted 11 others to the Full Firm Membership Program.

The ABA Advantage discount program is on track to exceed its fiscal year goal of more than $6 million, with revenue nearly 8 percent ahead of last year at the end of April. Top performers include Ricoch, Starwood, and Mercedes Benz, whose increase in per-car payments effective January 1 has helped those royalties increase 37 percent higher than this time last year. Underperformers include UPS and Law Pay. HP has left the program because of slow sales in its product line.

Based on last year’s successful publication of “Checklist for Family Survivors,” the ABA continues its partnership with AARP. The new collaboration, “Checklist for My Family: A Guide to My History, Financial Plans and Final Wishes,” was highlighted in a recent issue of AARP Magazine, which has the largest circulation of any periodical worldwide (47 million). The first printing of 5,000 quickly sold out and further printing will continue to meet market demand. A second book with AARP, focused on caregivers, will be released in May. That book will be highlighted in the upcoming PBS special, “Caring for Mom and Dad.”

**Finances**

Through the end of March, the Association generated (accrued) revenue of $111.3 million and incurred operating expenses of $116 million. The deficit of $4.8 million is slightly higher than the $4.4 million shortfall budgeted for the period, and is primarily due to lagging dues and publishing revenue. Compensating for the deficit, we have kept total operating expenses at $5 million less than budgeted.

The Fund for Justice and Education has raised more than $1 million in new gifts and grants this fiscal year, which tops the $850,000 year-end goal. With an almost 25 percent rise in the number of new donors compared to the same time last year, the Fund expects to close the fiscal year with about $2.4 million in revenue, approximately $650,000 more than was raised in fiscal year 2014.

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Advocacy, Communications, and Civic Engagement

In April, more than 350 ABA members and bar association leaders from across the country joined together on Capitol Hill to advocate for the legal profession. Participants at this year’s ABA Day made hundreds of visits to their elected representatives to discuss the importance of funding for Legal Services Corporation, federal sentencing reform, and ongoing opposition to proposals that would require accrual accounting for some law firms and other professions.

A few days before the three-day lobbying event, President Hubbard sent a letter to the leaders of the Senate Finance Committee and the House Ways and Means Committee that urged the lawmakers to reject the accounting proposals. Additionally, the Governmental Affairs Office (GAO) sent a legislative action alert to all state and local bar associations on the proposals; and thus far, almost three dozen state and local bars have joined the ABA to oppose the measures. Also, GAO and several other coalition representatives met with the senior staff to Senate Finance Committee members Bill Nelson (D-FL), John Thune (R-SD), and Benjamin Cardin (D-MD) in advance of ABA Day to brief them on the harmful effects the proposals would have on lawyers, accountants, and other professionals, their respective clients, and the overall economy.

GAO has also mounted a strong campaign against recent threats to two student loan forgiveness programs. In April, the Association coordinated with state and local bar associations to enlist several additional bipartisan Senate co-sponsors in support of funding for the John R. Justice Student Loan Repayment Program. And on March 23, April 8, and April 13, GAO helped to lead coalition meetings in support of the federal Public Service Loan Forgiveness Program. GAO staff also made Hill visits to oppose cuts to the program proposed by the Obama administration and to anticipated congressional efforts to repeal the program outright.

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, “Magna Carta: Symbol of Freedom Under Law.” Those events included an interactive discussion with 160 middle and high school students and a public discussion on the Great Charter, keynoted by U.S. Supreme Court Justice Stephen G. Breyer.

With the 800th anniversary of Magna Carta around the corner, the Association is in final preparations for the ABA 2015 London Sessions, a premier series of continuing legal education programs and plenary sessions June 11-15. A video produced by the Communications and Media Relations Division to promote the ABA’s festivities won first place in the 36th annual Telly Awards, a national competition that honors the finest videos and films worldwide. The Association’s resources on Magna Carta are aggregated on a new ABA website, iconolifefreedom.com.

After the Supreme Court of Canada struck down portions of the country’s anti-money laundering and anti-terror laws that intrude on the attorney-client privilege, President Hubbard praised the ruling in an op-ed published March 13 in the National Law Journal. He said that the decision in Attorney General of Canada v. Federation of Law Societies of Canada should serve
as an important reminder to U.S. legislators and regulators that federal regulation of the legal profession has limits."

While in Chicago for the Bar Leadership Institute in March, President Hubbard took part in an interview with the Chicago Tribune that resulted in a feature story on the Commission on the Future of Legal Services. Weeks later, Hubbard further discussed the commission with University of South Carolina News in an article on his service as ABA president.

Among other notable media placements, Bloomberg BNA published an April 14 column bylined by Hubbard that outlined the ABA’s many criminal justice reform efforts. The article responded to a speech by New York District Judge Jed Rakoff printed by the legal publisher a day earlier. In his remarks, Rakoff applauded the ABA’s work in the area of overcriminalization, but urged the bar community to further attend to the problem. Hubbard’s response emphasized the ABA’s ongoing commitment to end mandatory minimum sentences, address mass incarceration, and revise unfair collateral consequences statutes.

According to employment data released by the Section of Legal Education and Admissions to the Bar in May, law school graduates in 2014 obtained entry-level jobs at a modestly higher percentage than in 2013. The persistent jobs gap remains, however. To help address the shortage, ABA start-up grants from the Legal Access Job Corps will develop programs to employ new lawyers who will serve the legal needs of low-income individuals.

Several ABA groups seek to increase access to justice in additional ways. The Working Group on Unaccompanied Minor Immigrants continues to address the crisis at our Southwest border, where thousands of immigrant children need legal help. Earlier this year, the group established its new website of resources for volunteer attorneys and advocates, as well as released a new mobile app for pro bono attorneys representing unaccompanied immigrant children. Also notable, the ABA Journal and the Louisiana Bar Association hosted a “Hackaccess to Justice” hackathon on March 20-21, where technology-savvy developers were paired with lawyers to create solutions to problems related to legal services access. And in early May, the ABA hosted the National Summit on Innovation in Legal Services, a gathering of some of the nation’s most important thought leaders, who examined ways that technology and other innovations can improve access to legal services. Please visit the website of the Commission on the Future of Legal Services for video and other materials from the summit.

Other recent meetings of note include the Standing Committee on Law and National Security’s National Summit on Homeland Security Law on April 17-20. In recognition of the 20th anniversary of the Oklahoma City bombing, the conference included former President Bill Clinton and Homeland Security Secretary Jeh Johnson. Also in April, the Section of International Law organized its 17th ABA Day at the UN, where ABA leaders met with members of the United Nations Secretariat to help promote global rule-of-law issues. And ABA TECHSHOW celebrated its 30th year in March as the country’s most comprehensive legal technology convention.

Recipients of the 2015 Silver Gavel Awards for Media and the Arts were announced in May. The 14 winners, who represent work that enhances the public’s understanding of law and as an important reminder to U.S. legislators and regulators that federal regulation of the legal profession has limits."

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the legal system, will be honored by President Hubbard during a July 21 ceremony in Washington, D.C. Another national awards program, the Barton Awards, is sponsored by the ABA and the Library of Congress. On June 15, the two organizations will confer more than 70 awards to recognize accomplishments in the legal profession.

Since December, several useful resources for lawyers, policymakers, and the general public have been published by ABA entities. They include a video for first-time Hispanic home buyers produced by the Commission on Hispanic Legal Rights and Responsibilities and the Section of Real Property, Trust and Estate Law; a Standing Committee on Gun Violence report, "Gun Violence Laws and the Second Amendment," which analyzes litigation since District of Columbia v. Heller in 2008; the Commission on Law and Aging’s free guide, "Law Enforcement Legal Issues Related to Elder Abuse," free advance-care planning materials from the Commission on Law and Aging in recognition of National Health Care Decisions Day; and the inaugural edition of the "Annotated Standards for Imposing Lawyer Sanctions," a one-of-a-kind resource for regulators of the legal profession and counsel who represent lawyers in disciplinary proceedings.

Closing

Action taken by the House of Delegates becomes the roadmap for the ABA’s advocacy work, some of which occurs on ABA Day. A new video highlights the activities of this year’s three-day lobbying event, when more than 350 volunteer members, including leaders from other bar associations, converged on Capitol Hill to fight for legal aid, sentencing reform, and many other vital concerns.

Thank you for your strong leadership. Your ongoing efforts help assure critical accomplishments in the years ahead.

As always, I welcome your ideas, comments, and suggestions, especially concerning ABAAction! and our other plans to secure the Association’s future. I look forward to welcoming you to Chicago in August, when I will provide further updates on our many initiatives.

Respectfully submitted,

Jack L. Rives
Executive Officer and
Chief Operating Officer
AMERICAN BAR ASSOCIATION
COMMITTEE ON SCOPE AND CORRELATION OF WORK
INFORMATIONAL REPORT
TO THE HOUSE OF DELEGATES

The following are the activities in which the Committee on Scope and Correlation of Work ("Scope") has engaged since its last report to the House of Delegates at the American Bar Association's 2015 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 May 14-18, 2015, in Fort Lauderdale, Florida. Scope's next meeting will be held in conjunction with the ABA's Annual Meeting in Chicago, Illinois, on Sunday, August 2, 2015.

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

Task Force on Gender Equity – sunset at the conclusion of the 2015 Annual meeting, and the work of the Task Force be subsumed into the Commission on Women in the Profession

Task Force on Human Trafficking – Scope supports the recommendation of the Task Force that the Task Force on Human Trafficking sunset at the conclusion of the 2015 Annual meeting, and the work of the Task Force be subsumed into the Center for Human Rights.

Legal Access Job Corps Task Force - sunset at the conclusion of the 2015 Annual meeting, and the work of the Task Force be subsumed into the Standing Committee on Delivery of Legal Services.

Task Force on Sustainable Development – sunset at the conclusion of the 2015 Annual meeting.

Task Force on the Financing of Legal Education - Scope supports the recommendation of the Task Force that the Task Force on Financing of Legal Education sunset at the conclusion of the 2015 Annual meeting.

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Task Force on Sustainable Development – sunset at the conclusion of the 2015 Annual meeting.

Task Force on the Financing of Legal Education - Scope supports the recommendation of the Task Force that the Task Force on Financing of Legal Education sunset at the conclusion of the 2015 Annual meeting.
Other Recommendations:

Task Force on Gatekeeper Regulation and the Profession - If the Executive Director concurs, the Task Force on Gatekeeper Regulation and the Profession submit a request for general revenue funding through the FY2015-2016 budget process. Funding would defray the cost of members travel expenses, and would allow the Task Force to be in compliance with ABA guidelines for member travel.

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:

- American Judicial System, Standing Committee
- Armed Forces Law, Standing Committee
- Federal Judiciary, Standing Committee
- Law and National Security, Standing Committee
- Lawyer Referral and Information Services, Standing Committee
- Legal Assistance for Military Personnel, Standing Committee

Gatekeeper Regulation and the Profession, Task Force - Scope has no objection to the Task Force continuing as a Task Force of the Board of Governors for an additional (2) years, and will review the Task Force at its 2017 Midyear meeting to assess whether the Task Force should continue.

Commission on American Jury Project
Commission on the Future of Legal Services

Scope's 2015 Annual and Fall Agendas will include:

2015 Fall Meeting: Standing Committees on Client Protection and Professional Discipline; Center for Professional Responsibility, and Coordinating Council for the Center for Professional Responsibility

Respectfully Submitted,

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

Dated: June, 2015
REPORT OF THE SCOPE NOMINATING COMMITTEE TO THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES

The Committee on Scope and Correlation of Work consists of five members of the Association, one of whom is elected each year by the House of Delegates to serve a five-year term. Beginning with the adjournment of the Annual Meeting during which he or she is elected.

Association policy provides that Scope nominations are presented to the House of Delegates by the Scope Nominating Committee 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 2014-2015 Scope Nominating Committee was fortunate to have the difficult task of selecting two candidates from so many excellent applicants with impressive credentials to fill the forthcoming vacancies on Scope; a partial term (2 years) and a full term (5 years) that will occur at the conclusion of the 2015 Annual Meeting.

The Scope Nominating Committee voted to nominate W. Andrew Gowder, Jr., of Charleston, SC for the partial term and Amelia Helen Boss of Philadelphia, PA for the full term.

It is the belief of the Scope Nominating Committee that the nominees' extensive backgrounds in bar activities and their knowledge of the Association as a whole qualify them for membership on the Committee on Scope and Correlation of Work.

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Dated: June 2015
RESOLVED, That the American Bar Association adopts the *Standards of Representation of Clients in Immigration cases*, including the Commentary, dated August 2015.
STANDARDS

Definitions

- **A-File or Alien File**: The record compiled by the U.S. Department of Homeland Security on all matters relating to an individual’s Alien Registration Number.

- **Immigration case**: Refers generally to any proceeding involving an immigration matter before an agency within the U.S. Department of Homeland Security, U.S. Department of State, the U.S. Department of Justice’s Executive Office for Immigration Review (including Immigration Court and the Board of Immigration Appeals), and any other administrative or federal petitions or appeals. Includes affirmative petitions and applications for immigration benefits, as well as defenses and applications for relief made in removal proceedings.

- **Removal proceedings**: Immigration court proceedings and appeals before the U.S. Department of Justice’s Executive Office for Immigration Review that determine whether a noncitizen is in violation of U.S. immigration laws and subject to removal from the United States.

- **Representative**: For purposes of these standards, a “representative” refers to any individual authorized to represent an individual in an immigration case by filing an official Notice of Entry of Appearance (i.e., Form “G-28,” “EOIR-28,” “EOIR-27,” or federal court appearance form) with the appropriate agency or court.

List of Standards

A. Role of a Representative in an Immigration Case
B. Training and Experience
C. Caseload
D. Scope of Representation
E. Client Competency
F. Fees
G. File Maintenance
H. Meeting and Communicating with the Client
I. Investigation
J. Affirmative Applications
K. Review of Government Submissions and Pre-Hearing Preparation
L. Bond Hearings
M. Pleadings in Removal Proceedings
N. Pre-Hearing Motions and Briefing in Removal Proceedings
O. Requesting Continuances in Removal Proceedings
P. Applications for Relief in Removal Proceedings
Q. Individual Hearings in Removal Proceedings
R. Right to Appeal

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Q. Individual Hearings in Removal Proceedings
R. Right to Appeal
A. Role of a Representative in an Immigration Case

A-1. A representative in an immigration case shall advocate diligently for the client's interests and provide competent representation to the client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

A-2. A representative has a duty to inform the client of all available defenses and/or forms of relief in an immigration case, including the filing of applications and petitions. A representative has a duty to inform the client of the consequences of pursuing or foregoing defenses and/or forms of relief, including applications and petitions. A representative shall not subordinate his or her judgment as to the choice of defenses, relief, and applications/petitions to file for that of a client, except as provided herein. Representatives should take special care in their duty to inform clients who are not currently in removal proceedings of the consequences of pursuing affirmative applications and petitions for immigration benefits where doing so may place the client at risk of removal or other adverse consequences. Representatives may file such affirmative applications or petitions only with the client's informed consent.

A-3. If, after fully counseling and conferring with the client, a representative believes the client is not capable of exercising appropriate and reasoned judgment on his or her own behalf—due to age, mental illness or incapacity, or other mental or physical infirmity—the representative should consider and, if appropriate, consult with the client regarding moving the court for a guardian ad litem or other appropriate recourse to ensure the client's best interests.

A-4. Under no circumstances may a representative counsel a client to engage, or assist a client, in conduct that the representative knows is illegal or fraudulent, except that the representative must discuss the legal consequences of any proposed course of conduct with a client and also explore and advise on better options that may not be readily obvious.

Commentary:

The role of a representative in an immigration case should be understood within the confines of a representative's general ethical duties. Representatives should be familiar with the local rules of any court, agency, or tribunal before which they appear, including ethical rules and decisions. Attorney representatives must abide by all applicable rules governing attorneys' professional responsibilities and rules of professional conduct and other applicable codes/rules. Accredited representatives must also abide by all applicable rules governing the Board of Immigration Appeals' Recognition and Accreditation Program. In addition, all attorneys and accredited representatives should be familiar with those disciplinary rules and professional rules of conduct established by the U.S. Department of Homeland Security and the U.S. Department of Justice, Executive Office for Immigration Review's Disciplinary Program which allow for formal disciplinary sanctions against any attorney or accredited representative who "knowingly or with reckless disregard makes a false statement of material fact or law or willfully misleads, misinforms, threatens, or deceives any person" concerning any material or relevant matters relating to an immigration case without taking appropriate remedial measures to resolve the issue. See 8 CFR 3.102(c).
B. Training and Experience

B-1. Immigration law is a highly complex field. Representatives must be adequately versed in the procedural and substantive law relevant to a client’s specific immigration needs or associate with an experienced practitioner who is competent to handle the matter.

Representatives of clients in removal proceedings should familiarize themselves with the requirements of immigration court practice as well as the substantive legal areas involved in the case.

B-2. Because the field of immigration law is complex and constantly changing, all representatives who are involved in providing immigration representation should be required to complete a minimum of four hours annually of continuing legal education (CLE) and training sufficient to ensure that their skills and knowledge of the substantive and procedural law and ethical responsibilities relevant to the area of immigration law in which they will be practicing are sufficient to enable them to provide quality representation. Attorneys who provide representation in areas that include, but are not limited to immigration law, should allocate a significant portion of their annual mandatory continuing legal education credits towards courses directly related to the area of immigration law and should continue to have access to updates and training as required.

B-3. Areas involving complex issues, such as criminal grounds of removal, require special expertise and representatives should have considerable experience in the area or seek mentorship from an experienced immigration law practitioner. Representatives should consider attending additional CLE courses and other training programs for such complex issues if they arise in their clients’ cases.

B-4. All representatives shall supervise staff closely, conduct appropriate training, and protect against the unauthorized practice of immigration law.

Commentary:

This standard reflects the minimum amount of CLE training related to immigration law and practice that a representative should seek annually. By no means should a representative assume that fulfilling this minimum requirement will ensure that he or she is fully versed in the many issues that may arise in immigration cases. Representatives should seek regular and ongoing training in immigration representation and developments in law and practice.

Moreover, the Special Committee on Immigration Representation recognizes that CLE and training programs should be made available and affordable for all representatives providing immigration representation and that public funding should be provided to enable all nonprofit representatives to attend such programs to ensure that they will provide quality representation to indigent clients.

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Moreover, the Special Committee on Immigration Representation recognizes that CLE and training programs should be made available and affordable for all representatives providing immigration representation and that public funding should be provided to enable all nonprofit representatives to attend such programs to ensure that they will provide quality representation to indigent clients.
C. Caseload

C-1. A representative shall not carry a caseload that, by reason of its excessive size or representation requirements, interferes with the provision of quality legal representation and the satisfaction of ethical obligations to his or her clients.

C-2. A representative shall maintain a caseload that allows for competent, quality representation. Therefore, before agreeing to act as a representative, the representative has an obligation to ensure that he or she has sufficient time, knowledge, available resources and experience to offer quality legal services. In practice, this means that:

(1) A representative shall act with reasonable diligence and promptness in representing a client.

(2) A representative shall not neglect a legal immigration matter entrusted to the representative.

C-3. A representative shall not intentionally fail to carry out the written agreement entered into with a client for professional services as required by these standards (i.e., section D-1(1) below), but the representative may withdraw with proper notice to the client and as permitted under the rules and regulations, including the requirements of the Immigration Court Practice Manual.

D. Scope of Representation

D-1. A representative has the duty to ensure the client understands the scope of representation and that the client’s rights are duly protected. This includes the following aspects of representation:

(1) Initiation of representation: At the initiation of representation, a representative has a duty to confirm the scope of the representation with the client through a written agreement. In particular, the representative should provide clear notice of what aspects of the immigration case the representative will be handling and whether the representation agreement will include any appeals.

(2) Conflicts of interest: Where a representative is approached by multiple individuals seeking representation in an immigration case (such as spouses or other family members, or an employer/employee), a representative has a duty to investigate any conflicts of interest. If a potential or actual conflict of interest exists, a representative shall not represent the multiple clients unless the representative reasonably believes that he or she will be able to provide competent and diligent representation to each affected client and the representative obtains informed consent confirmed in writing from each of the individuals accordingly. A representative’s obligation to investigate conflicts extends beyond new conflicts to ensure that the representative does not take on the representation of a new client whose interests are materially adverse to a former client.
(3) Withdrawing or Terminating Representation: Where a representative must withdraw from representation before completion of the tasks outlined in the written agreement on scope of representation, the representative must provide reasonable notice to the client and, where applicable, advise the client on how to obtain another legal representative. The representative must also notify the agency or court in a manner that complies with applicable rules and practices (including, for court matters, with the Immigration Court Practice Manual). The representative must return any advanced fees, costs, or payments provided to him or her by the client for the tasks not completed.

Where a representative terminates representation after completion of the tasks outlined in the written agreement on scope of representation, the representative has a duty to inform the client of the termination of legal services and to provide the client with any information relating to the outcome of his or her efforts in providing immigration representation until the time services are ended. The representative shall also continue to provide the client with any additional information received by the representative on behalf of the client following termination of representation. The representative must follow all other standards herein triggered by the closing of a case.

If the representative receives any other correspondence, notices, order, decisions, or any other materials from an agency or court regarding a client whose representation has been terminated, the representative must make every reasonable effort to forward the materials to the client and must inform the agency or court that he or she is no longer representing the client.

Commentary:

Issues of scope of representation are particularly important in the immigration context because some immigration cases involve multiple agencies and courts. For example, a detained noncitizen facing removal proceedings may be eligible for affirmative immigration benefits adjudicated by various agencies. Full representation might require representation in immigration court on removal proceedings and on bond, before the Department of Homeland Security’s Immigration and Customs Enforcement to negotiate bond, and before the Department of Homeland Security’s Citizenship and Immigration Services to file certain affirmative applications for relief. Before the initiation of representation, a legal representative has a duty to investigate and explain to the client the various forms of advocacy that will be necessary or beneficial to his or her immigration case. The representative must then discuss and clarify with the client which forms of advocacy the representative will pursue as part of their written agreement.

The requirement of a written agreement on scope of representation stems in part from Matter of Lozada, 19 I.N.D.C. 637 (BIA 1988). In that case, the Board of Immigration Appeals determined that a claim of ineffective assistance of counsel is required to be supported by an affidavit from the client detailing the agreement between counsel and client concerning representation, that counsel must be informed of the allegations against him or her and given an opportunity to respond, and that the motion must reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel’s ethical or legal

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F. Client Competency

E-1. If there are indicia that a client lacks competency to understand the nature and object of the immigration case and cannot participate in his or her defense, a representative has a duty to discuss such issues with the client and should present this evidence to the judge/adjudicator in the immigration case so that appropriate steps may be taken to safeguard the client’s rights. In documenting evidence of the client’s lack of competency, a representative should interview the client and his or her family members or friends, gather any medical or psychological records, request production of relevant documents from the U.S. Department of Homeland Security (if necessary, by subpoena), and seek a competency determination.

Commentary:

Issues concerning a client’s competency may raise issues concerning continuing representation. A representative should be wary of proceeding on a client’s behalf when there are serious competency issues in the absence of a guardian. An Immigration Judge’s duties to address issues of competency are addressed in Matter of M-A-M-, 25 I&N Dec. 474 (BIA 2011). Representatives should be familiar with this and other cases discussing competency.

Where necessary, representatives should consult with disability advocacy agencies in their jurisdiction for assistance.

F. Fees

F-1. A representative shall not make an agreement for, charge, or collect an excessive or illegal fee or expense.

F-2. A representative shall communicate in writing to a client at the beginning of the representation or within a reasonable time thereafter the fee for such representation and any expenses associated with the representation for which the client is responsible.

F-3. Where the representation concludes without completion of the services agreed upon in the written scope of representation agreement, a representative shall render an accounting of all time spent and services rendered on a client’s matter and shall refund any unearned fees. A representative shall under such circumstances issue the refund with a letter memorializing the reason for termination of services.

F-4. A representative should resolve fee and expense disputes promptly and in advance of court appearances.
Commentary:

Over the years, many clients in immigration cases have expressed concerns about the excessiveness and uncertainty regarding the fees charged by and owed to their representatives. Because of these concerns, and the particular vulnerability of many noncitizens who seek representation, it is advisable to require a written fee agreement.

A written fee agreement can be a valuable tool to avoid misunderstanding and may also clarify other concerns that commonly arise in immigration cases. For example, it is not uncommon for legal fees to be paid by a client's relatives or friends, rather than the client. However, the client must be fully informed of the fees for representation and any disputes regarding payment. A representative's duties are to the client and not to the individual providing payment for the legal services.

G. File Maintenance

G-1. A representative has the duty to maintain his or her client's file. This includes keeping in a secure and confidential place: (a) all paper and electronic correspondence to and from the relevant government agencies; (b) all paper and electronic evidentiary records—documents, certificates, letters of support, declarations or affidavits, and any other records—from the client, his or her friends and family, the A-File, government agencies, criminal/family/other courts, medical professionals, and any other individuals, agencies, and institutions; (c) all correspondence, motions, briefs, evidence, and other attachments filed with the relevant court/agency or sent to/from opposing counsel; and (d) all notices, correspondence, and decisions received from the relevant court/agency.

G-2. In many immigration cases, the court or agency will require the client, supporting petitioners or witnesses, and others involved in a case to provide certain types of original or certified documents. A representative has a duty to determine when original or certified documents, rather than copies/facsimiles, are required. When handling original documents, a legal representative shall take special care to secure those documents and keep them for only as long as necessary for representation. The legal representative shall retain all originals as soon as is practicable after such documents are no longer needed for the case.

G-3. A representative also has a duty to keep an adequate record of developments in the immigration case. This includes keeping notes of telephone conversations, meetings, and hearings with opposing counsel, the court, or agency officials. A representative shall include these notes as part of the file.

G-4. At all times the client has a right to the file in his or her case, except for any documents that belong solely to the representative, such as internal memoranda that are intended for the benefit of the representative rather than the client, or documents the disclosure of which would violate a duty of nondisclosure owed to a third party.

G-5. A representative must maintain the file for the pendency of the case. Unless the client provides informed consent, a representative should not destroy or discard any informationpertaining to the file.
or documents that the lawyer knows or should know may be necessary or useful in the assertion of a client’s defense or right to relief in an immigration case.

G-6. Upon termination of representation, a representative should make a good faith effort to provide the client with a complete copy of any documents in the file that the representative has not previously provided, including all notices, forms, applications, motions, briefs, exhibits, decisions, and other materials prepared or received for the client’s case. A representative should also retain a copy of the file in his or her records for a reasonable period of time. In determining the length of time that is reasonable for file retention, a representative should exercise discretion based on the nature and contents of the file and the client’s objectives following the disposition of the immigration case. For example, if a client intends to pursue an immigration benefit in the near future, the files should be maintained for a sufficient period with the relevancy and materiality of the records in mind.

G-7. A representative must maintain any documents or records relating to the retainer, any costs or fees, and any invoices and receipts for payments for at least seven years after the events that these documents recorded. A representative should make a good faith effort to keep these records beyond this seven-year period for as long as is reasonably possible given the representative’s hard file and electronic storage capacities.

G-8. If a former client retains a new representative to handle the immigration case or future matters, the previous representative has a duty to provide that new representative with a copy of the client’s file upon consent by the former client.

G-9. Where a representative destroys or discards any documents or other records in a file (or the file as a whole), the representative should maintain an index of the documents or records destroyed or discarded. The representative should provide that index to his or her client or former client upon request.

Commentary:
The common rules for the retention of legal documents are the starting point for this standard. Stricter standards have been set here, where specified, given the importance of such records for clients whose immigration cases are still pending and/or for clients and representatives who must address fee disputes or ineffective assistance of counsel claims. Given the significant stakes in immigration cases—including loss of status, detention, or deportation—representatives should strive to immediately resolve any liens, disputes or other restrictions that may prohibit or cause unnecessary delay in transferring a file upon a client’s request. In addition, representatives should, whenever possible, meet and exceed any and all applicable standards for document retention, record keeping, and file sharing. Electronic storage, through conversion and scanning of hard file documents into electronic formats, is one means by which representatives may be able to expand the size and duration of their file retention capacity.
H. Meeting and Communicating with the Client

H-1. To ensure effective communication with and participation by the client, a representative shall take all appropriate and reasonable measures to:

1. Meet with the client as necessary to prepare for his or her case;
2. Meet with the client in a location where the representative and the client can discuss the case in confidence;
3. Secure the assistance of a competent interpreter when the client and the representative cannot effectively communicate in the same language;
4. Explore the client’s objectives and goals in the representation;
5. Keep the client informed about the status of his case on a reasonable basis, including informing the client of all court dates and explaining the nature of each court appearance and the client’s role;
6. Provide the client with copies of all documents obtained on the client’s behalf and all documents submitted to the government counsel, agencies, and courts regarding the client’s case on a reasonable basis;
7. Promptly inform the client of any decisions that the client needs to make involving material developments in the case;
8. Explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation;
9. Consult with the client about the means by which the client’s objectives are to be accomplished;
10. Promptly comply with reasonable requests for information;
11. Meet with the client and witnesses well in advance of agency appointments and court hearings to prepare for oral testimony;
12. Meet with the client after any agency or court renders a decision in the client’s case to discuss the appeal process and other options.

H-2. If the client is incarcerated or otherwise detained, a representative shall:

1. Endeavor to meet with the client as often as reasonably possible in light of the distance between the detention facility and the representative’s office;
2. Establish effective ways to communicate by telephone or in writing on a regular basis.

Commentary:

A representative should endeavor to make the client a full participant in the litigation of the client’s case. This often requires special care where the client and representative cannot speak the same language. In such cases, the representative must secure the assistance of a competent translator who is sufficiently proficient in each language and in the legal terms and expressions necessary to ensure effective representation.

In some cases, a client may prefer to use a family member or other potentially interested party to translate. A representative has a duty to ensure that there is no conflict of interest presented by such an arrangement and should proceed only after obtaining informed consent from the client.
of waiving his/her rights of confidentiality as to the translated information. Even where no conflict of interest is apparent, a representative must also assure that the party is competent in providing translations and that such translations do not impede the client-representative relationship due to sensitivity of issues or other concerns. All written translations must comply with immigration regulations and the Immigration Court Practice Manual to ensure proper certification for submission in court, if required.

I. Investigation

I-1. A representative has a duty to investigate each case thoroughly and to identify and obtain any documents reasonably necessary to provide diligent and competent representation of the client. A representative’s investigation should include the following steps:

1. Interview the client;
2. Interview any potential, available witnesses who may be required to provide affidavits, declarations or testimony relevant to the client’s case;
3. Review documentation and records provided by the client, including educational, tax, employment, medical, psychological, psychiatric, criminal and other court records relevant to the case;
4. Request and review relevant records not in the client’s possession but relevant to the immigration case, including educational, tax, employment, medical, psychological, psychiatric, criminal and other court records. To obtain these records, a legal representative may need to secure the client’s written authorization or a court issued subpoena;
5. Obtain and review a copy of the client’s A File from the government either by requesting the same from the Office of the Chief Counsel or in the alternative through a Freedom of Information Act request;
6. Review any records of prior proceedings by making a request with the Immigration Court in compliance with the Immigration Court’s procedure and rules or in the alternative through a Freedom of Information Act request;
7. Evaluate, in consultation with the client, the need for outside expert testimony or evaluations and discuss benefits and need for such expertise.

I-2. A representative also has a duty to research thoroughly the law applicable to the client’s case, including all applicable legal precedent, statutory and regulatory provisions.

Commentary:

Immigration law is an area of practice in constant change. A representative must keep up to date on changes in the law, including precedent decisions of the Board of Immigration Appeals and the Courts of Appeals, statutory and regulatory changes, policy shifts on the part of the applicable agencies, international law. A representative should seek out consultation or mentoring by a more experienced practitioner where a matter involves novel or complex issues.

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J. Affirmative Applications

J-1. A representative has a duty to inform the client of any affirmative applications for immigration benefits for which the client may be eligible. A representative shall be familiar with the statutory and regulatory eligibility requirements, deadlines, filing procedures, any applicable filing fees or waivers thereof, and supporting evidentiary requirements associated with such applications. A representative shall educate his or her client on the eligibility requirements, deadlines, filing procedures, filing fees or waivers thereof, and supporting evidentiary requirements that are associated with seeking the available applications.

J-2. A representative must inform the client of the consequences of filing such affirmative applications, including the risk that the Department of Homeland Security may initiate removal proceedings if applicable. A representative shall not file an affirmative application for an immigration benefit without the informed consent of the client.

J-3. In preparing to submit an affirmative application for an immigration benefit, a representative shall prepare and carefully review with the client the proposed submission and supporting documents in a manner and language that ensures the client’s comprehension of the submission and documents and the benefit sought.

J-4. No representative shall file an application or provide material information therein that he/she knows or has reason to know to be false. Representatives shall inform clients of the representative’s obligations to correct false information to the tribunal. Representatives shall advise clients of the consequences that may arise from filing a false or frivolous application with a federal agency.

Commentary:

Affirmative applications generally involve seeking a benefit on behalf of a client and can be as simple as seeking a replacement document or as complex as a request for asylum or complicated employment based visa. An inaccurate or baseless application may have significant and continuing adverse consequences to a client. The filing of any application for a client who is not in removal proceedings may trigger removal proceedings and/or detention if the government believes that the client is removable and decides to pursue removal charges. Preparation and filing of these applications, even when not filed with the court, should be accorded the same care and consideration as court filings and should not include any material information (i.e. relating to fact or to law) that is known to be false or made with reckless disregard as to its veracity or accuracy.

K. Review of Government Submissions and Pre-Hearing Preparation

K-1. In advance of all court hearings and agency appointments/interviews, a representative shall promptly review all documents and evidence submitted and filed by the Department of Homeland Security for proper service, factual accuracy, and legal sufficiency. A representative must also research and assess the burden of proof and the evidence needed by the

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parties to meet that burden. If the client is subject to removal, a legal representative shall investigate and identify forms of relief for which the client may be eligible.

Commentary:

A representative should discuss the representative’s best judgment about the strength of the government’s case with his/her client in a way that enables the client to be a full participant in the strategic decision to be made in immigration court or before the agency.

1. Bond Hearings

L-1. A representative shall ascertain and discuss with every detained client his/her custody status and eligibility for bond. A representative shall be fully familiar with the Immigration Court’s jurisdiction to conduct a bond hearing and with the requirements for seeking a bond determination hearing, including the contents of a request, evidence to be submitted in support of a bond request and the scope of a hearing.

L-2. For clients who are eligible for bond, a representative shall ascertain the client’s financial ability to pay a bond and shall explain to the client all possible outcomes of a bond determination hearing, including the court setting an unaffordable bond, the appeal process and the possibility of a stay pending appeal.

L-3. Where appropriate, and in consultation with the client, a representative should attempt to negotiate a reasonable bond or alternatives to bond (intensive supervision appearance program- ISAP) with the government.

Commentary:

Immigration courts treat bond matters and removal charges as separate proceedings. However, generally, once a representative enters an appearance in Immigration Court, that appearance is for all proceedings before the court, including bond. Therefore, a representative in removal proceedings for a detained client should be familiar with bond matters so that he or she may advise the client appropriately.

In some circumstances, however, a representative may seek permission to enter a limited appearance for the bond proceedings only. This may be particularly appropriate where there is a risk of transfer and the representative would be unable to fulfill representation in the removal proceedings if the detained client will be transferred to a facility in another jurisdiction. The immigration court makes the final determination as to whether it will permit such limited representation, and different courts have different approaches to the issue.

Representatives should also be aware of the relevant immigration and federal court case law governing an individual’s eligibility for bond. Representatives should familiarize themselves with legal arguments regarding eligibility for bond and the appropriate forums for raising such arguments (including petitions for writs of habeas corpus in federal court). Representatives who practice in federal court should consider seeking the mentorship of experienced federal court representatives.
practitioners when filing petitions. Where representatives are unable to bring federal court
challenges to bond ineligibility, representatives should, at a minimum, inform clients of the
option of challenging their detention in federal court.

M. Pleadings in Removal Proceedings

M-1. Before answering to exclusion, deportation or removal allegations and charges (i.e.,
often referred to as “entering pleadings”) during a master calendar hearing, a representative has
the duty to discuss the removal charges and allegations with the client, including the
technicalities of the hearing as well as the legal implications of admissions and denials of factual
allegations and grounds for removal and relief requests.

M-2. At the master calendar hearing a legal representative must be reasonably prepared
to:
(1) Concede or deny service of the Notice to Appear;
(2) Review, ask for more time to review, or raise objections to the evidence offered by
the government in support of the Notice to Appear;
(3) Admit or deny factual allegations and charges contained in the Notice to Appear
where appropriate;
(4) Designate or decline to designate a country for removal;
(5) State which applications for relief, if any, a client intends to file;
(6) Identify and narrow factual and legal issues;
(7) Estimate the amount of time (hours) needed to present the case;
(8) Request a date for filing applications for relief; and
(9) Request an interpreter if the client or potential witnesses need one.

Commentary:

A representative has the duty to discuss all strategic decisions with the client in advance of
taking the pleadings. A representative must provide the client with information that will allow
the client to participate intelligently in all decisions to be made during the course of the
representation. The choice regarding how to proceed belongs to the client.

A representative shall not request relief from removal that cannot be supported by a reasonable
argument for an extension, modification or reversal of existing law. Nor shall a legal
representative advise a client not to seek a form of relief from removal solely because the
chance of success on the merits is slim where the request is not frivolous. Such strategic
disagreements about whether a proposed course of action violates one or the other of these
dictates may, if they cannot be resolved, form the basis for ending the legal representation.

N. Pre-Hearing Motions and Briefing in Removal Proceedings

N-1. A representative should consider filing an appropriate motion where the applicable
law entitles the client to do so and the court has the power to grant such motion. Among the
issues that a representative should consider addressing in a pre-hearing motion are:
(1) Possible defects in the issuance of the charging document;
(2) Legal sufficiency of the charging document;
(3) Suppression of evidence.

N-2. A representative shall be fully familiar with and in compliance with the practices and local rules of the court or agency adjudicating the motion/briefing, including the Immigration Court Practice Manual and its provisions regarding motions and briefing requirements, or affiliate with a representative knowledgeable in these practices and rules.

N-3. Motions and all submissions in support of the motions should be filed in a timely manner and should comply with the requirements set forth in the Immigration Court's Practice Manual and/or the local rules of the Immigration Court or applicable tribunal. When the tribunal requires an evidentiary hearing on a motion, a representative should fully prepare for the hearing, such preparation should include understanding the burden of proof, conducting investigation and research on the claim advanced, and preparing all helpful witnesses.

N-4. A representative shall discuss the advantages and disadvantages of pre-hearing motions with the client, taking into account the possible benefits and the client's ultimate goal in the proceedings. A representative may also consult with opposing counsel before making a formal motion.

O. Requesting Continuances in Removal Proceedings

O-1. Unreasonable delays due to a representative's inability to promptly act on a client's behalf should be avoided. No representative shall accept an immigration matter that is before the Executive Office for Immigration Review unless that representative is confident that he/she can provide competent and diligent representation.

O-2. A representative shall work diligently to complete all necessary investigations to be fully prepared for each court proceeding. A representative shall attend each scheduled immigration court proceeding. In the event that a representative is unable to attend a hearing, he/she shall promptly notify the client of his/her unavailability and make a timely request (i.e., motion) to the immigration court for a continuance to a date and time that accommodates both the representative and the client. If the immigration court denies a request for continuance, the representative shall make all necessary accommodations that will ensure that his/her client is effectively represented at each immigration hearing.

O-3. Effective representation during removal proceedings, at a minimum, also requires that the representative obtain all available and relevant information concerning the client's background and circumstances for purposes of determining removability and/or any available relief from removal. Investigating the facts concerning the client's immigration matter and any relevant available remedies while also thoroughly researching the law and applicable supporting factual information is crucial to providing high quality representation. If a representative finds it necessary to seek additional time and/or resources to ensure adequate investigation, research and preparation of a removal proceeding, the representative should first consult with the client and discuss the process involved, the benefits and any potential consequences that may result from
requesting a continuance in the removal proceedings. Representatives should also obtain informed consent from the client before seeking a continuance from the Executive Office for Immigration Review. In addition, representatives of detained clients must be particularly diligent in assessing the need for a continuance with his/her client while balancing the representative's needs with the client's liberty and other interests.

O-4. A representative shall be fully familiar with and shall follow all necessary requirements for filing a motion for continuance of removal proceedings. The motion should be filed only after the representative has obtained informed consent from the client. A representative shall provide his/her client with a copy of the motion for continuance and inform the client of any decision issued by the immigration court in response to the filed motion. Before the filing of a motion for continuance, the client should be notified that the mere filing of the motion does not excuse the appearance of the client and/or representative at any scheduled hearing. All parties must appear as scheduled unless and until a motion for a continuance is granted.

Commentary:

When seeking continuances, representatives shall consult with local court rules and practices, including the Immigration Court Practice Manual.

P. Applications for Relief in Removal Proceedings

P-1. A representative shall thoroughly investigate a client's eligibility for all possible forms of relief from removal. Representatives shall be fully familiar with the legal requirements and evidence necessary to support any and all applications for relief from removal. The representative shall prepare and carefully review with the client all available applications and their statutory and regulatory criteria for relief from removal in a manner and language that ensures the client's comprehension of the potential defense strategies and available applications for relief from removal being discussed.

P-2. A representative shall be familiar with the filing procedures, the applicable filing fees or waivers thereof, and supporting evidentiary requirements associated with all of the forms of relief from removal available to and sought on behalf of his/her client. A representative shall educate his/her client on the application filing procedures, supporting evidentiary requirements and filing fees or waivers thereof, that are associated with seeking the available applications for relief from removal.

P-3. In consultation with a client, the representative and client shall agree upon which applications for relief from removal, if any, will be sought on behalf of the client with the immigration court and/or Department of Homeland Security.

P-4. A representative shall properly notify a client of all necessary filing requirements and any deadlines that will preserve any and all applications for relief from removal. A representative shall also advise his/her client of the consequences involved in failing to timely
file any and all necessary applications, supporting evidence, motions and filing fees or waivers of filing fees with the immigration court and/or relevant agency.

P-5. In consultation with the client, representatives shall seek evidence in support of any and all applications for relief from removal that are being sought on the client’s behalf before the immigration court and/or the Department of Homeland Security including, but not limited to, applying for a subpoena for production of documents or witnesses, when necessary.

P-6. All applications, supporting evidence, any motions and/or any necessary filing fees or waivers of filing fees shall be submitted to the immigration court or the Department of Homeland Security in a timely manner. A representative shall notify a client immediately of any inability to timely file an available application for relief from removal and shall advise the client of the likely consequence that may arise from failure to timely file an available application for relief from removal.

P-7. Representatives shall provide all clients with copies of any and all submissions made to the immigration court and/or the Department of Homeland Security on a client’s behalf.

P-8. Representatives shall advise all clients of the benefits awarded for all applications of relief from removal that are granted. Representatives shall also advise all clients of the immigration consequences that may arise if any application for relief from removal sought is denied.

P-9. No representative shall file an application or provide information therein that he/she knows to be false. Representatives shall advise all clients of the consequences that may arise from filing a frivolous or fraudulent application with the immigration court and/or Department of Homeland Security. Representatives shall inform clients of the representative’s obligations to correct false information to the tribunal.

P-10. A representative shall provide the client with any information necessary to ensure that the client is informed of any and all benefits that are available following the grant of relief from removal.

P-11. A representative shall timely inform of the client of his/her right to appeal any denial of a request for relief from removal, where applicable.

Commentary:

Where an application for relief from removal is filed, a representative must file the most updated version of the application for relief from removal, and shall consult with the Executive Office for Immigration Review and/or the U.S. Department of Homeland Security to ensure that the appropriate forms, supporting evidence, and filing fees/fee waivers are submitted in a timely manner. The most updated versions and filing fees are published at the EOIR website at http://www.justice.gov/eoir/formspage.htm and USCIS at the “Forms” section of http://www.uscis.gov.
Q. Individual Hearings in Removal Proceedings

Q-1. In preparation for an individual hearing on any applications for relief from removal, a representative shall be fully familiar with trial procedures set forth in the Immigration Court Practice Manual, including but not limited to making opening and closing statements, raising objections to opposing counsel’s evidence, presenting witnesses and evidence on all issues, cross examining opposing witnesses and objecting to unlawful or inadmissible testimony. Representatives shall also be fully familiar with Immigration Court Practice rules and local rules regarding the submission of applications, proposed exhibits and motions. Representatives who lack experience in these matters should affiliate with experienced representatives.

Q-2. A representative shall explain to the client the nature of the proceedings, including the format of the individual hearing. In consultation with the client, the representative should develop a theory of the case, timely submit documentary evidence in support of the application(s) for relief, consider the need for and secure lay and expert witnesses, and fully prepare the client and all witnesses for testimony at the hearing. Preparation for testimony should include a discussion of the direct examination questions that the representative plans to ask the client and witnesses, anticipation and discussion of the possible questions that the opposing counsel may ask during cross examination, and anticipation and discussion of the possible questions that the Immigration Judge may ask. The representative should endeavor to moot the hearing with the client and witnesses through mock direct and cross examination before the hearing.

Q-3. Throughout the individual hearing, a representative should endeavor to establish a proper record for appellate review. As part of this effort, representatives should request, whenever necessary, that every part of the proceedings be recorded by the tribunal.

Q-4. A representative must be fully familiar with the ethical rules regarding the consequences of presenting false documents or making a false statement to the tribunal and discuss them with the client and all witnesses. Representatives shall inform clients of the representative’s obligations to correct false information to the tribunal.

Q-5. When working with limited English proficiency clients, a representative shall ascertain the client’s best language and use a competent interpreter in preparing the client to testify. In addition, when the court provides an interpreter, the representative shall ensure that the client fully understands the interpreter provided by the court.

Q-6. Upon obtaining client consent, representatives are encouraged to discuss the relative merits of the client’s case with opposing counsel in advance of the individual hearing for the purpose of discussing sensitive matters, narrowing issues, or stipulating to issues such as statutory eligibility for the relief sought.

Commentary:

The Immigration Court Practice Manual governs most of the practices relating to individual hearings. However, some Immigration Judges may take varying approaches to how they
conduct individual hearings and what types of evidence they may deem appropriate. Before representing a client in an individual hearing before an Immigration Judge with whom the representative is unfamiliar, the representative should endeavor to observe an individual hearing before the Immigration Judge or speak with representatives who have appeared before the Immigration Judge.

R. Right to Appeal

R-1. At the time of the issuance of any appealable order, a representative must, in a timely manner, provide the client with a copy of the decision and any accompanying instructions for appeal. Even when a representative is not representing a client on appeal, the representative has a duty to inform the client of his or her right to appeal. This means that the representative must provide the client with a written or oral explanation of his or her right to appeal, including any deadlines and other pertinent rules. Special care should be taken if the client no longer has access to representation. In such cases, the representative should explain the client’s right to file the appeal pro se.
Immigration representation is in a state of crisis. The liberty interest at stake for many immigrants who face civil immigration detention, removal and likely permanent expulsion from the United States is often undermined by the lack of available competent counsel necessary to navigate through the "labyrinthine character of modern immigration law."

The 1996 amendments to U.S. immigration laws (the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132 on April 24, 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208 on September 30, 1996) have contributed significantly to the current crisis in immigration representation. The 1996 amendments, which imposed draconian consequences on affected immigrants, have made the provision of competent legal representation an overwhelming and daunting task. Faced with the challenges of navigating the notoriously opaque Immigration and Nationality Act (such as determining the immigration consequences of a criminal conviction), relatively few attorneys can devote the time necessary to develop an adequate understanding of the consequences imposed on affected noncitizens, including certain lawful permanent residents. Consequently, the 1996 immigration amendments have widened the cavernous gulf between immigration practice and notions of due process and equal protection.

To compound this crisis, the stakes involved in immigration matters are often very high and include life-altering experiences such as civil detention, removal and permanent expulsion from the United States.

In 2014, the immigration representation crisis was further exacerbated by an unprecedented influx into the U.S. of approximately 136,000 unaccompanied minor children and adults with their children, many of whom were fleeing human rights abuses, violent gangs, domestic violence, drug traffickers, human trafficking and economic deprivation. The government responded to this migration crisis by detaining many adults and their children while releasing a number of unaccompanied minors. To discourage further migration from Honduras, Guatemala and El Salvador, the government also ordered immigration courts to create "rocket dockets" to expedite the removal proceedings of the newly arrived unaccompanied minors and adults with children.

The lack of adequate immigration representation has a profound impact on those individuals whose lives depend upon preventing their own removal from the United States. For instance, between 2005 and 2014, approximately 1 out of 10 unrepresented unaccompanied minor children in removal proceedings obtained relief from removal. In contrast, 47% of unaccompanied minors with adequate legal representation afforded by assigned counsel obtained relief from removal from the United States.

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The current complexities and overburdened immigration court system is further exacerbated by executive actions initiated by President Obama in November 2014. Implementation of these executive actions will impose even greater challenges in meeting the need for providing adequate legal representation. More specifically, it is estimated that 5.2 million undocumented immigrants will be eligible for expanded Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Resident children (DAPA).  

Many of the potential applicants will require quality legal services and representation to identify and pursue their potential eligibility for permanent and/or temporary immigration benefits, to advise on interactions with the criminal justice system and to ensure due process in any subsequent initiation of removal proceedings if identified as a “priority” for immigration enforcement and removal from the United States.  

A study by the Katzmann Immigrant Representation Study Group, led by United States Second Circuit Court of Appeals Judge Robert A. Katzmann, found that having legal representation is one of the two most important variables in obtaining a successful outcome in an immigration proceeding. Unfortunately, there is often insufficient availability of legal representation and, when an attorney is involved, there are often complex legal issues that require specialized knowledge necessary to provide proper assistance and legal representation.  

Even for the small portion who do have counsel in immigration matters, the poor quality of representation exacerbates the representation crisis. Concerns about this have often been discussed in different fora for many years. The publication in December 2011 of a survey conducted by New York immigration judges by the New York Immigrant Representation Study raised renewed concerns about the quality of representation in immigration court proceedings. Surveyed judges rated the representation provided by 33% of attorneys who appeared in immigration court as “inadequate” and 14% as “ grossly inadequate.”  

This resolution recognizes the importance of quality of representation in these important cases. It proposes minimum standards for representation for attorneys and non-attorneys accredited by the Board of Immigration Appeals (BIA) (referred to as “accredited representatives”), who provide legal representation in immigration matters. The proposed standards codify longstanding and approved practices and norms and are intended to serve as a practical guide for all attorneys and accredited representatives who provide critical immigration representation. Although not binding, the proposed standards would complement the Model Rules of Professional Conduct, applicable State Rules of Professional Conduct, the ABA Standards of Representation of Minor Immigrants and the Executive Office for Immigration Review’s Professional Conduct for Practitioners, and are necessary to protect immigrants and ensure a fair and efficient immigration process.  

The purpose of these proposed standards is to provide attorneys and accredited representatives with a reminder of what is minimally needed to provide competent, quality representation in

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1 The Obama Administration has expressed an intent to appeal a recent temporary preliminary injunction on the implementation of DAPA and the extension of DACA issued by the U.S. District Court, Southern District of Texas on February 17, 2015. See Texas v. U.S., 144-545, U.S. District Court, Southern District of Texas (Houston).  

2 See 2010 report of the Commission on Immigration, “Reforming the Immigration System.”
immigration cases. These standards should be viewed as minimum standards, which alone do not establish the ideal model or the perfect case.

Attorneys and accredited representatives are encouraged to follow both the text and the spirit of these standards—and strive beyond them—to ensure quality representation in immigration cases.

All attorneys are bound by the ethical standards adopted by the appropriate authority within the jurisdiction in which they practice and must comply with the applicable Rules of Professional Conduct. The proposed standards are intended to build upon, not displace, any existing ethical standards, rules and norms governing legal representation. Rather, these proposed standards serve as a reminder to attorneys and accredited representatives to be aware of and to act in compliance with all ethical standards, rules and norms governing legal representation within their jurisdiction while acting within the scope of existing federal rules specifically governing immigration representation. Failure to comply with any one proposed standard may not by itself, create a presumption that a legal duty owed has been breached.

These standards are designed to apply to all attorneys, accredited representatives, law offices and law firms engaged in providing immigration representation as authorized by federal law. No individual who is unauthorized to represent immigrants should engage in any such representation in an immigration case. Representatives who work with staff not authorized to represent immigrants in an immigration case should ensure that all staff are properly supervised and do not engage in the unauthorized practice of immigration law themselves.

Respectfully submitted,

David P. Miranda, President
New York State Bar Association
August 2015
1. **Summary of Resolution(s).**
The Resolution adopts standards for representation in immigration cases. They are intended to serve as a practical guide for attorneys and accredited representatives handling those cases. Although not binding, they would complement the applicable Rules of Professional Conduct and the Executive Office for Immigration Review's Professional Conduct for Practitioners. The purpose of the Resolution is to assure competent, quality representation in immigration cases.

2. **Approval by Submitting Entity.**
The standards contained in this resolution were approved by the House of Delegates of the New York State Bar Association on June 23, 2012.

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 2010, several resolutions concerning immigration were adopted at both the Mid-Year meeting and the Annual Meeting.

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 applicable

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**
   Publicize standards generally, especially to Federal and immigration courts.

8. **Cost to the Association. (Both direct and indirect costs)**
   None
9. Disclosure of Interest. (If applicable)
Not applicable

10. Referrals.

The Resolution with Report has been sent to the following entities: Center for Professional Responsibility, Commission on Immigration, Section of Individual Rights and Responsibilities, Section of Family Law, Criminal Justice Section, Section of Litigation, Center for Children and the Law and the Commission on Youth at Risk.

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

   Joanne Macri, Esq.
   NYS Office of Indigent Legal Services
   80 S. Swan St., 29th Floor
   Albany, NY 12224
   518-408-2728
   Joanne.Macri@ils.ny.gov

   Jojo Annobil, Esq.
   Legal Aid Society – Civil Practice
   Immigration Law Unit
   199 Water Street
   New York, NY 10038
   212-577-3292
   jannobil@legal-aid.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 P. Miranda, Esq.
   Heslin Rothenberg Farley & Mesiti P.C.
   5 Columbia Circle
   Albany, NY 12203
   518-452-5600
   Cellphone: 518-391-3629
   dpm@hrfmlaw.com

9. Disclosure of Interest. (If applicable)
Not applicable

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1. Summary of the Resolution
   The Resolution adopts standards for representation in immigration cases. They are intended to serve as a practical guide for attorneys and accredited representatives handling those cases. Although not binding, they would complement the applicable Rules of Professional Conduct and the Executive Office for Immigration Review’s Professional Conduct for Practitioners. The purpose of the Resolution is to assure competent, quality representation in immigration cases.

2. Summary of the Issue that the Resolution Addresses
   There has been general concern about the quality of representation in immigration cases for some time. In December, 2011 a study was published in the Cardozo Law Review based on a survey of judges. They rated 33% of representatives in immigration cases as “inadequate” and 14% as “grossly inadequate.” The standards proposed, which were developed with the assistance of Hon. Robert Katzmann, chief Judge of the Second Circuit, as well as other judges and immigration specialists, are a response to this finding.

3. Please Explain How the Proposed Policy Position will address the issue
   These standards will serve to guide those representing clients in immigration cases as to the expectations in any such representation. They will help lawyers and accredited representatives better understand their responsibilities and allow judges to advise lawyers and representatives as to what is expected of them.

4. Summary of Minority Views
   None known
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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Report to the House of Delegates of the American Bar Association
by Edward Haskins Jacobs

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

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

For consideration at the August 3 and 4, 2015 Annual Meeting

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

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

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

Once again, God willing, I will move for the adoption of this proposal at the House of Delegates in Chicago in August 2015. I made the same motion before the House of Delegates the last fourteen 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 meetings of the House of Delegates where this proposal was considered was there an actual vote on the proposal.\(^1\) 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 ARA - 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\(^2\) 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 ARA 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 ARA constitution, since the constitution does not adopt policy "beyond the basics"; and as a result, clearly by arrangement with the Committee, another member of the House rose to move that the proposal be postponed indefinitely, and this was overwhelmingly approved by voice vote, with maybe only about five or so "nays" as far as I could tell.

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 "nays" 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 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 2014, the Chair of the Standing Committee on Constitution and Bylaws said the proposal is "out of order and inappropriate" and a non-committee member of the House moved to postpone the proposal indefinitely. Although a House member rose to "bark at the moon," seeking a vote on the proposal instead of postponing it; postponed it was, with maybe ten voice votes against.

In 2001 the vote on the motion to postpone action indefinitely was 209 to 39, but you will never find the precise vote in the record of proceedings of that meeting, because that motion, as well as 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 2014 the vote on the motion to postpone indefinitely was taken by voice vote.

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 assembly. 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 probably because more delegates wanted to vote the proposal down directly - but upon the voice vote that the ayes had it, and the proposal was again postponed indefinitely on the extraordinarily odd contention that defending the right to life of all innocent human beings is inconsistent with upholding and defending the Constitution of the United States. What a Constitution we must have!

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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? The ABA House of Delegates is a speck, but an important speck in the process. Maybe before too many more years baby-killing-in-the-womb 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? Do you have the 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 down should women's "rights" go? If you are a mother with a child in your womb, and if bearing your child to term or keeping your child after birth would be embarrassing, inconvenient, career-killing, poverty-causing, husband-limiting, depressing, or physically more than normally risky, do you have the right to kill your child as a legally-approved exit from motherhood, as long as you do it before your child fully emerges from the protection of your body?

Or does your child, by her mere humanity, have a sacrosanct right to live, and continue to develop and grow in liberty and pursue happiness as she comes to know it? The answer: Human life, including that of our littlest ones, is sacred. This realization was one of the greatest advances of Christianity over the paganism that condoned exposing unto death the unwanted child. Abortion in our society is quicker than 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'etre for the United States of America as a separate nation. The Declaration asserted that it is self-evident that all men are endowed by their Creator with the unalienable right to life; and that governments are instituted among men to secure the rights to life, liberty, and the pursuit of happiness. This insistence upon governmental protection of the right to life of 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.
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 a another mother walking by holding and cuddling her baby, or seeing a poster of a baby with the words “Abortion Kills,” are heart-warming, but they also underscore how the general discussion of the abortion problem in the media depersonalizes the separate human being held by God’s design in the vessel of her mother. That’s another, separate human being in there - one who has the right to life, liberty, and the pursuit of happiness, just as we do, no matter how deeply we stick our heads in the sand.

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

Dr. Condic rightly rejects the use of these three flawed arguments about when life begins. Instead, she cogently argues that we should determine when the new human organism begins, because that is the true beginning of the human being. She points out that one must distinguish between more living cells that are not organized into an organism, and living organisms. Dr. Condic points out that “[o]rganisms are living beings composed of parts that have separate but mutually dependent functions. While organisms are made of living cells, living cells themselves do not necessarily constitute an organism. The critical difference between a collection of cells and a living organism is the ability of an organism to act in a coordinated manner for the continued health and maintenance of the body as a whole. ... Unlike other definitions, understanding human life to be an intrinsic property of human organism does not require subjective judgments regarding ‘quality of life’ or relative worth. A definition based on the organismal nature of human beings acknowledges that individuals with differing appearance, ability, and ‘desirability’ are, nonetheless, equally human. ... Once the nature of human beings as organisms has been abandoned as the basis for assigning legal personhood, it is difficult to propose an alternative definition that 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 does. Slavery made the mistake of thinking that one human being can own another. We now know that no man should be permitted under man's law to own another. But how can one justify killing another innocent human being if one does not own him? The inconvenience and burden of the other's life on one's own is not enough. The burden of the dependent relation does not end at the birth canal. How far should the right to kill those dependent upon us go? Should the standard evolve from the complete dependence of the womb to the excessive dependence of severe mental retardation and severe physical handicaps?

Just because the child is held and nourished within her mother does not give her mother the right to kill her. To the contrary, the mother with a child in the womb has a special responsibility to protect and care for her child. The generally recognized principle that parents must take care of their children once they are born applies as well to the children while they are growing and developing in the womb. I am not judging here the status of the soul of those who have had abortions or who commit abortions. I leave that (and the judging of my own soul) to God. But what we must judge as a people is 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 to the hatred of, and the killing of, one's own child? Perhaps it is indifference to the child rather than hatred of the child, but this may be worse in its own way, as they say the opposite of love is not hate, but apathy.

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 4

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.

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for our culture of death. Speaking of being bamboozled, recall the serpent in the Garden of Eden, enticing Eve to eat the forbidden fruit on the promise that she would become like God. Now mothers are enticed into abortion with the lie that they can become like men, and needn't be burdened with 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 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 burdened upon her, 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 2013, when the Committee took no position "on the merits of the proposal," but asserted the proposed language does not merit inclusion in the purposes section of the ABA constitution. Then in 2012 the Committee said the proposal should be rejected due to unexplained inconsistencies with other Association purposes.

Although the Committee changed its position in 2011, it went back to the earlier position in later years, so I hereafter explain again why defending the right to life of all

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

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

2. The Supreme Court has determined that the Constitution’s penumbras 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 (i) that the holdings of Roe v. Wade and Doe v. Bolton, as modified by Planned Parenthood v. Casey are the Constitution itself - and (2) that if one opposes Roe, Doe, and Planned Parenthood, one is opposing the Constitution itself - and failing to uphold and defend it. The lack of identity of particular Supreme Court interpretations of the Constitution with the Constitution itself should be 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, condoning that opposition to a particular Supreme Court interpretation of the

6 Like St. Thomas Aquinas, I construct the argument against my position. I repeatedly asked the Standing Committee on Constitution and Bylaws to articulate the reasons for its - to me, bizarre - positions that taking a stance defending the right to life of all innocent human beings including all those conceived but not yet born is somehow inconsistent with upholding and defending the Constitution of the United States, but the Committee refuses to articulate the reasons for its position – either orally or in writing.

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Constitution constitutes opposition to the Constitution itself is stretching language and logic to the breaking point.

Now, maybe a persuasive argument could be made that although some Supreme Court interpretations of the Constitution are subject to later change, some are so indisputably correct that in some real sense the interpretation could be said to be the Constitution itself. If the Supreme Court rationale for Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey were so rock-solid and accepted by American society in general as the proper articulation of a virtually undisputed fundamental individual right grounded in the Constitution, one could argue that in effect these Supreme Court decisions are equivalent to the Constitution; that is certainly true in the case with Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey. (And note that Planned Parenthood itself modified fundamental holdings of Roe and Doe.)

The truth is quite to the contrary of the position of the Standing Committee on Constitution and Bylaws. The reality is that the rationale underlying these two Supreme Court decisions deserves no support from an organization pledged to uphold and defend the Constitution of United States. 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 is set aside 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. (Refering 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 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 indisputable (and thus, one might argue, the Constitution itself); rather, the rationale of Roe v. Wade is fatuous.

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 and at other times, the Committee on Constitution and Bylaws has suggested that what I advocate is a policy position for the ABA, not a purpose of the ABA, and therefore my proposal should be rejected on the ground that it does not belong in Section 1.2 of the ABA Constitution. I disagree with this contention also. After all, what is a purpose? A purpose is simply a fundamental policy. The innocent human beings in the wombs of their mothers (and the 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 innocent in the womb who cry out for us. 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 connection 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 disregarded. Incredibly, a fundamental disrespect for a category of persons' rights has been incorporated as a fundamental tenet 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 purposes of the American Bar Association and the Constitution and bylaws, and has ramifications over a wide array of policy that the Association has adopted and implemented." I have reviewed the ABA Policy and Procedures Handbook and note here policy positions taken by the ABA that are, or may be regarded as inconsistent with the proposal being made hereby.

The ABA Policy and Procedures Handbook lists hundreds of standing policies adopted by the ABA over the years, although action was taken at the 2001 meeting to "archive" some policies over ten years old, taking them off the list of current policy positions. Way back in 1978, the ABA adopted a policy, still in the 2013-2014 Handbook, supporting federal and state legislation to "finance abortion services for indigent women." In 1991, the ABA adopted a policy supporting legislation to promote "full counseling and referrals on all medical options" in federally funded family planning clinics. In 1992, the ABA adopted a policy, still in the 2013-2014 Handbook, opposing federal legislation restricting abortions prior to viability and thereafter if the abortion is "necessary to protect the life or health of the woman ...." And in 1994, the ABA adopted a policy recommending that the United States, at the Fourth World Conference on Women in Beijing, China, in 1995, "actively support the inclusion in the Platform for Action of [e]ffective 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 services.

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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 edwardjacob@yahoo.com.
SPONSORS: Mark Schickman (Principal Sponsor), Lauren Rikleen, Kirke Kickingbird, Robert Weiner, Estelle Rogers, Walter White, John Paul Graff, Myles Lynk, Stephen Wermiel, Drucilla Ramey, Barbara Mendel Mayden, and Wilson Adam Schooley.

PROPOSAL: Amends §10.1(a) of the ABA Constitution and Bylaws to reflect the name change of the Section of Individual Rights and Responsibilities to the Section of Civil Rights and Social Justice.

Amends §10.1(a) of the Constitution to read as follows:

§10.1 Sections and Divisions. (a) There are within the Association the following sections and divisions for carrying on its work:

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3
4
5 Section of Civil Rights and Social Justice
6 ...

(Legislative Draft – Deletions struck through; additions underlined)

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...
The ABA Section of Individual Rights and Responsibilities ("IRR") hereby asks to change its name to the ABA Section of Civil Rights and Social Justice, seeking the recommendation of the Board of Governors and approval of the House of Delegates at the 2015 ABA Annual Meeting in accordance with the ABA Constitution and Bylaws §30.2.

IRR History

IRR was created at an important moment in America's Civil Rights movement by some of the Civil Rights champions of the time, future ABA Presidents Bernard G. Segal and Jerome Shestack among them. The charter Section members included Supreme Court Justice William J. Brennan and future Section Chairs Abner Mikva, Peter Langrock and Father Robert Drinan. At the ABA's Montreal Annual Meeting in 1966, IRR was born.

Over the next 50 years, the Section led the ABA and the profession to review and address the great legal and public policy issues of the day. Those efforts always encompassed issues of civil rights and racial equality, but grew beyond them to address: gender equality; the death penalty; discrimination based upon sexual orientation; responses to health epidemics and bioethical concerns; free speech and expression; the right to informational privacy; disability access; international human rights; and many others.

The efforts of IRR founded and assisted in founding enduring ABA projects and entities, including the: Center for Human Rights; Death Penalty Due Process Review Project; Death Penalty Representation Project; AIDS Coordinating Committee; ABA Commission on Homelessness and Poverty; Bill of Rights Project; International Human Rights Trial Observer Project; and the Commission on Sexual Orientation and Gender Identity (SOGI), among many others. Today, IRR remains the only ABA entity which houses committees devoted to Native American concerns, and the right to religious expression and accommodation without discrimination.

IRR has authored and obtained passage of over 300 policy resolutions in the House of Delegates, dealing with the broad range of constitutional, civil rights, international human rights, anti- discrimination and social justice issues. It has also sponsored over 50 Amicus Curiae briefs on topics including the right to legal counsel in selective service matters, affirmative action, laws restricting women's participation on juries, the right to counsel where parental rights are threatened and in post-conviction proceedings, the imposition of the death penalty against minors and person of diminished capacity, discrimination against LGBT persons, among many, many others.

Purpose of Name Change

The Section's activities have always been grounded in Constitutional rights and principles, but have expanded beyond that. Thus, IRR engages in activities driven by robust committees

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including Public Education, Economic Justice, Native American Concerns, Rights of Women, Elder Rights, Fair and Impartial Courts, and others which move beyond the reasonable definition of constitutional or civil rights.

Now, nearly 50 years after our Section was named, we find that "Individual Rights and Responsibilities" does not capture all that we do; more importantly, today's attorneys and general public do not understand what it means. For the past decade, while we recognized the limitations in our name, the move to change it was deterred by (1) the pride in IRR's tradition, and the reluctance to lose that history and (2) a lack of consensus over what a new name would be.

In 2013 and 2014, IRR conducted a membership survey which showed that law students and young lawyers are unaware of what the Section of Individual Rights and Responsibilities does, what that name means and what legal issues the Section addresses. Attorneys searching for the civil rights section of the ABA were unable to identify IRR as that section. The historical context of "Individual Rights and Responsibilities" no longer describes to today's attorneys our focus on constitutional rights, civil rights, and civil liberties.

IRR does not seek a change in jurisdiction and will continue with its current financial level of general revenue funding. Other than the change in the name of the Section, the internal structure and bylaws of IRR would remain the same. I n summary, in addition to better describing what we really do in the year 2015, we hope to increase our membership from both existing ABA members and from non-ABA members.

Approval Process

On the eve of the Section's 50th Anniversary, after a report by a broadly based committee whose members spanned the decades of IRR's activities, and following a lengthy discussion at the 2014 Fall Council Meeting on November 6, 2014, the Section Council reached a broad consensus and voted to ask the House to approve the change of IRR's name to the Section of Civil Rights and Social Justice.

Post-Approval Process

During our 50th Anniversary year, our Section will promote our new name and, we hope, introduce new generations of lawyers to the legal principles promoting civil rights and social justice, which have always been our Section's focus. We believe that this will well serve the membership and pol icy interests of our Section, and of the ABA.

Respectfully submitted,

Mark I. Schickman, Chair
Section of Individual Rights and Responsibilities

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Respectfully submitted,

Mark I. Schickman, Chair
Section of Individual Rights and Responsibilities
Amends §28.4 of the Association’s Bylaws to read as follows:

§28.4 Expenses at Annual Meeting. A member of the Association who is not a staff member or a law student member may be reimbursed from Association funds for travel expenses incurred in attending an Annual Meeting with the same per diem as is allowed for other Association meetings within the by budgetary constraints of the reimbursing entity.

This authorization extends to those travel expenses incurred in attending a meeting held at the site or in the geographical area of an Annual Meeting within seven days immediately before and after the Annual Meeting. In addition, a per diem will be administered in a manner prescribed by the Board of Governors.

(Legislative Draft – Deletions struck through; additions underlined)

§28.4 Expenses at Annual Meeting. A member of the Association who is not a staff member or a law student member may not be reimbursed from Association funds for travel expenses incurred in attending an annual meeting, with the same per diem as is allowed for other Association meetings within the budgetary constraints and policies of the reimbursing entity. This authorization extends to those travel expenses incurred in attending a meeting held at the site or in the geographical area of an Annual Meeting within seven days immediately before and after the Annual Meeting. In addition, a per diem will be administered in a manner prescribed by the Board of Governors, or a member of the Board of Governors be reimbursed for other expenses incurred in attending an annual meeting or a meeting held at the site or in the area of an annual meeting, within seven days immediately before or after the annual meeting. However, a per diem allowance may be provided for attending a meeting if:

(a) a committee of the House of Delegates;
(b) a committee of the Association; or
(c) a section council or committee, including the equivalent component of the Law Student Division;

held at any time before or after the annual meeting. Payment of travel expenses and per diem allowances to special guests or speakers who would not otherwise attend the meeting, whether or not members of the Association, may be authorized under conditions prescribed by the Board.
REPORT

Currently, the Association’s policy prohibits a member from being reimbursed for any portion of that member’s travel expenses incurred to attend the Annual Meeting. That same prohibition does not apply to Midyear Meetings. In the course of its examination into issues surrounding the Annual Meeting and efforts that can be made to increase attendance, the Standing Committee on Meetings and Travel has been advised by a number of entities within the Association, primarily sections and divisions, that the prohibition against allowing any travel expense reimbursement is a significant factor in reduced attendance at the Annual Meeting.

While the Standing Committee is aware of the need to continue to monitor Association expenses from general revenue sources, it is also aware that many of the sections and divisions have their own funds that might allow them to provide such reimbursements to their members who attend the Annual Meeting.

Consequently, the Standing Committee recommends a modification to 28.4 of the Association Bylaws to permit an Association member who is neither a staff member nor a law student member to be reimbursed from Association funds for travel expenses to attend the Annual Meeting within the constraints and policies of that reimbursing entity. It provides specifically for the same per diem as is allowed for other Association meetings, including the Midyear Meeting. Finally, the proposed change delegates to the Board of Governors the manner in which to administer the per diem reimbursement.

By permitting the reimbursing entities to provide funds for their members to attend the Annual Meeting, this provision will not increase general revenue expenses. In that sense, it is revenue-neutral.

Barbara J. Howard, Chair
Standing Committee on Meetings & Travel

Co-Sponsors:
Suzanne E. Gilbert
Gretchen Chantelle Bellamy
Dennis J. Dracco
Andrew Demetriou
Paul W. Lee

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Barbara J. Howard, Chair
Standing Committee on Meetings & Travel

Co-Sponsors:
Suzanne E. Gilbert
Gretchen Chantelle Bellamy
Dennis J. Dracco
Andrew Demetriou
Paul W. Lee
SPONSORS: Geetha Ravindra, Howard Herman, Nancy Welsh, Dwight Golann, Philip S. Cottone, Lawrence R. Mills, Joan Stearns Johnsen, James J. Alfini, Bruce Meyerson, and Margaret M. Huff

PROPOSAL: Amends §30.5 of the Bylaws to allow associate members to serve on the Council and in the leadership of the Section of Dispute Resolution in accordance with its 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, the Section of Antitrust Law, the Section of Environment, Energy and Resources, and the Section of Labor and Employment Law as their respective bylaws may provide, and non-U.S. lawyer associate members may serve on the Council of the Law Practice Division as its bylaws may provide, and associate members may serve on the Council and in the leadership of the Section of Dispute Resolution as its bylaws may provide.

(Legislative Draft - Deletions Struck Through; Additions Underlined)

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SPONSORS: Geetha Ravindra, Howard Herman, Nancy Welsh, Dwight Golann, Philip S. Cottone, Lawrence R. Mills, Joan Stearns Johnsen, James J. Alfini, Bruce Meyerson, and Margaret M. Huff

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The Section of Dispute Resolution requests an amendment to Section 30.5 of the Association’s Bylaws allowing associate members to serve on the Section of Dispute Resolution Council and in leadership positions.

As the field of dispute resolution has developed over the past few decades, the number of non-lawyer dispute resolution professionals around the world has grown significantly. The Section has seen substantial growth in the membership and participation of non-U.S. lawyers and non-lawyer dispute resolution professionals, both domestically and abroad in the past ten years. The Section of Dispute Resolution’s associate membership has increased by 61 percent since 2005 and currently represents 16% of the non-student Section membership. Additionally, the Section has 435 student associate members which indicates significant non-law student and foreign law student interest in dispute resolution.

Many non-lawyer associate members join the Section of Dispute Resolution because our training and member resources provide sustainable value for their career development. The active involvement of non-lawyer associate members and non-U.S. lawyer associates in Section of Dispute Resolution programming and activities continues to increase. For example, the 2014 Section of Dispute Resolutions Spring Conference, the largest gathering of dispute resolution practitioners in the world (nearly 1000), attracted a number of lawyers, non-lawyers, and government officials from countries outside the U.S.

We believe that providing leadership opportunities for our associate members will increase ABA visibility and influence, and enhance the Section’s membership recruitment and retention efforts.

The Section of Dispute Resolution 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 2014.

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

Respectfully submitted,

Geetha Ravindra
Chair, Section of Dispute Resolution
Howard Herman
Chair-Elect, Section of Dispute Resolution

Nancy Welsh
Vice Chair, Section of Dispute Resolution

Dwight Golann
Budget Officer, Section of Dispute Resolution

Philip S. Cottone
Assistant Budget Officer, Section of Dispute Resolution

Lawrence R. Mills
Long Range Planning Officer, Section of Dispute Resolution

Joan Steams Johnsen CLE Officer

James J. Alfini
Delegate, Section of Dispute Resolution

Bruce Meyerson
Delegate, Section of Dispute Resolution

Margaret M. Huff
Strategic Outreach Officer
SPONSORS: Clyde J "Butch" Tate II (Chair), Dwain Alexander II, William S. Armannony, Charlotte Claverius, Lyndsey Olson, Pamela Stevenson, and Gregory L. Ulrich

PROPOSAL: Amends Article 31, §31.7 of the Constitution to clarify the scope of legal matters within the jurisdiction of the Standing Committee on Legal Assistance for Military Personnel and to add the Department of Veterans Affairs to the list of entities with which the Standing Committee maintains a close liaison relationship.

Amends §31.7 of the Constitution to read as follows:

§31.7 Legal Assistance for Military Personnel. The Standing Committee on Legal Assistance for Military Personnel has jurisdiction over matters relating to legal assistance for military personnel and their dependents. This includes all civil legal matters related to military service, whether directly or incidentally, and whether arising during periods of active-duty service or following transition to civilian status. It shall foster the continued growth of the military legal assistance programs and promote the delivery of legal services to military personnel and their dependents and to persons accompanying the armed forces outside the United States, for their personal legal affairs (except those involving proceedings under the Uniform Code of Military Justice). It shall advocate for policies improving access to legal services and civil legal protections for military personnel and their dependents. It shall maintain close liaison with the Department of Defense, the Department of Homeland Security with respect to the U.S. Coast Guard, the Department of Veterans Affairs, the military services, bar associations, and appropriate committees of the Association to enhance the scope, quality and delivery of free or affordable legal services to eligible legal assistance clients.

(Legislative Draft – Additions underlined; deletions struck through)

§31.7 Legal Assistance for Military Personnel. The Standing Committee on Legal Assistance for Military Personnel has jurisdiction over matters relating to legal assistance for military personnel and their dependents. This includes all civil legal matters related to military service, whether directly or incidentally, and whether arising during periods of active-duty service or following transition to civilian status. It shall foster the continued growth of the military legal assistance programs and promote the delivery of legal services to military personnel and their dependents and to persons accompanying the armed forces outside the United States, for their personal legal affairs (except those involving proceedings under the Uniform Code of Military Justice). It shall advocate for policies improving access to legal services and civil legal protections for military personnel and their dependents. It shall maintain close liaison with the Department of Defense, the Department of Homeland Security with respect to the U.S. Coast Guard, the Department of Veterans Affairs, the military services, bar associations, and appropriate committees of the Association to enhance the scope, quality and delivery of free or affordable legal services to eligible legal assistance clients.
REPORT

We, the undersigned members of the Standing Committee on Legal Assistance for Military Personnel (LAMP), propose amendment of the Standing Committee's jurisdictional statement contained within the ABA Bylaws under Article 31, § 31.7.

The Standing Committee has determined that the current bylaw does not clearly define what legal matters constitute those "relating to legal assistance for military personnel and their dependents" and therefore fall within the scope of the Standing Committee's jurisdiction. The proposed amendment makes clear that all civil legal issues affecting servicemembers and their dependents arising during a term of active-duty service are within the jurisdiction of the Standing Committee. The amendment further recognizes that a servicemember's separation from the military does not, on its own, end the Standing Committee's interest in delivery of legal assistance to address legal matters rising from, or connected to, the military service, and thus the Standing Committee remains concerned about supporting those legal needs that carry over as military personnel transition into civilian life. Examples of these may include:

- A National Guard servicemember whose activation and deployment for an extended tour overseas created legal problems with a creditor that continued once he came off of active duty;
- A reservist who suffered traumatic brain injury while on active duty and, only much later after returning to civilian employment, began to suffer a delayed impairment that affected her job performance and required her to seek legal protections and accommodations;
- A soldier who was severely injured while on active duty and needs legal representation to appeal the denial of his VA disability compensation;
- A Marine who retired from active duty and used his G.I. Bill money to attend a for-profit college who is now faced with the loss of that money because the school shut down before he could graduate;
- A spouse of a former sailor who was diagnosed with post-traumatic stress disorder and subsequently committed suicide in need of legal counsel to help her understand her rights to military survivor benefits; or
- The spouse of a permanently incapacitated airman who also serves as his caregiver who needs legal help to establish herself as his legal guardian and VA fiduciary in order to manage his legal and financial affairs.

It is not the intention that the proposed clarification be expansive; rather, it is framed to encompass only those legal matters for which there is a direct relationship to military service and for which no other entity in the ABA has a similar focus.

Finally, the proposed amendment explicitly recognizes the Department of Veterans Affairs as a key entity with which the Standing Committee maintains an ongoing liaison relationship.
Respectfully submitted,

Clyde J "Butch" Tate II (Chair)
Dwain Alexander II
William S. Aramony
Charlotte Claverius
Lyndsey Olson
Pamela Stevenson
Gregory L. Ulrich

Clyde J "Butch" Tate II (Chair)
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Gregory L. Ulrich

PROPOSAL: Amends various sections of the Association's Constitution and Bylaws regarding the House of Delegates, Nominating Committee, Board of Governors (including redistricting), and Officers.

Proposal A – House of Delegates

Proposal: Amend the Association's Constitution to:

(Legislative Draft – Additions underlined; deletions struck through)

11-6A(1)

1) provide that Goal III members become members of the House of Delegates while serving on the Nominating Committee if they are not already seated in the House of Delegates.

\section{6.2 Composition, (a) The House of Delegates, which is designed to be representative of the legal profession of the United States, is composed of the following members of the Association:}

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\subsection{5.2 Composition, (a) The House of Delegates, which is designed to be representative of the legal profession of the United States, is composed of the following members of the Association:}

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11-6A(2)

2) reduce the threshold for additional delegates for state and local bar associations and ABA sections based on ABA membership

\section{6.4 State and Local Bar Association Delegates.}

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\subsection{6.4 State and Local Bar Association Delegates.}

1
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5

\subsection{6.4 State and Local Bar Association Delegates.}

1
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\subsection{6.4 State and Local Bar Association Delegates.}

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members is entitled to one additional delegate. If it has more than 12,000
10,000 Association members and not more than 24,000 20,000
Association members, it is entitled to two additional delegates. If it has
more than 24,000 20,000 Association members and not more than 30,000
28,000 Association members, it is entitled to four additional delegates. If it
has more than 30,000 28,000 Association members, it is entitled to five
additional delegates. A local bar association that has more than 5,000
2,500 Association members is entitled to one additional delegate. For the
purposes of this subsection law student members are not included.

§6.6 Section Delegates. At the conclusion of the 2005 Annual
Meeting, each section shall be entitled to a minimum of two
delegates with staggered term 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 and in each succeeding third year, a section with more than 26,000 members and Non-U.S. Lawyer Associates, 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
26,000 members and Non-U.S. Lawyer Associates, shall elect from its
membership one additional delegate to the House. In 1995 and in each
succeeding third year, a section with more than 50,000 45,000 members
and Non-U.S. Lawyer Associates, shall elect from its membership one
additional delegate. All terms shall be staggered and in each succeeding
third year each position shall then be elected for a term of three
Association years.

3) provide an additional delegate to those delegations without a young lawyer, subject
to the additional delegate being less than 36 years old or admitted to his or her first
bar within the past five years at the beginning of the term.

§6.4 State Bar and Local Bar Association Delegates. (a) A state
bar association is entitled to at least one delegate in the House of
Delegates, except if there is more than one state bar association in a state
the House shall determine which associations may select delegates. Each state delegation that did not have an additional young lawyer
delegate prior to the 2015 Annual Meeting shall be entitled to one
additional delegate, chosen by either the state bar association or one of
the qualifying local bar associations referred to in Article 6.4(b) below,
provided that such delegate was admitted to his or her first bar within the
past five years or is less than 36 years old at the beginning of his or her
term.) ...
Proposal B – Nominating Committee

Proposal: Amend the Association's Constitution to:

(Legislative Draft – Additions underlined; deletions struck through)

11-6B(1)

1) provide that the ABA President shall appoint Goal III members-at-large from broadly solicited nominations; and increase the number of Goal III members-at-large to eight (8) to add one (1) self-identified LGBT member-at-large and 1 member-at-large self-identified as having a disability.

§9.2 Nominating Committee of the House of Delegates. (a) ...The Goal III members-at-large shall be appointed by the President, three-from nominations solicited from the diversity commissions, sections, divisions, and forums; state and local bar associations; and the membership at large, submitted by the Commission on Racial and Ethnic Diversity in the Profession and three from nominations submitted by the Commission on Women in the Profession. The President shall appoint as members at large no fewer than three women, three minorities, one who self-identifies as LGBT, and one who self-identifies as having a disability. No more than five members of the Nominating Committee may be from the same state at any one time.

§9.2(b) ...At the conclusion of the 1996 2015 Annual Meeting, the President shall appoint one Goal III member-at-large for a three year term and one Goal III member-at-large for a two-year term, one who must self-identify as LGBT and one who must self-identify as having a disability. At the end of those respective terms, and in each succeeding three year, these Goal III members-at-large shall be appointed for a term of three Association years. In addition, each year the President shall appoint a minority and a woman, each to serve a three year term. A member of the Committee may not serve for more than three consecutive three-year terms.

11-6B(2)

2) provide that petitions for election to the Nominating Committee include an acknowledgment that the candidates will abide by the Statement of Expectations.

§9.2(c) By Nominating Committee of the House of Delegates. ... Petitions for election to the Nominating Committee will include an acknowledgment signed by the candidate that the candidate has read and agrees to abide by the Statement of Expectations, adopted by the
Steering Committee of the Nominating Committee for members of the Nominating Committee.

11-6B(3)

3) eliminate the sunset provisions for at-large seats and clarify that districting is based on lawyer population.

9.2(a) ... and until the conclusion of the Annual Meeting in 2015, six members-at-large who need not be delegates in the House of Delegates...

§16.1 Decennial Review. Beginning in 2005 and once every ten years thereafter a review shall be conducted of the House of Delegates, the Board of Governors and the Nominating Committee. With respect to each body the review shall include an examination of its size and a consideration of its composition to ensure appropriate representation of constituencies. The review of the Board of Governors and Nominating Committee shall include a consideration of whether at-large representation of women and minorities should be continued, and (the review of the Board of Governors shall include a review of the issue of districting in terms of Association membership lawyer population.)
Proposal C – Board of Governors

Proposal: Amend the Association’s Constitution and Bylaws to:

(Legislative Draft – Additions underlined; deletions struck through)

11-6C(1)

1) clarify that the Board of Governors operates as a board of directors; has a fiduciary responsibility to the Association; and its members will abide by the Overview of the Role of Members of the Board of Governors.

$7.1$ Powers and Functions. The Board of Governors is the administrative agency-executive body of the House of Delegates Association, and as such, shall oversee the management of the Association. The Board shall develop methods and specific plans for making the Association and its activities useful to the members in their professional work. Between meetings of the House of Delegates, the Board of Governors may perform, not inconsistently with any action taken by the House, the functions that the House itself might perform.

$7.3$ Eligibility and Term. While selected from different constituencies within the Association, every member of the Board of Governors owes a fiduciary duty to act solely in the best interests of the Association as a whole. ...

$8.4$ Petitions for Nominations to the Board of Governors. Petitions for nomination to the Board of Governors must specify which position the petitioner candidate seeks and will include an acknowledgement signed by the candidate that the candidate has read and agrees to abide by the Overview of the Role of a Member of the Board of Governors, adopted by the Board of Governors for its members; no Person may petition for more than one position.

$48.1$ Function. The Board of Governors is the administrative agency of the House of Delegates shall oversee the management of the Association.

11-6C(2)

2) clarify the definition of a young lawyer and Goal III members-at-large.

$7.3$ Eligibility and Term. ... To be eligible for election as a young lawyer member-at-large, a person must be admitted to practice in his or her first bar within the past five years or be less than 36 years old at the
11-6

beginning of the term. To be eligible for election as a Goal III minority member-at-large, a person must be a minority, woman, or self-identify either as LGBT or as having a disability.

11-6C(3)

3) increase the number of section members-at-large on the Board from six (6) to nine (9).

11-6C(4)

4) revise the composition of the Board to include a Goal III member-at-large who self identifies as either LGBT or as having a disability.

11-6C(5)

5) eliminate the sunset provision.

§7.2 Number and Composition. Except as hereinafter provided, the Board of Governors is comprised of 38 42 members of the Association. The House of Delegates shall elect one member from each of the eighteen districts, six nine section members-at-large, and until the conclusion of the Annual Meeting in 2016, two women members-at-large and two minority members-at-large. Five Goal III members-at-large, and one of whom must self-identify either as LGBT or as having a disability.

§7.3 Eligibility and Term. ...To be eligible for election as a Goal III minority member-at-large, a person must be a minority, woman, or self-identify either as LGBT or as having a disability.

§26.1 Terms and Election. (a) A member of the Board of Governors shall be elected from each district established by the Constitution and, in addition, there shall be 14 18 members-at-large. ...

(c) In 1985 two section members-at-large shall be elected for a one-year term, two section members-at-large shall be elected for a two-year term, and two section members-at-large shall be elected for a three-year term. In 1985 and each succeeding third year, a young lawyer member-at-large and the judicial member-at-large shall be elected for a three-year term. In 1986 and each succeeding third year, two section members-at-large shall be elected. In 1987 and each succeeding third year, two section members-at-large and a young lawyer member-at-large shall be elected. In 1988 and each succeeding third year, two section members-at-large, a young lawyer member-at-large, and the judicial...
member-at-large shall be elected. In 2012 and in each succeeding year, a
law student member-at-large shall be elected to serve a one-year term. In
2016, one section member-at-large shall be elected for a one-year term,
one section member-at-large shall be elected for a two-year term, and one
section member-at-large shall be elected for a three-year term. At the end
of those respective terms, and in each succeeding third year, a section
member-at-large shall be elected for a term of three Association years.
(d) Beginning in 1996 and in each succeeding third year, two
members-at-large shall be elected, one of whom shall be a woman and
one of whom shall be a minority. In 1997 and in each succeeding third
year, one member-at-large who is a minority shall be elected. In 1998 and
in each succeeding third year, one member-at-large who is a woman shall
be elected. In 1996 one member-at-large who is a minority shall be
elected for a one-year term, and one member-at-large who is a woman
shall be elected for a two-year term. In 1996 and in each succeeding third
year, one member who self identifies as LGBT or as having a disability
shall be elected for a three-year term.

11-6C(6)
6) realign districts

§2.1 Definitions.
1 At the conclusion of the 2014-2015 Annual meeting:
2
3 District 2: Connecticut, Michigan, Virginia, Massachusetts ...
4 District 4: Virginia, Massachusetts, District of Columbia
5
6
7
8

11-6C(6)
6) realign districts

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1 At the conclusion of the 2014-2015 Annual meeting:
2
3 District 2: Connecticut, Michigan, Virginia, Massachusetts ...
4 District 4: Virginia, Massachusetts, District of Columbia
5
6
7
8
Proposal D – Officers

Proposal: Amend the Association’s Constitution and Bylaws to:

(Legislative Draft – Additions underlined; deletions struck through)

11-6D(1)

1) eliminate the position of secretary-elect.

§7.2 Number and Composition. In every third year, as provided in §8.2(c), the Board of Governors shall include as additional ex-officio member the Secretary-Elect.

§8.2 Election and Terms

(c) At the annual meeting in 1986 and in each succeeding third year, a Secretary shall be elected by the House of Delegates at the annual meeting for a term of three Association years beginning with the adjournment of the annual meeting during which elected.

§8.3 Vacancies. If the Secretary Elect dies, becomes disabled, or declines, the Nominating Committee shall convene at the call of the Board of Governors and nominate a successor, and the House of Delegates shall elect a successor at its next meeting. Service in an office for an unexpired term does not make that officer ineligible for nomination or election to an office.

§29-8 Secretary-Elect. The Secretary-Elect shall perform such duties as the Board of Governors and the Secretary, respectively, may prescribe.

11-6D(2)

2) eliminate the position of treasurer-elect.

§7.2 Number and Composition. In every third year, as provided in §8.2(c), the Board of Governors shall include as additional ex-officio member the Treasurer-Elect.
§8.2 Election and Terms

... (c) ... In 2017 and each succeeding third year a Treasurer shall be elected for a term of three Association years beginning with the adjournment of the next annual meeting following the annual meeting at during which they are elected. In the Association year prior to commencement of their terms, they the Treasurer shall serve as Treasurer-Elect respectively.

§8.3 Vacancies. ... If the Treasurer-Elect dies, becomes disabled, or declines, the Nominating Committee shall convene at the call of the Board of Governors and nominate a successor, and the House of Delegates shall elect a successor at its next meeting. Service in an office for an unexpired term does not make that officer ineligible for nomination or election to another office.

§29.8 Treasurer-Elect ... Treasurer-Elect shall perform such duties as the Board of Governors and the Treasurer respectively, may prescribe.
INTRODUCTION

Article 16 of the ABA Constitution and Bylaws requires a decennial review of the House of Delegates, the Nominating Committee, and the Board of Governors to ensure appropriate representation in each body. The Commission on Governance was created by the Board of Governors in August 2013 and appointed by then President James R. Silkenat, then President-elect William C. Hubbard, and then Chair of the House of Delegates, Robert M. Carlson, to conduct a decennial review pursuant to Article 16.1 of the ABA Constitution and Bylaws and report to the House of Delegates no later than the August 2015 Annual Meeting.

The Commission has been specifically charged to examine the size and composition of the House of Delegates, the Nominating Committee and the Board of Governors. The review of the Board of Governors and the Nominating Committee also includes consideration of whether at-large representation of women and minorities should be continued. In addition, the review of the Board of Governors was to include an analysis of districting to reflect changes in lawyer population.

The Commission is comprised of a wide cross-section of ABA leaders who also have had extensive experience as officers in state and local bar associations, as well as ABA sections and divisions. The Commission includes a former President of the ABA, former Presidents of state and local bar associations, current and former members of the ABA Board of Governors, State Delegate, as well as former Chairs of sections and divisions. Of greater significance, because of their experiences in leadership roles in the ABA as well as state and local bar associations, the members of the Commission have a keen understanding of the role and needs of these various entities and the importance of their contributions to the ABA as a whole.

The Commission began its work in September 2013. It has met by telephone and in person numerous times, with in-person meetings in Chicago, Chicago (in conjunction with the 2014 Midyear Meeting), Boston (in conjunction with the 2014 Annual Meeting), Houston (in conjunction with the 2014 Midyear Meeting), and Washington, DC. It held multiple open hearings at the 2014 Midyear and Annual Meetings and the 2015 Midyear Meeting. At each of the hearings, Association members were provided the opportunity to share their views with the Commission.

Each Commission member, as well as the liaisons to the Commission from the Board, was assigned specific ABA entities and constituencies to keep apprised of the work of the Commission and to solicit their input. The Co-Chairs of the Commission, as well as Commission members, attended a number of meetings of state delegations and section entities. Members of the Commission met with the Standing Committee on Bar Activities and Services, the Executive Committee of the National conference of Bar Presidents, the Metropolitan Bar Caucus, the Conference of State Bar Delegates, the Conference of State Delegates, the Section Officers Conference, the Conference of
Section and Division Delegates, the Women's Caucus and the Minority Caucus. In addition, the Commission met by telephone with experts on governance issues: former AFL-CIO President R. William Ide, III, Allen C. Goolsby, and Marshall Doke. The Commission also established an electronic suggestion box to solicit views regarding the governance of the Association, and has received a number of written comments from interested parties.

In addition to this outreach, the Commission created a website where various materials were posted regarding the work of the Commission, including summaries of the comments made during the open hearings.

The proposals presented reflect the work of Commission and agreement by a majority of its members.

HOUSE OF DELEGATES

The House of Delegates currently is comprised of 559 members (52 state delegates, 6 officers, 32 Board members, 73 section/division/conference delegates, 36 former officers, 36 delegates at large; 232 state bar association delegates, 72 local bar association delegates, 28 affiliated organizations, 4 at-large members, 1 American Samoa delegate, 1 Commonwealth of the Northern Mariana Islands delegate 1 Guam delegate, 1 Virgin Islands delegate and 2 members ex officio).

The House of Delegates is the policy-making body of the Association and the Commission believes that it needs to remain as representative of the profession as possible. Should all of the proposals be adopted the House of Delegates would increase by 41 members to 600.

Threshold for Representation

The Commission recommends that the threshold for additional seats in the House for state and local bar associations and sections based on Association membership be reduced slightly. For state bar associations: 6,000 reduced to 5,000 (entitled to one additional delegate); 12,000 reduced to 10,000 (entitled to two additional delegates); 24,000 reduced to 20,000 (entitled to four additional delegates); 30,000 reduced to 28,000 (entitled to five additional delegates). For local bar associations: 3,000 reduced to 2,500 (entitled to one additional delegate). For sections: 25,000 reduced to 20,000 (entitled to one additional delegate); 50,000 reduced to 45,000 (entitled to two additional delegates).

The slight reduction will help to ensure continued representation by state and local bar associations as well as sections even though there has been some decline in Association membership. The reduction seeks to address this decline by slightly modifying the parameters under which entities would be entitled to additional delegates.
The recommendation would impact nine states and two sections for a total of eleven additional seats in the House of Delegates.

Young Lawyer Representation

Currently, §6.4(a) of the Association’s Constitution provides that if the bar associations of a state are entitled to four or more delegates, at least one of the delegates must have been admitted to practice in his or her first bar within the past five years, or must be less than 36 years old at the beginning of the term. Thirty of the fifty-two delegations meet this criterion. The Commission recommends that the criterion of only those states with four or more delegates be eligible to have a young lawyer be amended to have all delegations to include at least one young lawyer member. The Commission views this change as an opportunity to recognize the importance of having younger voices in our Association.

This proposal of the Commission would not require delegations not currently having a young lawyer delegate to designate an existing position for the young lawyer, but rather would add a designated young lawyer seat to those delegations. The change to §6.4(a) would potentially increase the number of members in the House of Delegates by twenty-two.

Delegates to the House of Delegates currently are eligible for reimbursement for travel expenses to the Midyear Meeting. The Commission estimates that this proposal potentially would increase the budget of the House of Delegates by approximately $13,200 (22 new delegates at approximately $600) annually. However, the Commission suggests the budgetary amount while not insignificant, may be worth the input from young lawyers in the consideration of matters that come before the House of Delegates as well as the message it sends to young lawyers regarding the importance the ABA places on their participation.

NOMINATING COMMITTEE

Role of Nominating Committee Members

The Commission recommends that the Steering Committee of the Nominating Committee adopt the Statement of Expectations ("Statement") which sets out the role and responsibility of the members of the Nominating Committee. The Statement would be attached to petitions for election to the Nominating Committee and candidates interested in serving on the Nominating Committee would be required to sign the Statement acknowledging that they have read and agree to abide by the Statement.

At-Large Seats

The Commission recommends the addition of two member-at-large seats one for lawyers who self-identify as LGBT and one for lawyers who self-identify as having a
disability to maximize the opportunity to obtain different perspectives and viewpoints on the Nominating Committee.

In addition, the Commission recommends that the at-large seats be renamed the Goal III seats to better reflect the representation of those serving in these seats.

Currently, the minority and women-at-large seats on the Nominating Committee are selected by the President from recommendations submitted by the Commission on Racial and Ethnic Diversity and the Commission on Women. The Commission recommends that the pool of recommended members to serve in the at-large positions be expanded to include recommendations from sections/divisions/forum/special and standing committees and individual members. This will provide a wider and possibly more diverse selection of candidates from which the President may select the at-large members for the Nominating Committee.

BOARD OF GOVERNORS

Role and Responsibility of the Board of Governors

In addition to serving as the administrative body of the Association, the Board of Governors, according to the ABA Articles of Incorporation also is identified as the Association’s board of directors. After consulting with governance experts, the Commission recommends clarification that the Board of Governors operates as the Association’s board of directors with the understanding that while selected from different constituencies the members of the Board have a fiduciary responsibility to the Association to act solely in the best interests of the ABA. This recommendation makes the language of the Constitution and Bylaws consistent with the Association’s Articles of Incorporation. In addition, the Commission recommends that the petitions to serve on the Board include the document listing the Role of a Member of the Board of Governors (“Overview”) and that each candidate be required to sign the Overview acknowledging that he/she will abide by the document which outlines the responsibilities of the members of the Board.

Composition of the Board

The Commission weighed the need to ensure that the Board adequately represents the interests and concerns of all of its various constituencies against the need to ensure that the Board’s size enables it to function effectively and efficiently. Once again, after consultation with current and former members of the Board, as well as lawyers known for their expertise in governance, the Commission determined that slightly increasing the size of the Board was warranted for several reasons. First, the Board itself operates through three main committees, essentially mini boards. If the Commission’s recommendation to increase section representation by three and add a member who self-identifies as either LGBT or as having a disability, the committees would have approximately 14 members each, which should not impair their effectiveness. Second,
because the Board is charged with the management and strategic goal setting of the Association, which directly impacts the work of sections/divisions, it is important that sections have additional representation to ensure that their voices and interests are considered. Finally, adding one additional Goal III member-at-large seat for an individual who self-identifies as either LGBT or as having a disability will likewise promote diversity of viewpoint and provide greater representation to those Goal III constituencies.

Redistricting

The Board of Governors presently includes representatives from each state, the District of Columbia, and Puerto Rico allocated among 18 districts. The 1995 Decennial Governance review established the present baseline for assignment of states to districts. The 1995 Governance Commission recommended and the House of Delegates approved the grouping of states according to lawyer population within those districts in a series of one-state, two-state, three-state and four-state districts. With this allocation, all states were represented on the Board of Governors at least 3 of every 12 years.

While the 1995 Commission grouped some states in relative geographic proximity, this was not a primary goal of the 1995 district allocation. Rather, the intent was to group states with similar numbers of lawyers. The 1995 allocation has now remained in place for 20 years without change. However, lawyer population has not remained similarly static in all instances. The Governance Commission was charged with examining the current district allocation and determining whether any adjustment was necessary given intervening changes in lawyer population since 1995.

As a result of this review, it appears that 4 states may not be grouped with states with similar lawyer population. New York and California are the only states in one-state districts and they remain the states with the largest lawyer populations by a wide margin. With one exception, the states ranked 3 through 10 in lawyer population are all in two-state districts with representation on the Board of Governors 3 years out of 6 years. Massachusetts ranks 8th in lawyer population with 43,008 lawyers, but is presently in a three-state district. Conversely Virginia is ranked 13th in lawyer population with 24,268 lawyers and is in a two-state district. Based upon this review, the Governance Commission recommends that Massachusetts be moved into a two-state district with the District of Columbia and that Virginia be moved into a three-state district with Connecticut and Michigan. (A table showing lawyer population for each state is attached for reference.) However, further clarification is needed regarding population numbers for several states, including Kentucky, Oklahoma, Oregon, and Puerto Rico. The Commission has requested the Board of Governors to extend its term through 2016 for the purpose of completing the review of lawyer population figures and making any appropriate recommendation to the House regarding districting.

The Commission considered the following principles in developing its recommendation regarding districting:
States will be allocated to one-state, two-state, three-state or four-state districts based on the following principles:
The higher the population of the state, the fewer states should be in the district with it. Unavoidably, there will be a range in the population of states in each size district. The allocation of states to districts should seek the narrowest range that is feasible. There should be no overlap in the population of states in different size districts. For example, the states with the lowest population of lawyers in a three-state district should have more lawyers than the state with the highest population of lawyers in any four-state district.

MEMBERS-AT-LARGE
The Commission recommends that the sunset provision in §§7.2, 9.2(a), 16.1 and 26 be eliminated and the minority and women at-large seats be made permanent.

The at-large seats were created as part of the 1995 Governance review. While in the twenty (20) years since their creation, the ABA and the profession has seen an increase in the number of minorities and women, the Commission believes that the increase in participation at the Board and Nominating Committee level has not been consistent and on par with the increase in the profession. On the Board, beginning in 2004, the largest number of women who were not officers or minority/woman member in a class has been three (2006 out of a total of 14 nominees; 2009 out of 13 nominees; 2010 out of 14 nominees); the largest number of minorities who were not officers or minority/woman member in a class has been three (2014 out of 13 nominees) and there were several years when there were no minority members in a class of nominees (2005, 2008, and 2009). On the Nominating Committee, beginning in 2004, the largest number of women serving as state delegates was sixteen (in 2013). Among section delegates, there have been at most four women (2012-2013). With regard to minority men and women serving on the Nominating Committee no more than six men have served as state delegate (2010, 2011, 2012) and no more than five women (2010, 2012) with most years no more than three serving as state delegate. Among section delegates, there have been no more than two minority men (2013) and only one minority woman (2008, 2009). So while there has been some progress, the Commission believes more progress is necessary. In addition, voting to make the at-large seats permanent further demonstrates the continued commitment of the ABA to diversity and inclusion.

OFFICERS OF THE ASSOCIATION
The Commission considered the officer positions and recommends amendments to §§7.2, 8.3(c), 29.8 to eliminate the positions of secretary-elect and treasurer-elect. The Commission believes that these positions are no longer necessary given that nominations are made in February which provides the nominees with approximately six months to become informed regarding the workings and issues involved in the responsibilities of the two positions. In addition, given the responsibilities of relevant
senior staff to provide support to the positions of secretary and treasurer, it is the view of the Commission that six months is sufficient time for the nominees to receive training and understand the requirements of the positions.

In addition, the elimination of these two positions will allow the opportunity to increase the number of section-at-large members and at-large members on the Board without unduly increasing its size.

CONCLUSION

From its inception, the goal of the Commission has been to foster a transparent and collaborative process among all stakeholders in the evaluation of the current governance of the ABA and formulate recommendations to address the future needs of the Association. The Commission sought to obtain as broad a perspective of views as possible. During this extensive process, the Commission heard from numerous ABA members about their concerns regarding the daunting challenges facing the Association, both in recruitment and membership retention. The Commission was heartened by sentiments expressed by many that, in this decennial review, compromise would be important and necessary.

The recommendations of the Commission reflect its efforts to ensure a "win-win" for the Association as a whole as well as for its various constituent voices. The Commission believes that the proposed recommendations, which reflect the unanimous consensus of its members, will strengthen the ABA and enhance its ability to serve as an effective national voice for its members and for the profession in an ever-changing legal marketplace.

Respectfully Submitted,
Roberta D. Liebenberg, Co-Chair
James Dimos, Co-Chair

Members
Michelle Behrke
Deborah Enix-Ross
Ellen J. Flannery
Honorable James S. Hill
Kay H. Hodge
Tommy Preston, Jr.
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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 2014 Annual Meeting, the Committee has received six (6) proposals to amend the Association's Constitution and Bylaws. The Committee met during the Midyear Meeting on February 7, 2015, in Houston, Texas, and on May 1, 2015, 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 §10.1 of the Constitution to change the name of the Section of Individual Rights and Responsibilities to the Section of Civil Rights and Social Justice, 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 §28.4 of the Bylaws to permit an Association member who is neither a staff member nor a law student member to be reimbursed from Association funds for travel expenses to attend the Annual Meeting within the budgetary constraints of that reimbursing entity, be approved as to form. However, the Committee took no position on the substance of the proposal.

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Proposal 4

The Committee voted to recommend that the proposal to amend §30.5 of the Bylaws to allow associate members to serve on the Council and in the leadership of the Section of Dispute Resolution, 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 §31.7 of the Bylaws to change the jurisdictional statement of the Standing Committee on Legal Assistance for Military Personnel to clarify the scope of legal matters within the jurisdiction, 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 proposals to amend various sections of the Association’s Constitution and Bylaws regarding the Board of Governors (including redistricting), House of Delegates, Nominating Committee and Officers, be approved as to form. However, the Committee took no position on the substance of the proposals.

Respectfully submitted,

Mary L. Smith, Chair
Michael G. Bergmann
Lajuana Davis
David S. Houghton
Sandra R. McCandless
Robert D. Oster
Ethan Tidmore
Mary T. Torres, Board Liaison

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Ethan Tidmore
Mary T. Torres, Board Liaison
RESOLUTION

RESOLVED, That the American Bar Association approve the following program:

1. Tarrant County Community College, Paralegal Studies Program, Hurst, TX.

FURTHER RESOLVED, That the American Bar Association reapprove the following paralegal education programs: Fremont College, Paralegal Studies Program, Merrill, CA; Pasadena City College, Paralegal Studies Program, Pasadena, CA; University of California Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA; Nova Southeastern University, Paralegal Studies Program, Ft. Lauderdale, FL; Clayton State University, Legal Studies Program, Morrow, GA; Robert Morris University, Paralegal Studies Program, Chicago, IL; Robert Morris University, Paralegal Studies Program, Springfield, IL; Stevenson University, Paralegal Program, Owings Mills, MD; Webster University, Legal Studies Program, St. Louis, MO; University of Great Falls, Paralegal Studies Program, Great Falls, MT; College of St. Mary, Legal Studies Program, Omaha, NE; Mercer County Community College, Paralegal Studies Program, Trenton, NJ; LIU Brooklyn, Paralegal Studies Program, Brooklyn, 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, Jamaica, NY; Cuyahoga Community College, Paralegal Studies Program, Parma, OH; Kent State University, Paralegal Studies Program, Kent, OH; East Central University, Legal Studies Program, Ada, OK; Central Pennsylvania College, Paralegal and Legal Studies Program, Sunbury, PA; Harrisburg Area Community College, Paralegal Studies Program, Harrisburg, PA; Walters State Community College, Paralegal Studies Program, Morristown, TN; Lamar State College Port Arthur, Paralegal Program, Port Arthur, TX; Tacoma Community College, Paralegal Program, Tacoma, WA; and Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI.

FURTHER RESOLVED, That the American Bar Association withdraw the approval of Everest College Phoenix, Paralegal Program, Phoenix, AZ, and Rockford Career College, Paralegal Program, Rockford, IL, at the request of the institutions.

FURTHER RESOLVED, That the American Bar Association extend the terms of approval until the February 2016 Midyear Meeting of the House of Delegates for the following programs: University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK; Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; Samford University, Division of Paralegal Studies, Birmingham, AL; University of Arkansas Fort Smith, Legal
Studies and Paralegal Studies Programs, Knoxville, TN; Kaplan College, General Practice
Paralegal Program, Dallas, TX; Lee College, Paralegal Studies Program, Baytown, TX; J.
Sargeant Reynolds Community College, Paralegal Studies Program, Richmond, VA;
Marymount University, Paralegal Studies Program, Arlington, VA; Edmonds Community
College, Paralegal Program, Lynnwood, WA; Chippewa Valley Technical College, Paralegal
Program, Eau Claire, WI; Western Technical College (formerly Western Wisconsin Technical College),
Paralegal Program, La Crosse, WI; Casper College, Paralegal Studies Program, Casper, WY; and
Laramie County Community College, Paralegal Studies Program, Cheyenne, WY.
In August, 1973, the House of Delegates of the American Bar Association adopted the Guidelines for the Approval of Legal Assistant Education Programs as recommended by the Special Committee on Legal Assistants, now known as the Standing Committee on Paralegals. The Committee subsequently developed supporting evaluative criteria and procedures for seeking American Bar Association approval. Applications for approval were accepted formally beginning in the Fall of 1974.

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

For an initial approval, the inspection team is chaired by a member of the Approval Commission of the Standing Committee on Paralegals, or a specially designated past commissioner, and consists of a lawyer, an experienced paralegal or a director of another institution’s program. On a reapproval visit, the team, which is again chaired by a member of the Approval Commission, or a specially designated past commissioner, includes two of the previously mentioned groups. The purpose of the on-site visit is to verify the information provided in the self-evaluation report and to acquire supplementary information helpful to making an evaluation and which can only be obtained through the person-to-person contact and the observation the visit affords. The visit is conducted over a one and one-half day period and consists of a series of meetings with the advisory committee, students, faculty and other individuals involved to a lesser extent and in some aspect of the program, such as the registrar, financial officer, placement coordinator and admissions and counseling staff. The team also observes legal specialty classes in session and may inspect various program data, such as detailed curriculum materials, admission and placement records, student evaluations of faculty members, and courses.

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

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

Tarrant County Community College, Paralegal Studies Program, Hurst, TX

Tarrant County Community College is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in paralegal studies.
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:

Fremont College, Paralegal Studies Program, Cerritos, CA
Fremont College is a four-year private college accredited by the Accrediting Commission for Career Schools and Colleges. The college offers an Associate of Arts degree in Paralegal Studies.

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

University of California Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA
University of California Santa Barbara is a four-year university accredited by the Western Association of Schools and Colleges. The university offers a Certificate in Paralegal Studies.

Nova Southeastern University, Paralegal Studies Program, Ft. Lauderdale, FL
Nova Southeastern University is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers a Bachelor of Science degree and a Certificate in Paralegal Studies.

Clayton State University, Legal Studies Program, Morrow, GA
Clayton State University is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers an Associate of Applied Science degree, a Bachelor of Science degree, and a Certificate in Paralegal Studies.

Robert Morris University, Paralegal Studies Program, Chicago, IL
Robert Morris University, Chicago, IL is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers an Associate of Applied Science degree in Paralegal Studies.

Robert Morris University, Paralegal Studies Program, Springfield, IL
Robert Morris University, Springfield, IL is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers an Associate of Applied Science degree in Paralegal Studies.

Stevenson University, Paralegal Program, Owings Mills, MD
Stevenson University is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers a Bachelor of Science degree and a second Bachelor of 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:

Fremont College, Paralegal Studies Program, Cerritos, CA
Fremont College is a four-year private college accredited by the Accrediting Commission for Career Schools and Colleges. The college offers an Associate of Arts degree in Paralegal Studies.

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

University of California Santa Barbara, Paralegal Professional Certificate Program, Santa Barbara, CA
University of California Santa Barbara is a four-year university accredited by the Western Association of Schools and Colleges. The university offers a Certificate in Paralegal Studies.

Nova Southeastern University, Paralegal Studies Program, Ft. Lauderdale, FL
Nova Southeastern University is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers a Bachelor of Science degree and a Certificate in Paralegal Studies.

Clayton State University, Legal Studies Program, Morrow, GA
Clayton State University is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers an Associate of Applied Science degree, a Bachelor of Science degree, and a Certificate in Paralegal Studies.

Robert Morris University, Paralegal Studies Program, Chicago, IL
Robert Morris University, Chicago, IL is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers an Associate of Applied Science degree in Paralegal Studies.

Robert Morris University, Paralegal Studies Program, Springfield, IL
Robert Morris University, Springfield, IL is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers an Associate of Applied Science degree in Paralegal Studies.

Stevenson University, Paralegal Program, Owings Mills, MD
Stevenson University is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers a Bachelor of Science degree and a second Bachelor of Science degree in Paralegal Studies.
Webster University, Legal Studies Program, St. Louis, MO
Webster University is a four-year university accredited by the North Central Association of Colleges and Schools. The university offers a Bachelor of Arts degree, a Master of Arts degree, and a Certificate in Paralegal Studies.

University of Great Falls, Paralegal Studies Program, Great Falls, MT
University of Great Falls is a four-year university accredited by the Northwest Association of Schools and Colleges. The university offers an Associate of Science degree, a Bachelor of Science degree, and an option with the U.S. Army for completion of a degree.

College of Saint Mary, Legal Studies Program, Omaha, NE
College of Saint Mary is a four-year college accredited by the North Central Association of Colleges and Schools. The college offers a Bachelor of Arts degree, an Associate of Arts degree and a Certificate in Paralegal Studies.

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

LIU Brooklyn, Paralegal Studies Program, Brooklyn, NY
LIU Brooklyn is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers a Certificate in Paralegal Studies and a Certificate in Legal Nurse Consulting.

Nassau Community College, Paralegal Program, Garden City, NY
Nassau 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.

New York City College of Technology, Paralegal Program Brooklyn, NY
New York City College of Technology is a four-year technical college accredited by the Middle States Association of Colleges and Schools. The college offers a Bachelor of Science degree and an Associate of Applied Science degree in Paralegal Studies.

Queen's College, Paralegal Studies Program, Queens, NY
Queen's College is a four-year college accredited by the Middle States Association of Colleges and Schools. The college offers a Certificate in Paralegal Studies.

St. John's University, Legal Studies Program, Jamaica, NY
St. John's University is a four-year university accredited by the Middle States Association of Colleges and Schools. The university offers a Bachelor of Science degree and an Associate of Science degree in Paralegal Studies.
Cuyahoga Community College, Paralegal Studies Program, Parma, OH
Cuyahoga 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 Business degree, a Certificate in Paralegal Studies, and a Certificate in Legal Nurse Consulting.

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

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

Central Pennsylvania College, Paralegal and Legal Studies Program, Summerdale, PA
Central Pennsylvania College is a four-year college accredited by the Middle States Association of Colleges and Schools. The college offers a Bachelor of Science degree and an Associate of Science degree in Paralegal Studies.

Harrisburg Area Community College, Paralegal Studies Program, Harrisburg, PA
Harrisburg Area Community College is a two-year community college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Arts degree and a Certificate in Paralegal Studies.

Walters State Community College, Paralegal Studies Program, Morristown, TN
Walters State 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.

Lamar State College Port Arthur, Paralegal Program, Port Arthur, TX
Lamar State College Port Arthur 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.

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

Northeast Wisconsin Technical College, Paralegal Program, Greenbay, WI
Northeast Wisconsin Technical College is a two-year technical 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.
Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2016 Midyear Meeting of the American Bar Association House of Delegates.

University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK;
Auburn University Montgomery, Paralegal Education Program, Montgomery, AL;
Samford University, Division of Paralegal Studies, Birmingham, AL;
University of Arkansas Fort Smith, Legal Assistance/Paralegal Program, Fort Smith, AR;
NorthWest Arkansas Community College, Paralegal Studies Program, Bentonville, AR;
Coastline Community College, Paralegal Studies Program, Fountain Valley, CA;
El Camino Community College, Paralegal Studies Program, Torrance, CA;
Miramar College, Legal Assistant Program, San Diego, CA;
Mt. San Antonio College, Paralegal/Legal Specialty Program, Walnut, CA;
National University, Paralegal Studies Program, Los Angeles, CA;
Santa Ana College, Paralegal Studies Program, Santa Ana, CA;
University of California LA-UCLA Ext, Paralegal Training Program, Los Angeles, CA;
University of California, Irvine Extension, Paralegal Certificate Program, Irvine, CA;
University of California, San Diego, Legal Assistant Training Program, La Jolla, CA;
Norwalk Community College, Legal Assistant Program, Norwalk, CT;
Quinnipiac University, Legal Studies Program, Hamden, CT;
Widener University Law Center, Legal Education Institute, Wilmington, DE;
Seminole State College of Florida Fka Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL;
South University, Legal Studies/Paralegal Studies Program, Royal Palm Beach, FL;
Kirkwood Community College, Legal Assistant Program, Cedar Rapids, IA;
Northwestern College Fka Northwestern Business College, Institute of Legal Studies, Bridgeview, IL;
Roosevelt University, Paralegal Studies Program, Chicago, IL;
William Rainey Harper College, Paralegal Studies Program, Palatine, IL;
Vincennes University, Paralegal Program, Vincennes, IN;
Bowling Green Community College of Western Kentucky University, Paralegal Studies Program, Bowling Green, KY;
Sullivan University, Louisville, Institute for Legal Studies, Louisville, KY;
University of Louisville, Paralegal Studies Program, Louisville, KY;
Tulane University, Paralegal Studies Program, New Orleans, LA;
Baker College of Auburn Hills, Paralegal Program, Auburn Hills, MI;
Eastern Michigan University, Legal Assistant Program, Ypsilanti, MI;
Henry Ford Community College, Paralegal Studies Program, Dearborn, MI;
Oakland Community College, Paralegal Program, Farmington Hills, MI;
Oakland University, Paralegal Program, Rochester, MI;
Minnesota State University Moorhead, Paralegal Program, Moorhead, MN;
Missouri Western State University, Legal Studies Program, St. Joseph, MO;
University of Southern Mississippi, Paralegal Studies Program, Hattiesburg, MS;
University of Montana Missoula, Paralegal Studies Program, Missoula, MT;

University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK;
Auburn University Montgomery, Paralegal Education Program, Montgomery, AL;
Samford University, Division of Paralegal Studies, Birmingham, AL;
University of Arkansas Fort Smith, Legal Assistance/Paralegal Program, Fort Smith, AR;
NorthWest Arkansas Community College, Paralegal Studies Program, Bentonville, AR;
Coastline Community College, Paralegal Studies Program, Fountain Valley, CA;
El Camino Community College, Paralegal Studies Program, Torrance, CA;
Miramar College, Legal Assistant Program, San Diego, CA;
Mt. San Antonio College, Paralegal/Legal Specialty Program, Walnut, CA;
National University, Paralegal Studies Program, Los Angeles, CA;
Santa Ana College, Paralegal Studies Program, Santa Ana, CA;
University of California LA-UCLA Ext, Paralegal Training Program, Los Angeles, CA;
University of California, Irvine Extension, Paralegal Certificate Program, Irvine, CA;
University of California, San Diego, Legal Assistant Training Program, La Jolla, CA;
Norwalk Community College, Legal Assistant Program, Norwalk, CT;
Quinnipiac University, Legal Studies Program, Hamden, CT;
Widener University Law Center, Legal Education Institute, Wilmington, DE;
Seminole State College of Florida Fka Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL;
South University, Legal Studies/Paralegal Studies Program, Royal Palm Beach, FL;
Kirkwood Community College, Legal Assistant Program, Cedar Rapids, IA;
Northwestern College Fka Northwestern Business College, Institute of Legal Studies, Bridgeview, IL;
Roosevelt University, Paralegal Studies Program, Chicago, IL;
William Rainey Harper College, Paralegal Studies Program, Palatine, IL;
Vincennes University, Paralegal Program, Vincennes, IN;
Bowling Green Community College of Western Kentucky University, Paralegal Studies Program, Bowling Green, KY;
Sullivan University, Louisville, Institute for Legal Studies, Louisville, KY;
University of Louisville, Paralegal Studies Program, Louisville, KY;
Tulane University, Paralegal Studies Program, New Orleans, LA;
Baker College of Auburn Hills, Paralegal Program, Auburn Hills, MI;
Eastern Michigan University, Legal Assistant Program, Ypsilanti, MI;
Henry Ford Community College, Paralegal Studies Program, Dearborn, MI;
Oakland Community College, Paralegal Program, Farmington Hills, MI;
Oakland University, Paralegal Program, Rochester, MI;
Minnesota State University Moorhead, Paralegal Program, Moorhead, MN;
Missouri Western State University, Legal Studies Program, St. Joseph, MO;
University of Southern Mississippi, Paralegal Studies Program, Hattiesburg, MS;
University of Montana Missoula, Paralegal Studies Program, Missoula, MT;
Respectfully submitted,
Laura C. Barnard, Chair
Standing Committee on Paralegals
August 2015
GENERAL INFORMATION FORM

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

1. Summary of Resolution(s).
   
   This Resolution recommends that the House of Delegates grants approval to one program, grants reapproval to twenty-six paralegal education programs, withdraws the approval of two programs at the request of the institutions, and extends the term of approval to several paralegal education programs.

2. Approval by Submitting Entity.
   
   April 2015

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

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

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

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

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

   Approved programs are notified of the action of the House of Delegates by the Standing Committee on Paralegals. The programs are monitored for compliance during the approval term by the Standing Committee.
8. **Cost to the Association.** (Both direct and indirect costs.)

None

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

N/A

10. **Referrals.**

None

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

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

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

Laura C. Barnard
Chair, Business Department
Director, Paralegal Program
Lakeland Community College
7700 Clocktower Drive
Kirtland, OH 44094
(440) 525-7325
Cell: (517) 485-3232
E-Mail: jbarnard@lakelandcc.edu

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

None

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

N/A

10. **Referrals.**

None

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

Peggy C. Wallace, Staff Counsel
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EXECUTIVE SUMMARY

1. Summary of the Resolution
   This Resolution recommends that the House of Delegates grants approval to one
   program, grants reapproval to twenty-six programs, withdraws the approval of two
   programs, and extends the term of approval of sixty-seven programs.

2. Summary of the issue which the Resolution Addresses
   The programs recommended for approval and reapproval in the enclosed report
   meet the Guidelines for the Approval of Paralegal Education Programs.

3. Please Explain How the Proposed Policy Position will address the issue
   The programs recommended for approval and reapproval in this report have
   followed the procedures required by the Association and are in compliance with
   the Guidelines for the Approval of Paralegal Education Programs.

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

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

FURTHER RESOLVED, That the American Bar Association urges Congress to amend 31 U.S.C. §330(d) to clarify that the Treasury Department has the authority to regulate persons who advise taxpayers with respect to the reporting of items on Federal tax returns, provided that the American Bar Association continues to oppose any legislation establishing or expanding the regulatory jurisdiction of any federal agency with respect to the regulation of lawyers engaged in the practice of law, except to the extent that lawyers are currently subject to regulation by a federal agency under existing law.
I. Introduction

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

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

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

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

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

Only certain types of persons are permitted to “practice before the Internal Revenue Service.” Specifically, section 103.3 of Circular 230 authorizes attorneys, CPAs, and certain other categories of “practitioners” to “practice before the Internal Revenue Service.”

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

This Association has previously addressed the scope and extent of standards of practice that may be adopted by federal agencies concerning the conduct of attorneys who practice before such agencies. Specifically, a resolution addressing this question was adopted by the House of Delegates in 1982, and an additional resolution concerning this issue was adopted by the Board of Governors at its meeting in October 2009. Consistent with those prior resolutions, copies of which are attached to this Report, this resolution would not permit the expansion of regulation of attorneys who practice before the Treasury Department. Rather, this resolution would urge Congress to clarify that the level and scope of regulation that existed prior to the recent judicial decisions was appropriate. Moreover, this resolution expressly reaffirms the Association’s long standing opposition to any legislation that would establish or expand the regulatory jurisdiction of any federal agency with respect to the regulation of lawyers engaged in the practice of law, except to the extent that lawyers are currently subject to regulation by a federal agency under existing law.

II. Recent Judicial Decisions

On February 11, 2014, the U.S. Court of Appeals for the D.C. Circuit held in Loving v. Internal Revenue Service, 742 F.3d 1013 (D.C. Cir. 2014) that amendments made to Circular 230 in 2011 to expand its scope and cover all paid tax return preparers exceeded the statutory

Enrolled agents, enrolled actuaries and enrolled retirement plan agents, which are specified categories of individuals who apply to the Internal Revenue Service for the right to represent taxpayers, also are subject to regulation under Circular 230. To be qualified under those rules, applicants must satisfactorily complete a written examination, or otherwise demonstrate proficiency through years of technical experience as an Internal Revenue Service employee, and once accepted, these individuals are required to complete a minimum number of hours of continuing education credits, including a minimum number of hours of ethics or professional conduct study credits.

On February 11, 2014, the U.S. Court of Appeals for the D.C. Circuit held in Loving v. Internal Revenue Service, 742 F.3d 1013 (D.C. Cir. 2014) that amendments made to Circular 230 in 2011 to expand its scope and cover all paid tax return preparers exceeded the statutory

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authority provided to the Treasury Department in 31 U.S.C. § 330. The Court of Appeals affirmed the District Court’s prior order enjoining the Internal Revenue Service from implementing a broad program to test the initial competence of hundreds of thousands of previously unregulated paid tax return preparers and to subject those persons to minimum continuing education requirements. The Court based its decision on six separate factors, including a finding that paid tax return preparers are not “representatives” of persons before the Treasury Department within the meaning of 31 U.S.C. § 330 and that “practice” before the Treasury Department is limited to adversarial or other proceedings where a taxpayer designates a representative to act on his or her behalf, and does not include the submission of tax returns or other documents to the Internal Revenue Service.

Six months after the D.C. Circuit’s decision in Loving, the U.S. District Court for the District of Columbia in Ridgely v. Lew, 55 F. Supp. 3d 89 (D.D.C. 2014), held that regulations set forth in section 10.27 of Circular 230 limiting certain contingent fee arrangements that can be charged by tax practitioners also exceeded the statutory authority of 31 U.S.C. § 330. The plaintiff in Ridgely was a CPA who was admitted as a “representative” of persons before the Treasury Department in other contexts. The District Court held, however, that this did not provide a basis for subjecting the plaintiff’s fee practices to regulation under Circular 230 when preparing “ordinary” refund claims because that activity, standing alone, did not constitute “practice” before the Treasury Department. Other cases brought in courts around the country have relied on the D.C. Circuit’s decision in Loving to further challenge the Treasury Department’s authority to regulate paid tax advisors.8

The Loving Court noted that its decision should not be construed as a commentary on the need to regulate paid return preparers. “It might be that allowing the IRS to regulate tax-return

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

  6 For example, in Sexton v. Hawkins, a disbanded lawyer sought to enjoin OPR from investigating his tax return preparation related activities, including opinion writing, and to enjoin the Internal Revenue Service from limiting his access to the electronic tax return filing system. After being disbailed in South Carolina following his conviction in federal court for mail fraud and money laundering, OPR suspended his right to practice before the Internal Revenue Service. The District Court denied OPR’s motion to dismiss, finding that the court had jurisdiction to hear the claim and enjoining OPR from enforcing its document requests during the pendency of the action. Sexton v. Hawkins, 2014 U.S. Dist. LEXIS 157766 (D. Nev. Oct. 30, 2014). See also, Davis v. Internal Revenue Service, Case No. 14-cv-0261 (N.D. Ohio) (individual challenged the Internal Revenue Service’s authority to limit access to its electronic tax return filing system; case was settled in December 2014). Separately, in American Institute of Certified Public Accountants v. Internal Revenue Service, 2014 U.S. Dist. LEXIS 157723 (D.D.C. Oct. 27, 2014), the District Court dismissed on jurisdictional grounds a challenge brought by the national association representing CPAs to the Internal Revenue Service’s authority to promulgate a voluntary preparer compliance program through Rev. Proc. 2014-42, 2014-29 I.R.B. 192; the AICPA has appealed that decision to the Court of Appeals for the D.C. Circuit.
II. Broad Consequences of the Recent Judicial Decisions

In *Leving v. Ridgely*, the courts interpreted the statutory reference to “practice of representatives of persons before the Department of the Treasury” in 31 U.S.C. § 330(a). The rationale in those cases may be extended to support the conclusion that any work done by a paid tax professional that does not involve direct interaction with the Internal Revenue Service in an adversarial or other proceeding in which the professional is authorized to bind the taxpayer is not subject to regulation under 31 U.S.C. § 330.7 This interpretation is noteworthy given that in 2004 Congress amended 31 U.S.C. § 330 to clarify that the statute does not limit the authority of the Treasury Department to impose practice standards applicable to certain written tax advice.8 Accordingly, without amendment, 31 U.S.C. § 330, as construed by the Court of Appeals in *Leving*, authorizes the Treasury Department to regulate certain written tax advice that is at least one step removed from the preparation and filing of a tax return, but does not authorize the regulation of persons who prepare, sign and file hundreds or thousands of tax returns with multiple millions of dollars in tax consequences. *Ridgely* goes one step further in calling into question the Treasury Department’s authority to regulate a broader range of conduct by paid tax advisors that does not necessarily involve direct interaction with the Internal Revenue Service in 7 Legislation has been introduced in the 114th Congress providing for broader regulation of paid tax return preparers, but has not yet been acted upon. See S. 137, Taxpayer Protection and Preparer Proficiency Act of 2015, 114th Cong. (2015). The Obama Administration has also supported legislation authorizing the Treasury Department and Internal Revenue Service to regulate paid tax return preparers. See General Explanation of the Administration’s Fiscal Year 2016 Revenue Proposals, at 259 (February 2015). Similar legislation authorizing the regulation of paid tax return preparers has been introduced in prior Congresses but has also never been enacted. See, e.g., S. 802, Low Income Taxpayer Protection Act of 2001, 107 Cong. (2001); H.R. 1528, Tax Administration Good Government Act, 108th Cong. (2004); Telephone Excise Tax Repeal Act of 2005, 109th Cong. (2005); Taxpayer Protection and Assistance Act of 2007, 100th Cong. (2007); H.R. 5716, Taxpayer Bill of Rights Act of 2008, 100th Cong. (2008); H.R. 1387, Taxpayer Protection and Preparer Fraud Prevention Act of 2013, 113th Cong. (2013); H.R. 4463, Tax Refund Protection Act of 2014, 113th Cong. (2013); H.R. 4470, The Tax Return Preparer Accountability Act of 2014, 113th Cong. (2013).

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

9 American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, § 820. Notably, the “covered opinion” rules in prior Circular 230 section 10.35 that the amendment to 31 U.S.C. § 350 was designed to cover have recently been repealed based on a determination by the Treasury Department and the Internal Revenue Service that the burden they imposed outweighed the benefit they provided in terms of improved compliance with the tax law. T.D. 9699, 79 Fed. Reg. 33685 (June 12, 2014).
a proceeding in which the tax advisor can bind the taxpayer. These include, for example, portions of the general due diligence rule in Circular 230 section 10.22, rules governing the submission of tax return forms and other documents to the Internal Revenue Service in Circular 230 section 10.34, and rules governing certain written tax advice in Circular 230 section 10.37.

As the scope and complexity of the tax law continues to grow, taxpayers have increasingly come to rely on assistance from paid tax advisors in meeting their tax obligations. This has increased the need for those tax advisors to maintain a high level of competence and, at the same time, increased the need for oversight to ensure that minimum competence levels are maintained and that appropriate steps are taken to address incompetent and unscrupulous conduct. The Internal Revenue Code includes a number of civil and criminal penalty provisions that allow indirect regulation of paid tax advisors, but only through resource-intensive, after-the-fact proceedings. Recent studies have found that these provisions have not been adequate to ensure that paid tax advisors provide the necessary level of assistance to their clients in complying with their obligations under the tax law.10

Despite the complexity of the Internal Revenue Code and the Treasury Regulations, unregulated return preparers are not subject to minimum educational or other competency requirements. In contrast, attorneys and CPAs must complete prescribed courses of study and then pass state licensing exams to practice their professions. Enrolled agents who do not have prior experience working for the Internal Revenue Service must pass a written examination to demonstrate their knowledge of tax law and procedure. In addition, attorneys and CPAs are subject to ethical requirements and, in most jurisdictions, continuing professional education requirements.12

The proposed resolution is intended to benefit consumers and the overall tax system. Given the pervasive and growing role of the tax law in a wide range of socio-economic activities, the need for some level of affirmative practice standards applicable to paid tax advisors cannot be disputed. Yet, under Loving, the vast majority of paid tax return preparers are subject to no 10

These include the preparer penalty provisions in 26 U.S.C. §§ 6694 and 6695, the penalty under 26 U.S.C. § 6700 for promoting abusive tax shelters, the penalty under 26 U.S.C. § 6701 for aiding and abetting an understatement of tax and the civil injunction provisions in 26 U.S.C. §§ 7407 and 7408. See also 26 U.S.C. § 7201 (criminal sanction for attempting to evade or defeat tax), § 7206(3) (criminal sanction for willful fide tax or assistance in making false or fraudulent submissions to the IRS), § 7212 (criminal sanction for attempting to interfere with the administration of the tax law), and § 7216 (improper disclosure of taxpayer return information).


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

a proceeding in which the tax advisor can bind the taxpayer. These include, for example, portions of the general due diligence rule in Circular 230 section 10.22, rules governing the submission of tax return forms and other documents to the Internal Revenue Service in Circular 230 section 10.34, and rules governing certain written tax advice in Circular 230 section 10.37.

As the scope and complexity of the tax law continues to grow, taxpayers have increasingly come to rely on assistance from paid tax advisors in meeting their tax obligations. This has increased the need for those tax advisors to maintain a high level of competence and, at the same time, increased the need for oversight to ensure that minimum competence levels are maintained and that appropriate steps are taken to address incompetent and unscrupulous conduct. The Internal Revenue Code includes a number of civil and criminal penalty provisions that allow indirect regulation of paid tax advisors, but only through resource-intensive, after-the-fact proceedings. Recent studies have found that these provisions have not been adequate to ensure that paid tax advisors provide the necessary level of assistance to their clients in complying with their obligations under the tax law.11

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such standards. Because more than half of all taxpayers pay paid return preparers who are excluded from regulation under Circular 230 as a result of the Loving decision, a substantial portion of the nearly 150 million tax returns filed each year are prepared by persons who are not subject to any generally applicable standards of competency. Beyond obvious examples of fraud and incompetence, the absence of any generally applicable competency standards is a driving factor in negligent or unintentional noncompliance with the tax law. Not only does this noncompliance result in lost tax revenue, it also imposes significant risks on taxpayers and the Internal Revenue Service in dealing with erroneous tax filings. In light of the complexity of the tax law, there is a continued and growing demand for paid tax advisors. Maintaining minimum competence and practice standards will strengthen the market for tax advisors while at the same time protecting consumers and safeguarding the tax system.

It is important to note that Circular 230 regulates all professionals practicing before the Internal Revenue Service, including lawyers. The Association has a long history of opposing efforts by federal agencies to establish ethical standards governing federal agency practice, arguing that primary regulation and oversight of the legal profession should be vested in the highest court of the state in which the lawyer is licensed. However, the Association has long recognized limited exceptions to this view for regulation by the specified agencies, including the Internal Revenue Service. For example, at the 1982 Annual Meeting, the House of Delegates adopted a resolution that provides, in part, that “Except as existing legislation expressly provides, no federal agency shall adopt standards of practice to govern the professional conduct of attorneys who represent clients subject to the administrative procedures for regulation by that federal agency . . .” The report that accompanied that Resolution explained that existing legislation authorized both the Internal Revenue Service and the Patent Office to regulate attorneys and other practitioners appearing before those agencies, and suggested that because (i) practice before those agencies is conducted by many practitioners who are not attorneys, and (ii) the bars of those agencies did not appear dissatisfied with the current state of affairs, it would not be prudent to advocate for change of those exceptions. To ensure that there is no conflict between the proposed Resolution and the Resolutions adopted in 1982 and 2009, the proposed Resolution expressly reaffirms the Association’s long-standing opposition to any legislation establishing or expanding the regulatory jurisdiction of any federal agency with respect to the

12 Introduction to the April 2014 GAO Report, supra.

14 Recognizing the importance of the issue and to fill the regulatory vacuum, four states have implemented their own regimes for regulating otherwise unlicensed paid return preparers. Cal. Code Regs. tit. 22, §§ 22250 et seq.; Md. Code Ann. §§ 10-824 et seq.; NY CLS Tax §§ 32 et seq.; Or. Rev. Stat. §§ 673.457 et seq. While paid return preparers in these states are subject to regulation and oversight, their reach is limited to state tax matters and would only cover issues pertaining to federal tax returns if there happened to be substantive overlap between applicable state and federal tax regimes.


16 Similarly, in October 2009 the Board of Governors adopted a resolution opposing provisions of the Consumer Financial Protection Act that would regulate lawyers engaged in the practice of law “except to the extent that lawyers are currently subject to regulation by a federal agency under existing law.”
regulation of lawyers engaged in the practice of law, except to the extent that lawyers are currently subject to regulation by a federal agency under existing law.

We further note that the Association's long standing opposition to federal agency regulation of lawyers is based, in large part, on the view that lawyers are adequately regulated by state courts. In most areas this view cannot be disputed. However, when it comes to matters involving information reflected on federal tax returns, or otherwise obtained by the Internal Revenue Service in the course of an examination of tax return information, state courts or bar associations will not ordinarily have access to such information, and, therefore, ordinarily would not be in any position to know that a lawyer might have undertaken the type of conduct with respect to which discipline might be appropriate. For example, under Circular 230, OPR can sanction a practitioner for "giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under Federal tax laws."17 The Internal Revenue Service ordinarily would learn about such conduct only through conducting examinations of tax returns filed by clients who received such opinions from the practitioner. However, because information obtained by the Internal Revenue Service in such examinations is confidential and cannot be disclosed by the Internal Revenue Service except pursuant to limited exceptions set forth in 26 U.S.C. § 6103, the Internal Revenue Service could not disclose such information to a state court or bar association that regulates the lawyer who gave such opinions.18 Similarly, under Circular 230, OPR can sanction a practitioner for "willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax."19 Again, unless the Internal Revenue Service proceedings an individual for such actions, information on nonfiling of Federal tax returns or nonpayment of Federal taxes would not be available to a state court or bar association that regulates lawyers. Because the Internal Revenue Service is the only agency that would have access to such information, it is uniquely positioned to use that information, when appropriate, to ensure that persons who violate the Federal tax laws are not counseling or otherwise representing other taxpayers before the agency. Moreover, because state courts do not have access to such information, regulation of lawyers on the basis of information available only to the Internal Revenue Service does not undermine the ability of state courts to supervise and discipline lawyers. Accordingly, the limited exception to the Association's long standing opposition to federal agency regulation of lawyers to permit the Internal Revenue Service to regulate lawyers and others who practice before the agency is justified to ensure that those who fail to comply

17 31 C.F.R. § 10.51(a)(13).
18 An exception to the general confidentiality of tax return information would permit the Internal Revenue Service to disclose information regarding the assessment of certain tax return preparer penalties to a state agency that regulates tax return preparers, but only upon the written request of that state agency. See 26 U.S.C. § 6103(k)(5).
19 31 C.F.R. § 10.51(a)(6).

regulation of lawyers engaged in the practice of law, except to the extent that lawyers are currently subject to regulation by a federal agency under existing law.

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IV. Conclusion

To improve compliance with tax law and reduce the risks imposed on taxpayers and the Internal Revenue Service by erroneous tax returns, and to ensure that all paid return preparers demonstrate satisfaction of minimum competency requirements and will be subject to oversight by OPR, this resolution urges Congress to clarify the authority of the Treasury Department to regulate any person who, for compensation, advises or represents taxpayers with respect to any matters arising under the Internal Revenue Code, including the reporting of items on Federal tax returns. Specifically, this resolution urges Congress to amend 31 U.S.C. §§ 330(a) and (b) to allow the Treasury Department to regulate non-attorney paid “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and the regulations thereunder.

This resolution also addresses the authority of the Treasury Department to regulate persons (including attorneys) who advise taxpayers with respect to the reporting of items on federal tax returns by urging Congress to allow such regulation. In doing so, we are mindful of prior resolutions of the Association concerning the extent to which federal agencies may establish standards of practice for attorneys who practice before such agencies. Specifically, a resolution addressing the scope and extent of standards of practice that may be adopted by federal agencies concerning the conduct of attorneys who practice before such agencies was adopted by the House of Delegates in 1982 (107 Annus. Rep. A.B.A. 605, 669 (1982)), and an additional resolution was adopted by the Board of Governors at its meeting in October 2009. The purpose of this resolution is not to permit the expansion of the regulation of attorneys who practice before the Treasury Department but, rather, to urge Congress to clarify that the level and scope of regulation that existed prior to the Loving and Ridgely decisions was appropriate. Under current law, regulations generally applicable to civil preparer penalties appropriately limit the definition of persons subject to those penalties to exclude persons who are not compensated for their work in assisting taxpayers in preparing returns;21 or whose work is otherwise too attenuated from the filing of a tax return or other submission to the Internal Revenue Service.22 In addition, the regulations at issue in Loving did not impose any application requirements, examinations, or continuing education requirements on lawyers or other regulated professionals because the bar rules or other applicable professional standards already operate to ensure that lawyers and other regulated professionals meet the minimum competency requirements that the regulations sought to impose on the otherwise non-regulated paid return preparers. Those limitations should continue to apply and we do not support any expansion of

20 In this regard, we note that, with respect to the delivery of tax advice, Circular 230 focuses on patterns of conduct, and that OPR traditionally has pursued discipline only in cases where it has determined that the conduct at issue was particularly egregious.
22 Treas. Reg. § 301.7701-15(a) (requiring that a person prepare “all or a substantial portion of” a tax return or claim for refund in order to be considered a “tax return preparer”).

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with the Federal tax laws, or engage in a pattern of giving false or incompetent opinions on matters of Federal tax law, can be disciplined when appropriate.

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the scope of Circular 230 beyond its present form. In particular, we would expressly oppose any expansion of the authority of the Treasury Department or the Internal Revenue Service to regulate lawyers in matters that extend beyond the Federal tax laws and practice before the Internal Revenue Service, or if any such expansion of authority would adversely affect key aspects of the confidential lawyer-client relationship such as the attorney-client privilege and client confidentiality, or would otherwise undermine the ability of state courts to supervise and discipline lawyers.

Respectfully submitted,

Armando Gomez, Chair
Section of Taxation
August 2015

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23 We also note that Circular 230 expressly recognizes privilege, and does not adversely affect the confidential lawyer-client relationship. See, e.g., 31 C.F.R. §§ 10.20 and 10.71(d).
1. Summary of Resolution(s).

The Resolution urges Congress to amend 31 U.S.C. § 330(a) and (b) to include within the scope of those provisions non-attorney “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and Treasury Department regulations promulgated thereunder. The Resolution also urges Congress to amend 31 U.S.C. § 330(d) to clarify that the Treasury Department has the authority to regulate persons who advise taxpayers with respect to the reporting of items on Federal tax returns, provided that the Resolution expressly reaffirms the American Bar Association’s long standing opposition to any legislation establishing or expanding the regulatory practice of any federal agency with respect to the regulation of lawyers engaged in the practice of law, except to the extent that lawyers are currently subject to regulation by a federal agency under existing law. These changes would reverse the effect of recent judicial decisions limiting Treasury’s authority to regulate the conduct of paid tax advisors, including tax return preparers, to protect consumers and safeguard the tax system.

2. Approval by Submitting Entity.

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

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

A similar resolution was submitted in February 2015. After consultation with other Sections, that resolution was withdrawn and revised.

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

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

Separately, the Standing Committee on Ethics and Professional Responsibility has issued formal opinions addressing the ethical relationship between the Internal Revenue Service and lawyers practicing before it,\(^3\) ethical considerations for lawyers issuing tax shelter opinions,\(^4\) and standards governing the position a lawyer may advise a client to take on a tax return.\(^5\) While limited to standards applicable to lawyers, the guidance expressed in those opinions has influenced the standards reflected in Treasury Department Circular 230. The proposed Resolution would not affect the guidance expressed in these formal opinions.

The Association has previously addressed the scope and extent of standards of practice that may be adopted by federal agencies concerning the conduct of attorneys who practice before such agencies. Specifically, a resolution addressing this question was adopted by the House of Delegates in 1982,\(^6\) and an additional resolution concerning this issue was adopted by the Board of Governors at its meeting in October 2009. Consistent with those prior resolutions, this resolution would not permit the expansion of regulation of attorneys who practice before the Treasury Department. Rather, this resolution would urge Congress to clarify that the level and scope of regulation that existed prior to the Loving and Ridgely decisions was appropriate.

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

\(^1\) Statement on behalf of the American Bar Association Section of Taxation before the IRS Forum on Preparer Regulations (July 30, 2009), available at: http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2009/090724irspreparerreview.ntaxreturnpreparerreview.authcheckdam.pdf.
\(^2\) Comments on Summary of Staff Discussion Draft on Reforming Tax Administration (June 25, 2014), available at: http://www.americanbar.org/content/dam/aba/administrative/taxation/policy/062514comments.authcheckdam.pdf.
\(^3\) Formal Opinion 314 (April 27, 1965).
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Legislation has been introduced in the 114th Congress providing for broader regulation of paid tax return preparers, but has not yet been acted upon.7 The Obama Administration has also supported legislation authorizing the Treasury Department and Internal Revenue Service to regulate paid tax return preparers.8 Similar legislation authorizing the regulation of paid tax return preparers has been introduced in prior Congresses but has also never been enacted.9

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

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


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


None known at this time.

10. Referrals.

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

8 See General Explanation of the Administration’s Fiscal Year 2016 Revenue Proposals, at 259 (February 2015).
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

   Armando Gomez  
   Chair, Section of Taxation  
   c/o Skadden, Arps, Slate, Meagher & Flom LLP  
   1440 New York Avenue, NW  
   Washington, DC 20005  
   Office: (202) 371-7868  
   armando.gomez@skadden.com

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

   Susan P. Serota  
   Delegate, Section of Taxation  
   c/o Pillsbury Winthrop Shaw Pittman LLP  
   1540 Broadway  
   New York, NY 10036  
   Office: (212) 858-1125  
   Mobile: (917) 359-9776  
   susan.serota@pillsburylaw.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges Congress to amend 31 U.S.C. § 330(a) and (b) to include within the scope of those provisions non-attorney “tax return preparers,” as that term is defined by 26 U.S.C. § 7701(a)(36) and Treasury Department regulations promulgated thereunder. The Resolution also urges Congress to amend 31 U.S.C. § 330(d) to clarify that the Treasury Department has the authority to regulate persons who advise taxpayers with respect to the reporting of items on Federal tax returns, provided that the Resolution expressly reaffirms the American Bar Association’s long standing opposition to any legislation establishing or expanding the regulatory jurisdiction of any federal agency with respect to the regulation of taxpayers engaged in the practice of law, except to the extent that taxpayers are currently subject to regulation by a federal agency under existing law. These changes would reverse the effect of recent judicial decisions limiting Treasury’s authority to regulate the conduct of paid tax advisors, including tax return preparers, to protect consumers and safeguard the tax system.

2. Summary of the Issue that the Resolution Addresses

In 2011 the Treasury Department promulgated regulations under 31 U.S.C. § 330 to regulate paid tax return preparers. The Court of Appeals for the D.C. Circuit held in Loving v. Internal Revenue Service, 742 F.3d 1013 (D.C. Cir. 2014), that those regulations exceeded the Treasury Department’s authority. More recently, in Ridgely v. Lew, 55 F. Supp. 3d 69 (D.D.C. 2014), the U.S. District Court for the District of Columbia invalidated other regulations promulgated by the Treasury Department under 31 U.S.C. § 330 that limited certain contingent fee arrangements charged by tax practitioners. These and other cases have limited the Treasury Department’s authority to regulate the conduct of persons who, for compensation, advise or represent taxpayers with respect to any matters arising under the Internal Revenue Code, including the reporting of items on Federal tax returns.

3. Explanation of how the Resolution Will Address the Issue

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

No minority views have been identified in opposition to the proposed Resolution. Comments expressed in February 2015 questioned whether the proposed Resolution might conflict with the Resolutions adopted in 1982 and 2009. Those comments have been addressed in the revised proposed Resolution.
RESOLVED, That the American Bar Association urges state and territorial bar licensing entities to eliminate any questions that ask about mental health history, diagnoses, or treatment when determining character and fitness for the purpose of bar admission. The questions should focus instead on conduct or behavior that impairs an applicant’s ability to practice law in a competent, ethical, and professional manner.

FURTHER RESOLVED, That this resolution replaces the 1994 policy, ABA Resolution No. 110, Aug. 1994 (94A110).
Introduction

State and territorial bar examiners have a duty to the public to ensure that all licensed attorneys are fit to practice law. To fulfill this duty, state bars ask all applicants a series of moral character and fitness questions. Many of these questions focus on conduct or behavior, including deceit, fraud, financial irresponsibility, criminal arrests and convictions, academic, employment and professional discipline, and driving under the influence of alcohol or drugs.¹

In addition to conduct and behavior-related questions, many state bars inquire about applicants’ mental health diagnoses and treatment. Applicants who answer these questions affirmatively are subject to burdensome supplemental investigations that are not imposed on other applicants. Typically, they are required to authorize their treatment providers to release information relating to mental health diagnoses and treatment, including medical and hospitalization records. These records contain highly sensitive, personal information such as details about childhood, parents, siblings, and sexual history that is not relevant to one’s ability to practice law. These applicants may also have to undergo examinations by independent psychiatrists or psychologists at their expense. Questions about mental health history, diagnoses, or treatment are not only unduly intrusive, but screen out or tend to screen out individuals with disabilities, are ineffective for the presumed purpose of identifying unfit applicants, and are likely to deter individuals from seeking mental health counseling and treatment.

Purpose

This Resolution urges state and territorial bar licensing entities, when determining character and fitness for the purpose of bar admission, to eliminate all questions that ask about mental health history, diagnoses, or treatment and instead focus on conduct or behavior that in a material way impairs an applicant’s ability to practice law competently, ethically, and professionally.

This Resolution replaces ABA Resolution No. 110 (Aug. 1994),² which stated:

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

¹ See, e.g., NATIONAL CONFERENCE OF BAR EXAMINERS, REQUEST FOR PREPARATION OF A CHARACTER REPORT, at 13, available at http://ncbex.org/character-and-fitness (e.g., “Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?”).
² Available at http://www.americanbar.org/content/dam/aba/directories/policy/1994_am_110.authcheckdam.pdf.

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In addition to conduct and behavior-related questions, many state bars inquire about applicants’ mental health diagnoses and treatment. Applicants who answer these questions affirmatively are subject to burdensome supplemental investigations that are not imposed on other applicants. Typically, they are required to authorize their treatment providers to release information relating to mental health diagnoses and treatment, including medical and hospitalization records. These records contain highly sensitive, personal information such as details about childhood, parents, siblings, and sexual history that is not relevant to one’s ability to practice law. These applicants may also have to undergo examinations by independent psychiatrists or psychologists at their expense. Questions about mental health history, diagnoses, or treatment are not only unduly intrusive, but screen out or tend to screen out individuals with disabilities, are ineffective for the presumed purpose of identifying unfit applicants, and are likely to deter individuals from seeking mental health counseling and treatment.

Purpose

This Resolution urges state and territorial bar licensing entities, when determining character and fitness for the purpose of bar admission, to eliminate all questions that ask about mental health history, diagnoses, or treatment and instead focus on conduct or behavior that in a material way impairs an applicant’s ability to practice law competently, ethically, and professionally.

This Resolution replaces ABA Resolution No. 110 (Aug. 1994),² which stated:

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

¹ See, e.g., NATIONAL CONFERENCE OF BAR EXAMINERS, REQUEST FOR PREPARATION OF A CHARACTER REPORT, at 13, available at http://ncbex.org/character-and-fitness (e.g., “Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?”).
² Available at http://www.americanbar.org/content/dam/aba/directories/policy/1994_am_110.authcheckdam.pdf.
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.3

Although the 1994 policy was a step forward in limiting unnecessary and intrusive questions regarding mental health and treatment, it stopped short of calling for their elimination. The drafters recognized it might well become necessary to revisit the issue in the future, and expressed their intent “to pursue further dialogue and interaction.” The 20 years that have elapsed since adoption of that policy have brought significant developments in the law and our understanding of mental disabilities that call into question the continued use of even narrowly-tailored questions regarding mental health and treatment. It has become clear that questions about mental health history, diagnoses, or treatment are inherently discriminatory, invade privacy, stigmatize and needlessly exclude applicants with disabilities, are ineffective in identifying applicants who are unfit, and discourage some applicants from seeking necessary treatment. By calling for the elimination of such questions, the proposed Resolution will help ensure that bar applicants with disabilities are assessed—like other applicants—solely on the basis of their fitness to practice law.

3 This concern was acknowledged in a subsequent policy adopted by the House of Delegates in February 1998 regarding character and fitness determinations of state and territorial judicial candidates, nominees, or appointees. Available at http://www.americanbar.org/content/dam/aba/directories/policy/1998甬ny114-autohandbook.pdf. Brought before the House by the Commission on Mental and Physical Disability Law (now the Commission on Disability Rights), the Resolution stated:

RESOLVED, That the American Bar Association recommends that when making character and fitness determinations of state and territorial judicial candidates, nominees, or appointees, any nominating or evaluating entity: 1) consider the privacy concerns of the candidates; 2) narrowly tailor questions concerning physical and mental disabilities or physical and mental health treatment in order to elicit information about current fitness to serve as a judge, with such reasonable modifications as may be required; and 3) take steps to ensure that the process does not have the effect of discouraging those who would seek judicial office from pursuing professional assistance when needed. (Emphasis added.)

FURTHER RESOLVED, That fitness determinations may include specific, targeted questions about state and territorial judicial candidate or’s behavior, conduct, or current impairment as it affects the ability to serve as a judge.

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.3

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FURTHER RESOLVED, That fitness determinations may include specific, targeted questions about state and territorial judicial candidate’s behavior, conduct, or current impairment as it affects the ability to serve as a judge.
Developments Since Adoption of 1994 Policy

In early 2014, the U.S. Department of Justice (DOJ) informed the states of Vermont\(^4\) and Louisiana\(^5\) that their questions about bar applicants’ mental health diagnoses and treatment violate Title II of the Americans with Disabilities Act (ADA). The decision with respect to Louisiana followed an extensive investigation in response to a complaint filed by Louisiana bar applicants, resulting in a formal finding in February 2014 that Louisiana’s character and fitness questions regarding applicants’ mental health diagnoses and treatment discriminate based on disability and thus violate Title II of the ADA. The questions at issue were:

25. Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

26A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?

26B. If your answer to Question 26A is yes, are the limitations caused by your mental health condition or substance abuse problem reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?

27. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational institution?

\(^4\) Letter from Jocelyn Samuels, Acting Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to Karen L. Richards, Executive Director, Vermont Human Rights Commission (Jan. 21, 2014) [Vermont Letter]. Richards had requested the Department of Justice’s (DOJ) position regarding the extent to which states may consider mental health in their screening process for bar applicants. DOJ stated its position— the questions are eligibility criteria that screen out or tend to screen out persons with disabilities and subject them to additional burdens; the questions are unnecessary because questions related to applicants’ conduct are sufficient and most effective to evaluate fitness; and the questions are unnecessary because they do not effectively identify unfit applicants— but did not make a formal finding because no complaint was lodged.

Applicants who responded affirmatively to these questions were required to provide a detailed description of their condition(s) and treatment, list all of their treatment providers, and authorize their providers to release all of their medical records to bar officials.

The DOJ found that, to comply with the ADA, "attorney licensing entities must base their admissions decisions on an applicant’s record of conduct, not the applicant’s mental health history." Moreover, “[r]quiring about bar applicants’ medical conditions substitutes inappropriate questions about an applicant’s status as a person with a disability for legitimate questions about an applicant’s conduct.” The DOJ concluded that the questions at issue: impermissibly screen out or tend to screen out persons with disabilities “based on stereotypes and assumptions about their disabilities,” are unnecessary to determine fitness and ineffective in identifying unfit applicants; and are likely to deter individuals from seeking mental health counseling and treatment and, therefore, are counterproductive to the goal of ensuring fitness to practice.

As to Question 26A, the DOJ found that asking whether a condition or impairment “if untreated could affect” an applicant’s ability to practice law “reduces the question to one about an applicant’s diagnosis, not the effect of that diagnosis on his or her fitness to practice law.” Because the question “considers an applicant’s disability in a hypothetical future untreated form,” it fails to "inform an assessment of how the disability affects the applicant’s current fitness to practice law." It assumes “a worst case scenario that may never come to pass” and “appears rooted in unfounded stereotypes about individuals with these diagnoses.”

6 Id. at 5. 7 Id. at 9. 8 Id. at 18. See also Carol J. Banta, Note, The Impact of the Americans with Disabilities Act on State Bar Examiners: Impurities into the Psychological History of Bar Applicants, 94 Mich. L. Rev. 167, 176-78 (1995).
9 Findings Letter, supra note 4, at 19, 22. See also Banta, supra note 8, at 182-83.
10 Findings Letter, supra note 4, at 22. Id. at 23. See also Jennifer McPherson Hughes, Suffering in Silence: Questions Regarding an Applicant's Mental Health on Bar Applications and Their Effect on Low Students Heading Treatment, 28 J. Legal Prof. 187 (2003-04); Banta, supra note 8, at 183-84.
11 Findings Letter, supra note 4, at 22. See also Nafziger v. United Air Lines, Inc., 527 U.S. 471, 472 (1999) (finding that a "disability" under the Americans with Disability Act "exists only where the impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken.").
12 Id. at 22. See also Nafziger v. United Air Lines, Inc., 527 U.S. 471, 472 (1999) (finding that a "disability" under the Americans with Disability Act "exists only where the impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken.").
13 Id. at 22. See also Nafziger v. United Air Lines, Inc., 527 U.S. 471, 472 (1999) (finding that a "disability" under the Americans with Disability Act "exists only where the impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken.").
14 Id.
In August 2014, the DOJ entered into a settlement agreement with the Louisiana Supreme Court to ensure the right of qualified bar applicants with mental health conditions to have equal access to the legal profession. The settlement requires the court to revise its character and fitness questions so that they focus on an applicant’s conduct or behavior. Under the terms of the settlement, inquiries into mental health diagnoses or treatment are prohibited unless an applicant voluntarily discloses this information (1) to explain conduct or behavior that may otherwise warrant denial of admission or (2) in response to Question 26A on the National Conference of Bar Examiners’ Character and Fitness application, “Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?”

Although the settlement did not require Louisiana to eliminate Question 26A, at least one other state has done so. The Tennessee Board of Law Examiners decided to remove Questions 26A and B from the National Conference of Bar Examiners’ application accessed by applicants for licensure in Tennessee.

The Law and its Application

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” The federal agency charged with enforcing Title II is the DOJ. It regulates bar public entities from “administer[ing] a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of a disability.” In addition, public entities cannot impose or apply “eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary” for the provision of the service, program, or activity. Also prohibited are policies that “unnecessarily impose


26. A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner? C. Yes ☐ No ☐ B. If your answer to Question 26A is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?


28 C.F.R. § 35.130(b)(6).

Id. § 35.130(b)(8).

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28 C.F.R. § 35.130(b)(6).

Id. § 35.130(b)(8).
requirements or burdens on individuals with disabilities that are not placed on others.21 State bars are public entities and thus fall within the scope of coverage under Title II.

As the DOJ concluded in its Findings Letter, inquiries about bar applicants’ mental health diagnoses and treatment constitute eligibility criteria that screen out or tend to screen out individuals based on speculation, stereotypes, and assumptions about their disabilities.22 Bar examiners appropriately ask a wide range of questions that focus on conduct relevant to applicants’ fitness. Such conduct-based questions are not only sufficient to evaluate fitness, but also the most effective means for doing so.23 A history of mental health diagnosis or treatment is not a useful predictor of future attorney misconduct or malpractice.

Furthermore, as the DOJ observed, questions concerning mental health diagnoses and treatment are counterproductive to the goal of ensuring the fitness of licensed attorneys by deterring applicants from seeking counseling and treatment for mental health concerns.24 Applicants fear that such disclosures may preclude them from becoming

23 Findings Letter, supra note 4, at 19.
24 Id. at 22-23. See also Allison Wiebeboe, Bar Application Mental Health Inquiries: ‘Unwise and Unlawful’, 24 J. HUMAN RIGHTS 12, 14 (Winter 1997) (“But questions about behavior, not mental health treatment, would more accurately discover potentially problematic practitioners.”); Banta, supra note 8, at 186-87 (“Permissible inquiries into conduct and behavior to determine fitness are sufficient to serve bar examiners’ purpose of protecting the public.”); Phyllis Coleman & Ronald A. Shellow, Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution, 29 J. Litits. 147, 149 (1994) (“Consequently, professional licensing boards should inquire about conduct, not treatment for or history of mental illness substance abuse.”)
25 See, e.g., Jon Bauer, The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act, 49 UCLA L. REV. 93, 114 (2001) (“There is simply no evidence to suggest applicants’ mental health histories are significantly predictive of future misconduct or malpractice as an attorney.”); Banta, supra note 8, at 182-83 (Psychological records are not a reliable predictor of behavior, since the range and severity of individuals’ problems varies); In re Petition & Questionnaire for Admission to R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996) (“Research has failed to establish that a history of previous psychiatric treatment can be correlated with an individual’s capacity to function effectively in the workplace.”); Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. 430, 446 (E.D. Va. 1995) (licensing questions related to mental health status or treatment were unnecessary where “the Board presented no evidence of correlation between obtaining mental counseling and employment dysfunction”); past behavior is the best predictor of present and future mental fitness.”); Application of Underwood, 1993 WL 664928, *2 (Mr. Dec. 7, 1993) (“Although it is certainly permissible for the Board of Bar Examiners to fashion other questions more directly related to behavior that can affect the practice of law without violating the ADA, the questions and medical authorization objected to here are contrary to the ADA.”) (emphasis in original).
26 Findings Letter, supra note 4, at 22-23 (citing American Psychiatric Ass’n, Recommended Guidelines Concerning Disciplinary and Confidentiality (1999) (disclosure policies “intend to shield individuals who are in need of treatment from seeking help”); Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. 430, 445-66 (E.D. Va. 1995) (bar examiners’ mental health question “deters the counseling and treatment from which persons with mental disabilities could benefit” and “has strong negative stigmatic and deterrent effects upon applicants”); In re Petition & Questionnaire for Admission to R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996) (bar examiners’ questions regarding mental health may prevent a person in need of treatment from seeking assistance). In re
lawyers. In addition, such questions may prevent applicants who seek treatment from being totally candid about their conditions, thereby limiting the health care provider’s ability to accurately diagnose and treat them.\textsuperscript{27}

Finally, unnecessary burdens are placed on applicants who respond affirmatively to mental health questions.\textsuperscript{28,29} Typically, they are subjected to further investigations such as interviews and independent psychiatric or psychological examinations at their own expense, and are required to submit detailed medical information related to their condition and treatment, including copies of medical and hospitalization records. These records contain highly sensitive, personal information such as details about childhood, parents, siblings, and sexual history that is not relevant to one’s ability to practice law. These practices impose significant expense, delays, and invasions of privacy on applicants with disabilities.

\textbf{Conclusion}

Nearly 25 years after the passage of the ADA, in the wake of intervening court and federal agency decisions, the time has come for the ABA to update its position on this issue of great significance to our profession and our members. The ABA has long sought to “promote the full and equal participation in the association, our profession, and the justice system by all persons.”\textsuperscript{29} In 2000, the House adopted policy urging courts to ensure equal access to justice by making courthouses and court proceedings accessible. The accompanying report cited the congressional finding that people with disabilities frequently face restrictions and limitations “resulting from stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”\textsuperscript{30}

Petition of Frickies, 515 N.W.2d 741 (Minn. 1994) (“the prospect of having to answer the mental health questions in order to obtain a license to practice causes many law students not to seek necessary counseling”)

\textsuperscript{27} Findings Letter, supra note 4, at 24 (citing Clark v. Va. Bd. of Bar Exam’r’s, 880 F. Supp. 430, 438 (E.D. Va. 1995); U.S. Dep’t of Health & Human Services, Mental Health: A Report of the Surgeon General 441 (1999) (“evidence also indicates that people may become less willing to make disclosures during treatment if they know that information will be disseminated beyond the treatment relationship”).

\textsuperscript{28} Vermont Letter, supra note 3, at 8-9 (citing Clark v. Va. Bd. of Bar Exam’r’s, 880 F. Supp. at 442-43 (E.D. Va. 1995) (finding applicants with disabilities cannot be subjected to additional unnecessary burdens); Ellen S. v. Fla. Bd. of Bar Exam’r’s, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994); Med. Soc’y of N.J. v. Jacobs, 1993 WL 413016, at *8 (D.N.J. Oct. 5, 1993) (holding that licensing board may not place burden of additional investigations on applicants who respond affirmatively to questions about disability status); Brewer v. Wis. Bd. of Bar Exam’r’s, 2006 WL 346938, at *10 (E.D. Wis. Nov. 28, 2006) (concluding licensing entities may not require additional investigation solely because of applicants’ disabilities)). See also Coleman & Shellow, supra note 23, at 148 (stating that applicants who disclose a history of illness or treatment are not injured because their admission is delayed, are compelled to reveal private details of mental health, and face the stigma associated with mental conditions).

\textsuperscript{29} ABA Goal III: Eliminate Bias and Enhance Diversity, available at http://www.americanbar.org/about_the_abas/aba-mission-goals.html.

\textsuperscript{30} ABA Recommendation No. 112, at 4 (2000).
The signatories to the 1994 Resolution wrote in the conclusion to their report, “What has been accomplished to date represents both progress and the promise of greater progress.” We believe this new Resolution represents that “greater progress” and we commend it to the House of Delegates for its favorable consideration.

Respectfully submitted,
Mark D. Agrust
Chair
Commission on Disability Rights

Mark I. Schickman
Chair
Section of Individual Rights and Responsibilities

August 2015
1. **Summary of Resolution(s).** This resolution urges state and territorial bar licensing entities, in their character and fitness determinations for the purpose of bar admission, to eliminate any questions that ask about mental health history, diagnoses, or treatment and instead focus questions on conduct or behavior that in a material way impairs an applicant’s ability to practice law in a competent, ethical, and professional manner. This resolution replaces the 1994 policy (ABA Resolution No. 110 (Aug. 1994)).

2. **Approval by Submitting Entity.** The Commission on Disability Rights approved the resolution at its fall meeting in Washington, DC, on November 17, 2014. The Section of Individual Rights and Responsibilities approved the resolution at its council meeting on April 24, 2015.

3. Has this or a similar resolution been submitted to the House or Board previously? No. However, this proposed resolution would replace existing policy as noted under Question 4.

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

In August 1994, the House passed policy—submitted by the Commission on Mental and Physical Disability Law (now the Commission on Disability Rights), the Section of Legal Education and Admissions to the Bar, and the Association of American Law Schools—recommending that state and territorial bar examiners, when making character and fitness determinations for the purpose of bar admission, should 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. The proposed resolution would replace this 1994 policy by urging state and territorial bar licensing entities and the National Conference of Bar Examiners to no longer ask any questions concerning mental health and treatment.

In February 1998, the House passed policy—submitted by the Commission on Mental and Physical Disability Law (now the Commission on Disability Rights) and the Section of Individual Rights and Responsibilities—urging any nominating or evaluating entity making character and fitness determinations of state judicial
candidates, nominees, and appointees to: consider the privacy interests of the candidates; narrowly tailor questions concerning physical and mental disabilities and health treatment in order to elicit information about current fitness to serve as a judge, with such reasonable modifications as may be required; and take steps to ensure that the evaluation process does not have the effect of discouraging those who would seek judicial office from pursuing professional assistance when needed. This policy would not be affected by the proposed resolution, which does not address judicial character and fitness determinations.

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. Adoption of this policy will enable the Association to urge state and territorial bar licensing entities to eliminate any questions that ask about mental health history, diagnoses, or treatment and instead ask questions that focus on conduct or behavior that in a material way impairs a bar applicant's ability to practice law in a competent, ethical, and professional manner.

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

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

10. Referrals.

Criminal Justice Section
Section of Family Law
Section of Legal Education and Admissions to the Bar
Section of Real Property, Trust and Estate Law
Judicial Division
Law Student Division
Senior Lawyers Division
Young Lawyers Division
Association of American Law Schools
National Conference of Bar Examiners
Standing Committee on Client Protection
Standing Committee on Ethics and Professional Responsibility
Standing Committee on Legal Assistance for Military Personnel
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)
   Commission on Disability Rights
   Amy L. Allbright
   1050 Connecticut Avenue, NW Suite 400
   Washington, DC 20036
   (202) 662-1575
   amy.allbright@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.)

   Commission on Disability Rights:
   Mark D. Agrast
   1419 Crittenden St., NW
   Washington, DC 20011
   (202) 305-7851
   agrast@gmail.com

   Section of Individual Rights and Responsibilities:
   Mark I. Schiekman
   Freeland Cooper & Foreman LLP
   Ste. 100
   150 Spear Street
   San Francisco, CA 94105-1541
   (415) 541-0200
   mis@freelandlaw.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges state and territorial bar licensing entities, in their character and fitness determinations for the purpose of bar admission, to eliminate any questions that ask about mental health history, diagnoses, or treatment and instead focus questions on conduct or behavior that in a material way impairs an applicant’s ability to practice law in a competent, ethical, and professional manner. This resolution replaces the 1994 policy (ABA Resolution No. 110 (Aug. 1994)).

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the extent to which questions about mental health history, diagnoses, or treatment are necessary or appropriate in determining an applicant’s character and fitness. It provides that such questions are unnecessary and ineffective in identifying applicants who are unfit and are likely to deter individuals from seeking mental health counseling and treatment. These kinds of questions are counterproductive to the goal of ensuring fitness to practice; unnecessarily invade applicants’ privacy; and impermissibly tend to screen out persons with disabilities based on stereotypes and assumptions about their disabilities, rather than focusing on their conduct or behavior that impairs their ability to practice law in a competent, ethical, and professional manner.

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

The proposed resolution urges state and territorial bar licensing entities to eliminate any questions that ask bar applicants about mental health history, diagnoses, or treatment.

4. Summary of Minority Views

At this time, we are unaware of any opposition. However, to the extent that some licensing entities currently ask questions about mental health history, diagnoses, or treatment, it is possible that there will be some opposition to the resolution.
RESOLUTION

1 RESOLVED, That the American Bar Association adopts the *Model Act Governing the Confidentiality and Expungement of Juvenile Delinquency Records*, dated August, 2015.
Section I. Purpose
Juvenile arrest, law enforcement, court, and probation records are a hindrance to an individual’s present and future ability to obtain employment, education, housing, and credit. This Act is intended to protect juvenile and adult citizens against the damage stemming from their juvenile delinquency records, and the unauthorized use or disclosure of confidential records and any potential stigma that would result from their disclosure.

Section II. Scope
This Act governs the confidentiality and expungement of juvenile delinquency records as those terms are defined in Section III. This Act does not govern public access and admittance to juvenile delinquency court proceedings.

Section III. Definitions
In this Act,
(a) “adjudication” means a juvenile court judge’s determination that a youth committed a delinquent offense. A juvenile adjudication is akin to, but distinct from, an adult criminal conviction.
(b) “conviction” means a judgment or disposition in criminal court against a person following a finding of guilt by a judge or jury.
(c) “expunge” means to physically destroy the records, and in the case of electronic records to delete them, the legal effect of which is that the record never existed. All references to the juvenile’s arrest, detention, adjudication, disposition, and probation must be destroyed and in the case of electronic records deleted from the files of the juvenile court, juvenile probation, law enforcement agencies, and any other person, department, agency, or entity that provided services to the juvenile pursuant to court order. The term is distinguished from “seal” which means to close the record from public viewing so that it cannot be examined by any individual except by court order.
(d) “juvenile” means [reference to definition of juvenile in state law]
(e) “juvenile delinquency record” refers to the records, reports and information maintained in any form, including electronic, by the juvenile court, juvenile probation, and law
enforcement agencies documenting the juvenile’s journey through the juvenile justice system. Although juvenile court, probation, and law enforcement records may have different levels of accessibility, for purposes of expungement, when a court orders expungement of a juvenile record, all law enforcement, juvenile probation, and juvenile court records relating to the juvenile’s delinquency court involvement must be expunged.

Section IV. Confidentiality of Juvenile Delinquency Records Maintained by Juvenile Court and Juvenile Probation

(a) The following records, reports, and information acquired or generated in juvenile courts or juvenile probation concerning juveniles shall be confidential and shall not be open to inspection nor released to any person, department, agency, or entity except as provided elsewhere in this section:

1) Juvenile legal files (including formal documents such as petitions, notices, motions, legal memoranda, orders, and decrees).

2) Law enforcement records, including but not limited to:
   i. Fingerprints.
   ii. DNA samples.

3) State juvenile/criminal justice information system records.

4) Juvenile sex offender registration and notification records.

5) Social records, including but not limited to:
   i. Records of juvenile probation officers.
   ii. Records of the Department of Human Resources [or its equivalent].
   iii. Records of the Department of Children and Youth Services [or its equivalent].
   iv. Medical records.
   v. Psychiatric or psychological records, including records of screening and assessment instruments administered to the juvenile.
   vi. Reports of preliminary inquiries and predisposition studies.
   vii. Supervision records.
   viii. Birth certificates.
   ix. Individualized service plans.
   x. Education records, including, but not limited to, Individualized Education Plans (IEPs) as those terms are defined in the Family Educational Rights and Privacy Act of 1974.
   xi. Detention records.
   xii. Demographic information that identifies a juvenile or the family of a juvenile.

(b) The records, reports, and information described in subsection (a) shall be filed separately from other files and records of the court. The juvenile legal files described in subsection...
(1) of subsection (a) shall be maintained in a separate file from all other juvenile records, reports, and information.

(c) Subject to applicable federal law, the records, reports, and information described in subsection (a) shall not be open to public inspection and shall be open to inspection and copying only by the following under these specified circumstances:

1) The juvenile court having the juvenile before it in any judicial proceeding.
2) Juvenile probation officers or other court professional staff ordered by the juvenile court to serve the juvenile.
3) Representatives of a public or private agency or department having custody or control of the juvenile pursuant to a court’s order.
4) The juvenile and his or her attorney, including an attorney or guardian ad litem who is representing the juvenile in another matter.
5) The parent (except when parental rights have been terminated), the legal guardian, and the legal custodian of the juvenile.
6) The prosecutor authorized to prosecute criminal or juvenile cases under state law.
7) A court in which the juvenile is convicted of a criminal offense for the purpose of imposing sentence upon or supervising the juvenile, or by officials of penal institutions and other penal facilities to which the juvenile is committed, or by a parole board in considering the juvenile’s parole or discharge or in exercising supervision over the juvenile.
8) Any person or agency for research purposes, assuming that person or agency is employed by the state or is under contract with the state and is authorized by [STATE AGENCY] to conduct such research; and the person or agency conducting the research ensures that all documents containing identifying information are maintained in secure locations and that access to such documents by unauthorized persons is prohibited; that no identifying information is included in documents generated from the research conducted; and that all identifying information is deleted from documents used in the research when the research is completed.
9) A person, department, agency, or entity identified in a juvenile court order issued pursuant to subsection (d) or (e).
10) A person, department, agency, or entity identified in subsection (f).

(d) Subject to applicable federal law, upon a written petition and a finding that a release of information will serve to protect the public health or safety, the juvenile court may order release of the juvenile’s name and designated portions of the records, reports, and information described in subsections (a)(1) and (a)(2) to a person, department, entity or agency charged under law to protect the public health or safety. The court may include in its order restrictions on the use and re-disclosure of the released information.

1) The juvenile court having the juvenile before it in any judicial proceeding.
2) Juvenile probation officers or other court professional staff ordered by the juvenile court to serve the juvenile.
3) Representatives of a public or private agency or department having custody or control of the juvenile pursuant to a court’s order.
4) The juvenile and his or her attorney, including an attorney or guardian ad litem who is representing the juvenile in another matter.
5) The parent (except when parental rights have been terminated), the legal guardian, and the legal custodian of the juvenile.
6) The prosecutor authorized to prosecute criminal or juvenile cases under state law.
7) A court in which the juvenile is convicted of a criminal offense for the purpose of imposing sentence upon or supervising the juvenile, or by officials of penal institutions and other penal facilities to which the juvenile is committed, or by a parole board in considering the juvenile’s parole or discharge or in exercising supervision over the juvenile.
8) Any person or agency for research purposes, assuming that person or agency is employed by the state or is under contract with the state and is authorized by [STATE AGENCY] to conduct such research; and the person or agency conducting the research ensures that all documents containing identifying information are maintained in secure locations and that access to such documents by unauthorized persons is prohibited; that no identifying information is included in documents generated from the research conducted; and that all identifying information is deleted from documents used in the research when the research is completed.
9) A person, department, agency, or entity identified in a juvenile court order issued pursuant to subsection (d) or (e).
10) A person, department, agency, or entity identified in subsection (f).
(e) Subject to applicable federal law, upon a written petition and a finding of legitimate interest, and in accordance with the conditions below, the juvenile court may order release of the juvenile’s name and designated portions of the records, reports, and information described in subsections (a)(1) and (a)(2) to another person, department, entity, or agency.

1. The juvenile court shall provide notice to the juvenile and his or her attorney of the petition and an opportunity to object.
2. The juvenile court shall hold a hearing on the petition if requested by the petitioner or the juvenile.
3. The petition filed with the juvenile court and served on the juvenile and his or her attorney shall state the following:
   i. The reason the person, department, entity, or agency is requesting the information;
   ii. The use to be made of the information, including any intended redisclosure; and
   iii. The names of those persons within the department, entity, or agency who will have access to the information.
4. In ruling on the petition, the juvenile court shall consider the privacy interests of the juvenile and potential risk of harm to the juvenile, whether a compelling reason exists for release of the information, and whether the release is necessary for the protection of a legitimate interest.
5. The juvenile court may impose restrictions on the use and re-disclosure of the released information.

(f) Subject to applicable federal and state laws, the juvenile court shall provide access to or release designated portions of the records, reports, and information described in subsections (a)(1) to the person, department, agency, or entity listed below as follows:

1. The juvenile court shall provide access to the state department of motor vehicles to information related to traffic offenses that is specifically required by statute to be given to the department for purposes of regulating automobile licensing.
2. The juvenile court shall provide access to summary information in the juvenile’s record as to the nature of the complaint, a summary of the formal proceedings, and the result of the proceedings to a law enforcement agency for the purpose of executing an arrest warrant or other compulsory process, or for a current investigation.
3. The juvenile court shall notify the law enforcement agency that arrested the juvenile or that initiated the filing of the complaint or petition of the final disposition of the case.

(g) Each person, other than the juvenile who is the subject of a juvenile record, his or her parents, and his or her attorney, to whom a juvenile record or information from a juvenile record is to be disclosed pursuant to this section, is required to execute a nondisclosure agreement.
agreement in which the person certifies that he or she is familiar with the applicable
disclosure provisions and promises not to disclose any information to an unauthorized
person.
(b) The juvenile court shall create a procedure by which the juvenile and his or her attorney
can challenge the correctness of the juvenile’s record, and provide notice to the juvenile
and his or her attorney as to that procedure.
(i) Files inspected under this subsection shall be marked: UNLAWFUL DISSEMINATION
OF THIS INFORMATION IS A [X] DEGREE MISDEMEANOR PUNISHABLE BY A
FINE UP TO [$$XXXX].
(ii) Any person found to be in violation of this section is guilty of a misdemeanor in the [X]
degree or subject to a fine of [$$XXXX]. This subsection shall not apply to the person
who is the subject of the record.

Section V. Confidentiality of Juvenile Delinquency Records Maintained by Law
Enforcement Agencies
(a) Except as provided elsewhere in this section, all law enforcement records, reports or
information, including but not limited to fingerprints and DNA evidence, generated or
acquired by law enforcement agencies relating to the arrest, detention, apprehension, and
disposition of any juvenile under the jurisdiction of the juvenile court shall be maintained
separate from the records and files of other persons. Such records and files shall not be
open to public inspection nor their contents disclosed to the public by any person.
(b) Notwithstanding the foregoing, inspection of such law enforcement records, reports, or
information by the following is not prohibited:
1. The juvenile court having the juvenile before it in any judicial proceeding.
2. Juvenile probation officers or other court professional staff ordered by the juvenile
court to serve the juvenile.
3. The juvenile and his or her attorney, including an attorney or guardian ad litem who
is representing the juvenile in another matter.
4. The parent (except when parental rights have been terminated), the legal guardian,
and the legal custodian of the juvenile.
5. The prosecutor authorized to prosecute criminal or juvenile cases under state law.
6. Representatives of a public or private agency or department having custody or
control of the juvenile pursuant to a court’s order.
7. Any person or agency for research purposes, assuming that person or agency is
employed by the state or is under contract with the state and is authorized by
[STATE AGENCY] services to conduct such research; and the person or agency
conducting the research ensures that all documents containing identifying
information are maintained in secure locations and that access to such documents
by unauthorized persons is prohibited; that no identifying information is included in

agreement in which the person certifies that he or she is familiar with the applicable
disclosure provisions and promises not to disclose any information to an unauthorized
person.
(b) The juvenile court shall create a procedure by which the juvenile and his or her attorney
can challenge the correctness of the juvenile’s record, and provide notice to the juvenile
and his or her attorney as to that procedure.
(i) Files inspected under this subsection shall be marked: UNLAWFUL DISSEMINATION
OF THIS INFORMATION IS A [X] DEGREE MISDEMEANOR PUNISHABLE BY A
FINE UP TO [$$XXXX].
(ii) Any person found to be in violation of this section is guilty of a misdemeanor in the [X]
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separate from the records and files of other persons. Such records and files shall not be
open to public inspection nor their contents disclosed to the public by any person.
(b) Notwithstanding the foregoing, inspection of such law enforcement records, reports, or
information by the following is not prohibited:
1. The juvenile court having the juvenile before it in any judicial proceeding.
2. Juvenile probation officers or other court professional staff ordered by the juvenile
court to serve the juvenile.
3. The juvenile and his or her attorney, including an attorney or guardian ad litem who
is representing the juvenile in another matter.
4. The parent (except when parental rights have been terminated), the legal guardian,
and the legal custodian of the juvenile.
5. The prosecutor authorized to prosecute criminal or juvenile cases under state law.
6. Representatives of a public or private agency or department having custody or
control of the juvenile pursuant to a court’s order.
7. Any person or agency for research purposes, assuming that person or agency is
employed by the state or is under contract with the state and is authorized by
[STATE AGENCY] services to conduct such research; and the person or agency
conducting the research ensures that all documents containing identifying
information are maintained in secure locations and that access to such documents
by unauthorized persons is prohibited; that no identifying information is included in
documents generated from the research conducted; and that all identifying
information is deleted from documents used in the research when the research is
completed.

7) To persons such as law enforcement officials to whom it is necessary to disclose
information for the limited purpose of investigating a crime, apprehending a
juvenile, or determining whether to detain a juvenile. The information released
should include the disposition or current status of the case. The recipient must
execute a nondisclosure agreement that states that the recipient shall only disclose
the information to law enforcement personnel, probation officers, judges and
prosecutors who are currently concerned with the juvenile.

8) A person, department, agency, or entity identified in a juvenile court order issued
pursuant to subsection (c) or (d).

(c) Subject to applicable federal law, upon a written petition and a finding that a release of
information will serve to protect the public health or safety, the juvenile court may order
release of the juvenile’s name and designated portions of the records, reports, and
information described in subsection (a) to a person, department, entity or agency charged
under law to protect the public health or safety. The court may include in its order
restrictions on the use and re-disclosure of the released information.

(d) Subject to applicable federal law, upon a written petition and a finding of legitimate
interest, and in accordance with the conditions below, the juvenile court may order release
of the juvenile’s name and designated portions of the records, reports, and information
described in subsection (a) to another person, department, entity, or agency.

1) The juvenile court shall provide notice to the juvenile and his or her attorney of the
petition and an opportunity to object.

2) The juvenile court shall hold a hearing on the petition if requested by the petitioner
or the juvenile.

3) The petition filed with the juvenile court and served on the juvenile and his or her
attorney shall state the following:

   i. The reason the person, department, entity, or agency is requesting the
      information;
   ii. The use to be made of the information, including any intended re-disclosure; and
   iii. The names of those persons within the department, entity, or agency who
      will have access to the information.

4) In ruling on the petition, the juvenile court shall consider the privacy interests of the
juvenile and potential risk of harm to the juvenile, whether a compelling reason
exists for release of the information, and whether the release is necessary for the
protection of a legitimate interest.

5) The juvenile court may impose restrictions on the use and re-disclosure of the
released information.
Section VI. Expungement

(a) Automatic Expungement.

1) Records, reports and information maintained by juvenile court, juvenile probation and law enforcement agencies that relate to cases in which there was no adjudication of delinquency shall be expunged immediately following the court's discharge of the case. This includes dismissed cases in which the time for the government to appeal the dismissal has ended, diverted cases in which the juvenile has successfully completed diversion, cases in which the juvenile was ruled not involved, cases in which charges were not substantiated, and cases in which the law enforcement agency did not refer the juvenile to court. This requires no application or action on the part of the juvenile. If the chief law enforcement officer of the agency, or his or her designee, certifies in writing that certain information is needed for a pending investigation involving the commission of a felony, that information, and information identifying the juvenile, may be retained in an intelligence file until the investigation is terminated or for one additional year, whichever is sooner.

2) Except for those offenses listed in subsection (b)(2), in cases in which there was an adjudication of delinquency the juvenile court shall automatically order the expungement of the juvenile records two (2) years after the juvenile's case was closed if no delinquency or criminal proceeding is pending and the person has had no subsequent delinquency adjudication or criminal conviction. This requires no application or action on the part of the person. Upon receipt of the court order, all agencies shall immediately destroy the records except that if the chief law enforcement officer of the agency, or his or her designee, certifies in writing that certain information is needed for a pending investigation involving the commission of a felony, that information, and information identifying the
juvenile, may be retained in an intelligence file until the investigation is
terminated or for one additional year, whichever is sooner.

(b) Expungement Upon Application.

1) At any time after a person’s juvenile case has been closed, he or she may petition
the court for expungement of his or her juvenile record. The prosecutor shall
be notified and given the opportunity to present evidence at a hearing in which the
juvenile court will rule on the expungement after considering the following:
   i. the best interests of the person;
   ii. the age of the person during his or her contact with the juvenile court or
      law enforcement agency;
   iii. the nature of the offense;
   iv. the disposition of the case;
   v. the manner in which the person participated in any court ordered
      rehabilitative programming or supervised services;
   vi. the time during which the person has been without contact with the
      juvenile court or with any law enforcement agency;
   vii. whether the person has any subsequent criminal involvement; and
   viii. the adverse consequences the person will suffer as a result of retention of
         his or her record.

2) Persons who were adjudicated delinquent for acts that would have constituted first
degree murder, aggravated rape, or [first degree XXXX] if committed by an adult
may petition the juvenile court for the expungement of the juvenile record five (5)
years after the court’s discharge of the case. The prosecutor shall be notified and
given the opportunity to present evidence at a hearing in which the Juvenile court
will rule on the expungement after considering the factors listed in subsection
(b)(1).

(c) Prior to expungement, the juvenile court shall provide a copy of the records to be
destroyed to the juvenile about whom the records pertain.

(d) Fee for expungement. There shall be no cost for filing a petition requesting expungement
of a juvenile record, for the court to issue an order of expungement, or for agencies
subject to the order to physically expunge the records.

(e) Verification of Expungement. If the court grants the expungement petition, the court shall
order all agencies named in the juvenile’s court and probation files, including each law
enforcement agency, other state agencies who may have records of the juvenile’s
adjudication, public or private correctional, detention, and treatment facilities and each
individual who provided treatment or rehabilitation services for the juvenile under an order of the court, to send that person’s juvenile records to the court. The court shall then destroy the paper and electronic records and mail an Affidavit of Expungement to the person. Additionally, each law enforcement agency shall also affirm in an Affidavit of Expungement to the court that it destroyed all paper and electronic copies of the expunged records, except that if the chief law enforcement officer certifies in writing that certain information is needed for a pending investigation involving the commission of a felony, that information, and information identifying the juvenile, may be retained in an intelligence file until the investigation is terminated or for one additional year, whichever is sooner.

(i) Subsection (c) does not apply any person or agency that previously-received records for research purposes that are subsequently expunged, assuming that person or agency is employed by the state or is under contract with the state and is authorized by [STATE AGENCY] services to conduct such research; and the person or agency conducting the research ensures that all documents containing identifying information are maintained in secure locations and that access to such documents by unauthorized persons is prohibited; that no identifying information is included in documents generated from the research conducted; and that all identifying information is deleted from documents used in the research when the research is completed.

(g) Sanction for disclosure of expunged record. The disclosure of an expunged record in violation of this section shall be unlawful. A person who discloses an expunged record in violation of this section is guilty of a misdemeanor in the [X] degree or a fine of [$$XX].

This subsection shall not apply to the person whose record was expunged.

Section VII. Notification of Expungement Rights

(a) Notification by Juvenile’s Attorney. It shall be the duty of the juvenile’s attorney to inform the juvenile of the consequences of being adjudicated delinquent, the definition of expungement, and the timeline for expungement that is automatic and that which is available upon application.

(b) Notification by Court.

a. At the time of dismissal or disposition of the case, the judge shall inform the juvenile of his or her expungement rights. The court shall provide an expungement information packet to the juvenile, written in plain language, that contains the following:

i. information about the rights and procedures described in Section VI;

ii. instructions to the juvenile that once the case is expunged, it shall be treated as if it never occurred and the juvenile shall not be required to disclose that he or she had a juvenile record;
iii. a sample petition for expungement;
iv. a list of resources for expungement assistance.

b. The failure of the judge to inform the juvenile of the right to petition for
expungement as provided by law does not create a substantive right, nor is does
that failure constitute grounds for a reversal of an adjudication of delinquency, a
new trial, or an appeal.

(c) Notification by Clerk of Court. The clerk of the juvenile court shall send a “Notification
of a Possible Right to Expungement” to the juvenile at the address last received by the
clerk of the juvenile court on the date that the juvenile’s case is discharged from court
supervision. Notification may be by electronic means if available. This message will
include the same information provided by the court at the time of dismissal or disposition
of the case as described in subsection (b).

(d) Notification upon Expungement. Once a juvenile’s records have been expunged by the
court, the clerk of the juvenile court shall send by United States Postal Service to the
juvenile at the address last received by the clerk of the juvenile court a statement
verifying that the records have been expunged.

Section VIII. Effect of Expunged Record

(a) Once a person’s juvenile record is expunged, the person shall not be required to disclose
that he or she had a juvenile record and properly may reply that no record exists upon
inquiry.

(b) The juvenile court, juvenile probation office, law enforcement offices and any agencies
that provided treatment and/or rehabilitation services shall reply, and all persons shall
reply, to an inquiry that no juvenile record exists with respect to that person.

(c) With respect to the matter in which the record was expunged, the person who is the
subject of the record and the person’s parent shall not be held thereafter under any
provision of any laws to be guilty of perjury or otherwise giving a false statement by
reason of the person’s failure to recite or acknowledge such record or response to any
inquiry made of the person or the person’s parent for any purpose, except that if the
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be ordered to testify about the expunged case.

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person is to testify as a witness in a criminal or juvenile delinquency case, the person may
be ordered to testify about the expunged case.
I. Introduction

Juvenile courts were founded on the belief that children should be treated differently than adults, because most will outgrow their youthful behavior and their offenses are largely nonviolent. One of the core principles of the juvenile justice system is rehabilitation – helping troubled youth get back on track so they can become productive, responsible members of the community. Records of juvenile offenses are to be kept confidential in order to give youth a meaningful chance at rehabilitation. But today, records of juvenile court involvement can follow an individual into adulthood, thus creating barriers to success. Since the 1990s, a growing number of states have eliminated earlier practices designed to protect confidentiality such as limiting access to juvenile records. This is an alarming development given that juvenile arrest and court records can be just as damaging to an individual as records of adult criminal justice system involvement.

As the New York Times editorial board recently pointed out, “because some juvenile court records remain open to the public when they should have been sealed or expunged, these young people can be denied jobs, housing and even admission to college.” Making juvenile records publicly available does very little to advance public safety while narrowing the path to success that the juvenile justice system was designed to provide. The American Bar Association has long maintained that the confidentiality of juvenile delinquency records is “a worthwhile goal to pursue in order to limit the risk that labels and stigma may undercut the purposes of juvenile court intervention and cause children to be denied opportunities for which they would otherwise be eligible.”

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2. Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Reform Initiatives in the States: 1994-1996, at 36 (1997), available at https://www.ncjrs.gov/pdfs/reform/pdf; see also Smith v. Daily Mail Pub’g Co., 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring) (“It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public’s full gaze and the youths brought before our juvenile courts have been shielded from publicity.”).
3. See Katherine H. Federle and Paul Skendzel, Thinking Like a Child: Legal Implications of Recent Developments in Brain Research for Juvenile Offenders in LAW, MIND AND BRAIN (Michael Freeman and Oliver R. Goodenough, eds., 2009).
5. Id. The editorial goes on to note that “[t]he fact that most juvenile offenders never presented a threat to public safety and have no further contact with the law after they become adults argues strongly for sealing or expunging records so that young offenders are not permanently impaired by their youthful transgressions.” Id.
Increased public awareness, spurred by recent initiatives and reports (see generally Part III infra), makes this an opportune moment for the ABA to provide critical guidance to state lawmakers. The proposed Model Act Governing the Confidentiality and Expungement of Juvenile Delinquency Records builds on the ABA’s long-standing policy, as discussed in Part II infra, that directs states to enact statutes to protect youth from the adverse consequences of juvenile delinquency records. As described in more detail in Part III infra, a recent comprehensive survey reveals a wide variation among state confidentiality and expungement laws; many states have not embedded the key principles in ABA policy in their statutes. Thus, the proposed Model Act seeks to provide states with language codifying ABA policy so that youth throughout the country have the best opportunity to succeed.

II. American Bar Association Policy on Juvenile Delinquency Records

As described in this section, the ABA has a long history of protecting the confidentiality of juvenile delinquency records and advocating for their swift expungement after youth have successfully been discharged from the justice system.

A. Institute of Judicial Administration-American Bar Association Juvenile Justice Standards

In 1979 and 1980, the American Bar Association adopted as policy twenty (20) volumes of Juvenile Justice Standards that were developed by the Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards. Juvenile records are addressed in the volume entitled Standards Relating to Juvenile Records and Information Systems (hereinafter “IJA-ABA JR-IS”). 7 These standards direct each state to enact laws that, inter alia,

- protect juveniles from the adverse consequences of disclosure of juvenile records;
- establish safeguards to protect against the misuse, misinterpretation, and improper dissemination of juvenile records;
- limit the collection and retention of juvenile records so that unnecessary and improper information is not collected or retained;
- restrict the information and juvenile records that may be disseminated to and used by third persons;
- afford juveniles and their parents with maximum access to juvenile records pertaining to them; and
- provide for the timely destruction of juvenile records. 8

7 Under the IJA-ABA JR-IS standards, the term “juvenile records” covers juvenile delinquency court records, which include the “case file” (formal documents such as the complaint or petition, summons, warrants, motions, legal memoranda, judicial orders or decrees), “summary records” (the equivalent of the docket maintained by most juvenile courts), and “probation records” (which include social histories).

8 IJA-ABA JR-IS 13.1, 13.3, 14.1-14.3. The term also includes “fear enforcement records.” IJA-ABA JR-IS Section III. Standards for Police Records. The Model Act definitions track the definitions in the standards. See Model Act Sections III(e), IV(a) and V(a).

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The objective of the proposed Model Act is to operationalize the above objectives. The Model Act language is largely based on the IJA-ABA JR-IS standards.

Pursuant to IJA-ABA standards, the Model Act mandates that courts, probation offices and law enforcement agencies keep juvenile court and law enforcement records confidential. See generally Model Act Sections IV and V. Such records are not open to public inspection, and only enumerated individuals and agencies are allowed to access the records. Individuals and agencies with access include the juvenile and his/her attorney; the juvenile’s parents; the juvenile court and probation officers; the prosecutor; an agency having custody or control of the juvenile; a criminal court before whom a proceeding involving the juvenile is pending; and researchers. Law enforcement records additionally may be released to persons, such as other law enforcement officials, to whom it is necessary to disclose information for such purposes of investigating a crime, apprehending a juvenile, or determining whether to detain a juvenile. As per the IJA-ABA JR-IS standards, the Model Act further directs juvenile courts and law enforcement agencies to create processes by which juveniles and their attorneys can challenge the accuracy of records, and provide notice about the available procedure.

Pursuant to the IJA-ABA JR-IS standards, the Model Act also provides for the “expungement” of juvenile records. See generally Model Act Sections VI, VII and VIII. Juvenile court records, including probation records, must be automatically destroyed in all cases that were terminated prior to an adjudication of delinquency immediately after the discharge of the case. This includes records that relate to dismissed cases, diverted cases, cases in which the juvenile was ruled not involved, cases in which charges were not substantiated, and cases that law enforcement officials did not refer to the courts.

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The objective of the proposed Model Act is to operationalize the above objectives. The Model Act language is largely based on the IJA-ABA JR-IS standards.

Pursuant to IJA-ABA standards, the Model Act mandates that courts, probation offices and law enforcement agencies keep juvenile court and law enforcement records confidential. See generally Model Act Sections IV and V. Such records are not open to public inspection, and only enumerated individuals and agencies are allowed to access the records. Individuals and agencies with access include the juvenile and his/her attorney; the juvenile’s parents; the juvenile court and probation officers; the prosecutor; an agency having custody or control of the juvenile; a criminal court before whom a proceeding involving the juvenile is pending; and researchers. Law enforcement records additionally may be released to persons, such as other law enforcement officials, to whom it is necessary to disclose information for such purposes of investigating a crime, apprehending a juvenile, or determining whether to detain a juvenile. As per the IJA-ABA JR-IS standards, the Model Act further directs juvenile courts and law enforcement agencies to create processes by which juveniles and their attorneys can challenge the accuracy of records, and provide notice about the available procedure.

Pursuant to the IJA-ABA JR-IS standards, the Model Act also provides for the “expungement” of juvenile records. See generally Model Act Sections VI, VII and VIII. Juvenile court records, including probation records, must be automatically destroyed in all cases that were terminated prior to an adjudication of delinquency immediately after the discharge of the case. This includes records that relate to dismissed cases, diverted cases, cases in which the juvenile was ruled not involved, cases in which charges were not substantiated, and cases that law enforcement officials did not refer to the courts.
103A

Moreover, in cases that resulted in adjudication, juvenile records of misdemeanors and selected felonies are to be automatically destroyed two years after court discharge of the case as long as there is no other delinquency or criminal proceeding pending and the individual was not adjudicated delinquent or convicted of an another offense.22 The youth is not required to take any action because destruction is automatic. Juvenile courts are to provide a copy of any records to be destroyed to the juvenile who is the subject of the records prior to expungement.23 Similarly, law enforcement agencies must automatically destroy all records of arrested or detained youth who are not referred to juvenile court, and must destroy any other records upon receipt of a court order.23

The Model Act also includes language from the IJA-ABA JR-IS standards on the effect of expunged records. See Model Act Section VIII. Specifically, once records of a case are expunged, the individual will not be required to disclose that he or she had a juvenile records and the court, probation and law enforcement shall reply that no record exists in response to inquiries.25 Finally, consistent with the standards, the Model Act also provides that an individual or entity who violates any of the confidentiality or expungement provisions may be subject to criminal penalties.26

There are four (4) provisions in the Model Act that are not found in the IJA-ABA JR-IS standards as follows:

First, the standards are silent on a court’s ability to issue an order granting third party access to juvenile records. By contrast, a recent comprehensive survey of state laws demonstrates that almost every state statute includes a provision allowing courts to order the release of juvenile records. See Failed Policies, Forfeited Futures: A Nationwide Scorecard on Juvenile Records, available at www.jlc.org/juvenile records. Very few of these statutes establish criteria for the courts to consider before issuing such an order. Given that state laws already grant this authority to courts, the proposed Model Act includes criteria for courts to review before issuing such an order. See Model Act sections IV(d) and (c), and V(c) and (d). Specifically, the Model Act provides that courts may grant a petition requesting access to juvenile records upon a finding that such disclosure is necessary to protect the public health or safety. The Model Act further provides that courts may order release of information in a juvenile record upon a finding of “legitimate interest”; the Act specifies the criteria the court must consider in determining a “legitimate interest” and provides the youth and his/her counsel with

21 IJA-ABA JR-IS 17.3. Upon expungement, the court shall inform all agencies in possession of the juvenile’s records and direct such agencies to destroy the records. Id. at 17.5.
22 IJA-ABA JR-IS 17.6(A).
23 IJA-ABA JR-IS 22.1 (law enforcement records). However, if the chief law enforcement officer of the agency, or his or her designee, certifies in writing that certain information is needed for a pending investigation involving the commission of a felony, that information, and information identifying the juvenile, may be retained in an intelligence file until the investigation is terminated or for one additional year, whichever is sooner. Id.
24 IJA-ABA JR-IS 17.3.
25 IJA-ABA JR-IS 2.8 (making it a misdemeanor for any person to willfully obtain or attempt to obtain a record or information from the record, willfully provide access, disclose or communicate information from a juvenile record, or willfully destroy or falsify information in or to be included in a record)
notice and an opportunity to be heard before the court may issue the order. Second, IJA-ABA JR-IS standards provide that law enforcement agencies may release juvenile records to law enforcement in other jurisdictions only if the juvenile was adjudicated delinquent or convicted of a crime or unless there is an outstanding arrest warrant for the juvenile. The Model Act does not include the limiting clause following the words “only if”, to allow law enforcement agencies to share information about pending charges for investigation purposes.

Third, the IJA-ABA JR-IS standards only provide for automatic expungement of juvenile records in cases of misdemeanors, not felonies. The standards are silent on expungement by application of juvenile records for offenses that would be felonies if committed by an adult. However, a number of states allow for the expungement of juvenile records for felony offenses, either by including felonies on their automatic expungement list or permitting individuals to petition the court for expungement of felony offenses or both. See, e.g., Indiana, Mississippi, Missouri, South Dakota, Oklahoma, Oregon, and Washington. There also appears to be bi-partisan support at the federal level for moving in this direction: the REDIEEM Act introduced by Sens. Paul and Booker calls for automatic expungement of non-violent felony offenses such as drug offense. See discussion in Part III infra. For these reasons, the Model Act gives states the option to include selected felonies on the automatic expungement list, and to allow for individuals to petition the court for expungement of selected felonies.

Fourth, the IJA-ABA JR-IS standards contain no explicit provisions directing courts and other juvenile justice agencies to provide youth with notice about their expungement rights and eligibility. Currently at least seven (7) states require detailed notification of the steps required to

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American Bar Association Resolution Limiting the Collateral Consequences of Juvenile Arrests, Adjudications, and Convictions

In 2010, the American Bar Association adopted a policy addressing the collateral consequences facing individuals adjudicated delinquent. The resolution is as follows:

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to increase the opportunities of youth involved with the juvenile justice or criminal justice systems and to prevent the continuing discrimination against those who have been involved with these systems in the past by limiting the collateral consequences of juvenile arrests, adjudications, and convictions.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to adopt and enforce laws and policies which:

- Prohibit employers, colleges, universities, vocational and technical schools, financial aid offices licensing authorities and similar agencies from inquiring about or considering an arrest of a juvenile that did not lead to a finding of guilt, an adjudication or a conviction, or basing the denial of educational or vocational opportunities to applicants on such arrest;


The I.A.-ABA JR-18 standards also provide that “[p]ublic and private employers, licensing authorities, credit companies, insurance companies, banks, and educational institutions should be prohibited from inquiring, directly or indirectly, and from seeking any information relating to whether a person has been arrested as a juvenile, charged with committing a delinquent act, adjudicated delinquent, or sentenced to a juvenile institution...” I.A.-ABA JR-18.1. The only exception is that a state agency or department responsible for juvenile justice may be authorized to inquire and seek such information pertaining to persons being considered for positions requiring ex-offenders. Id. .

Prohibit employers and educational institutions from considering any records pertaining to an arrest, adjudication or conviction of an applicant that occurred while the applicant was a juvenile if such records have been sealed or expunged by the court.

Prohibit colleges, universities, financial aid offices, other educational institutions and employers and employment licensing authorities: (1) from considering juvenile adjudications or criminal convictions unless engaging in the conduct underlying the adjudication or conviction would provide a substantial basis for denial of a benefit or opportunity even if the person had not been adjudicated or convicted, and (2) if the underlying conduct does provide such a basis: (a) from considering a juvenile adjudication, if three years have passed following the applicant's discharge from custody or supervision without being adjudicated or convicted of a subsequent offense; and (b) from considering a criminal conviction, if five years have passed following the applicant's release from custody or supervision without being convicted of a subsequent offense.

FURTHER RESOLVED, that the American Bar Association urges federal, state, territorial and local governments to adopt and enforce policies encouraging employers, colleges, universities, financial aid offices, licensing authorities and other agencies to give consideration to a juvenile’s successful completion of a community re-entry program or the terms of their probation.

FURTHER RESOLVED, that the American Bar Association urges federal, state territorial and local governments to adopt and enforce policies encouraging employers, colleges, universities, financial aid offices, licensing authorities and other agencies to include on applications clear definitions of legal terms such as arrest, adjudication, and conviction. 40

The policy resolution grew out of the recognition that:

[ ]

[ ]

[ ]

[ ]
only exist when the incident is directly relevant to the position sought or a concern of a school.\textsuperscript{41}

C. Mission Statement of the American Bar Association’s Convocation on Poverty Related Legal Issues

In June 2014, the Board of Governors approved a mission statement submitted by the Convocation on Poverty Related Legal Issues, which calls on the ABA to advance four (4) objectives including the decriminalization of poverty. The mission statement provides in pertinent part that:

\[
[\text{t}]\text{he discriminatory enforcement of laws drives too many into our courts and prisons. Criminal records create barriers to obtaining employment, housing, and other life essentials. The ABA believes that all citizens charged with crimes should have access to representation. The ABA also supports policies and programs that divert individuals from justice system involvement by providing alternatives to adjudication, and laws that promote the justified expungement of arrest and court records. To that end, the ABA will enact a Model Act on the Confidentiality and Expungement of Juvenile Delinquency Records, so that young people will have the greatest chance to overcome poverty and succeed in adulthood.}\textsuperscript{42}
\]

III. Recent Reports and Initiatives on Juvenile Records

A number of reports and initiatives also call for greater protection and expungement of juvenile records as a means to eliminate barriers to success for youth who have come into contact with the justice system. These reports and initiatives have increased public awareness of this issue, making it an ideal time for the ABA to offer model statutory language on confidentiality and expungement to state lawmakers.

National Summit on Collateral Consequences

On February 27, 2015, the ABA Criminal Justice Section in collaboration with the National Institute of Justice Presented the first National Summit on Collateral Consequences\textsuperscript{43}. The Summit was a by-invitation only event that brought together law enforcement, as well as members of the bar who work in judicial, prosecutorial, policy, and academic capacities. Panels at the Summit focused on the problems that collateral consequences pose for individuals trying to

\textsuperscript{42} Mission Statement of the American Bar Association (ABA)’s Convocation on Poverty Related Issues, adopted the ABA Board of Governors at its June 2014 meeting (emphasis added).
\textsuperscript{43}See http://www.americanbar.org/groups/criminal_justice/events_cle/co_summit_2015.html
make successful re-entry into their communities following their involvement in the justice system. Participants also discussed how to structure laws, policies and practices that maintain public safety while also optimizing the opportunities for success for ex-offenders.

The My Brother’s Keeper Initiative

The My Brother’s Keeper Task Force Report to the President urges public and private employers to “ban the box” and calls on legal services organizations to help young people expunge their records. Specifically, the report recommends the following:

RECOMMENDATION 11.4: Launch an initiative to eliminate unnecessary barriers to giving justice-involved youth a second chance.

11.4.1 Large employers, including the Federal government, should study the impacts of requiring disclosure of juvenile or criminal records on job applications and consider “banning the box.” Federal, state, local, and private actors should support public campaigns focused on eliminating forms of discrimination and bias based on past arrest or conviction records.

11.4.2 Legal and other services focused on addressing successful reentry are acutely needed to address accuracy and expunge criminal records, reinstate licenses and reduce excessive fines. Relevant agencies should work with civil legal services providers, including the Legal Services Corporation, state and local attorneys general, and the private bar to expand awareness of the need and access to these services.

The REDEEM Act

Building on the growing momentum and bipartisan coalitions rallying behind broad-based criminal justice reform, on March 9, 2015 U.S. Sens. Rand Paul (R-Ky) and Cory Booker (D-N.J.), re-introduced S. 675, the REDEEM (Record Expungement Designed to Enhance Employment) Act. One of the bill’s objectives is to give youth convicted of non-violent crimes a second chance to become more self-reliant and less likely to commit future crimes. The bill specifically provides for automatic expungement of records for kids who commit non-violent crimes before they turn 15 and automatic sealing of records for those who commit non-violent crimes after they turn 15 years old. As Sen. Paul has stated, “The War on Drugs has had a disproportional effect on minorities and our inner cities. Our current system is broken and has trapped tens of thousands of young men and women in a cycle of poverty and incarceration. It is my hope that the REDEEM Act will help many of these young people escape this trap by reforming our criminal justice system, expunging records after time served, and preventing non-violent crimes from becoming a permanent blot on one’s record.”

44 My Brother’s Keeper Task Force Report to the President, October 2014 at p. 53.
45 The Ban the Box Campaign asks employers to remove questions regarding conviction histories from their employment applications and to adopt hiring practices that give applicants a fair chance.

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Failed Policies, Forfeited Futures: A Nationwide Scorecard on Juvenile Records

In November 2014, Juvenile Law Center published a scorecard that is the first comprehensive evaluation of how juvenile records are handled across the 50 states and the District of Columbia. In measuring each state’s overall treatment of records, Juvenile Law Center rated performance in two key policy areas: (1) confidentiality of records during and after juvenile court proceedings, and; (2) the availability of and process for sealing or expungement. For each of the two policy areas, Juvenile Law Center identified core principles to ensure the protection of juvenile records as follows:

- Youths’ law enforcement and court records are not widely available and are never available online.
- Sealed records are completely closed to the general public.
- Expungement means that records are electronically deleted and physically destroyed.
- At least one designated entity or individual is responsible for informing youth about the availability of sealing or expungement, eligibility criteria, and how the process works.
- Records of any offense may be eligible for expungement.
- Youth are eligible for expungement at the time their cases are closed.
- There are no costs or fees associated with the expungement process.
- The sealing and expunging of records are automatic—i.e., youth need not do anything to initiate the process and youth are notified when the process is completed.
- If sealing or expungement is not automatic, the process for obtaining expungement includes youth-friendly forms and is simple enough for youth to complete without the assistance of an attorney.
- Sanctions are imposed on individuals and agencies that unlawfully share confidential or expunged juvenile record information or fail to comply with expungement orders.

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- If sealing or expungement is not automatic, the process for obtaining expungement includes youth-friendly forms and is simple enough for youth to complete without the assistance of an attorney.
- Sanctions are imposed on individuals and agencies that unlawfully share confidential or expunged juvenile record information or fail to comply with expungement orders.
Juvenile Law Center then compared each state’s performance with these core principles for juvenile record protection to obtain the state’s overall score. States were rated on a scale of one (1) to five (5) stars based on their performance with respect to these core principles:

- No state earned an overall rating of 5 stars
- Fewer than 16% of the states received 4 stars
- 55% of the states received 3 stars
- 25% of the states received only 2 stars

The scorecard shows that “the vast majority of states fail to adequately protect youth from the harmful effects of their juvenile records and states must take steps to ensure “greater protection of juvenile record information” so that youth can pursue educational opportunities, enter the workforce and become contributing members of their communities.”

The core principles for the Juvenile Law Center scorecard align with many of the IJA-ABA JR-IS standards that are the basis for the proposed Model Act. Thus, the Juvenile Law Center scorecard demonstrates that few states have implemented the IJA-ABA JR-IS standards that are the basis for the Model Act. The Model Act will provide much needed guidance to legislators to enact juvenile records laws that further the unfulfilled objectives of American Bar Association policy for the last 25 years.

IV. Conclusion

Since 2005, the United States Supreme Court has issued four major opinions reaffirming the principle that youth are developmentally different than adults in ways that matter when they become involved with the justice system. In particular, these cases recognize what any parent of a teenager will tell you: adolescents lack maturity and have an underdeveloped sense of responsibility; they are vulnerable to negative influences and outside pressures; their characters are transient and developing; they have limited ability to control their immediate circumstances and environments; and for all these reasons, they are less culpable than adults. The proposed Model Act aligns with these fundamental principles and thus give young people the optimal chance for success.
Respectfully submitted,

Nancy Scott Degan, Chair
Section of Litigation
August 2015
1. Summary of Resolution.

The Model Act Governing the Confidentiality and Expungement of Juvenile Delinquency Records builds on the ABA’s long-standing policy to protect youth from the adverse consequences of juvenile delinquency records. Records of juvenile justice involvement can follow an individual into adulthood, thus creating barriers to education, jobs, and housing. The Model Act provides statutory language for states to adopt to break down these barriers. Specifically, the Model Act mandates that courts, probation offices and law enforcement agencies keep juvenile court and law enforcement records confidential. Such records are not open to public inspection, and only enumerated individuals and agencies are allowed to access the records. The Model Act further provides for the expungement of juvenile records. Certain records are to be automatically expunged; courts may order the expungement of other records upon application by the juvenile.

2. Approval by Submitting Entity.

Approved on April 30, 2015 by the Section of Litigation Council.

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 1979 and 1980, the American Bar Association adopted as policy twenty (20) volumes of Juvenile Justice Standards that were developed by the Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards. Juvenile records are addressed in the volume entitled *Standards Relating to Juvenile Records and Information Systems* (hereinafter “IJA-ABA JR-IS”).57 These standards direct each state to enact laws that protect youth from the adverse consequences of juvenile records. The Model Act operationalizes the IJA-ABA JR-IS standards by providing states with statutory language to enact.

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In 2010, the American Bar Association adopted a policy addressing the collateral consequences facing individuals adjudicated delinquent. Specifically, the resolution urges federal, state, territorial and local governments to increase the opportunities of youth involved with the juvenile or criminal justice systems and to prevent the continuing discrimination against those who have been involved with these systems in the past by limiting the collateral consequences of juvenile arrests, adjudications, and convictions.

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

This is not a late report.

6. Status of Legislation. (If applicable)

N/A

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

The Section plans to publish the policy widely, post it on its website, and seek coverage in its publications.

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

None

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

The Criminal Justice Section, the Commission on Homelessness and Poverty, and the Commission on Youth at Risk have voted to co-sponsor.

Additionally, the resolution has been referred to the following entities:

ABA Center on Children and the Law
ABA Forum on Communications
Individual Rights & Responsibilities
Judicial Division
NLADA
SCLAID
Young Lawyers Division

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

Lourdes M. Rosado, Esq.
Associate Director
Juvenile Law Center
1315 Walnut Street, 4th floor
Philadelphia, PA 19107
215-625-0551 (office)
215-625-2808 (office fax)
215-805-0249 (mobile)
Email: lrosado@jlc.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.)

Lawrence J. Fox
Delegate, Section of Litigation
Drinker Biddle & Reath, LLP
One Logan Square, Suite 2000
Philadelphia, PA 19106
Phone: 215.988.2714
Fax: 215.988.2757
Mobile: 215.816.8571
Email: lawrence.fox@dbr.com
Email: lawrence.fox@yale.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution
The Model Act Governing the Confidentiality and Expungement of Juvenile Delinquency Records builds on the ABA's long-standing policy to protect youth from the adverse consequences of juvenile delinquency records. Specifically, the Model Act mandates that courts, probation offices and law enforcement agencies keep juvenile court and law enforcement records confidential. Such records are not open to public inspection, and only enumerated individuals and agencies are allowed to access the records. The Model Act further provides for the expungement of juvenile records. Certain records are to be automatically expunged; courts may order the expungement of other records upon application by the juvenile.

2. Summary of the Issue that the Resolution addresses
The juvenile court system was founded on the principle that youth are worthy and capable of rehabilitation. But today, records of juvenile justice involvement can follow an individual into adulthood, thus creating barriers to success. Young people across the U.S. are often denied access to employment, education and financial aid, and housing because of their juvenile delinquency records. A recent comprehensive survey reveals a wide variation among state confidentiality and expungement laws; many states have not embedded the key principles in ABA policy regarding confidentiality and expungement into their statutes. Thus, there is a need to provide model statutory language that will increase the confidentiality and ultimate expungement of juvenile records.

3. Please Explain How the Proposed Policy Position Will Address the Issue
The Model Act operationalizes longstanding ABA policy by providing states with specific statutory language to enact. Specifically, the Model Act provides that courts, probation offices and law enforcement agencies keep juvenile court and law enforcement records confidential. Such records are not open to public inspection, and only enumerated individuals and agencies are allowed to access the records. The Model Act further provides for the expungement of juvenile records. Certain records are to be automatically expunged; courts may order the expungement of other records upon application by the juvenile. States' enactment of the Model Act will reduce barriers to success for youth who have been successfully discharged from the juvenile justice system.

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4. **Summary of Minority Views**

None of which we are aware.
AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
STANDING COMMITTEE ON AMERICAN JUDICIAL SYSTEM
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1. RESOLVED, That the American Bar Association urges Congress to amend 28 U.S.C. §1332, to provide that any unincorporated business entity shall, for diversity jurisdiction purposes, be deemed a citizen of its state of organization and the state where the entity maintains its principal places of business.
REPORT

Introduction

Determining the citizenship of unincorporated business litigants has turned into a complicated jurisdictional morass. The subject matter diversity jurisdiction statute was last amended to address citizenship of business entities in 1958. At that time, as a matter of substantive law only corporations were treated as "entities" with an existence apart from that of their membership. Since that change, substantive law has changed with respect to general and other partnerships, and a host of other entities. Moreover, today exponentially more businesses are operating as unincorporated associations, such as general partnerships, limited liability companies (LLCs), limited partnerships (LPs), professional corporations (PCs), limited liability partnerships (LLPs), business trusts, and other forms of business entities. Yet, under the current subject matter jurisdiction statute, in determining whether diversity jurisdiction exists there is still a major difference between corporations and all other entities. Corporations are treated as citizens only of the states (i) where they are incorporated, and (ii) where they maintain their principal place of business. The identity of any or all of a corporation's shareholders is irrelevant to the diversity analysis. By contrast, for all business entities that are not organized as corporations the citizenship of every member, shareholder, or other owner of any portion of the entity must be examined to determine whether complete diversity exists. For example, if even one of one hundred members in an LLC is not diverse from even one of a hundred partners of an adversary LLP, then diversity is destroyed irrespective of whether the non-diverse LLC member or limited partner had any connection with the facts giving rise to the dispute.

The current diversity regime thus sets a potential trap for plaintiffs, defendants, and even trial court judges every time litigation involves an unincorporated business entity. For example, the existence of a single, passive member of an LLC who was not even involved in the dispute or event being litigated can destroy diversity if he or she hails from the same state as one adverse party. Unfortunately, the LLC's records may not even reveal the citizenship of every member, thus making it difficult if not impossible for any party to determine quickly (let alone with any assurance of accuracy) whether complete diversity exists prior to discovery. Yet because subject matter jurisdiction is not waivable and because federal courts must satisfy themselves sua sponte that they have subject matter jurisdiction over a matter, see Fed. R. Civ. P. 12(b)(3), this situation may be a ticking legal time bomb.

This problem affects plaintiffs and defendants alike. The uncertainty of whether a case can be filed in or removed to a federal forum not only increases the cost and complexity of litigation, it can completely undermine a fully-litigated case when it is discovered at the appellate stage that the trial court lacked jurisdiction in the first place. Given that litigants need absolute clarity in order to avoid litigating a case in federal court only to have it remanded on jurisdictional grounds after judgment, the diversity statute needs to be streamlined and simplified in order to apply the corporate citizenship test to business entities that are functionally equivalent to corporations.

Given the significant developments in the structure, recognition under the law, and usage of multiple non-corporate entities over the past five decades, no principled reason exists for continuing the divergent treatment of corporations and other business entities. Revising the
diversity jurisdiction statute, 28 U.S.C. § 1332, can eliminate these traps and correlate federal court jurisdiction with modern business entity structures. These revisions, if enacted, will bridge the “disconnect between the modern business realities” of unincorporated business entities “and the formalistic rules” for determining their citizenship, simplifying the forum selection process and avoiding the waste of judicial resources and time. Debra R. Cohen, Limited Liability Company Citizenship: Reconsidering an Illogical and Inconsistent Choice, 90 MARQUETTE L. REV. 269, 269 (2006).

**Background**

Through a judicially-created rule, federal courts sitting in diversity have long required complete diversity between each and every plaintiff, on the one hand and each and every defendant, on the other. See Strawbridge v. Curtis, 7 U.S. 267 (1806). Shortly after Strawbridge, the Supreme Court declared that corporations were not citizens, “and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name.” Bank of the U.S. v. Deveaux, 9 U.S. 61 (1809). Because corporations enjoyed the aggregate citizenship of their owners and members, they were able to force litigants into state court if a single shareholder was nondiverse from a single plaintiff. See Cohen, supra. p. 284 & n.95.

Although the Supreme Court later overruled Deveaux and declared that corporations were legal entities separate and apart from their members and owners, see Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. 497 (1844), it took Congress over a hundred years to codify this rule. In 1958, Congress amended the federal diversity statute, 28 U.S.C. § 1332, to tie corporate citizenship to the states where the entities are incorporated and where they maintain their principal places of business. J.A. Olson Co. v. Winona, 818 F.2d 401, 404-05 (5th Cir. 1987), abrogated on other grounds by Hertz Corp. v. Friend, 559 U.S. 77 (2010); see also Case Co., Seventh Circuit Holds that the Term “Corporation” is Entirely State-Defined, Hoagland v. Sandberg, Phoenix, & von Gontard, P.C., 118 HARV. L. REV. 1347-48, 1352 (2005). The 1958 amendment also was “intended to further the original purpose of diversity jurisdiction to provide to out-of-state litigants a forum free of local bias.” J.A. Olson, 818 F.2d at 406. Indeed, “the need for diversity jurisdiction is lessened when a foreign corporation has substantial visibility in the community.” See id. at 404. 406.

This logic made sense in 1958. At the time, the primary unincorporated business entities—partnerships—were merely contracts between individuals who both owned and controlled the business. Corporations, by contrast, were legal fictions created by their states of incorporation for the sole purpose of separating ownership from control. See Cohen, supra. p. 289. The 1958 amendment thus recognized the functional differences between corporations and partnerships as they existed at the time and “highlighted the citizenship of the true litigants.” Id. Those states that allowed the formation of partnerships, limited partnerships, limited liability companies, and other business entities did not recognize those business forms as entities separate and apart from their owners and members. For example, at the time of the first Uniform Partnership Act, promulgated in 1914, partnerships were frequently treated as conglomérates of the individual partners. As explained by the drafters of the 1994 revisions to the Uniform Partnership Act ("UHPA"):

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Summary of 1994 revisions to Uniform Partnership Act ("RUPA").

In short, general partnerships are no longer viewed solely as aggregations of individuals. Thirty-seven states plus the District of Columbia have adopted the 1994 or 1997 version of the RUPA and its entity designation. Even those states that have not adopted RUPA (1994) frequently recognize partnerships as a distinct entity for at least some purposes. In addition, while not adopting RUPA, Louisiana recognizes a partnership as a "judicial person, distinct from its partners." La. Civ. Code art. 2801. At least six other "non-RUPA (1994)" states recognize a partnership as a separate entity by statutes providing that partnerships can sue or be sued in the partnership name. And some states have recognized entity status for at least some purposes, as recognized by case law. R.E. v. H. H., 575 N.E.2d 1021, 1026 (Ind. 1990) (holding that a judgment by or against a partnership binds the partnership as if it were an entity and does not bind individual members unless they were named); Michigan Employment Sec. Comm. v. Crane, 54 N.W.2d 616, 620 (Mich. 1952) ("The Michigan employment security act expressly recognizes that a partnership is an "employing unit" within the meaning of the act"); Philadelphia Tax Review Bd v. Adams Ave. Assoc., 360 A.2d 817, 820 (Pa. Commw. Ct. 1976) ("it does not follow that for purposes of taxation a partnership may not be taxed, or may not have a domicile for tax purposes, separate and distinct from that of the individuals who compose it. In other words, a partnership may be recognized as a legal entity.

Summary of 1994 revisions to Uniform Partnership Act ("RUPA").


The existing law concerning the status and determination of the citizenship of non-corporate entities for diversity jurisdiction purposes has not kept up with reality. The corporate landscape simply looks much different than it did in 1958, but Section 1332(c) has not been amended to acknowledge unincorporated entities as "citizens" for diversity purposes. Nor have courts been willing to impute citizenship status on these entities because they are "corporate-like," as courts narrowly construe statutes conferring federal jurisdiction. See, e.g., Carden v. Arkoma Associates, 494 U.S. 185 (1990); Northbrook Nat'l Ins. v. Brewer, 493 U.S. 6, 9 (1989). We must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth." (quoting Horrohn v. Liberty Mutual Insurance Co., 367 U.S. 348, 352 (1961)); Thompson v. Gaskill, 315 U.S. 442, 446 (1942) ("The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction.").

The Supreme Court has explicitly held that due to the plain and limited language of Section 1332(c), the statute only applies to traditional corporations. See Carden, 494 U.S. at 195-96. Cf Steelworkers v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) (holding that unincorporated labor union was not itself a "citizen" for diversity jurisdiction purposes, but that citizenship was to be determined based upon the citizenship of each individual member of the unincorporated entity). In Carden, the trial court dismissed an action brought by a limited partnership on the ground that one of the plaintiff's limited partners was a citizen of the same state as the defendants. The Court "firmly resisted any judicial extension of "citizenship" status to entities other than corporations, and leaves any "further adjustments" to the status of business entities for diversity purposes in the hands of Congress. Carden, 494 U.S. at 189, 196.

Following Carden's clear mandate, courts have routinely concluded that the citizenship of every member of unincorporated business entities must be diverse from all opposing parties before complete diversity of citizenship exists. In one of the earliest post-Carden decisions, the Seventh Circuit concluded that Carden "crystallized as a principle" that members of an entity are citizens for diversity purposes, at least until "Congress provides otherwise." Congrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998). Given the similarities between LLC's and LP's, the court applied Carden to LLC's. Id.; see also Belleville Catering Co. v. Champagne Market Place L.L.C., 350 F.3d 691, 692 (7th Cir. 2003) (same). It does not matter that LP's and LLCs "are functionally similar to corporations," they are not entitled to corporate treatment for diversity purposes. See also Hoagland v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737, 739 (7th Cir. 2004). The Supreme Court drew a "bright line" in Carden between entities that are technically called "corporations" and all other types of entities, see id. at 741, such that judges need not "entangle themselves in functional inquiries into the differences among corporations," see id. at 743.

Every court of appeals to address this question directly has followed the 7th Circuit in analogizing to Carden's treatment of limited partnerships and requiring the examination of the citizenship of all owners/members of LLC's in determining whether diversity jurisdiction exists. See, e.g., Rolling Greens MHP, LP v. Comcast SCH Holdings LLC, 374 F.3d 1020 (11th Cir. 2004) (remanding appeal from grant of summary judgment to consider citizenship of every member of LP and LLC; noting unanimity among circuits regarding both LP's and LLC's and citing cases from 2d, 4th, 7th, 8th, and 9th Circuit Courts of Appeal); Johnson v. Smithkline Beecham Corp., 724 F.3d 337 (3d Cir. 2013); Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d...
412 (3d Cir. 2010); Delay v. Rosenthal Collins Group, Inc., 585 F.3d 1003 (6th Cir. 2009); Harvey v. Gray Wolf Drilling Co., 542 F.3d 1077 (5th Cir. 2008); Pramco LLC v. San Juan Bay Marina, Inc., 435 F.3d 51 (1st Cir. 2006); Johnson v. Columbia Properties Anchorage, LP, 437 F.3d 894 (9th Cir. 2006); Gen. Tech. Applications, Inc. v. Extrud Lida., 388 F.3d 114 (4th Cir. 2004); GMAC Commercial Credit LLC v. Dillard Dept. Stores, 357 F.3d 827 (8th Cir. 2004); Belleville Catering Co. v. Champion Mkt. Place, LLC, 350 F.3d 691 (7th Cir. 2003); Handselman v. Bedford Village Associates Ltd. Partnership, 213 F.3d 48 (2d Cir. 2000). Neither the D.C. Circuit Court of Appeals nor the 10th Circuit Court of Appeals has directly decided this issue, though both the District of D.C. and at least the District of Colorado have agreed with other circuits that the citizenship of an LLC is determined by the citizenship of each of its members. See, e.g., Marvis v. Tindall, No. 13-00750, 2013 U.S. Dist. LEXIS 41397 (D. Colo. Mar. 25, 2013); Jackson v. JCHA-HealthOne, LLC No. 13-02615, 2013 U.S. Dist. LEXIS 146023 (D. Colo. Oct. 9, 2013); Shulman v. Vouos, LLC, 305 F. Supp. 2d 36 (D.D.C. 2004); Johnson-Brown v. 2200 M St. LLC, 257 F. Supp. 2d 175 (D.D.C. 2003).

The courts have made clear that any change in how citizenship is to be determined for diversity jurisdiction purposes. Accordingly, we propose an amendment to 28 U.S.C. § 1332 to address these issues.

Proposed Rule Revision

Attached as Appendix I is a proposed revision to the diversity statute that serves primarily to ensure that the letter of the diversity statute mirrors its spirit. This idea is nothing new or radical. In 1965—almost fifty years ago—the American Law Institute proposed giving unincorporated business entities the same citizenship status as corporations for diversity purposes. See Diversity Jurisdiction Over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243, 244 n.8 (1978) (citing ALL STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, PART I, 59 (Sept. 25, 1965, Official Draft)). It is well past time that the diversity statute recognizes unincorporated business entities as what they effectively are—legal constructs, like corporations, with rights and duties separate and apart from the rights and duties of their members and owners.

Why the Federal Diversity Rule Should Be Amended

A. The current statute leads to unacceptable and readily avoidable wastes of time, money, and judicial resources.

Uncertainty as to whether a case belongs in federal court increases not only the “cost and complexity of litigation,” but also “the parties will often find themselves having to start their litigation over from the beginning.” Hoogland, 385 F.3d at 739-40. Both potential plaintiffs and defendants often have difficulty determining the non-management members of opposing party entities, particularly if such membership is not public information. As a result, they lack a good basis for pursuing (or challenging) the propriety of the federal forum. The resulting uncertainties have led appellate courts to criticize the efforts expended to address citizenship at the outset and on appeal. See, e.g., Smoot v. Mazda Motors of America, Inc. 469 F.3d 675, 677-78 (2006) (and cases cited therein) (criticizing jurisdictional statements of all parties on appeal and noting “the lawyers have wasted our time as well as their own and (depending on the fee
arrangements) their clients' money. We have been plagued by the carelessness of a number of the lawyers practicing before the courts of this circuit with regard to the required contents of jurisdictional statements in diversity cases."

This uncertainty means that parties can fully litigate a case, only to have an appellate court determine that the district court lacked jurisdiction in the first instance. GMAC Commercial Credit, Inc. v. Dillard Department Stores, Inc., 357 F.3d 827 (8th Cir. 2004), presents an example of this waste of judicial resources and the court's inability effectively to address the waste. In that case, the LLC plaintiff sued the defendant in federal court on diversity grounds. Neither party challenged subject matter jurisdiction before the district court. The defendant won partial summary judgment and a jury verdict. Id. at 828. After obtaining new counsel, plaintiff moved to vacate the judgment award on the ground that diversity of citizenship did not exist and thus the court lacked subject matter jurisdiction from the outset. Id. Unable to determine, based on the record below, whether the citizenship of the plaintiff’s members in fact destroyed complete diversity, the Eighth Circuit remanded for a discovery hearing on diversity. Id. at 829. Defendants also moved for attorneys fees because plaintiff—who chose the federal forum—never raised the diversity issue until appeal. Id. The appellate court left the decision of whether to award fees to the district court on remand. Id.

Sometimes even the type of entity involved can be unclear. Tuck v. United Servs. Auto. Ass’n, 859 F.2d 842 (10th Cir. 1988), involved an uninsured motorist who had killed Johnny Tuck in a collision. Tuck’s estate and parents sued United Services Automobile Association ("USAA") to recover benefits under an uninsured motorist provision of Tuck’s insurance policy. Id. Believing that USAA was a corporation, the Tucks alleged that USAA was diverse from the Tucks, and the pretrial order incorporated the jurisdictional allegations. Id. at 844. The jury returned a verdict for the Tucks on all claims. Id. at 843. USAA filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. Id. The district court denied both motions but did reduce the Tucks’ actual damage award. Id. USAA appealed and "revealed, for the first time, that it was not a corporation, but rather an unincorporated association organized under the insurance laws of the state of Texas." Id. USAA’s status as an association made it a citizen of every state in which its members were citizens, and in consequence, USAA argued, the court lacked subject matter jurisdiction. Id. at 844. Admonishing USAA, the court stated, "[t]his is not the first time that USAA has faced this problem." Id. at 845 (citing Baer v. United Servs. Auto. Ass’n, 503 F.2d 393 (2d Cir. 1974)). To salvage the case and halt USAA’s attempted jettisoning of an unfavorable verdict, the court allowed the Tucks to amend their complaint on remand by dismissing all of the Oklahoma citizens who were “members" of USAA. Id. at 846. However, the court also noted that dismissing this dismissal plan might not work on the case before it as USAA had been sued as an entity, and not the individual members. Still, the appellate court remanded to allow the district court to determine if a jurisdictional basis could be identified. Otherwise, the jury verdict (even as reduced) could not stand. Id. at 846-67.

Two problems are highlighted by Tuck. First, under the current regime the distinction between a corporation and any other form of business entity drives whose “citizenship” determines the entity’s citizenship. Thus, mistakenly believing that an entity with a national presence and operations in multiple states is a corporation can result in plaintiffs, defendants, and trial courts failing to examine citizenship properly. Second, and perhaps more substantively
disturbing, Tuck highlights that once the proper analysis is applied some large unincorporated associations, with members in all 50 states, simply could not be held into federal court (or seek relief in federal court) unless a federal question was presented. There is no practical reason for closing off access to federal courts in this manner either to plaintiffs who wish to bring a case in, or to non-corporate entity defendants who wish to remove a case to, federal courts.

Because federal courts are obligated to determine whether they may exercise subject matter jurisdiction regardless of whether the parties ever raise the issue, see Chapman v. Baray, 129 U.S. 677, 681 (1889), uncertainty as to forum can be an expensive and unexpected problem to address well into litigation, possibly requiring jurisdictional discovery. For example, one court addressed the LLC defendant’s citizenship sua sponte in order to “satisfy itself” that federal jurisdiction existed, even though neither litigant raised the question of whether any LLC members were citizens of the same state (and the complaint failed to allege facts regarding the citizenship of the LLC’s members). See Delay v. Rosenthal Collins Group, Inc., 585 F.3d 1003, 1004-05 (6th Cir. 2009). The court directed the defendant “to submit a jurisdictional statement identifying the citizenship of all of its members.” Id. at 1005.

In addition to the problems highlighted by Tuck, the problem of a case being reversed on appeal for lack of subject matter jurisdiction can wreak out-sized consequences upon plaintiffs. Should years pass and then a case be remanded as void ab initio due to a lack of subject matter jurisdiction, the plaintiff-attorney may discover that the statute of limitations has run during the time the matter was pending, although improperly, in federal court. Because states’ tolling statutes will vary from state to state, particularly with respect to an action that was void (as opposed to voidable or subject to an affirmative defense) from the outset, further uncertainty is injected into an already uncertain process.

While the Smoot and Tuck courts, and others, have been quick to criticize attorneys for failing to investigate sufficiently deeply, the criticism can gloss over the difficulty of the investigation. It is not enough to examine who the members were of the unincorporated association at the time it came into existence; citizenship is determined as of the time of filing. Thus, an individual member who has moved from a diverse state to a non-diverse state can destroy diversity, even if the unincorporated association is not aware of the move. And as more and more communications take place via cell phones (with “traveling” area codes) and internet communications (which do not necessarily reflect physical addresses at all), the ability to unearth this information, let alone to unearth it in a timely enough manner to gather the information to file or remove a lawsuit, presents substantial practical difficulties. These difficulties are highlighted by the increased reliance upon unincorporated entities as a means of doing business that are shown in the IRS filing statistics quoted supra.

Given that litigants need absolute clarity in order to avoid litigating a case in federal court only to have it remanded on jurisdictional grounds after judgment, the diversity statute needs to be streamlined and simplified in order to apply the corporate citizenship test to business entities that are functionally equivalent to corporations.
B. The proposed amendment provides a workable, bright line rule that courts have been applying for decades to corporations.

Currently, counsel for plaintiffs and for defendants can find themselves guessing about citizenship at critical filing or removal stages. Plaintiffs in non-federal question cases who choose to file their lawsuits in federal court must plead that diversity jurisdiction exists. This requires pleading the citizenship of the defendant. Should the defendant be an LLC or other unincorporated association, however, the information may not be available to the plaintiff. Information regarding the ownership of unincorporated entities like LLCs frequently is not a matter of public record. While the LLCs themselves should be able to identify their members, even they may have difficulty identifying the citizenship of every member on any given date. Cohen, supra, p. 303. Yet plaintiffs filing or defendants trying to remove, are forced to determine and plead citizenship under tight timeframes.

Further, the current rules, which ignore the reality of where an unincorporated association actually does business, can result in diversity citizenship, and thus removal, being available where the purposes of diversity jurisdiction are not met. In Johnson v. Smithkline Beecham Corp., 724 F.3d 337 (3d Cir. 2013), the Third Circuit granted interlocutory appeal after plaintiffs unsuccessfully tried to remand their personal injury lawsuit after the defendants, including two LLC’s, removed the action to federal court. Plaintiffs, who are citizens of Pennsylvania, argued that one LLC defendant was headquartered and largely managed in Pennsylvania. See id. at 342. The defendant’s sole member, however, was incorporated in and operated primarily out of Delaware. The Third Circuit concluded that, even though the LLC was based in the same state where plaintiffs were citizens, the district court properly exercised diversity jurisdiction. Id. at 346-48; see also Gen. Tech. Applications, Inc. v. Ero Lida, 388 F.3d 114, 116 (4th Cir. 2004) (remanding case after defendants removed and won summary judgment, concluding that there was not complete diversity, and the case should proceed in state court).

C. The proposed change will bring cohesions between 28 U.S.C. §1332(c) and the Class Action Fairness Act.

Other changes to federal law have recognized the benefit of treating all unincorporated associations in the same manner as corporations. The Class Action Fairness Act of 2005 (“CAFA”) expressly defines the citizenship of “unincorporated association[s]” as limited to the state where the association has its principal place of business and the state under whose laws the association is organized. See 28 U.S.C. §1332(d)(10). While the statute does not clarify what entities are considered “unincorporated associations,” several courts have construed it to include any business entity that is not organized as a corporation. See, e.g., Ferrell v. Express Check Advance of SC LLC, 591 F.3d 698, 699 (4th Cir. 2010) (holding that a limited liability company is an “unincorporated association” for diversity purposes under CAFA); Bond v. Veolia Water Indianapolis, LLC, 571 F. Supp. 2d 905, 910 (S.D. Ind. 2008) (same). Indeed, Congress’ express purpose in adding subsection (d)(10) was to ensure that unincorporated entities were as protected from state-court bias in class actions as were incorporated entities. See Christine M. Kailus, Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall, 2007 UNIV. OF ILL. L.R. 1543, 1554 (Sept. 7, 2007).
The CAFA citizenship test for unincorporated associations literally mirrors the test for corporations under the existing 28 U.S.C. §1332(c), but it applies only in the context of class action litigation. This disconnect means that an LLC, for example, is a legal fiction with "separate entity" status if the lawsuit is a class action; in a non-class suit, the LLC is merely the sum of its members. It begs the question whether, had the Supreme Court decided Carden after CAFA was passed rather than 15 years prior, the Court might have reached a different result in order to avoid interpreting the diversity statute in a manner that yields an absurd result.

Regardless, the proposed revision will ensure uniform treatment of unincorporated associations regardless of whether the plaintiff sues solely on his or her own behalf or on behalf of a putative class.

D. The proposed change will not lead to additional administrative difficulties but will lessen existing administrative burdens.

The proposed change should not result in new administrative difficulties. Experience with the Class Action Fairness Act (28 U.S.C. §1332(d)(10)) has not led to difficulties in determining either the state under which entities are organized or where they have their principal places of business. To the extent issues may arise with respect to identifying a principal place of business, the experience regarding doing so for corporations, both that cited in and applying Hertz Corp. v.Friend, 559 U.S. 77 (2010), is available, as well as nearly a decade of experience under the Class Action Fairness Act. Moreover, removing the requirement of examining the citizenship of every member of unincorporated business associations can greatly simplify administrative burdens upon parties both filing and removing actions on the basis of diversity of citizenship.

E. The proposed change will not greatly increase filings in federal courts or removals to federal courts.

Criticism of the proposed change has focused upon whether a change is necessary and whether federal filings will greatly increase. The need and rationale for the change are set forth above in the "Background" section and sections A-D above. One case that goes to trial, only to be reversed due to a "hidden" lack of subject matter jurisdiction from the outset, represents a tremendous waste of judicial resources. The proposed change will allow lawyers and judges at the outset to achieve certainty about the citizenship of parties and then proceed accordingly.

The proposed change should not greatly increase the number of filings in federal courts or removals to federal court. Only situations where the citizenship of an uninvolved owner/shareholder is involved would have a different result. The proposed change only deals with citizenship of entities. The "complete diversity" requirement of Strawbridge v. Curtais is retained. As a result, in situations where a member of an unincorporated association is an active participant in providing the services at issue (frequently professional services for various LLCs and LLPs), that individual may still be named as a defendant. If that naming destroys diversity because that individual is a citizen of the same state as the plaintiff, then the plaintiff’s choice of a state forum will remain. The only situation in which a plaintiff would lose the ability to keep a case in state court due to the proposed change would involve the fortuitous citizenship of an uninvolved member of an entity, and even that fortuitous citizenship must be different from that of the state in which the entity is organized or where the entity has its principal place of business.
While it is impossible to forecast the total number of "new" federal filings (including removal actions) that would become available and thus might result, under the new proposal, the impact should be minimal. Unincorporated associations with their principal place of business where they generally perform work (and thus impact potential plaintiffs), and which have as members citizens of that same state, will still have the same citizenship. The major change involves providing clarity concerning where to look—the now well-developed "principal place of business" and state of organization sites—and where not to look—eliminating the need to examine the citizenship of every record owner at the time the suit is filed.

A presumably accurate forecast of the proposed number of new filings and removals would require knowing or estimating the total number of cases currently being filed in state courts where (i) there is a lack of diversity solely because of the citizenship of a member of an unincorporated association and that member is a citizen of a state other than the principal place of business of the entity, 9,10 and (ii) either the plaintiff would wish to file in federal court or the defendant would wish to remove (assuming that the forum state is not the defendant's principal place of business). We are not aware of research from state court dockets that would reveal this type of information.

Removal experience under CAFA is instructive for some comparative purposes. From 2005 through 2008 the Federal Judicial Center published four annual interim reports on "The Impact of the Class Action Fairness Act of 2005 on the Federal Courts." The final report of a two-phase study was published in April 2008,11 and concluded the statistical analysis of filings through June 2007 with prior years, including a year-by-year comparison with experience under CAFA and a comparison to the pre-CAFA year of 2001. This study was limited to class actions, and the authors note that while there was an increase in federal filings, "[m]uch of that increase was in federal question cases, especially labor class actions and class actions filed under federal consumer protection statutes." Lee & Willigning, "Impacting (April 2008) at 1. In fact, "about 86 percent of [of the increase in federal filings and removals from the pre-CAFA to post-CAFA periods studied] was accounted for by the increase in federal question class action filings and removals." Lee & Willigning, "Impact" (April 2008), at 3, n.2. This impact in federal question cases does not reflect an increase due to CAFA, and serves as a noteworthy reminder that increased federal filings pursuant to federal statutes providing federal jurisdiction will not be impacted by the current proposal to change the citizenship analysis for diversity jurisdiction. That is, increased filings under consumer protection statutes such as the Fair Debt Collection Practices Act, Fair Credit Reporting Act, and similar statutes will be unaffected.

9 The "Judicial Caseload Indicators" for the twelve-month periods ending September 30 show that between September 30, 2014 and September 30, 2013, civil filings in United States District Courts increased 3.8 percent. The percent increase from 2010 to 2014 was 3.8 percent. http://www.uscourts.gov/Statistics/JudicialBusiness/2014/judicial-caseload-indicators.aspx?fn=2
10 For purposes of this analysis this Report assumes that the jurisdictional amount can be satisfied at a pleading stage for a complaint or at the removal stage, if a defendant removes.

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9 The "Judicial Caseload Indicators" for the twelve-month periods ending September 30 show that between September 30, 2014 and September 30, 2013, civil filings in United States District Courts increased 3.8 percent. The percent increase from 2010 to 2014 was 3.8 percent. http://www.uscourts.gov/Statistics/JudicialBusiness/2014/judicial-caseload-indicators.aspx?fn=2
10 For purposes of this analysis this Report assumes that the jurisdictional amount can be satisfied at a pleading stage for a complaint or at the removal stage, if a defendant removes.
The April 2008 “Impact” study revealed two key points. First, there was an increase in class actions filed under CAFA’s expanded diversity jurisdictions. This was, of course, one of the express purposes of CAFA. The April 2008 “Impact” study notes that the number of cases varied widely jurisdiction to jurisdiction.

The “Impact” study also separately examined removed actions. As shown in the table accompanying the study, “[a]lthough diversity class action removals, like filings, increased in the immediate post-CAFA period, the prevailing trend for such cases in both the pre-CAFA and post-CAFA periods is downward. . . . [D]iversity class action removals have been initiated in federal court in the last twelve months of the study period [2006-2007] at about the same rate as they were in the pre-CAFA period. CAFA appears to have temporarily increased the number of diversity class action removals to the federal courts, especially in comparison with the immediate pre-CAFA period, when removals of such cases were few. But in both the pre-CAFA and post-CAFA periods, the trend has been for fewer class actions to be removed to federal courts on the basis of diversity of citizenship jurisdiction.” Lee & Willing, “Impact” (April 2008), at 7. In short, following CAFA’s passage there was a temporary uptick in removals and then removals returned to pre-CAFA levels.

With the proposed change in diversity jurisdiction, one would not expect the type of increase in original filings created with CAFA. CAFA’s citizenship provisions were expressly crafted to increase diversity jurisdiction in a class action context and in response to concerns that a more uniform rule was needed. The diversity changes in the current proposal are more limited. Also significantly, the current proposal will still allow “local” disputes to be adjudicated “locally,” because where the unincorporated association has its principal place of business in a state and deals with others within that state, diversity jurisdiction will not exist. Similarly, if a member, shareholder, partner, or other stakeholder of an entity is non-diverse from a party on the other side of the case, and if that member or shareholder or partner or the like was sufficiently actively involved in the matter giving rise to the lawsuit, then naming the member, shareholder, partner, or other stakeholder would not divest the court of diversity jurisdiction.

The purpose section of CAFA expressly noted that: “Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;
(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.”


A variety of reasons may be postulated for the return to pre-CAFA levels. Plaintiffs may have begun filing cases in federal court initially, thus obviating the need for removal. Or Plaintiffs desiring to litigate in state courts may have changed the mix of defendants named.

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partner or the like would also defeat diversity. The only change occurs when a non-involved member, shareholder, partner, or the like happens to have the same citizenship as a party on the other side of the dispute.

Removal experience under the proposed statutory change may track that of CAFA. While there may be an initial increase in removals to federal court, the ability to craft a complaint within ethical bounds to still add non-diverse defendants and the fact that truly local disputes will likely remain local should avoid a long-term increase. The structure and purpose of CAFA would likely have resulted in a more significant prospect for removal, as one of the stated goals was to move multi-state actions filed in state courts to federal courts via the removal process.

Summary of Potential Costs/Benefits

Any analysis of the impact of the proposed change must not stop at attempting to “count new cases.” Under the present system, as shown by cases such as Smoot, Tuck, and GMAC Commercial Credit LLC v. Dillard Department Stores (all cited supra), the judicial resources that can be expended are huge when a case is improperly in federal court due to a misapprehension of the current jurisdictional rules. A mistake on the part of both parties can result in the appellate reversal of a case tried to a jury because lack of subject matter jurisdiction is an unwaviable defect. On the other side of the equation, one can predict that a substantial percentage of new cases that are filed or removed solely because of the new citizenship proposal for unincorporated entities will not result in the resources of a full jury trial being expended. In short, for every case that, like Dillard, results in an appellate reversal, multiple cases would have to be filed and resolved before the same level of resources expended is reached. One late reversal under the current system would take the same resources as multiple new filings made possible by the proposed change in the statute.

The current difference in treatment between corporations and unincorporated entities was defensible when (i) there were far few unincorporated entities being used, (ii) partnership and other unincorporated entity rules in the majority of states did not recognize the entity as distinct from its members, and (iii) entities could reasonably be expected to keep up with the citizenship of their individual members at all times. Today, every one of these considerations has changed. Unincorporated entities are chosen as the appropriate structure for businesses at an ever-increasing rate. The rules on the entity/partnership distinction have completely reversed, with the entity being recognized as separate from its individual members and capable of suing and being sued in model statutes enacted across the country. And increased communication to non-physical locations has increased substantially the difficulty of knowing “where” individual members are “citizens” in an increasingly mobile society. In short, the time to re-examine the citizenship rules has long since arrived.

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Respectfully submitted,

Nancy Scott Degan
Chair, ABA Section of Litigation
August 2015
Appendix 1: Proposed Revision

Existing Provisions (No changes to § 1332(c)(1) and (2) are proposed except the addition of a semicolon at the end of (2) in lieu of a period.)

28 U.S.C. 1332(c)(1):

A corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business;

and

28 U.S.C. 1332(c)(2):  
The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent; New Provisions

and

28 U.S.C. 1332(c)(3):

Any unincorporated association that has the capacity to sue or be sued as determined as set forth in Federal Rule of Civil Procedure 17(b) (including any amendments or revisions as may subsequently be made thereto), including without limitation an entity that is a general partnership, a limited partnership, a master limited partnership, a professional corporation, a limited company, a limited liability company, a professional limited liability company, a business trust, a union, or any other unincorporated association irrespective of name or designation, shall be deemed to be a citizen of every State and foreign state in or by which it has been organized and of the State or foreign state where it has its principal place of business without reference to the citizenship of each partner, shareholder, member, or beneficiary, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business.
1. **Summary of Resolution(s).**

   The resolution requests that Congress change the definition of “citizenship” for purposes of 28 U.S.C. § 1332 to provide that all unincorporated business entities be treated in the same manner as corporations.

2. **Approval by Submitting Entity.**

   Approved by Section of Litigation Council on April 18, 2015.

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

   No.

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

   None.

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

   This is not a late report.

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

   Legislation has not yet been introduced.

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

   Coordinate concerning identification of appropriate contacts for planned submission to Congress once ABA Policy.

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

   None

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

   None.
10. Referrals.

Business Law Section
Judicial Division
Standing Committee on the American Judicial System
Tort Trial Insurance Practice Section

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

Dennis Drasco
Lum, Drasco & Positan LLC
103 Eisenhower Parkway
Roseland, NJ 07068
973-228-6770
ddrasco@lumlaw.com

Gregory Hanthorn
Jones Day
1420 Peachtree Street NE, Suite 800
Atlanta, GA 30309
404-581-8425
ghanthorn@jonesday.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.)

Dennis Drasco and/or Greg Hanthorn, information above.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution requests that Congress change the definition of “citizenship” for purposes of 28 U.S.C. § 1332 to provide that all unincorporated business entities be treated in the same manner as corporations.

2. Summary of the Issue that the Resolution Addresses

Currently, the definition of “citizenship” of unincorporated associations ignores that today (unlike when § 1332 was last amended in 1958) unincorporated associations are both widespread and generally recognized as separate entities capable of suing and being sued and distinct from their members and partners. Moreover, the current definition of “citizenship” can lead to waste of judicial time and effort, needless appellate review and even reversals even following jury verdicts and judgments, and related problems with determining the citizenship of unincorporated associations. Because unincorporated associations are currently treated as citizens of every state where any of their members, shareholders, partners, beneficiaries, etc., are citizens; there can be significant problems arising when determining whether to sue in federal court in the first instance and whether a case can be removed to federal court. Because the citizenship issue impacts subject matter jurisdiction, a wrong determination mandates a dismissal from the outset, no matter how long the proceedings have been pending or what stage has been reached. Subject matter jurisdiction issues are not waivable.

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

The proposed amendments to the statute will treat unincorporated associations in the same manner as corporations. For diversity of citizenship purposes, the association will be deemed to be a citizen of up to two places: (i) the state of organization and (ii) the association's principal place of business. As with corporations, the citizenship of the individual members or partners would not be a factor.

4. Summary of Minority Views

The one potential, expected minority view is a concern that the amendment might result in more cases finding their way to federal courts. Yet, by replacing uncertainty with a more workable rule, the extreme judicial waste of cases being tried that would never have been filed in federal court can be substantially avoided. The avoidance of this waste alone may counterbalance any minimal increase in filings or removals. Moreover, the “complete diversity” rule will remain and is likely to lessen any potential, minimal increase in filings or removals.
RESOLVED, That the American Bar Association urges election administrators, officials, and legislators at the federal, state, local, territorial, and tribal levels to adopt and implement policies designed to achieve a thirty-minute maximum per voter wait time at the polls.
Introduction

Every election year, Americans nationwide are privy to scenes that illustrate what electoral participation in our country involves today: campaign signs in front yards and on roadways, "I Voted" stickers on the lapsels of strangers and colleagues, and, much less gratifyingly, long lines of voters seeking to cast their ballot at their local precinct. In many countries, standing in long lines to vote is a badge of honor demonstrating a commitment to democracy. In recent U.S. elections, however, long lines have been widely viewed as a sign of mismanagement and even disenfranchisement.

During the 2012 election, voters in Florida, Virginia, Maryland, and South Carolina, among other states, reported waiting in line as long as five hours. In some cases, voters simply gave up and went home before casting their ballots: researchers from Ohio State University found that 49,000 people in Florida alone were discouraged from voting due to long lines. Press coverage of the debacle was widespread, and puntists raised against what many viewed as a less obvious form of disenfranchisement. President Barack Obama called on election officials to streamline the process in order to make certain that every elector was afforded the chance to vote without suffering an exorbitant wait. Accordingly, President Obama established the bipartisan Presidential Commission on Election Administration (PCEA) to identify best practices in election administration and make recommendations to improve the voting experience.

The ABA’s Standing Committee on Election Law commissioned its own report on the sources of election delays in 2012 in order to identify the problems that most need to be addressed. The ABA’s Standing Committee on Election Law has a long and consistent history of past resolutions advocating for improvements in the voting process and experience.

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1 The Standing Committee on Election Law gratefully acknowledges the assistance of the William & Mary Law School’s Election Law Program for the research and drafting of this report, specifically Professor Rebecca Green and Election Law Fellows Ben Adzer 2018 and Allison Davis 2017.


3 Id.; see also Pam Fessler, Fixing Long Lines At The Polls May Be Harder Than you Think, NPR (Feb. 12, 2013, 3:24 AM), http://www.npr.org/blogs/stallpolitics/2013/02/12/171513526/fixing-long-lines-at-the-polls-may-be-harder-than-you-think.


7 AMERICAN BAR ASSOCIATION, ELECTION DELAYS IN 2012 (May 2013), which served as the basis of the Standing Committee’s Resolution and Report No. 110, adopted by the American Bar Association House of Delegates at the 2013 Annual Meeting.
Both the PCEA and the ABA’s Standing Committee have the shared goal of pinpointing areas of concern that lead to long lines and addressing those elements of the voting experience that create unnecessary friction for both electors and election administrators.

One of the PCEA’s key recommendations was the establishment of a “30-minute rule.” In essence, this rule would require election administrators to implement measures to ensure that no voter waits in line more than 30 minutes after arriving at the polling place. Acknowledging that sometimes long wait times are a direct result of problems in the voting booth or at the ballot box (e.g. machine failures), this rule affirmatively does not seek to limit the amount of time that voters spend casting their ballot in the voting booth. Rather, the rule would help streamline the process by which voters are checked in and given their ballots. Clearly, the PCEA’s 30-minute rule recommendation is aspirational, as no election administrator can guarantee the length of wait times due to the many pressures—foreseen and unforeseen—on Election Day. Still, the PCEA’s 30-minute rule sets an important goal for election administrators to work toward.

In response to the PCEA’s recommendations, in March 2014, U.S. Senators Barbara Boxer (D-CA) and Bill Nelson (D-FL) introduced legislation to implement the 30-minute rule. This legislation—the Lines Interfere with National Elections (LINE) Act—was reintroduced in January 2015, and has not yet progressed in the Senate. The ABA, however, believes that the reform goal the recommendation prompts is not limited to federal legislative action. By introducing best practices that fit their individual jurisdictions and sharing the results of their success, state and local election administrators can carry out reforms geared toward the de facto achievement of the 30-minute time limit on voter wait time.

The ABA’s Standing Committee on Election Law supports the adoption of the 30-minute rule as a means of addressing long lines and potential voter disenfranchisement, and proposes that certain reforms should be prioritized in order to achieve this goal. The Standing Committee emphasizes that the proposed 30 minute rule is aspirational—with no sanction if the rule is violated. The suggestions in this report are intended to address practicalities of voting that may stand in the way of voters efficiently casting ballots. Some voting inefficiencies may be correctable on an individual basis; others may be impossible to address due to factors often outside the control of election planners. With these caveats aside, the ABA believes some of the causes of long lines are addressable. This report examines the reasons why the ABA supports the 30-minute rule to address the problem of long lines, as well as the most important approaches (gleaned from recommendations made to the PCEA by interested parties) to successful implementation of the rule. Section I discusses the reasoning behind the implementation of a 30-minute rule, Section II reviews several key recommendations made by the PCEA that would support the realization of this rule in future elections, and Section III discusses line-shortening reforms that several jurisdictions put into place during the 2014 election cycle.

8 Id at 1-2.

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8 Id at 1-2.
I. Why Have a 30-Minute Rule?

The right to vote for the candidate of one’s choice is a fundamental aspect of American democracy. Thus, it follows that lawmakers and regulators should seek to make the electoral process as smooth as possible for voters. Unfortunately, several aspects of American elections slow the voting process.

First, most elections take place on Tuesday—a business day—when most voters are at work and unable to sacrifice more than a few minutes of their time. Thus, most voters must cast their ballots in the mornings or the evenings, cutting into their commute time and forcing those with children to make alternative arrangements. In the morning, many voters simply cannot afford to spend time waiting in line and risking missing work; in the evenings, wait times tend to stretch past the official time for the close of polls. Individuals with young children or who are in lower income brackets tend to suffer most: It is often difficult or impossible for them to arrive at work late or to afford child care in the evenings while they wait in line to vote. Assurance of a 30-minute limit to the wait could reduce this burden and help those in low-wage jobs and working parents to find time to vote.

Second, as the PCEA noted in its report, although isolated incidents at individual polling places can lead to long wait times, systemic problems are both more widespread and easier to identify and address. Such problems include improper allocation of election resources and staff, poor training for poll workers, and limited days and hours for voting. Providing election officials with a goal—a 30-minute rule to strive for—will encourage election administrators to address the issues that arise time and time again, election after election.

Third, a 30-minute rule would set a nationwide standard. At the present time, widespread monitoring of Election Day lines at the local level is not in place. Systematically collecting wait time data would ultimately help states allocate resources more effectively. Researchers have found that precints in which wait times are long and problems repeatedly occur—which are usually in poorer areas—have lower voter turnout. Such precincts tend to have the same issues: insufficient accessibility, inadequate signage, less physical space, poor organization, inadequate parking, and so on. A 30-minute rule would help election administrators better identify precincts with problems and compel resource reallocation to bring these precincts up to speed.

Finally, a multitude of studies have addressed the link between long lines and voter confidence in elections. Additionally, news reports include anecdotal evidence that frustrated voters did not cast ballots because of long lines and wait times. This is not an insignificant problem: Voter confidence is a key factor in the electoral process. Increased confidence would lead to increased participation, ultimately leading to more accurate representation of the electorate.

II. Why Have a 30-Minute Rule?

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voters have a low level of trust in the process. After the 2012 election, the Orlando Sentinel noted that hours-long lines led some to compare the 2012 election in Florida to the state’s 2000 election—a comparison that sends shudders down the spines of those who care about public confidence in elections. If lines are shorter, voter confidence is less likely to erode.

In short, a 30-minute rule addresses burdens on voting for individual voters, provides impetus to address systemic problems, and prompts better data gathering that should lead to reallocation of staff and resources to bring all precincts toward a fair and equal mean. Widespread adoption of a 30-minute rule has real potential to improve voter confidence in our system of elections. The following pages describe individual reforms—proposed by the PCEA and recommended for prioritization by the ABA’s Standing Committee on Election Law—that election administrators could consider implementing in order to achieve a nationwide 30-minute maximum on voter wait time.

II. Recommendations for Reform

In a study released in September 2014, the U.S. Government Accountability Office (GAO) found nine key factors that affected wait times on Election Day: inadequate or reallocation of voting equipment, insufficient staffing and training of poll workers, opportunities or lack thereof to vote before Election Day, poll book type, ballot characteristics, polling place design, voter education, voter eligibility, and resource allocation. Many of the PCEA’s proposed solutions address these factors directly. The following section will set forth the ways in which election officials could use the PCEA’s recommendations to address these concerns.

A. Document Voting Machine Failure and Implement Testing Protocols

Twelve years after Congress passed the Help America Vote Act of 2002 (HAVA), in order to help state election officials update voting systems to meet new mandatory minimum standards, many of the voting machines purchased with HAVA funding are on their last legs. Older machines are far more inclined to malfunction or simply stop working during heavy Election Day use, and funding for new machines is often hard to come by. The importance of testing older machines prior to the opening of polling is therefore more important than ever. When a voting machine malfunctions, more voters are forced to use any remaining machines that are still in working order. Alternatively, when precinct machines malfunction, some states require a move to paper ballots, which can be more time-consuming to distribute, collect, and count.

B. Use a Comprehensive Voter Registration System

Many of the PCEA’s proposed solutions address these factors directly. The following section will set forth the ways in which election officials could use the PCEA’s recommendations to address these concerns.

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19 Damon & Powers, supra note 2.
20 U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 14, at 1.
22 Presidential Comm’n on Election Admin., supra note 9, at 4.
25 Damon & Powers, supra note 2.
26 U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 14, at 1.
28 Presidential Comm’n on Election Admin., supra note 9, at 4.
especially when poll workers are not properly trained in their use and handling—and especially when their use is compelled as a Band-Aid to cope with a problem on Election Day. Several states have statutory or regulatory guidelines mandating the testing of voting machines prior to each election, but a nationwide standard for how such tests should be conducted does not exist. In the absence of such a national standard, states should ideally attempt to mandate testing by law according to their needs and equipment. Ensuring the accuracy of voting equipment is of great interest across the political spectrum, so such proposals are unlikely to face opposition.

The Brennan Center has suggested creating a national database of voting equipment failures (accessible to state and local election officials) in order to track malfunctions by manufacturer and model. The EAC currently maintains a quality-monitoring program for election equipment, and such a database would supplement this program by aiding election officials in addressing machine failure and learning from past incidents. Additionally, a database would create accountability for voting machine manufacturers who seek to earn additional contract business from states.

B. Step Up Poll Worker Recruitment

Polls are largely administered by volunteers, and relying on a volunteer workforce on Election Day can lead to chronic understaffing at polling places. Fewer people to manage lines, check in voters, and provide assistance when needed often leads to longer wait times. While older poll workers are very often hard-working and committed civic participants, many older poll workers express discomfort with new technologies that are now commonplace at the polls. Widespread recruitment of high-school- and college-age poll workers could work wonders in alleviating staff shortages on Election Day and provide the ancillary benefit of increasing youth civic participation. In order to help effectuate this goal, election officials should


27GA ADC 183-1-12-02; GA ADC 183-1-14-01, 04


5
work with local school boards and post-secondary institutions to increase the ranks of student volunteers to receive academic credit for working the polls. Some election administrators have worked with local school officials to enable students who volunteer to take Election Day off from school as a no-penalty “civic participation” day.29 Moreover, the Bar at all levels should make it a priority to encourage lawyers to use their considerable talents by volunteering to serve in the election workforce. The Standing Committee is encouraging the recruitment of lawyers as poll workers through its “Lawyer as Citizen” program.

Additionally, election officials are often confronted with voters who speak English as a second language—or not at all. In 1975, Congress expanded the Voting Rights Act to include special protections for language minorities; and states and counties with substantial populations of language minorities were required to provide ballot and election materials in languages other than English.30 Notwithstanding, to this day, poll workers who are not able to properly assist these voters when they need help casting their ballots.31 The Advance Project has suggested that state and local election officials can improve minority turnout and election participation—as well as the general experience for voters who speak little or no English—by recruiting poll workers from language-minority communities via bi-lingual recruiting advertisements, social media outlets, and messages on foreign-language radio stations.32

C. Improve Poll Worker Training

Proper operation of the polls requires properly trained poll workers, and in 2012, 36% of jurisdictions surveyed by the GAO believed that insufficient training was a contributing factor to long wait times.33 Since poll workers are mainly volunteers who provide their services episodically,34 it is imperative that election officials provide comprehensive training in a way that keeps matters reasonably simple while still emphasizing the importance of adhering to strict protocols. The editors of the Field Guide to Ensuring Voter Intent have set forth guidelines for

42 U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 14, at 33.
effective training, which include simplifying training materials by using graphics instead of verbiage and extensive use of checklists.26

Nuts-and-bolts instructions, while useful, must also be combined with adequate preparation for situations that might arise during voting. Studies have shown that individual voters’ interactions with poll workers and how they deal with problems—long lines, malfunctioning machines—largely shapes the electorate’s perception of how fairly and accurately an election is conducted.17 In order to increase poll workers’ confidence in their abilities, researchers have recommended that training be hands-on, rather than in lecture form. By familiarizing themselves with actual machines and ballots, workers are provided with better practice for Election Day than training that consists only of passively watching a presentation or viewing PowerPoint slides.18

D. Expanded Early Voting
An effective way to reduce lines on Election Day is to spread voting out beforehand, over multiple days or weeks. Although some have called on Congress to mandate early voting on the national level,28 different states have different needs and resources. For example, in states with smaller populations spread out over a larger area, early in-person voting might not make practical sense whereas early voting by mail may offer numerous advantages. States with larger suburban populations may want to expand early in-person voting at vote centers that are easily accessible for those who commute to work by car. In states with large urban centers that have experienced severe Election Day delays in the past, expanded opportunities for early in-person voting at polling places or registrars’ offices may be the best solution.

The PCEA has cautioned that expansion of early and by-mail voting should not come at the expense of Election Day operations: the U.S. Postal Service is facing its own funding crisis, and overloading an already overloaded system could result in delayed or lost ballots.92 Thus, officials should be careful to allocate resources to adequately cover both early and Election Day operations.

E. Modernize Voter Check-In
In a 2014 study, the GAO found that in 35% of surveyed jurisdictions, election officials believed that the use of paper poll books contributed to longer wait times.41 Paper poll books only contain the names of voters registered in a single precinct, while electronic poll books

27 See, e.g., Thad Hall, J. Quin Monson, & Kelly D. Patterson, Poll Workers and the Vitality of Democracy: An Early Assessment, 40 P.S.: POLITICAL SCIENCE AND POLITICS 4, 647 (2007).
28 See ADVANCEMENT PROJECT, supra note 33, at 8, see also Hall, Monson, & Patterson, supra note 37, at 653.
31 U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 14, at 28.
(EPBs) with access to more comprehensive voter databases allow poll workers to more quickly direct voters who are in the wrong polling place to the proper location, rather than holding up voters in line while the worker calls the state election authority to verify a voter’s correct precint. 42

Numerous witnesses testified before the PCEA regarding the usefulness of EPBs, which poll workers can access via laptop computers or handheld devices. EPBs enable poll workers to quickly look up a voter who is checking in (rather than flipping through a heavy paper poll book), and provide real-time access to state and county voter lists. 43 The GAO’s study also supported this recommendation, but cautioned that older poll workers may not be comfortable or familiar with the handheld technology used to operate EPBs. Thus, although EPB technology should be the standard for Election Day management at the precinct level, election officials should make sure to incorporate information on their proper use during poll worker training.

F. Improve Polling Place Capacity, Design and Management

The PCEA identified several steps that election officials can take in order to increase polling place capacity, speed up lines, and improve flow through the polling place, many of which can be implemented at little or no cost.

The simplest of these reforms involves publicizing a sample official ballot in advance of the election, so that voters are able to make their selections before entering the voting booth. Local officials could accomplish this by publishing the sample official ballot in local newspapers (which would likely be inclined to grant such a request in the interest of civic participation), posting the sample official ballot online, and making the sample official ballot available to individuals in line on Election Day. 44

Additionally, “line walkers” could address individual voters in line to make sure that they are voting in the correct location, and direct them toward the correct precinct if they are not. Potential problems with partisan line walkers could be preempted by restricting their role to strictly information distribution, perhaps with scripted lines to work from. Line walkers can also cul the line, weeding out voters ineligible to cast ballots in that location before they reach the front of the line. Redirecting voters who are in the wrong place or who have registration issues from the general line will reduce waits for correctly registered voters. 45 It is worthy of note that the addition of the role of line walker will require additional recruitment and adequate training to ensure this role is performed efficiently and correctly.

Redirecting voters who have appeared at the incorrect polling place could also be done through a precinct map posted at the entrance of the voting location. This would allow voters an easy opportunity to verify they are in the correct location. The precinct could also send out postcards to the most recent address for each voter. This may prove ineffective if issues with non-delivery or late delivery make the receipt of the postcards difficult.

Finally, election officials may wish to adopt elements of queuing theory, a systematic means of evaluating how voters move through a polling place, how long they take at each point of service, and how fast the entire process must be in order to maximize volume while

42 See PRESIDENTIAL COMM’N ON ELECTION ADMIN., supra note 9, at 44-45.
43 Id.
45 See PRESIDENTIAL COMM’N ON ELECTION ADMIN., supra note 9, at 36.
III. Implementation of Reforms

Many jurisdictions that experienced long lines during the 2012 election put several of the aforementioned recommendations in place in advance of the 2014 election. This section

G. Better Ballot Design

Improvements in ballot design are generally targeted at reducing voter confusion and improving accuracy, but they have the secondary benefit of helping voters complete their ballot more quickly. Confused voters may ask election officials for assistance (which those officials may be prohibited by law from providing in certain states), thus holding up the line for voters behind them. Additionally, in jurisdictions that use optical-scan paper ballots, voters who make mistakes on their ballots and request a replacement create extra work for election officials, who must both provide the new ballot and make sure that the spoiled ballot is properly disposed.

The Brennan Center, among other organizations, has suggested several ideas to simplify ballot design, such as placing instructions for voters closer to their related actions, using more consistent formatting and fonts, eliminating disqualified candidates from the ballot altogether, and ensuring that different candidates for the same office are placed in the same column or on the same page. In some cases, overly prescriptive state laws and regulations that mandate certain ballot designs prevent such reforms. The Brennan Center has suggested that state election codes should simply set out general principles for ballot design, which election officials can implement through the adoption of administrative rules. States that already have problematic laws in place should work with usability experts in order to develop new standards that cause less difficulty for voters.

III. Implementation of Reforms

Many jurisdictions that experienced long lines during the 2012 election put several of the aforementioned recommendations in place in advance of the 2014 election. This section
describes some examples. Time (and successfully-run future elections) will tell whether these reforms are effective in reducing voter wait times.

A. Orange County, Florida
In 2012, Florida had the longest lines in the country, and central Florida’s Orange County had some of the worst lines in the state: the Orlando Sentinel found that 48% of Orange County residents who cast votes on Election Day lived in precincts that closed at least 90 minutes late. Since 2012, local election officials have made meaningful reforms that could contribute significantly toward reducing wait times in 2014 and beyond.

In an email interview, Orange County Supervisor of Elections Bill Cowles described several such reforms, which include the use of EPBs with real-time voter turnout information and “line walkers” with iPad Minis who will quickly be able to verify if those who are waiting to vote are in the correct precinct. These line walkers will also provide on-the-ground monitoring of wait times. Additionally, Cowles noted that in 2013, the Florida legislature reversed many of the changes that it made to the state’s election laws prior to the 2012 cycle. The revisions require at least eight days of early voting, leaving it up to the discretion of the Supervisor of Elections to allow up to 14 days of early in-person voting, and the early voting period was expanded to include Sundays once again.

B. City of Chesapeake, Virginia
In 2012, local news affiliates reported persistent long lines and hours-long delays at some of the largest precincts in Chesapeake. At that time, officials attributed wait times to voters who had moved and forgotten to update their address with state election authorities. Chesapeake General Registrar Al Spradlin confirmed in an email interview that the long lines in 2012 were limited to four or five of the largest precincts in the city, and these lines were not a problem in the vast majority of Chesapeake’s 64 polling places. Spradlin also detailed several reforms that local officials had put into place in response to lines at the largest precincts, including expanding and improving his jurisdiction’s EPB program by allocating more EPBs and experienced election officials at “problem precincts,” adding a “problem-solving” table for voters with registration issues at the highest-volume precincts in order to remove these voters from the general line, and having highly-experienced election officials on standby and available for dispatch to the busiest precincts on Election Day.

54 E-mail from Bill Cowles, Supervisor of Elections, Orange County, to Ben Adler, Graduate Research Fellow, William & Mary Election Law Program (Sept. 22, 2014, 17:08 EST) (on file with author).
55 Id. See Fla. Stat. § 101.657(6).
57 E-mail from Al Spradlin, General Registrar, City of Chesapeake, to Ben Adler, Graduate Research Fellow, William & Mary Election Law Program (Sept. 24, 2014, 18:35 EST) (on file with author).

59 E-mail from Bill Cowles, Supervisor of Elections, Orange County, to Ben Adler, Graduate Research Fellow, William & Mary Election Law Program (Sept. 22, 2014, 17:08 EST) (on file with author).
60 Id. See Fla. Stat. § 101.657(6).
62 E-mail from Al Spradlin, General Registrar, City of Chesapeake, to Ben Adler, Graduate Research Fellow, William & Mary Election Law Program (Sept. 24, 2014, 18:35 EST) (on file with author).
C. Prince William County, Virginia

In 2012, certain precincts in Prince William County had lines that stretched for as long as four hours.58 As a result of this experience, Prince William County created a total of nineteen new precincts for the 2014 election, which were fully staffed and stocked with the maximum number of polling machines available. Prince William County registrar’s office staffer Diana Dutton said in an interview that by creating new polling places, a smaller total number of people would be assigned to each precinct to make “surge hours” more manageable.59

As Dutton described, one of the major barriers to creating these new precincts was finding locations that would be able to serve as polling locations. Many of the current precincts are located in schools, and the number of schools available for this purpose is limited due to lack of parking. Thus, the county also reached out to churches and other organizations with ample parking in order to identify locations that could be used as polling places.60

Prince William County has also taken measures to educate the public on new voter ID laws in Virginia: the registrar’s office has sent representatives to volunteer at assisted living and nursing homes to take photographs of individuals who do not already have a photo ID.61 The county has also made efforts to inform the public of the content of any constitutional amendments and referendums before voters arrive at their polling locations.

D. Montgomery County, Virginia

In 2012, several precincts in Montgomery County, Virginia experienced newsworthy wait times at the polls.62 Because of the presence of Virginia Polytechnic Institute and State University (Virginia Tech) in the county, the student population makes up a significant proportion of the voting population.

In past years, officials at Virginia Tech would not approve voting locations on campus. Due to this inconvenience, students often found it difficult to vote, and many of their classmates were done for the day; thus, in 2012, nearly 40% of the student body had not voted until after 4:00 pm. This led to excessively long lines at the end of the day.63 Additionally, most students no longer lived at the addresses where they initially registered to vote, and thus they were required to fill out additional forms to become registered at the correct address. These factors led to longer wait times.

In May of 2014, however, the Board of Supervisors at Virginia Tech approved the use of campus facilities for polling locations for students living in on-campus housing. In response, county registrar Randy Wertz and his staff put a variety of reforms into place to ease wait times.

59 Telephone Interview with Diana Dutton, Representative, Office of Prince William County Registrar (Oct. 8, 2014).
60 Id.
61 Id.
62 Telephone Interview with Randy Wertz, General Registrar, County of Montgomery (Oct. 7, 2014).
63 Id.
providing two laptops and poll books for a side table designed to specifically assist inactive voters in the re-registration process. On top of these improvements, the county has purchased two tablets for LPBs, and will have one line walker in each precinct to determine if voters are in the right location. With these improvements, Wertz and his staff hope to dramatically improve the wait times for the polling places in their county.64

Randy Wertz later related that in the November 2014 midterm election the new precincts were generally overstaffed. He said that this was likely because the turnout for the campus precincts was 8.4% while the other precincts in the county averaged 40%. He is convinced that this is the result of being a midterm election and that in a presidential election the new precincts will now be more prepared for a higher turnout.65

IV. Conclusion

Voter wait time is a pressing issue that election officials cannot put on the back burner, and long lines are the result of a variety of factors, from obsolete technology to understaffed precincts to poor polling place design. In the absence of federal mandates, state and local election officials can and are working hard to evaluate what combination of reforms will best use limited election equipment and personnel. The PCEA, ABA, and various independent researchers have determined that long lines are a solvable problem and have proposed numerous ways election officials can streamline voting procedures. Indeed, a number of jurisdictions that experienced the country’s longest wait times in 2012 have already made significant improvements.

A 30-minute rule—combined with the proper recommendations for its implementation—forces election officials to deal with systemic problems that lead to long lines, rather than dealing with issues piecemeal. Additionally, a 30-minute rule would serve to increase voter confidence by making the electoral process smoother and less time-consuming, thus affording more individuals the ability to cast their vote. Ultimately, every state, county, and precinct faces different challenges on Election Day. Election administration is not a one-size-fits-all endeavor.

Respectfully submitted,

John Hardin Young
Chair
Standing Committee on Election Law
August 2015

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August 2015

64 Id.
65 E-mail from Randy Wertz, General Registrar, County of Montgomery, to Ben Ader, Graduate Research Fellow, William & Mary Election Law Program (Jan 5, 2015, 08:28 EST) (on file with author).
GENERAL INFORMATION FORM

Submitting Entities: Standing Committee on Election Law

Submitted By: John Hardin Young, Chair, Standing Committee on Election Law

1. Summary of Resolution(s).

This resolution urges election administrators, officials, and legislators at the federal, state, local, territorial, and tribal levels to adopt and implement policies designed to achieve a thirty-minute maximum per voter wait time at the polls.

2. Approval by Submitting Entity.

The Standing Committee on Election Law approved the resolution on 16 April 2015.

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

No.

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

In August 2010, the Association adopted policy urging states, localities, and territories to review their election systems and recent experiences of election delays if any, in light of available data and scholarship, including the Standing Committee on Election Law's Report on Election Delays in 2012. The resolution also encouraged the enactment of appropriate legislation or administrative rules to address the causes and potential remedies for election delays, including but not limited to technological improvements to provide statewide database access in real time to all polling places; as well as urging the enforcement of the deadline for the creation of statewide databases imposed by the Help America Vote Act ("HAVA") and compliance with the deadline. The proposed resolution would complement and expand the above listed Association policy.

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

N/A

6. Status of Legislation. (If applicable)

Several bills have been proposed in the House and Senate to improve the voting process and voter wait times. In January 2015, S.212 the Lines Interfere with National Elections (LINE) Act was introduced to implement the 30-minute rule. The Streamlined and Improved...
Methods at Polling Locations and Early (SIMPLE) Voting Act of 2015, H.R.411, introduced in January 2015, requires that states provide sufficient election resources in federal elections to ensure a fair and equitable wait time and that no voter wait longer than one hour to cast a ballot. The Universal Right to Vote by Mail Act of 2015, H.R.1618, introduced in March 2015, amends the Help America Vote Act of 2002 to prohibit states from limiting an individual's ability to cast a vote by mail in federal elections.

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 election administrators, officials, and legislators at the federal, state, local, territorial, and tribal levels to adopt and implement policies that work toward achieving a thirty-minute maximum per voter wait time at the polls.

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 late April 2015 the proposed report and resolution was circulated to the following entities:

    - Section of Administrative Law
    - Commission on Disability Rights
    - Commission on Hispanic Legal Rights and Responsibilities
    - Section on Individual Rights and Responsibilities
    - Commission on Racial and Ethnic Diversity in the Profession
    - Coalition on Racial and Ethnic Justice
    - Senior Lawyers Division
    - Section of State and Local Government Law

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges election administrators, officials, and legislators at the federal, state, local, territorial, and tribal levels to adopt and implement policies designed to achieve a thirty-minute maximum per voter wait time at the polls.

2. Summary of the Issue that the Resolution Addresses

Long wait times at the polls can lead to voter frustration and inconvenience. President Obama established the bipartisan Presidential Commission on Election Administration (PCEA) to identify best practices in election administration and make recommendations to improve the voting experience. One of the PCEA’s key recommendations was the establishment of a “30-minute rule.” Both the PCEA and the ABA’s Standing Committee have the shared goal of pinpointing areas of concern that lead to long lines and addressing those elements of the voting experience that cause unnecessary friction for both electors and election administrators.

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

The 30-minute rule as proposed by the PCEA would set a nationwide standard. It would require election administrators to implement measures to ensure that no voter waits in line more than 30 minutes after arriving at the polling place. The ABA’s Standing Committee on Election Law’s proposed resolution and report support the adoption of an aspirational 30-minute rule, as a means of addressing long lines and potential voter frustration.

4. Summary of Minority Views

None to date.

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RESOLVED, That the American Bar Association urges the federal government to adopt laws that protect patients and promote patient safety from defective medical products.

FURTHER RESOLVED, That the American Bar Association opposes legislation that limits and/or bans punitive damages for claims of patient harm allegedly caused by manufacturers of FDA-approved medical products or devices.
REPORT
For decades the ABA has participated in national discussions on the interrelationship between the healthcare professions and the legal system. The ABA has resolved to assure that patients continue to have access to the civil jury system in the nation’s courts and that they will also be awarded damages, as supported by evidence, without being subject to an arbitrary cap on actual or punitive damages. This Resolution is consistent with and furthers these policies by opposing efforts to ban punitive damages for claims of patient harm allegedly caused by manufacturers of FDA-approved medical products or devices, as proposed by past, and likely to be reintroduced by future Congresses.2

The ABA House of Delegates first opposed caps on damages in 1978.3 Later, in 2006, there was discussion about proposed federal legislation to deny full compensation to individuals by imposition of arbitrary caps and to create a system of involuntary “health courts.” In response, the House passed a resolution that “[r]efirms opposition to legislation that places a dollar limit on recoverable damages that operates to deny full compensation to a plaintiff in a medical malpractice action, recognizes that the nature and extent of damages in a medical malpractice case are triable issues of fact (that may be decided by a jury) and should not be subject to formulas or standardized schedules, and opposes the creation of healthcare tribunals that would deny patients injured by medical negligence the right to request a trial by jury or the right to receive full compensation for their injuries.”4

On December 29, 2008, the ABA continued to advocate for patient rights and safety by sending letters to the House and Senate urging support for legislation to allow injured patients to hold negligent medical device manufacturers liable for damages for product related deaths and injuries in state courts under state laws.5

The Help Efficient, Accessible, Low-cost, Timely Healthcare (“HEALTH”) Act of 2011,6 was introduced in the 112th Congress, and had been introduced in previous Congresses in similar if not identical form, and given the ongoing controversy about health care reform can be expected to be reintroduced in future Congresses. The HEALTH Act’s scope applies to the large realm of all healthcare related tort actions, not just medical negligence. It applies to any “health care lawsuit” which is broadly defined to include many claims against a number of institutions - not just providers - including hospitals and nursing homes, defective product claims against pharmaceutical companies and medical device corporations, and even bad faith claims against health insurers and HMOs. Additionally, “health care lawsuit” applies to any claim regarding the

1 ABA Resolution 114 (Feb. 1986).
2 ABA Resolution 117 (Feb. 1979).
3 ABA Resolution 103 (Feb. 2006).
6 ABA Resolution 114 (Feb. 1986).
7 Help Efficient, Accessible, Low-cost, Timely Healthcare (“HEALTH”) Act of 2011.8 was introduced in the 112th Congress, and had been introduced in previous Congresses in similar if not identical form, and given the ongoing controversy about health care reform can be expected to be reintroduced in future Congresses. The HEALTH Act’s scope applies to the large realm of all healthcare related tort actions, not just medical negligence. It applies to any “health care lawsuit” which is broadly defined to include many claims against a number of institutions - not just providers - including hospitals and nursing homes, defective product claims against pharmaceutical companies and medical device corporations, and even bad faith claims against health insurers and HMOs. Additionally, “health care lawsuit” applies to any claim regarding the
The ABA continues to strongly advocate for patient’s safety and rights and allowing the jury system to promote and protect those rights. If adopted, the HEALTH’s Act provisions regarding its ban on punitive damages in defective product claims relating to FDA-approved products will run contrary to the American Bar Association’s longstanding policy to oppose caps on damages, including punitive damages which encourage responsible behavior by manufacturers of consumer products. This is because the HEALTH Act contains a complete ban on punitive damages for claims alleging a medical product caused the claimant’s harm. The manufacturers or distributors of a medical product would receive that benefit of this ban on punitive damages if:

(1) that medical product “was subject to premarket approval, clearance, or licensure by the Food and Drug Administration with respect to the safety of the formulation or performance of the aspect of such medical product which caused the claimant’s harm or the adequacy of the packaging or labeling of such medical product” and was “so approved, cleared, or licensed;” or

(2) where “such medical product is generally recognized among qualified experts as safe and effective with respect to the safety of the formulation or performance of the aspect of such medical product which caused the claimant’s harm or the adequacy of the packaging or labeling of such medical product”.

The HEALTH Act caps punitive damages at $250,000 or twice the amount of compensatory damages – of which non-economic damages are also capped - whichever is greater. Therefore, while all defendants in “health care lawsuits” would get the benefit of the $250,000 cap on punitive damages, manufacturers and distributors of medical products would get the additional benefit of an almost complete ban on punitive damages in product liability cases involving their medical products in the event that their medical product received FDA-approval or was “generally recognized among qualified experts as safe and effective.”

Banning all punitive damages is poor legal policy and is also contrary to ABA’s existing policies. There is no justification to cap or limit punitive damages in any tort cases. Empirical studies have concluded that punitive damages are rarely awarded, are correlated to the plaintiff’s injuries and are reserved for the most egregious behavior. Additionally, there is no evidence that caps on punitive damages lower the cost of healthcare.

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that punitive damage awards are increasing, or that judges and juries are not fairly and properly awarding punitive damages."

Further, the deterrent effect and purpose of punitive damages is eliminated by capping or eliminating punitive damages. "Unless one wishes to ignore the literature, it is apparent that caps reduce the deterrent effect of the civil justice system, protect wrongdoers who cause harm, and transgress the most basic rights associated with civil justice, including the right to a jury trial."  

There is no justification to cap or limit punitive damages in tort cases, particularly in cases alleging defective consumer products. As a practical matter, not only are punitive damages only awarded in one percent of product liability actions in state courts, but furthermore, in the rare cases where punitive damages are awarded in product liability actions, their award serves an important deterrent role in ensuring that dangerous products are taken off the market. Research of punitive damages in product liability actions has shown that:

Punitive damages played a vital social policy role in discouraging firms from marketing dangerous products or failing to recall them. The vast majority of dangerous products have been recalled, modified, and redesigned by their manufacturers. Of the cases studied, as many as eighty-two percent of the defendants took some safety step to remedy the dangerous situation. Forty-three percent of the defendants took remedial steps prior to litigation. This is heartening but does not negate the need for punishment in situations in which firms had prior notice but did not correct the danger before injury ensued... In general, companies think twice about cutting corners on safety when faced with the prospect of indeterminate punitive damages.

The HEALTH Act's ban on punitive damages for defective product claims caused by FDA-approved products evidences a misunderstanding of the role of punitive damages and product liability law. As an example, in claims alleging a manufacturing defect of an adulterated drug, the fact that the product design received FDA approval is "generally recognized as safe" is entirely unrelated to the cause of action or whether corporate misconduct in the manufacturing defect would warrant a punitive damage award.


12 Theodore Eisenberg et al., Judges, Juries and Punitive Damages, 3 JOURNAL OF EMPIRICAL LEGAL STUDIES 263, 283 (2006) ("We report evidence across 10 years and three major data sets that: (1) judges and juries award punitive damages in approximately the same ratio to compensatory damages, (2) little evidence of increasing levels of punitive awards exists, and (3) judges' and juries' tendencies to award punitive damages differs in bodily injury and no-bodily-injury cases.")

13 Andrew Popper, Capping Incentives, Capping Innovation, Courting Disaster, 60 DePaul L. Rev. 975, 997 (2011) ("It forces actors to consider the possibility of harm and injury associated with product or service failure. It pushes companies to optimize safety, within reasonable limits. This pressure is absent with a cap on liability.")

14 Id.


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14 Id.


Moreover, adherence to government regulations is already relevant and considered in product liability cases. Under current tort law, any manufacturer in any industry, including a pharmaceutical or medical corporation, can defend an allegedly defective product by introducing evidence of its compliance with industry or government standards. However, mere compliance with an industry standard does not excuse what is otherwise culpable misconduct. The Restatement of Torts provides that:

a product’s compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.¹⁷

Similarly, there is no justification to assume that adherence to a government standard, such as FDA approval or clearance for a medical product, should completely eliminate the availability of punitive damages where there may otherwise be a finding of intentional or wrongful conduct that warrants an award of punitive damages. Indeed, in many product liability claims alleging a design defect or failure to warn defect in a medical product, the product was nearly always FDA-approved.

Certainly, defendants may continue to introduce evidence of their compliance with FDA rules and regulations as part of their defense, and judges and juries may consider such information in evaluating any award or amount of damages, but adherence to a government standard will not, nor should it, forgive a company of an award of punitive damages if that company is otherwise guilty of gross misconduct. This is especially true where the government’s approval process, itself, has been subject to widespread criticism.¹⁸

The consequences for specifically exempting FDA-approved products from punitive damages are particularly grave since these products inherently present the most serious risks of all consumer products and to the safety of patients. “While admittedly these products are socially useful, they also pose some of the greatest risks to human beings. Consider, for example, the widespread injuries that thousands of women suffered as a consequence of using the Dalkon Shield or DES, to name but two prescription products. Indeed, the level of potential risk from such products is one of the reasons they are so closely regulated.”¹⁹

There exist other examples of FDA-approved products where FDA’s regulatory review process proved inadequate in protecting the public from serious risks posed by a medical product.²⁰ As summarized in a recent report from the Congressional Research Service:

Problems related to medical devices can have serious consequences for consumers. Defects in medical devices, such as artificial hips and pacemakers, have caused severe patient injuries and deaths. In 2006, FDA reported 116,086 device-related

³⁰ Id. at 1348-49. The listed examples include Orthofix, Orlon, Breast Implants, Aspirin warning labels, and Copper 7 IUD, among other medical products approved by the FDA.

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injuries, 96,485 malfunctions, and 2,830 deaths; an analysis by the National Research Center for Women & Families claims there were 4,556 device-related deaths in 2009.21

Where there is corporate wrongdoing rising to the level of gross misconduct, an award of punitive damages should appropriately be considered and current ABA policy would support that submission to a jury. Yet, the HEALTH Act would forbid such an award in these cases.

In essence, a complete ban on punitive damages from government-approved products represents poor public policy and highlights a misunderstanding of the purpose of punitive damages and product liability laws. The consequences of banning punitive damages in medical product liability actions are particularly troubling given the risks of these particular consumer products and the history at the FDA to inadequately protect public health in its review process of particular medical products.22 In such case, punitive damages serve as an important deterrent against gross corporate misconduct and a safeguard to better ensure the safety of medical products on the market.

Furthermore, the HEALTH Act’s ban on punitive damages violates existing ABA policies regarding the availability of punitive damages in medical liability cases. The ABA has previously concluded that there is no justification to limit or ban punitive damages for specific sets of defendants. In the 1986 ABA Resolution, the ABA concluded that, “[n]o justification exists for exempting medical malpractice actions from the rules of punitive damages applied in tort litigation to deter gross misconduct.”

While the 1986 Resolution was focused on punitive damages awards in medical malpractice actions against healthcare providers -- which as explained above are not the type of cases implicated by the HEALTH Act’s ban on punitive damages for FDA-approved products – it is clear that the ABA’s policy implied application to apply to all tort and personal injury causes of action.

The 1986 Resolution relied upon the report of the Special Committee on Medical Professional Liability. This Special Committee Report recognized that the recommended policy against limits on punitive damages applies broadly, not just medical malpractice causes of action. The Special Committee found that:

The purpose of punitive damages is to deter gross wrongful conduct. There has been no justification shown for eliminating those damages when the gross misconduct occurs in the delivery of health care services, and there, this committee opposes treating medical malpractice defendant differently than any other wrongdoer accused of acts of gross misconduct.

In passing the 1986 Resolution, the ABA has affirmed the purpose and intent of punitive damages and has shown its unwillingness to cap or eliminate the award of punitive damages. The

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Special Committee Report stated, “This committee emphasizes that punitive or exemplary damages are reserved for the rare situation in which a physician – or any other defendant in a tort action – has committed willful wrongs of such a heinous nature that the punishment is appropriate.”

Additionally, the ABA has previously recognized that punitive damages are particularly important in the cases alleging corporate wrongdoing, since traditional criminal punishments for reprehensible conduct is not available in product liability claims. In the ABA’s 1987 Report of the Action Commission to Improve the Tort Liability System, the Commission found the following in making its recommendations:

From the standpoint of tort theory, punitive damages express the full measure of societal outrage and assure the appropriate deterrent effect in cases where a defendant’s conduct is outside the bounds of civilized behavior. Typically, there is no effective criminal remedy to complement civil redress. Hence, punitive damages traditionally have served the important function of ensuring a measure of punishment for essentially private unlawful conduct that is commensurate with the antisocial nature of the action.

The ABA’s prior position is well founded, but particularly for product liability claims. It is impossible for a corporation to face criminal prosecution, and there is not a criminal remedy for mournful injuries by a defective medical product. Indeed, for many of these cases an award of punitive damages may be the only means to punish a corporation for any willful misconduct. If anything, the availability of punitive damages in allegations of corporate wrongdoing deserves special protection, the exact opposite of the limits offered by the HEALTH Act.

While the ABA has previously recommended some types of reforms to punitive damage awards, none of those reforms are remotely correlated to the HEALTH Act’s ban on punitive damages. In the 1987 Report, the ABA recommended other reforms to punitive damage awards, such as altering the standard of proof in awarding punitive damages and implementing pre-trial procedures to weed out frivolous claims for punitive damages. However, the ABA has never endorsed – as discussed above previously, the ABA has in fact opposed - any proposal that limits or bans punitive damages.

Such statements readily acknowledge that questions of availability and amount of punitive damages properly rest with a jury under the normal judicial oversight of the judge. Bans on punitive damages, as proposed in the HEALTH Act, would take these decisions away from juries and judges, fundamentally altering the inherent purpose and effect of punitive damages in the American judicial system.

Conclusion

The ABA recognizes that availability of punitive damages serves the purpose of deterring gross wrongful conduct, regardless of the type of defendant or regulatory approval of their

25 In 1985, the ABA President appointed this Commission, chaired by Robert B. McLean. It was charged with examining all aspects of the tort liability system.
27 See ABA Resolution 125D (Aug. 1987) implementing some of these recommendations.

6
product. Without question, eliminating punitive damages against pharmaceutical and medical device corporations in product liability claims would allow such corporations to avoid the deterrent purpose of punitive damages. Indeed, in cases such as medical devices, where patient safety is at stake, and when awards of punitive damages are rare for product liability cases, there is no justification for legislation to shield wrongful conduct or limit the jury’s and court’s ability to deter such conduct.

The Standing Committee on Medical Professional Liability requests the House of Delegates to adopt the resolution herein.

Respectfully submitted,

Howard Wall, Chair
Standing Committee on Medical Professional Liability
August 2015
1. **Summary of Recommendation.**

The American Bar Association supports patient safety. The ABA further opposes any legislation limiting or banning punitive damages for claims of patient harm allegedly caused by manufacturers of FDA-approved medical devices.

2. **Approval by Submitting Entity.**

The proposed resolution has been approved by the Medical Professional Liability Standing Committee via electronic balloting on May 4, 2015.

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

Previous resolutions have dealt with different areas of broad policy against limiting punitive damages and on general support of legislation that protects patients. This resolution builds on existing ABA policy particularly 1978 and 2006 resolutions opposing limits on damages and fair compensation for persons in medical malpractice actions, as well as 1995 and 2003 policies regarding regulation of product liability law.

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

The proposed recommendation will supplement the following American Bar Association policies:


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

There are numerous advocates seeking national changes to torts involving medical device manufacturers. We strongly believe a form of H.R. 5 will be introduced in Congress and the ABA should be ready to oppose bans on punitive damages as to wrongful conduct of medical device manufacturers.

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

See #5 above.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Standing Committee and interested sections will work closely with our Government Affairs Office to oppose legislation that may be introduced in the next Congress.

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

There are no direct or indirect costs to the Association anticipated as a result of its adoption of this Resolution as ABA policy.

9. Disclosure of Interest. (If applicable)

Members of the Standing Committee represent all stakeholders in healthcare claims, as counsel for plaintiffs and defendants, including insurance companies. We are not aware of any potential conflicts of interest related to this Resolution.

10. Referrals.

Referral is being made to all Sections, Divisions, and interested Committees, including:

Health Law
Litigation
Tort Trial and Insurance Practice
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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laura@sharpfirm.com

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The American Bar Association supports patient safety. In so doing, it opposes efforts, by way of federal legislation, that would limit or ban punitive damages for claims of patient harm allegedly caused by manufacturers of FDA-approved medical devices.

2. Summary of the Issues that the Resolution Addresses

In recent Congresses, as part of the ongoing debate over accessibility and cost of health care, bills have been proposed to place limits on what persons may recover in medical malpractice cases. Included have been provisions to limit punitive damages against manufacturers for medical products and devices that have received FDA approval. This is despite evidence that punitive damages promote patient safety as well as shortcomings in the FDA approval process. This resolution will allow the ABA to oppose such legislation, consistent with our other ABA-approved policies on medical malpractice liability.

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

This resolution will specifically oppose legislation that would limit or ban punitive damages for manufacturers of FDA-approved medical devices.

4. Summary of Minority Views

No minority views or opposition have been identified at this time.
RESOLVED, That the American Bar Association urges state, local, territorial and tribal
court and tribal courts to develop oversight protocols to ensure that these policies are implemented in
child welfare and juvenile justice cases under their jurisdiction, and to ensure that medication
continues to be evaluated, and, if appropriate, continue without interruption when placement
changes occur or when the child is transitioning out of the foster care or juvenile justice systems.

FURTHER RESOLVED, That the American Bar Association urges attorneys, judges, bar
associations, and law school clinical programs on children's issues to promote education and to
develop technical assistance resources on legal issues related to psychotropic medications and on
the appropriate use of psychotropic medication for children.

FURTHER RESOLVED, That the American Bar Association urges Congress to enact
legislation requiring state, territorial and tribal governments to collect data and report to
appropriate federal agencies on the ongoing use of psychotropic medication for children in foster
care and in the juvenile justice system under their jurisdiction.
Children in foster care and youth involved in the juvenile justice system are prescribed psychotropic medications at alarmingly high rates. Foster children are given psychotropic medications at a rate nine times higher than children not in foster care. And over fifty percent of the youth involved in the juvenile justice system are prescribed psychotropic medications within one month of intake.

While psychotropic medications can be a useful part of a child’s treatment plan, over-medication causes these children and youth to “act like zombies”, contemplate harming themselves or worse, commit suicide. Additionally, the side effects of over-medication are endless. They can range from, but are not limited to, the less severe to the most extreme – anxiety, dizziness, confusion, and changes in behavior, to excessive weight gain, seizures, and death from liver failure.

Children in foster care and youth in the juvenile justice system are overmedicated because they are often prescribed psychotropic medication: (1) without informed consent by the child, his/her parent, or the court-appointed guardian; (2) without the review of a full medical history and diagnostic assessment, without record keeping by the agency who has custody of the child, without protocols to monitor and review medication use on a short or long-term basis, and with inadequate court oversight; (3) to control behavior, often concomitantly with other psychotropic medication, in dosages exceeding the maximum recommendation, and for off-label use.

1Allison Flood, Class of 2015 of the Maurice A. Deane School of Law at Hofstra University, researched and authored this report. The ABA Commission on Youth at Risk is grateful for her important contribution and excellent work.


4 See Lyons et al., supra note 2, at 59.


use; and (4) without previous or concurrent use of any alternate therapies or psychosocial treatments.1 Children in foster care and youth involved in the juvenile justice system are thereby denied their constitutional right to adequate medical care, including the right to avoid the overadministration of psychotropic medications.2

A number of organizations have weighed in on this issue. The American Academy of Child and Adolescent Psychiatry ("AACAP") created its Position Statement on the Oversight of Psychotropic Medication Use for Children in State Custody: A Best Principles Guideline, and the National Council of Juvenile and Family Court Judges ("NCJFCJ") passed a resolution in 2013, both of which are intended to improve the oversight and regulation of psychotropic medication use in the child welfare and juvenile justice systems.3 The ABA Center on Children and the Law also published a practice and policy brief in 2011 for attorneys and judges; the report concluded that children in care are especially vulnerable to the overuse of psychotropic medication and that medication use should be supported with other treatments and therapies to avoid any risk of harm to a child or youth in care.4

This resolution urges states and agencies that oversee child welfare and juvenile justice to develop comprehensive policies so that children and youth who need psychotropic medications are prescribed such medications only to treat mental and behavioral health conditions, only as medically necessary, and not merely to control behavior, and that these policies are developed in collaboration with best practice guidelines from medical professional organizations and medical, mental health and disability experts. Second, the resolution urges the implementation of court and agency oversight processes to ensure that children in both systems receive appropriate treatment for mental health conditions and trauma, and that their treatment continues without interruption when placement changes occur or when children and youth transition out of either or both systems. The resolution further encourages attorney and judges to increase their education of the legal issues around psychotropic medication use in children. Finally, the resolution urges

4 Solchany, supra note 5.
Congress to enact legislation that will require states to collect data and report on use of
psychotropic medication for all children in state custody.

Section I provides information about most commonly prescribed psychotropic
medications to foster children, the prescription rates, the side effects of psychotropic
medications, and testimonials from foster children who have been over-medicated. Section II
presents information about the position statement of the AACAP’s Best Principles Guideline and
the NCJFCJ’s 2013 Psychotropic Medication Oversight Resolution. Section III discusses the
state and agency responses to date across the country and explains the need for a coordinated,
comprehensive set of policies and data collection in order to protect children and to ensure that
children and youth in state custody receive all modes of treatment to successfully manage their
conditions or symptoms. Section IV asserts the need for attorneys and judges to improve their
competence on legal issues around use of psychotropic medication.

I. “I Feel Like a Zombie”: The Over-Administration of Psychotropic
Medications to Children in State Custody Is a Nationwide Epidemic

A. What are psychotropic medications?

Psychotropic medications are defined as “substances that act directly on the brain to
chemically alter mood, cognition, or behavior.” Their effect is typically achieved by altering
the process of the brain’s neurotransmission. Psychotropic medications are typically divided
into six classes: stimulants, antidepressants, depressants, antipsychotics, mood stabilizers, and
anxiolytics (anti-anxiety). Of all the psychotropic medications, antipsychotics are, by far, the most frequently
prescribed medicines to foster children and youth involved in the juvenile justice system.
Antipsychotics were initially designed to treat schizophrenia and bipolar disorder in adults, but
are commonly prescribed to these children to treat behavioral issues for which the FDA has not approved,
including agitation, anxiety, acting out, and irritability. The most commonly prescribed antipsychotics, which are also among the most powerful medications, include
Seroquel, Abilify, Risperdal, Zyprexa, Geodon, Invega, Latuda, Fanapt, Clozaril, Saphris, and
Solian. Only Seroquel, Abilify, Risperdal, and Zyprexa have very limited FDA approval for
use in children.

11 Angela Olivia Burton, “They Use it Like Candy”: How the Prescription of Psychotropic Drugs to State-Involved
12 Id.
13 Matthew M. Cummings, Sedating Forgotten Children: How Unnecessary Psychotropic Medication Endangers
14 Michael Piraino, Another Prescription Drug Abuse Problem: The Oversedication of Foster Kids, THE
HUFFINGTON POST (May 5, 2011), http://www.huffingtonpost.com/michael-piraino/prescription-drug-
abuse_b_855547.html; see also CLOYES ET AL., supra note 6, at 8.
15 Abdelmalek et al., supra note 3.
16 Id.
17 Id.

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abuse_b_855547.html; see also CLOYES ET AL., supra note 6, at 8.
15 Abdelmalek et al., supra note 3.
16 Id.
17 Id.
B. What are the prescription rates among foster children and youth involved in the juvenile justice system?

Foster children and youth involved in the juvenile justice system are prescribed psychotropic medications at shockingly high rates. At a nation-wide level, studies have shown that up to fifty percent of all children in foster care are prescribed one or more of these psychotropic medications at any given time, a rate nine times higher than children not in foster care. While published national data on the rates of psychotropic medication use in either detained or incarcerated juvenile populations does not currently exist, recent studies conducted in various states indicate that these youth are also prescribed psychotropic medications at rates higher than youth in the general population. A study of the Utah Juvenile Justice System indicated that fifty-six percent of youth involved in the juvenile justice system were prescribed psychotropic medications. A study of the Washington State Juvenile Justice System indicated that thirty-six percent of youth involved in the juvenile justice system were prescribed psychotropic medications. And, a study of the Oregon State Juvenile Justice System indicated that fifty-eight percent of females and thirty-two percent of males involved in the juvenile justice system were prescribed psychotropic medications.

As previously discussed, the most commonly prescribed psychotropic medications to foster children and youth involved in the juvenile justice system are antipsychotics. Foster children are given antipsychotics at a rate nine times higher than children not in foster care, according to a 2010 sixteen state analysis by Rutgers University. An estimated fifty percent of youth under eighteen who are within the juvenile justice system are prescribed antipsychotics, compared to just eight to ten percent in the general population. Additionally, a 2007 study of the Florida Department of Juvenile Justice indicated that in twenty-four months, the Department of Juvenile Justice purchased 326,081 tablets of antipsychotics for use in state-operated jails—enough to hand out 446 pills a day, seven days a week, for two years in a row to the 2,300 youth involved in the Florida juvenile justice system.

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18 See Camp, supra note 2, at 373; see also Prescription Psychotropic Drug Use Among Children in Foster Care: Hearing Before the Subcomm. on Income, Sec. and Family Support of the H. Comm. on Ways and Means, 110th Cong., 1st Sess. (2008), available at http://www.gpo.gov/fdsys/pkg/CHRG-110hrg4553/html/CHRG-110hrg4553.htm (citing the testimony of Lauren K. Leslie, M.D., in which she stated that the research studies available show rates of psychotropic drug medication use ranging from 13-56% among children in foster care and the testimony of Tricia Lee, Ph.D., in which she stated that she in 2003, twenty-five percent of children in Tennessee foster care were prescribed psychotropic drugs); Melissa D. Carter, Mediating Trauma: Improving Prescription Oversight of Children in Foster Care, 46 CLEARINGHOUSE REV. 398, 399 (2013).

19 See Lyons et al., supra note 2, at 59; see also Allon Evans Cueliar et al., Incarceration and Psychotropic Drug Use by Youth, 183 PEDOPHTHYAL ADOLESCENTI MED. 219 (2008).

20 See CLOYES ET AL., supra note 7, at 8.

21 See Lyons et al., supra note 2, at 59.

22 id.

23 Abdelmalek et al., supra note 3.


Not only are foster children and youth involved in the juvenile justice system prescribed psychotropic medications—the majority of which are antipsychotics—at rates that are truly disturbing, but they are also heavily over-medicated. Over-medication of foster children and youth involved in the juvenile justice system is not the only alarming trend in psychotropic medication prescription rates. Even more frightening is polypharmacy, which occurs when a child is prescribed psychotropic medications concomitantly, or in combination. These children are often prescribed a deadly combination of the most powerful psychotropic medications, despite the fact that experts state that children should rarely take multiple psychotropic medications at the same time.

A recent study of forty-seven states and the District of Columbia indicated that 38.3 percent of states were administering multiple psychotropic medications simultaneously to foster children and 21.3 percent of states were engaging in polypharmacy before monopharmacy. Additionally, a recent United States Government Accountability Office (GAO) study of 100,000 foster children across five states found that, in Texas, foster children were fifty-three times more likely to be prescribed five or more psychotropic medications at the same time than non-foster care children. And, a recent study of the Utah Juvenile Justice System indicated that sixty-two percent of the youth prescribed psychotropic medications were taking more than one medication concomitantly, while thirty-eight percent were taking only one psychotropic medication.

GAO experts stated, upon review of these findings, that they did not find any evidence supporting the use of five or more psychotropic medications in adults, let alone in children.

C. What effects do psychotropic medications have on children?

Psychotropic medications have a number of extreme side effects on children. Side effects include tics, increased heart rate and blood pressure, vomiting, increased appetite and weight gain, sleepiness, sedation, stomachaches, dizziness, diarrhea, tremor, hair loss, unusual bleeding or bruising, rash or hives with itching, and suicidal thoughts and attempts. Other side effects include akathisia (motor restlessness, desire to remain in constant motion), acute dystonia (spasms of upper body, face, tongue and eyes), neuroleptic malignant syndrome (rare but potentially fatal), it is characterized by muscular rigidity and altered consciousness, tardive dyskinesia (involuntary movements of various body parts, which can be irreversible), and an

34 See Barton, supra note 11, at 477; see also U.S. GOVT’ ACCOUNTABILITY OFFICE, GAO-12-270T, FOSTER CHILDREN: HHS GUIDANCE COULD HELP STATES IMPROVE OVERSIGHT OF PSYCHOTROPIC PRESCRIPTIONS (2011).
36 Carter, supra note 18, at 399.
37 Id.
38 Leslie et al., supra note 7. Monopharmacy means the use of a single medication, as opposed to polypharmacy, which is the use of multiple medications.
39 Id.
41 See CLOYES ET AL., supra note 7, at 7-8.
42 U.S. GOVT’ ACCOUNTABILITY OFFICE, supra note 26.
43 Norton, supra note 24, at 159; see also Citizens Comm’n on Human Rights Intl’, supra note 6.
44 Norton, supra note 24, at 160.

Not only are foster children and youth involved in the juvenile justice system prescribed psychotropic medications—the majority of which are antipsychotics—at rates that are truly disturbing, but they are also heavily over-medicated. Over-medication of foster children and youth involved in the juvenile justice system is not the only alarming trend in psychotropic medication prescription rates. Even more frightening is polypharmacy, which occurs when a child is prescribed psychotropic medications concomitantly, or in combination. These children are often prescribed a deadly combination of the most powerful psychotropic medications, despite the fact that experts state that children should rarely take multiple psychotropic medications at the same time.

A recent study of forty-seven states and the District of Columbia indicated that 38.3 percent of states were administering multiple psychotropic medications simultaneously to foster children and 21.3 percent of states were engaging in polypharmacy before monopharmacy. Additionally, a recent United States Government Accountability Office (GAO) study of 100,000 foster children across five states found that, in Texas, foster children were fifty-three times more likely to be prescribed five or more psychotropic medications at the same time than non-foster care children. And, a recent study of the Utah Juvenile Justice System indicated that sixty-two percent of the youth prescribed psychotropic medications were taking more than one medication concomitantly, while thirty-eight percent were taking only one psychotropic medication.

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increased risk of diabetes. In 2004, a Columbia University review of the pediatric trials of commonly prescribed psychotropic medications found that young people who took them often experienced suicidal thoughts or actions. And in 2006, results of an analysis of FDA data showed that at least forty-five children died between 2000 and 2004 from the side effects of psychotropic medications.

Throughout various interviews of foster children and youth involved in the juvenile justice system, children reported that they were heavily over-medicated while in state custody. These children have stated that psychotropic medications make them “feel like zombies.”

For example:

- Eleven-year-old Ke’onte from Texas indicated that he was on at least twelve different psychotropic medications while in foster care, up to four of them concomitantly. The medications made him irritable and exhausted, caused a loss of appetite, and put him “in a lights-out mode fifteen minutes” after he had taken them.
- Fourteen-year-old Westley stated that he was prescribed five psychotropic medications concomitantly. He would resist the pills because he did not like the way they made him feel.
- Mark, a former foster child from California, was also prescribed multiple psychotropic medications concomitantly. He stated that he felt too “zoned out” to focus on high school and was so groggy that he was cut from his varsity basketball team.
- Yolanda, a former foster child who was also involved in the California juvenile justice system, indicated that doctors prescribed her a series of powerful psychotropic medications in order to numb her pain from being physically and sexually abused and control her outbursts. She was “so medicated with psychotropic medications that she literally lost her ability to speak.”

Unfortunately, these stories are not unique to Ke’onte, Westley, Mark, and Yolanda. All across the United States, foster children and youth involved in the juvenile justice system are

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37 Norton, supra note 24, at 160.
38 Citizens Comm’n on Human Rights Int’l, supra note 6.
39 See Fried, supra note 5.
40 Abdulmalek et al., supra note 3.
42 See Fried, supra note 5.
43 Id.
45 Id.
46 Id.
47 Id.
prescribed multiple powerful psychotropic medications at significantly higher rates than children in the general population. These children remain heavily over-medicated – those who prescribe these medications use them “like candy” – and the overreliance on these medications is a nationwide epidemic. 48

D. What problems in the psychotropic medication oversight and regulation process have foster children and youth involved in the juvenile justice system encountered?

Polypharmacy is not the only problem related to prescription drugs that foster children and youth involved in the juvenile justice system encounter while in the care of the state. First, many states prescribe psychotropic medication to foster children and youth involved in the juvenile justice system without the informed consent of the child, his/her parent, or court-appointed guardian. 49 In the majority of states, the state often provides consent on behalf of the child, although sound reasons, discussed in Section II.A, recommend against this process. 50
Second, many states prescribe psychotropic medication without completion of a full medical history and/or making any diagnostic assessment, without record keeping by the agency who has custody of the child, without protocols to monitor and review medication use on a short or long-term basis, and with inadequate court oversight. 51 These states fail to properly document the administration of psychotropic medications or to conduct periodic reviews of a medication plan. 52 Third, many states prescribe psychotropic medication to control behavior, in dosages exceeding the maximum recommendation, and for off-label use. 53 Foster children and youth involved in the juvenile justice system are often prescribed these medications simply for the purpose of sedating the child – basically, maintaining control – a practice which has been widely condemned. 54 I mostly, many states prescribe psychotropic medication without any previous or concurrent use of alternate therapies or psychosocial treatments. 55

II. AACP and NCJFCJ: Best Principles Guideline and Recommendations to Improve the Administration and Oversight of Psychotropic Medications

As a result of the various problems foster children and youth involved in the juvenile justice system have faced, the AACP and the NCJFCJ made recommendations to improve use of psychotropic medications for children in the child welfare and juvenile justice system. 56

48 See Burton, supra note 11, at 477; see also U.S. G.O.V’T ACCOUNTABILITY OFFICE, supra note 26.
49 Id. at 380; see also Joseph V. Penn et al., Practice Parameter for the Assessment and Treatment of Youth in Juvenile Detention and Correctional Facilities, 44 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1085, 1094-95 (2005).
50 See Camp, supra note 2, at 380; see also Leslie et al., supra note 7 (discussing that a state should not be equated with a parent for the purpose of medicating a child since the state does not form an emotional attachment with the child).
51 See Leslie et al., supra note 7; see also Penn et al., supra note 49, at 1094-95.
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53 See U.S. G.O.V’T ACCOUNTABILITY OFFICE, supra note 26; Leslie et al., supra note 7.
54 See Leslie et al., supra note 7; see also Camp, supra note 2, at 373; Penn et al., supra note 49, at 1094.
55 See Penn et al., supra note 49, at 1095-96.
56 See AACP, supra note 9; see also Resolution, supra note 8.

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A. No psychotropic medication should be prescribed without informed consent by the child, his/her parent, guardian and/or licensed caretaker.

As stated, in many states, the state agency often provides consent for the administration of psychotropic medications on behalf of the child-patient. The AACAP has recommended against this practice, particularly because a state agency should not be equated with a parent for the purpose of medicating a child since the state does not form an emotional attachment with the child. While in state custody, the child interacts with a long series of social workers, clinic doctors, caseworkers, and supervisors making it impossible for the agency to form a bond with the child. The state is less likely to make sound medical decisions for the child because it does not know the intricacies of the child’s medical or behavioral history.

According to the Best Principles Guideline, states should not permit a state agency to consent to the administration of psychotropic medications on behalf of a child. The AACAP recommends that states should identify the parties empowered to consent for treatment for youth in state custody in a timely fashion and establish a mechanism to obtain consent for psychotropic medication management from minors when possible. Because studies have indicated that fourteen-year-olds possess the developmental capabilities necessary for providing informed consent to personal health and medical treatment, child development psychologists and the AACAP recommend that children fourteen years of age or older provide informed consent on behalf of themselves. For children under fourteen years of age, informed consent should be obtained by the parent, guardian, or licensed caretaker.

States should obtain and distribute simply written psychoeducational materials and medication information sheets to facilitate the consent process. Both the AACAP and NCJFCJ have recommended that these materials consist of information about the proposed medication, and its risks and potential side effects, including adverse effects of sudden discontinuation of psychotropic medications.

59 See Leslie et al., supra note 7; see also Michael W. Naylor et al., Psychotropic Medication Management for Youth in State Care: Consent, Oversight and Policy Considerations, 86 CHILD WELFARE 175, 182 (2007).
60 See AACAP, supra note 9; see also Leslie et al., supra note 7; Bernard P. Perlmuter & Carolyn S. Salibory, “Please Let Me Be Heard:” The Right of a Florida Foster Child to Due Process Prior to Being Committed to a Long-Term, Locked Psychiatric Institution, 25 NOVA L. REV. 725, 734 (2001).
61 Perlmuter & Salibory, supra note 58, at 734.
62 Id.
64 AACAP, supra note 9; Resolution, supra note 9.
65 AACAP, supra note 9; Resolution, supra note 9; Penn et al., supra note 49, at 1094-95.
67 Id.
68 AACAP, supra note 9.
69 Id.
70 AACAP, supra note 9; Resolution, supra note 9.
B. No psychotropic medication should be prescribed without appropriate administration, oversight, and regulation.

The AACAP makes several recommendations to improve the oversight and regulation of psychotropic medication use in foster children and youth involved in the juvenile justice system. Its Best Principles Guideline notes that developing both a short-term and long-term monitoring plan is essential for assessing any developments or increases in suicidal ideation, initial side effects, and potential changes over time. Thus, the guidelines recommend that the prescriber reassess the child frequently in order to monitor the response to the treatment and ensure the medication’s effectiveness. At a minimum, periodic reviews of the child should occur every six months.

Additionally, psychotropic medications are often prescribed without the presence of a full medical history and diagnostic assessment. Each state should require its agencies to maintain an ongoing record of diagnoses, height and weight, allergies, medical history, ongoing medical problem list, psychotropic medications, and adverse medication reactions that are easily available to treating clinicians 24 hours a day.

C. No psychotropic medication should be prescribed to a child without secondary review in dosages that exceed recommended use, or for off-label or concomitant use.

Many states prescribe psychotropic medications to foster children and youth involved in the juvenile justice system concomitantly, or in combination. Additionally, these states often prescribe psychotropic medications to manage—rather than treat—these children. This is referred to using the medication as a “chemical restraint,” since the medication is being used without a therapeutic purpose, but for the sole purpose of sedating and immobilizing the child. Concomitant use and chemical restraint of these children has been widely condemned by the AACAP and the Child Welfare League.

In addition, many prescriptions are written for psychotropic medications in dosages exceeding current manufacturer, federal, professional and internal state maximum recommendations. Taking psychotropic medications at dosages exceeding recommended

63 Solchany, supra note 5; AACAP, supra note 9; Resolution, supra note 9.
65 Magellan Health, supra note 68; Solchany, supra note 5; AACAP, supra note 9.
66 Magellan Health, supra note 68.
67 See Leslie et al., supra note 7.
68 AACAP, supra note 9.
69 Carter, supra note 18, at 399.
70 Camp, supra note 2, at 378.
71 See Burton, supra note 11, at 492.
72 Id.
73 Leslie et al., supra note 7.
levels not only increases the potential for adverse side effects, and for some medications, a higher dose may actually be less effective than the more moderate recommended dose. As a result, the AACAP recommends that psychotropic medications only be administered at therapeutic dosages and should not exceed recommended dosage levels.

D. Use of alternative therapies must precede or accompany use of psychotropic medications in children and youth in custody.

According to a 2006 report issued by the FDA, the FDA approved only thirty-one percent of psychotropic medications for children and youth. Because pediatric trials of commonly prescribed psychotropic medications found that children/youth who took them experienced suicidal thoughts or action, the FDA ordered pharmaceutical companies to add a “black box warning” to all commonly prescribed psychotropic medications due to the medications’ effect on children under 18. A “black box warning” appears on a prescription drug’s label and is designed to call attention to serious or life-threatening risks. Despite FDA warnings, use of psychotropic medications in children continues without first exploring alternative treatment options, either before turning to these medications or as a part of the medication treatment regimen.

The AACAP guidelines dictate that children and youth should only take psychotropic medication when absolutely necessary and as a last resort. The guidelines insist that prior to prescribing psychotropic medications to a child or youth, other therapies should be utilized to treat the child, such as intensive therapy or psychosocial treatments.

III. States Should Adopt Comprehensive Policies on Administration and Oversight of Psychotropic Medication in Collaboration with Medical Expertise

This resolution urges states and its administrative agencies that oversee child welfare cases and juvenile justice systems to develop comprehensive policies to protect children in state custody from over-medication. It also urges juvenile and dependency courts to implement administration and oversight protocols in order to manage and regulate psychotropic medication use among children in foster care and youth involved in the juvenile justice system. Finally,

77 U.S. Gov’t Accountability Office, supra note 26.
78 U.S. Gov’t Accountability Office, supra note 26; Solchany, supra note 5; Leslie et al., supra note 7.
79 Cummings, supra note 13, at 360.
80 See Citizens Comm’n on Human Rights Int’l, supra note 6.
82 Leslie et al., supra note 7.
83 Cummings, supra note 13, at 365.
84 Solchany, supra note 5; AACAP, supra note 9; Resolution, supra note 9.

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the resolution urges attorneys and judges to become educated and offer training about the use of psychotropic medication in children.

In a recent analysis of the policies and practices of forty-seven states and the District of Columbia by the Tufts Institute, twenty-six states currently have some policies and/or guidelines regarding psychotropic medication use in children involved in state custody.67 Thirty states are in the process of developing a guideline, and nine states have no policy or guideline regarding psychotropic medication use.68

Many of the policies implemented in the 26 states are spotty and do not follow the AACAP guidelines. While these states are moving in the right direction, the vast majority of states are still over-medicating these vulnerable populations by engaging in unregulated, unsupervised and improper prescription processes.

A. Minimal use of informed consent by states

In the twenty-six states that did have a written policy or guideline regarding psychotropic medication use, only two states included the state-involved child in the informed decision making process.69 These two states acknowledge that states’ informed consent processes needs to be strengthened in order to protect youth from being overmedicated.70 The states, however, provide youth with information about the proposed medication, its side effects and medical risks.71 In twenty-two states, informed consent authority resides with the child welfare agency, despite the fact that the AACAP has strongly recommended against this practice.72

In thirty states currently developing policy, all expressed interest in involving the child, when age-appropriate, in the decision-making process.73 These states recognized the importance of a “child-centered perspective”74 and are working toward implementing a comprehensive child welfare psychotropic medication oversight system.75 Their system would include obtaining informed consent from the youth if psychotropic medication is recommended,76 and actively involve the youth in both initial and ongoing decision-making.77

would be incentivized to immediately comply because they would receive federal funding for doing so. Id.; see also Camp, supra note 2, at 395.
67 See Leslie et al., supra note 7. “States” refers to either child welfare agencies or state legislation. Id.
68 See Leslie et al., supra note 7.
69 Id.
70 Id.; see also Naylor et al., supra note 57, at 182.
71 Leslie et al., supra note 7; AACAP, supra note 10.
72 Leslie et al., supra note 7 (finding that states wanted to involve youth, when age-appropriate, in decisions about the child and that the name of the medication, dosage, why it’s being prescribed, side effects, and risks should be provided to the child all in language the child can understand).
73 A “child-centered perspective” is all about focusing on a child’s needs and best interests directly from the perspective of the child. See Barbara Bennett Woodhouse, From Property to Personhood: A Child-Centered Perspective on Parents’ Rights, 5 GEO. J. ON FIGHTING POVERTY 313, 318 (1997).
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74 Leslie et al., supra note 7.
75 Id.
76 Id.
77 Id.

Finally, nine states have no written policy or guidelines regarding informed consent in the psychotropic medication administration process.  

B. Administration, Oversight, and Regulation are Lacking

Among the 26 states that have instituted some policy around psychotropic medication use in state-involved children and youth, all of the states identified “monitoring a youth’s response to psychotropic medication and its side effects” as a major challenge. While these states recognized that this was an important aspect in medication oversight, they did not require periodic reporting and review of the benefits and side effects of medications. Only North Carolina requires a physician to review the psychotropic medication regimen of a state-involved child at least every six months.

In the thirteen states that were currently in the process of developing a guideline, all thirteen expressed interest in ensuring that up-to-date oversight programs and records on each child-patient were in place. Nine states had no written policy or guidelines regarding the oversight and regulation of the psychotropic medication administration process.

C. Dosages, Polypharmacy, and Off-Label Use Needs Scrutiny; Alternate Treatments and Therapies are Ignored

Of the forty-eight states that participated in this study, fourteen states were administering psychotropic medications to state-involved children in dosages exceeding current maximum recommendations. Eight states were administering newer, non-FDA approved psychotropic medications over FDA-approved medications. Eighteen states were administering three to five psychotropic medications to state-involved children simultaneously, despite the fact that GAO experts stated that they did not find any evidence supporting the use of five psychotropic medications in adults, let alone children. And eight states were prescribing psychotropic medications used to treat Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, or Adjustment Reaction Disorder to state-involved children that did not exhibit symptoms of any of those disorders.
All forty-eight states in the study understand that psychotropic medication plays an important role in addressing mental health problems. However, all of the states were concerned that medications were being used to manage problems that might respond as well, or better, to psychosocial treatments. It is unclear from this study the percentage of states that consider alternative therapies prior to prescribing psychotropic medications, but because all of the states indicated it as a major area of concern, it is unlikely that alternative treatment options are being explored.

D. Data Should Be Collected in Both Systems for Appropriate Oversight

Published national data on the rates of psychotropic medication use in either detained or incarcerated juvenile populations does not currently exist. Data on the rates of psychotropic medication use among children and youth in foster care are spotty and difficult to locate. A brief on the latter subject by ACF states, “Prior research on psychotropic medication use has relied primarily on Medicaid data, which does not permit examination of medication use in relationship to mental health needs and typically does not distinguish children in foster care by type of foster care placement. Children eligible for Medicaid living in foster care may be living formally with kin caregivers, in group homes or residential placements, or in more traditional nonrelative, foster parent homes. Those various types of foster care placements may be associated with different rates of psychotropic medication use or various levels of mental health need. Prior research also does not provide estimates of psychotropic medication use among children who remain at home with at least one biological parent after reports of maltreatment, or children living in informal kin caregiver arrangements.”

The GAO report recommended states improve documentation on the implementation of psychotropic medication policies and practices in the child welfare system, especially to confirm the use of alternative evidence-based therapies. In addition, the Annie E. Casey Foundation, in a partnership with the Center for Health Care Strategies, specifically urges that, in order to limit overuse of psychotropic medication for children in foster care, data should be aggregated across systems for a comprehensive picture of use. Data, which often resides in disparate agencies, are needed for several purposes: to determine baseline rates of psychotropic medication use and expense; to identify outlier prescribing patterns; understand the types, number, and quantity of psychotropic medications prescribed; and track quality and cost outcomes. According to CSGC, New Jersey is examining child welfare, Medicaid, and children’s behavioral health data to develop a clear picture of both psychotropic medication use

106 Id.
107 Id.
108 Id.
109 see Lyons et al., supra note 2, at 59.
111 U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 26.
and that of psychosocial interventions. The state is also enhancing its child welfare data information system to capture data on psychotropic medication use.

Collection of data on the use of psychotropic medication and psychosocial treatments and therapies in the juvenile justice system in every state, territorial and tribal government is essential to understanding the areas of improvement that must be addressed. Likewise, uniform and consistent tracking of data in the child welfare system is necessary in order to create better oversight and implementation of policies to benefit the health and wellbeing of the children in their care. Congress should enact legislation requiring data collection in both systems.

III. Attorneys and Judges Need More Education on Psychotropic Medications

Attorneys and judges in both the child welfare and juvenile justice systems have long accepted medications and the amount of medication for the children and youth in their cases as normal, expected, and medically necessary. However, the overuse of psychotropic medication among children and youth in state custody demands that lawyers for children and the courts ask many questions about the child’s diagnosis, recommended treatment alternatives, and the qualifications of the medical professionals prescribing and administering psychotropic medication. Lawyers for children and youth, as well as the courts that have jurisdiction over the cases, should ask, at a minimum, “Why is this prescribed? Why is this amount necessary? Where can I learn more about this medication and its side effects? What are the possible long-term consequences of use of this medication?”

Moreover, to ensure continued competence and adherence to best practice standards and the rules of professional responsibility, attorneys and judges should be educated and develop technical knowledge on legal issues relating to psychotropic medications and on the appropriate use of psychotropic medication for children.


117 Marisa Wright Edelman, Child Watch Column: Overmedicating Children in Foster Care, CHILDEREN’S DEFENSE FUND (May 22, 2015), http://www.childrensdefense.org/newsroom/child-watch-columns/child-watch-columns-overmedicating-children-in-foster-care.html (bringing attention to the Administration’s current budget proposal that requests $250 million to reduce the over-reliance on drugs and increase the use of appropriate screening, assessment, and interventions, including better data collection and information sharing by child welfare agencies, Medicaid, and behavioral health services).

118 Solchany, supra note 5, 27-28.

119 NACC Recommendations for Representation of Children in Abuse and Neglect Cases, NATL ASSOC. OF COUNSEL FOR CHILDREN, http://wtrz.nmu.edu/files/2014/12/NACC-Standards-and-Recommendations.pdf (last visited May 27, 2015) (stating that competence in the foundation of all legal representation. For attorneys who represent children and youth, competence includes knowledge of child development, and of trauma and mental health conditions, and treatment and services available to the child. An attorney must have sufficient knowledge to advocate for all of a child’s needs, including their medical and mental health needs, and the court has an ongoing role to ensure that lawyers are continually trained; see also MODEL CODE OF PROF’L CONDUCT 11.1, 11.6 (1983); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1, EC 7-12, DR 6-10 (1980); AMERICAN BAR ASSOCIATION (1996); STANDARDS FOR PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES §§ A-1, B-1, C-1 (1996); STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES §§ 1.7, 4.3, 6.4, 9.2, 10.1 (1996); STANDARDS FOR PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES §§ C-2, D-2 (2004).


117 Marisa Wright Edelman, Child Watch Column: Overmedicating Children in Foster Care, CHILDEREN’S DEFENSE FUND (May 22, 2015), http://www.childrensdefense.org/newsroom/child-watch-columns/child-watch-columns-overmedicating-children-in-foster-care.html (bringing attention to the Administration’s current budget proposal that requests $250 million to reduce the over-reliance on drugs and increase the use of appropriate screening, assessment, and interventions, including better data collection and information sharing by child welfare agencies, Medicaid, and behavioral health services).

118 Solchany, supra note 5, 27-28.

119 NACC Recommendations for Representation of Children in Abuse and Neglect Cases, NATL ASSOC. OF COUNSEL FOR CHILDREN, http://wtrz.nmu.edu/files/2014/12/NACC-Standards-and-Recommendations.pdf (last visited May 27, 2015) (stating that competence in the foundation of all legal representation. For attorneys who represent children and youth, competence includes knowledge of child development, and of trauma and mental health conditions, and treatment and services available to the child. An attorney must have sufficient knowledge to advocate for all of a child’s needs, including their medical and mental health needs, and the court has an ongoing role to ensure that lawyers are continually trained; see also MODEL CODE OF PROF’L CONDUCT 11.1, 11.6 (1983); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1, EC 7-12, DR 6-10 (1980); AMERICAN BAR ASSOCIATION (1996); STANDARDS FOR PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES §§ A-1, B-1, C-1 (1996); STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES §§ 1.7, 4.3, 6.4, 9.2, 10.1 (1996); STANDARDS FOR PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES §§ C-2, D-2 (2004).
Conclusion

Children in foster care and youth involved in the juvenile justice system are overmedicated as a result of the absence of meaningful policies to treat children with trauma and mental health conditions. Children, their parents, guardians or caregivers are not given informed consent before these powerful medications are prescribed. The prescriptions are written without the benefit of a complete medical history and a diagnostic assessment. Protocols do not exist to monitor the side effects of these medications and to adjust medications on an ongoing basis. Off-label use is widespread, often by medical professionals without sufficient training, dosages often exceed manufacturer recommendations, and concomitant use of multiple psychotropic medications is the norm. There is little oversight in the legal system by the courts or by the advocates who are appointed to represent the best interest of children, and children and youth are rarely given the opportunity to give their opinions about their health care and the medications they are taking. It is easier to prescribe psychotropic medications in lieu of alternate treatments or therapies, when the latter should always be used first or as a concurrent treatment with medication.117 All states should develop policies incorporating the recommendations set forth in this resolution so that foster children and youth involved in the juvenile justice system have the best opportunity for meaningful, appropriate and comprehensive mental health treatment.

Respectfully submitted,
Vanessa Peterson Williams, Chair
Commission on Youth at Risk
August 2015

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117 See Leslie et al., supra note 7; see also CLOYES ET AL., supra note 7, at 63-68.
GENERAL INFORMATION FORM

Submitting Entity: Commission on Youth at Risk

Submitted By: Vanessa Peterson Williams, Chair, Commission on Youth at Risk

1. **Summary of Resolution(s).** The resolution urges state child welfare and juvenile justice agencies to develop comprehensive policies and for state courts to develop protocols to oversee the administration of psychotropic medications for children in state custody. The resolution also recommends that attorney and judges become better educated on this subject, and that Congress enact legislation to require data collection from states to learn progress that is made on this subject.

2. **Approval by Submitting Entity.** This resolution was approved by the Commission on Youth at Risk by electronic vote on April 30, 2015.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** No existing Association policies are relevant to this Resolution.

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

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

7. **Brief explanation regarding plans for implementation of the policy if adopted by the House of Delegates.** The policy will be distributed to various child welfare and juvenile justice organizations. The policy will also be featured on the Commission on Youth at Risk website, and in ABA publications.

8. **Cost to the Association.** (Both direct and indirect costs) No cost to the Association is anticipated.

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

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

    **Special Committees and Commissions**
    Commission on Domestic and Sexual Violence
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

   Linda Britton  
   Director, Commission on Youth at Risk  
   American Bar Association  
   1050 Connecticut Ave. NW, Suite 400  
   Washington, DC 20036  
   Phone: 202-662-1730 (office); 972-743-7743 (cell)  
   Email: Linda.Britton@americanbar.org

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

   Vanessa Peterson Williams, Chair, Commission on Youth at Risk  
   R.L. Polk & Co.  
   26533 Evergreen Road  
   Southfield, MI 48076  
   Phone: (248) 728-7250 (office); (248) 794-7276 (cell)  
   Email: Vanessa.Williams@ihs.com
EXECUTIVE SUMMARY

1. Summary of the Resolution
The resolution urges state child welfare and juvenile justice agencies to develop comprehensive policies and state courts to develop oversight protocols on the administration of psychotropic medications for children in state custody. The resolution also recommends that attorney and judges become better educated on this subject, and that Congress enact legislation to collect data from states to learn whether progress that is made on this subject.

2. Summary of the Issue that the Resolution Addresses
Children in foster care and youth in the juvenile justice system are being prescribed anti-psychotics medications in percentages far exceeding children and youth in the normal populations and without sufficient medical justification. These medications are prescribed without medical histories or diagnostic assessments, in dosages exceeding manufacturer recommendations, often in combination with other psychotropic medications, and for off-label use. Little is done to monitor these medications, and no state affords these children or youth, or their parents or caretakers, informed consent. These medications are most often prescribed before any alternate therapies or psychosocial treatments are utilized and often used to control behavior, not to treat mental health conditions. Many concerns are raised by medical professionals about the short-term side effects of these medications, and little is known about long-term effects of these medications on young people.

3. Please Explain How the Proposed Policy Position will address the issue
The sponsor, co-sponsors and supporters hope that this resolution will assist states, courts, attorneys and judges, and the federal government to bring greater awareness and education to this issue. Some states have developed policies that are piecemeal and incomplete, and others have ignored this issue altogether. Court systems and the attorneys who represent children, youth and parents in these cases are beginning to recognize the importance of improving supervision over this subject, and this proposed policy position is consistent with the resolution passed in July, 2013, by the National Council of Juvenile and Family Court Judges. This policy position will also encourage Congress to enact legislation requiring states to report on the use of psychotropic medications in youth in the juvenile justice system, which is currently absent, and to develop better data on this subject for children in foster care. States and courts should provide all children and youth in state custody with medically appropriate treatments for their mental health conditions and for trauma, and not simply rely on the overuse of psychotropic medication.

4. Summary of Minority Views
None are known.

5. Summary of Minority Views
None are known.
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 2015 to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Definition (17) and Standard 106 [Separate Locations and Branch Campuses]
2. Standard 105 [Acquiescence for Major Change in Program or Structure] and Rule 29(a) [Application for Acquiescence in Major Change]
4. Standard 304 [Simulation Courses and Law Clinics]
5. Standard 305(c)(6) and Interpretation 305-2 [Field Placements and Other Study Outside the Classroom]
6. Interpretation 305-2 [Field Placements and Other Study Outside the Classroom]
7. Standard 311(a) and Interpretation 311-1 [Academic Program and Academic Calendar]
8. Standard 311(f) [Academic Program and Academic Calendar] and Standard 308(a) [Academic Standards]
9. Interpretation 311-4 [Academic Program and Academic Calendar]
10. Standard 502(b)(2) [Educational Requirements]
11. Interpretation 503-3 [Admission Test]
12. Standard 505(b) [Granting of J.D. Degree Credit for Prior Law Study]
13. Rule 27 [Application for Provisional or Full Approval] and Rule 28 [Reapplication for Provisional or Full Approval]
14. Rule 29(b)(g) [Application for Acquiescence in Major Change]
15. Rule 30 [Major Changes Requiring a Reliable Plan]
1. DEFINITION (17) AND STANDARD 106

Definition (17)

“Separate location” means a physical location within the United States: (1) at which the law school offers J.D. degree courses, (2) where a student may earn offerings more than sixteen credit hours of the school’s program of legal education, and (3) that is not in reasonable proximity to the law school’s main location.

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
(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 106-4

"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 106-1-106-2

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

2. STANDARD 105 AND RULE 29(a)

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 that requires application for acquiescence includes:

(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 school resulting from a change in ownership of the school or a contractual arrangement;

(8) 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;

(b) A law school shall not make a major change described in subsection (a) unless it has obtained the acquiescence of the Council.

Interpretation 106-4

"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 106-1-106-2

A law school with more than one location may have one dean for all locations.
(9) Establishing a branch campus;
(10) Establishing a separate location;
(11) A significant change in the mission or objectives of the law school; and
(12) The addition of courses or programs since the most recent ACG period, such as that represent a significant departure from existing offerings or method of delivery since the last most recent accreditation period site evaluation, 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; instituting a new full-time or part-time division; 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) The Council shall grant acquiescence only if the law school demonstrates that the change will not detract from the law school’s ability to remain in compliance with the Standards.

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) Establishing a branch campus;
(6) Establishing a separate location;
(7) A significant change in the mission or objectives of the law school; and
(8) The addition of courses or programs since the most recent ACG period, such as that represent a significant departure from existing offerings or method of delivery since the last most recent accreditation period site evaluation, 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; instituting a new full-time or part-time division; or changing from a full-time to a part-time program or from a part-time to a full-time program;
(9) 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;
(10) 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;
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(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 since the most recent AC period, such that represent a significant departure from existing offerings or method of delivery since the last most recent accreditation period site evaluation, including combined undergraduate and J.D. programs, such as 2+4, 4+2 program, and programs leading to a J.D. and a first-degree program at foreign institution; instituting a new full-time or part-time division 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.

3. STANDARD 205 AND STANDARD 206

Standard 205. 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, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the applicant’s capability to satisfactorily complete the school’s program of legal education.

(b) A law school shall foster and maintain equality of opportunity for students, faculty, and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, gender identity, sexual orientation, age, disability, or any other characteristic not relevant to the law school’s capability to operate in compliance with the Standards and carry out its program of legal education.

(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 (1) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (2) 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 may 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, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the applicant’s or student’s capability to satisfactorily complete the school’s program of legal education. This 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.

(d) Non-discrimination and equality of opportunity in legal education includes equal employment opportunity. A law school shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement 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, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the student’s capability in regard to hiring, promotion, retention and conditions of employment.

Interpretation 205-1
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
So long as a school complies with Standard 205(c), 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, Standard 205(c) does not require a school to recognize or 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.

(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, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the applicant’s capability to satisfactorily complete the school’s program of legal education.

(b) A law school shall foster and maintain equality of opportunity for students, faculty, and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, gender identity, sexual orientation, age, disability, or any other characteristic not relevant to the law school’s capability to operate in compliance with the Standards and carry out its program of legal education.

(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 (1) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (2) 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 may 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, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the applicant’s or student’s capability to satisfactorily complete the school’s program of legal education. This 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.

(d) Non-discrimination and equality of opportunity in legal education includes equal employment opportunity. A law school shall communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement 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, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the student’s capability in regard to hiring, promotion, retention and conditions of employment.

Interpretation 205-1
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
So long as a school complies with Standard 205(c), 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, Standard 205(c) does not require a school to recognize or 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 205-3
Standard 205(d) 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 205-4
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, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the applicant’s capability to satisfactorily complete the school’s program of legal education 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, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the applicant’s capability to satisfactorily complete the school’s program of legal education though not purporting to do so.

Interpretation 205-5
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, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the law school’s capability to operate in compliance with the Standards and carry out its program of education 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, gender identity, sexual orientation, age, or disability, or any other characteristic not relevant to the law school’s capability to operate in compliance with the Standards and carry out its program of legal education though not purporting to do so.

Standard 206. DIVERSITY AND INCLUSION

(a) Consistent with sound legal education policy and the Standards, a law school shall provide an environment in which diversity and inclusion are welcomed and embraced. A law school shall demonstrate a commitment to diversity and inclusion by concrete action, by providing full opportunities for the study of law and entry into the profession by 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. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required
by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.

Interpretation 206-2
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. Creating a diverse and inclusive law school environment promotes cross-cultural understanding, helps break down racial, ethnic, and gender, and other stereotypes, and enables students to better understand persons of different backgrounds. It also enables faculty and staff to carry out the law school’s program of education in a setting that invites open and constructive dialogue among individuals who are diverse with respect to characteristics that include, without limitation, race, color, religion, national origin, gender, gender identity, sexual orientation, age, and disability. 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 admission 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 favorable environment for students from underrepresented groups.

Interpretation 206-3
While the forms of concrete action to demonstrate a law school’s commitment to diversity and inclusion under this Standard may vary, indicators that constitute concrete action include, without limitation: recruitment, hiring and retention efforts for students, faculty and staff; law school programming and curricula; dissemination of information regarding opportunities for underrepresented groups; commitment of scholarship and other resources; periodic assessment of conditions and progress toward diversity and inclusion at a law school; designated diversity groups and personnel; mentoring opportunities; and pro bono and externship opportunities. The determination of a law school’s satisfaction of its obligations under this Standard is based on the totality of the law school’s actions and the results achieved.

4. STANDARD 304

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;

by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.

Interpretation 206-2
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. Creating a diverse and inclusive law school environment promotes cross-cultural understanding, helps break down racial, ethnic, and gender, and other stereotypes, and enables students to better understand persons of different backgrounds. It also enables faculty and staff to carry out the law school’s program of education in a setting that invites open and constructive dialogue among individuals who are diverse with respect to characteristics that include, without limitation, race, color, religion, national origin, gender, gender identity, sexual orientation, age, and disability. 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 admission 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 favorable environment for students from underrepresented groups.

Interpretation 206-3
While the forms of concrete action to demonstrate a law school’s commitment to diversity and inclusion under this Standard may vary, indicators that constitute concrete action include, without limitation: recruitment, hiring and retention efforts for students, faculty and staff; law school programming and curricula; dissemination of information regarding opportunities for underrepresented groups; commitment of scholarship and other resources; periodic assessment of conditions and progress toward diversity and inclusion at a law school; designated diversity groups and personnel; mentoring opportunities; and pro bono and externship opportunities. The determination of a law school’s satisfaction of its obligations under this Standard is based on the totality of the law school’s actions and the results achieved.

4. STANDARD 304

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.

(b) A law clinic provides substantial lawyering experience that (1) involves advising or representing one or more actual clients or serving as a third-party neutral, and (2) includes the following:

(i) 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

(iiv) a classroom instructional component.

5. STANDARD 305(e)(6) AND INTERPRETATION 305-3

Standard 305. FIELD PLACEMENTS AND OTHER STUDY OUTSIDE THE CLASSROOM

(a) A law school may grant credit toward the J.D. degree for courses that involve student participation in studies or activities in a format that does not involve attendance at regularly scheduled class sessions, including 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 educational achievement in such a course shall be evaluated by a faculty member. 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 its goals and methods, and a demonstrated relationship between those goals and methods and 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 site supervisor;

(4) a method for selecting, training, evaluating, and communicating with site supervisors;

(5) 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 sufficient prerequisites or receives sufficient training to assure the quality of the student educational experience in the field placement program; instruction equivalent to 28 credit hours toward the J.D. degree 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 may earn three or more credit hours in a field placement program, the opportunity for student 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**
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 305-3**
To qualify as an experiential course under Standard 303, a field placement must also comply with the requirements set out in Standard 303(a)(5).

**6. INTERPRETATION 305-2**

**Interpretation 305-2**
A law school may not grant credit to a student for participation in a field placement program for which the student receives compensation. A law school that grants credit for a field placement

(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 site supervisor;

(4) a method for selecting, training, evaluating, and communicating with site supervisors;

(5) 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 sufficient prerequisites or receives sufficient training to assure the quality of the student educational experience in the field placement program; instruction equivalent to 28 credit hours toward the J.D. degree before participation in the field placement program;

(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 may earn three or more credit hours in a field placement program, the opportunity for student 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.

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To qualify as an experiential course under Standard 303, a field placement must also comply with the requirements set out in Standard 303(a)(5).

**6. INTERPRETATION 305-2**

**Interpretation 305-2**
A law school may not grant credit to a student for participation in a field placement program for which the student receives compensation. A law school that grants credit for a field placement
for which a student receives compensation must demonstrate sufficient control of the student experience to ensure that the requirements of the Standard are met. The law school must maintain records to document the steps taken to ensure compliance with the Standard. This Interpretation does not preclude reimbursement of reasonable out-of-pocket expenses related to the field placement.

7. STANDARD 311(a) AND INTERPRETATION 311-1,
8. STANDARD 311(f) AND STANDARD 308(a), and
9. INTERPRETATION 311-4

Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

(a) A law school shall have an academic year of not fewer than 140 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 and breaks, but such time does not count toward the 140-day academic year requirement.

(b)(4) A law school shall require, as a condition for graduation, successful completion of a course of study of not fewer than 83 credit hours. At least 64 of these credit hours shall be in courses that require attendance in regularly scheduled classroom sessions or direct faculty instruction.

(c)(5) 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.

(d)(4) A law school shall not permit a student to be enrolled at any time in coursework that exceeds 20 percent of the total credit hours required by that school for graduation.

(e)(4) 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 written policy requiring regular class attendance. [MOVED TO STANDARD 308(a)]

Interpretation 311-4
A law school may not count more than five class days each week toward the 140-day requirement.

Interpretation 311-2-1
(a) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction for the purpose of Standard 311(b)(4), 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)(a), 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 303;
(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, 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 311-4.2
Whenever a student is permitted on the basis of extraordinary circumstances to exceed the 84-month program limitation in Standard 311(e)(b), 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 311-4.3
For purposes of Standard 311(e)(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 commences study at the law school from which the transfer credit is accepted. If a law school accepts a student’s transfer credit for prior law study who has completed law studies at a law school outside the United States as permitted under Standard 305(c), only the time commensurate with the amount of credit given counts toward the length of study requirements of Standard 311(e). For example, if a student has studied for three years at a law school outside the United States and is granted one year of credit toward the J.D. degree, the amount of time that counts toward the 84-month requirement is one year. The student has 72 months in which to complete law school in the United States.

Standard 308. ACADEMIC STANDARDS
(a) A law school shall adopt, publish, and adhere to sound academic standards, including those for regular class attendance, good standing, academic integrity, graduation, and dismissal.
(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.

10. STANDARD 502(b)(2)

Standard 502. EDUCATIONAL REQUIREMENTS

(a) A law school shall require for admission to its J.D. degree program a bachelor’s degree 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.

(c) In an extraordinary case, a law school may admit to its J.D. degree program an applicant who does not satisfy the requirements of subsections (a) or (b) if the applicant's experience, ability, and other qualifications clearly demonstrate an aptitude for the study of law. 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

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.

Interpretation 502-2

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.
11. INTERPRETATION 503-3

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 Applicants admitted under this Interpretation must meet the following conditions:

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:

4(a) Scored at or above the 85th percentile on the ACT, or SAT, for purposes of subsection (a)(1); or for purposes of subsection (a)(2); scored at or above the 85th percentile on the GRE or GMAT; and

(b) 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.

12. STANDARD 505(b)

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 the unapproved 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 if graduates of the unapproved law school are permitted to sit for the bar examination in the jurisdiction in which the unapproved law 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.

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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:

4(a) Scored at or above the 85th percentile on the ACT, or SAT, for purposes of subsection (a)(1); or for purposes of subsection (a)(2); scored at or above the 85th percentile on the GRE or GMAT; and

(b) 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.

12. STANDARD 505(b)

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 the unapproved 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 if graduates of the unapproved law school are permitted to sit for the bar examination in the jurisdiction in which the unapproved law 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 if it offers:

(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.

13. RULE 27 AND RULE 28

Rule 27: Application for Provisional or Full Approval

(a) A law school seeking provisional or full approval shall file with the Managing Director a written notice of intent to seek approval. 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) The notice shall be filed no later than March 15th in the academic year prior to the academic year in which the law school will apply for approval and shall indicate the school’s preference for a fall or spring site evaluation visit. 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) Upon receipt of written notice of a law school’s intent to seek provisional or full approval, the Managing Director shall arrange for a site evaluation as provided under Rule 5.

(3) A law school may not apply for provisional approval until it has completed the first full academic year of operating a full-time program of legal education.

(4) A provisionally approved law school may apply for full approval no earlier than two years after the date that provisional approval was granted.

13. RULE 27 AND RULE 28

Rule 27: Application for Provisional or Full Approval

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(1) The notice shall be filed no later than March 15th in the academic year prior to the academic year in which the law school will apply for approval and shall indicate the law school’s preference for a fall or spring site evaluation visit. 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.

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(3) A law school may not apply for provisional approval until it has completed the first full academic year of operating a full-time program of legal education.

(4) A provisionally approved law school may apply for full approval no earlier than two years after the date that provisional approval was granted.
Upon notice to the Managing Director of its intent to seek provisional approval, a law school seeking provisional approval shall comply with Standard 102(f) regarding communication of its status.

(b) The application for provisional or full approval is due at least eight weeks prior to the scheduled site evaluation visit and must contain:

1. A letter from the dean certifying that the law school has completed all of the requirements for seeking provisional or full approval or that the law school seeks a variance from specific requirements of the Standards and that the law school has obtained the concurrence of the president in the application;

2. All completed forms and questionnaires, as adopted by the Council;

3. In the case of a law school seeking provisional approval, a copy of a feasibility study that evaluates the nature of the educational program and goals of the law school, the profile of the students who are likely to apply, and the resources necessary to create and sustain the law school, including relation to the resources of a parent institution, if any;

4. A copy of the self-study;

5. Financial operating statements and balance sheets for the last three fiscal years, or such lesser time as the institution has been in existence. If the applicant is not a publicly owned institution, the statements and balance sheets must be certified;

6. Appropriate documents detailing the law school and parent institution’s ownership interest in any land or physical facilities used by the law school;

7. A request that the Managing Director schedule a site evaluation at the law school’s expense; and,

8. Payment to the Section of any required fee the application fee.

(e) A law school may not apply for provisional approval until it has completed the first full academic year of its program.

(g) 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.

(d) 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 notice and reapplication must be filed within the schedule prescribed by Rule 27(a).

14. RULE 29(b-g)

Rule 29: Application for Acquiescence in Major Change

(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 under Rules 29(a)(1) through 29(a)(9), the Committee or Council may shall appoint a fact finder subsequent to the effective
date of acquiescence, as provided in Rule 30(e). The Committee or Council may appoint a fact finder subsequent to the effective date of acquiescence in a major change under Rules 29(α)(10) through 29(α)(17) for purposes of determining whether the law school remains in compliance with the Standards. In recommending or granting acquiescence under Rule 29(α)(10) in a separate location at which the law school offers more than 50% of the law school’s program of legal education, however, the Committee or Council shall appoint a fact finder to conduct a visit within six months of the effective date of acquiescence or in the first academic term subsequent to acquiescence in which students are enrolled at the separate location.

(c) In addition to satisfying the requirements of Rule 29(b), an application for acquiescence shall contain information sufficient to allow the Accreditation Committee to determine whether the major change is so significant as to constitute the creation of a new or different law school. If the Accreditation Committee determines that the major change constitutes the creation of a new or different law school, then it shall recommend to the Council that the school apply for provisional approval under the provisions of Standard 102 and Rule 27. Factors that shall be considered in making the determination of whether the major change is so significant as to constitute the creation of a new or different law school include, without limitation:

1. the financial resources available to the law school;
2. a significant change, present or planned, in the governance of the law school;
3. the overall composition of the faculty and staff at the law school;
4. the educational program offered by the law school; and
5. the location or physical facilities of the law school.

(e)(f) A law school’s approval status remains unchanged following acquiescence in any major change.

15. RULE 30

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(α)(1) through Rule 29(α)(9) shall include a reliable plan.

(b) The reliable plan in connection with the establishment of a branch campus under Rule 29(α)(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) 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), (g), or (h); or (i).

(f) In the case of the establishment of a branch campus under Rule 29(a)(9), the fact finding visit required in accordance with (c) shall be conducted appointed within six months of the effective date of acquiescence or in the first academic term subsequent to acquiescence in which students are enrolled at the branch campus to verify that the branch campus satisfies the requisites of (b)(2).

(g) In a case involving a substantial change in ownership, control, assets, or finances of the law school under Rule 29(a)(1) through 29(a)(7), the fact finding visit required in accordance with (c) shall be conducted appointed within six months of the effective date of acquiescence to verify that the law school is in compliance with the Standards.

(b) 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 finding visit required in accordance with (c) shall be conducted appointed within one year of acquiescence to verify that the law school is in compliance with the Standards.

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(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) 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), (g), or (h); or (i).

(f) In the case of the establishment of a branch campus under Rule 29(a)(9), the fact finding visit required in accordance with (c) shall be conducted appointed within six months of the effective date of acquiescence or in the first academic term subsequent to acquiescence in which students are enrolled at the branch campus to verify that the branch campus satisfies the requisites of (b)(2).

(g) In a case involving a substantial change in ownership, control, assets, or finances of the law school under Rule 29(a)(1) through 29(a)(7), the fact finding visit required in accordance with (c) shall be conducted appointed within six months of the effective date of acquiescence to verify that the law school is in compliance with the Standards.

(b) 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 finding visit required in accordance with (c) shall be conducted appointed within one year of acquiescence to verify that the law school is in compliance with the Standards.
REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence, the attached changes to the ABA Standards and Rules of Procedure for Approval of Law Schools.

The revisions were approved by the Council at its meetings in March and June 2015 to be circulated for Notice and Comment. A public hearing was held on April 30, 2015, and another hearing is scheduled for July 16, 2015. The Council approved the majority of the revisions at its meeting in June 2015 and is expected to approve the remaining revisions at its meeting on July 30-August 1, 2015.

In August 2014, the Council approved and the HOD concurred in a comprehensive set of changes to the ABA Standards and Rules of Procedure for Approval of Law Schools. The HOD referred Interpretation 305-2 back to the Council for further consideration.

Following the completion of the comprehensive review, the Council asked the Standards Review Committee (SRC) to continue to discuss two issues that had been part of the comprehensive review: Standard 206 on Diversity and Inclusion, and Interpretation 305-2, which prohibits granting credit for participation in a field placement program for which a student receives compensation. The Council also requested that the SRC continue to review the Standards to identify technical corrections and modifications that may be needed following the comprehensive review and to recommend possible courses of action. In addition, the Council circulated a request for ideas and suggestions regarding issues the SRC might consider during the academic year.

The majority of the proposed amendments are technical corrections or clarifications of changes made in the comprehensive review.

The proposed change to Interpretation 305-2 responds to the request of the House of Delegates at the August 2014 meeting to reconsider the Council’s action on that Interpretation.

The following explanations detail the revisions to each of the Standards and Rules of Procedure approved by the Council:

1. DEFINITION (17) AND STANDARD 106

Under the proposed change, the definition of “separate location” is changed from one at which “the law school offers more than sixteen credit hours” to one at which “a student may earn more than sixteen credit hours.”

In the 2013-2014 Standards, a “satellite campus” was defined in Standard 100(15) as one “at which a student could take the equivalent of 16 or more semester credit hours.” Standard 105 required schools to provide a certain level of support for satellite campuses including library resources, academic advising, full-time faculty, etc.

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The revisions were approved by the Council at its meetings in March and June 2015 to be circulated for Notice and Comment. A public hearing was held on April 30, 2015, and another hearing is scheduled for July 16, 2015. The Council approved the majority of the revisions at its meeting in June 2015 and is expected to approve the remaining revisions at its meeting on July 30-August 1, 2015.

In August 2014, the Council approved and the HOD concurred in a comprehensive set of changes to the ABA Standards and Rules of Procedure for Approval of Law Schools. The HOD referred Interpretation 305-2 back to the Council for further consideration.

Following the completion of the comprehensive review, the Council asked the Standards Review Committee (SRC) to continue to discuss two issues that had been part of the comprehensive review: Standard 206 on Diversity and Inclusion, and Interpretation 305-2, which prohibits granting credit for participation in a field placement program for which a student receives compensation. The Council also requested that the SRC continue to review the Standards to identify technical corrections and modifications that may be needed following the comprehensive review and to recommend possible courses of action. In addition, the Council circulated a request for ideas and suggestions regarding issues the SRC might consider during the academic year.

The majority of the proposed amendments are technical corrections or clarifications of changes made in the comprehensive review.

The proposed change to Interpretation 305-2 responds to the request of the House of Delegates at the August 2014 meeting to reconsider the Council’s action on that Interpretation.

The following explanations detail the revisions to each of the Standards and Rules of Procedure approved by the Council:

1. DEFINITION (17) AND STANDARD 106

Under the proposed change, the definition of “separate location” is changed from one at which “the law school offers more than sixteen credit hours” to one at which “a student may earn more than sixteen credit hours.”

In the 2013-2014 Standards, a “satellite campus” was defined in Standard 100(15) as one “at which a student could take the equivalent of 16 or more semester credit hours.” Standard 105 required schools to provide a certain level of support for satellite campuses including library resources, academic advising, full-time faculty, etc.
During the comprehensive review of the Standards, the term “satellite campus” was eliminated and replaced with the term “separate location.” In the 2014-2015 Standards, a “separate location” is defined as one at which the law school “offers more than sixteen credit hours” of the program of legal education.

Following the comprehensive review, law schools that offered courses at separate locations voiced concern about the revision. If the school offered a number of courses at the location that totaled more than sixteen credits, new Standard 106 required that they provide the level of support required for a separate location even if a student was not permitted to earn more than sixteen credit hours at that location. The proposed change returns the situation to that found before the comprehensive revision, and requires that the school provide the level of support required for a separate location only if a student may earn more than sixteen credit hours.

Interpretation 106-1, which repeated the definition of “separate location” found in the Definitions section, is deleted. Interpretation 106-2 is renumbered to be Interpretation 106-1.

2. STANDARD 105 AND RULE 29(a)

In the 2013-2014 Standards and Rules, Interpretation 105-1 included the following in the list of major changes that require acquiescence: [the same items were included in Rule 21(a)(1) – (3) and Rule 20(a)(13) of the 2013-2014 Standards and Rules]

(1) Instituting a new full-time or part-time division;
(2) 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;

(19) The addition of courses or programs that represent a significant departure from existing offerings or method of delivery since the last accreditation period.

In the comprehensive review those subsections were combined in Standard 105 and in Rule 29 to state:

(12) 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; instituting a new full-time or part-time division; or changing from a full-time to a part-time program or from a part-time to a full-time program;

Some of the additional language that was added has caused confusion. The proposed change clarifies the language and complies with the Department of Education requirements.

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Some of the additional language that was added has caused confusion. The proposed change clarifies the language and complies with the Department of Education requirements.
3. STANDARD 205 AND STANDARD 206

Following the completion of the comprehensive review in August 2014, the Council asked the SRC to continue to discuss Standard 205 Nondiscrimination and Equality of Opportunity and Standard 206 Diversity and Inclusion.

In response to statements offered at an information session held by the SRC and comments received during the Notice and Comment period, the Council proposes to expand the list of categories covered under Standard 205 to include “gender identity” and “any other characteristic not relevant to the applicant’s ability to satisfactorily complete the school’s program of legal education.”

The ABA has explicitly recognized the importance of equality with respect to sexual orientation and gender identity. These changes will bring Standard 205 into conformity with current ABA goals and policies.

The inclusion of the “catch-all” category is intended to ensure that law schools do not consider that they are limited to the stated groups in maintaining equality of opportunity in their programs.

The Council recommends two changes to Standard 206. First, the Council recommends that Standard 206 itself not include a list of those groups to which it applies, but focus on the broader purpose of the Standard, which is to promote cross-cultural understanding, help break down stereotypes, and enable students to understand persons of different backgrounds. The specific categories are now included in Interpretation 206-2, and have been changed from “gender, race, and ethnicity” to “race, color, religion, national origin, gender, gender identity, sexual orientation, age, and disability.” The Council believes that all of these categories fall into the reason for which Standard 206 was created. The Interpretation also has listed the groups “without limitation” so that law schools do not consider that they are limited to the stated groups in applying the Standard.

A new Interpretation provides examples of the types of concrete action a law school can take to demonstrate a commitment to diversity and inclusion.

4. STANDARD 304

Subsequent to the comprehensive revision to the Standards, several faculty teaching mediation clinics submitted comments that the new definition of a "law clinic" excluded work done by their students serving as mediators, a lawyering role that does not involve advising or representing one or more clients. The change addresses that issue. The language of "serving as a third-party neutral" is used in Rule 2.4 of the ABA Model Rules of Professional Conduct to describe lawyering work as mediators. In mediation clinics, students serve as third-party neutrals for real parties who are either proceeding pro se or with the assistance of counsel. This is real lawyering work and involves actual individuals. Like other law clinics under the new definition, these mediation clinics provide students with substantial lawyering experience in a real life context.

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Prior to the comprehensive revisions, Standard 305(c)(6) allowed a student to participate in a field placement after successfully completing one academic year toward the J.D. degree. Under the revisions to the Standards, Standard 305(c)(6) was changed to require 28 units of instruction prior to participation. Under the former Standard, students who had completed one year of part-time instruction were entitled to enroll in field placements. Under the current Standard, part-time students with one year of instruction are not entitled to participate.

The change in language from “one academic year” to “28 units” was designed, in part, to comport with Standard 306 on Distance Education, which required – pre and post comprehensive revisions – 28 units prior to enrolling in distance education courses. Additionally, there was some concern expressed whether part-time students who had completed only one year of education would be able to participate meaningfully in a field placement program. However, it is unclear whether the change in language was actually intended as a substantive change to the field placement program to prohibit first year part-time students from participating or whether it was intended only as a change in language – that one academic year equals 28 units of instruction in the full time program.

Following the adoption of Standard 306(c)(6), the Council received comments from law schools with part-time programs. They argued for a return to the former rule, especially in light of the greater emphasis on experiential learning. In addition, some of those who commented suggested that emphasis should be placed on the extent of preparation for the field placement program rather than on the number of credits taken prior to participation in a field placement program.

The Council recommends that students may participate in field placement programs if the student has successfully completed sufficient prerequisites or receives sufficient training to assure the quality of the student educational experience in the field placement program.

The Council recommends the addition of Interpretation 305-3 to make clear that field placement programs must comply with the requirements of Standard 303(a)(3) in order to qualify as an experiential course under Standard 303.

In August 2014, when the House of Delegates reviewed the proposed comprehensive set of changes to the ABA Standards and Rules of Procedure for Approval of Law Schools, it referred Interpretation 305-2 back to the Council for further consideration.

While the Standards Review Committee was considering the Interpretation and during the Notice and Comment period, the Council received a number of comments for and against a change in this Interpretation. Some of those who commented expressed the belief that some law schools do not provide adequate supervision of students participating in field placement programs. The Council discussed possibly reviewing Standard 305 to determine if any changes are needed in the Standard but decided that the current Standard already includes many safeguards to assure
adequate supervision. The Council also noted that enforcement of Standard 305 is increasingly important with the new requirement of 6 hours of experiential learning.

The Council concluded that if a law school properly monitors the operation of a field placement program and is in compliance with all of the requirements of Standard 305, the question of whether or not a student may receive both compensation and credit for the experience should be determined by the law school. Rather than completely eliminating the Interpretation, the Council proposes that a law school be given the option of granting credit for a field placement experience where compensation is provided only if it is able to demonstrate that sufficient control was maintained in these instances such that all of the requirements of Standard 305 were met. In order to meet that requirement, law schools granting credit where compensation is provided must maintain separate records of these instances for examination by site visitors.

7. STANDARD 311(a) AND INTERPRETATION 311-1

Subsequent to the comprehensive revision of the Standards and Rules, the Council requested the Standards Review Committee reexamine Standard 311 (Academic Program and Academic Calendar) to see if the requirements regarding the academic calendar could be streamlined.

Standard 311 contains four specific requirements that impact the nature and length of the academic program: a) 140 days of regular instruction including examinations; b) 83 credits of minimum instruction to earn the JD; c) the limitation that a degree may not be earned earlier than 24 months or later than 84 months; and d) limitation prohibiting a law school from allowing a student to be enrolled at any time in more than 20% of total credit hours required for graduation.

The Council recognizes that it is important to maintain requirements to ensure that the required minimum program of study provides a rigorous program of legal education. The Council also understands that students must have the opportunity for adequate time for study and reflection. The Council determined that those requirements can be met by maintaining three of the four requirements set out in Standard 311. The Council concluded that there was no need to prescribe a minimum of 140 days of instruction, given that the other three requirements offer sufficient protection to ensure an academic calendar that is of sufficient length and breadth, and given the newly stated requirements found in Standard 310 regarding credit hours. Removal of the 140 days of instruction requirement does not change the amount of work that a student must do to earn a degree, but does remove a vestigial requirement that may hamper law schools' abilities to be innovative in how their J.D. programs are structured and delivered. Therefore, the Council recommended the elimination of Standard 311(a) and Interpretation 311-1 and the re-lettering of the remaining sections to address the elimination.

8. STANDARD 311(f) AND STANDARD 308(a)

Standard 311(f) focuses on the law school’s obligation to adopt, publish, and adhere to a written policy requiring regular attendance. The Council proposed the retention of this Standard, but that
it should be moved to Standard 308(a), which contains similar obligations for other academic standards.

9. INTERPRETATION 311-4

Under Standard 505(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 the courses had been completed at the admitting school. Pursuant to Standard 505(f), a student admitted under 505(c) may receive up to one-third of the total number of credits required by the admitting school for the J.D. degree.

Students admitted under 505(c) must, of course, complete all of the requirements for the J.D. degree at the admitting law school. Since they are earning up to one year's credit, they may need to spend at least two years at the admitting law school. For a student from a law school outside the U.S., that might mean that they have already studied for three to five years abroad. If the course of study for the J.D. degree is considered to have started when the student began studies at the foreign law school, the student will have a limited amount of time to complete studies at the admitting ABA-approved law school.

Current Interpretation 311-4 was intended to explain that the time for determining the commencement of law studies under Standard 311(c) is different for students accepted with credits for prior law study from a foreign institution. It states that only the time commensurate with the amount of credit given counts toward the length of study requirements of Standard 311(c).

As written, current Interpretation 311-4 is not clear. The proposed change clarifies the ambiguities and simplifies the Interpretation. The proposed change limits the Interpretation to an explanation of how Standard 311(c) applies when credit is given for prior law study outside the United States and attempts to further clarify the interplay between 505 and 311. An example is provided to further clarify how the Interpretation works.

10. STANDARD 502(b)(2)

Standard 502(b)(2) is changed to remove the word "legal." The Standard speaks to the requirements for education received by a student prior to attending law school, and the phrase "program of legal education" should have been "program of education."

11. INTERPRETATION 503-3

Based on the experience of granting variances to Standard 503, the Council approved Interpretation 503-3 in August 2014. Since adoption of the new Interpretation, the Council has received numerous requests for expansion of the exception codified in Interpretation 503-3. The current Interpretation limits its application to students from an undergraduate program of the
same institution as the law school in certain circumstances or to students in joint degree programs. The Council is persuaded that the original limitations in Interpretation 503-3 are not necessary to assure that law schools admit only students they understand are capable of completing their program and being admitted to the bar. The proposed changes broaden the application of the Interpretation, benefitting law schools, some applicants, and without harm to the integrity of the Standards.

12. STANDARD 505(b)

Prior to the comprehensive review, Standard 506(a) had permitted ABA-approved law schools to admit students with advanced standing and allow credits for studies at law schools not approved by the ABA if the unapproved law school had been granted the power to confer the J.D. degree by the appropriate governmental authority in the unapproved school’s jurisdiction, or if graduates of the unapproved school were permitted to sit for the bar examination in that jurisdiction. Following the comprehensive review, Standard 505 stated that credits could only be transferred if graduates of the unapproved law school were permitted to sit for the bar examination in that jurisdiction, the section regarding transfer of credits from unapproved law schools that had been granted the power to confer the J.D. degree by the appropriate governmental authority had been removed.

The change made to this section could be detrimental to students enrolled in some unapproved schools who seek to transfer to ABA-approved law schools. In some jurisdictions, the authority to start a law school is granted by an agency that has no authority to grant graduates of the school permission to sit for the bar examination in that jurisdiction. Indeed, some law schools have started with permission from a state agency so that they can obtain provisional accreditation and their graduates be permitted to sit for the bar examination in that jurisdiction. If ABA-approved law schools can accept credits only from those unapproved schools whose graduates have been granted permission to take the bar examination in their jurisdiction, students enrolled in unapproved law schools during that period between the granting of authority by a state agency and the granting of approval to take the bar examination, if separate operations, would be unable to transfer. The proposal to amend Standard 505 restores the ability of students to seek to transfer credit if they are enrolled in an unapproved law school that has been granted the power to confer the J.D. degree by the appropriate governmental authority in the unapproved school’s jurisdiction.

13. RULE 27 AND RULE 28

Under the Rules of Procedure, a law school seeking provisional or full approval may request a site evaluation in the spring semester by filing an application no later than October 15 of the preceding fall semester. This timetable provides insufficient time to appoint a site evaluation team and arrange for a visit by the spring semester. The proposed changes to Rules 27 and 28 would require that a law school seeking approval file a written notice of intent to seek approval no later than March 15th in the academic year prior to the academic year in which the law school will apply for approval and indicate the semester in which it would prefer to have a visit.

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14. RULE 29(b-g)

Subsequent to the adoption of the revised Rules of Procedure, it came to the attention of the Standards Review Committee that newly adopted Rule 29, which addresses Major Changes, does not include language that is required by the Department of Education.

The revisions to Rule 29(d) comply with U.S. Department of Education requirements regarding the timing of fact finding visits to law schools following acquiescence in certain types of major changes.

New Rule 29(e) restores the language of former Rule 20(b)(1) – (2) regarding applications for a major change that may result in the creation of a new or different law school.

New Rule 29(g) restores the language of former Rule 20(d), which was inadvertently omitted during the drafting of Rule 29.

15. RULE 30

The revision to Rule 30 were made in order to ensure compliance with the U.S. Department of Education regulation 34 CFR 602.24 regarding the timing of fact finding visits to law schools following acquiescence in certain types of major changes.

Respectfully submitted,

Associate Dean and Professor Joan S. Howland, Chair
Council of the Section of Legal Education and Admissions to the Bar
August 2015
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association
Section of Legal Education and Admissions to the Bar

Submitted By: Associate Dean and Professor Joan S. Howland, Chair

1. Summary of Resolution(s).

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 2015 to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Definition (17) and Standard 106 [Separate Locations and Branch Campuses]
2. Standard 105 [Acquiescence for Major Change in Program or Structure] and Rule 29(a) [Application for Acquiescence in Major Change]
4. Standard 304 [Simulation Courses and Law Clinics]
5. Standard 305(e)(6) and Interpretation 305-3 [Field Placements and Other Study Outside the Classroom]
6. Interpretation 305-2 [Field Placements and Other Study Outside the Classroom]
7. Standard 311(a) and Interpretation 311-1 [Academic Program and Academic Calendar]
8. Standard 311(f) [Academic Program and Academic Calendar] and Standard 308(a) [Academic Standards]
9. Interpretation 311-4 [Academic Program and Academic Calendar]
10. Standard 502(b)(2) [Educational Requirements]
11. Interpretation 503-3 [Admission Test]
12. Standard 505(b) [Granting of J.D. Degree Credit for Prior Law Study]
13. Rule 27 [Application for Provisional or Full Approval] and Rule 28 [Reapplication for Provisional or Full Approval]
14. Rule 29(b)-(g) [Application for Acquiescence in Major Change]
15. Rule 30 [Major Changes Requiring a Reliable Plan]

2. Approval by Submitting Entity.

The revisions were approved by the Council at its meetings in March and June 2015 to be circulated for Notice and Comment. A public hearing was held on April 30, 2015, and another hearing is scheduled for July 16, 2015. The Council approved the majority of the revisions at its meeting in June 2015 and is expected to approve the remaining revisions at its meeting on July 30-August 1, 2015.

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Section of Legal Education and Admissions to the Bar

Submitted By: Associate Dean and Professor Joan S. Howland, Chair

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8. Standard 311(f) [Academic Program and Academic Calendar] and Standard 308(a) [Academic Standards]
9. Interpretation 311-4 [Academic Program and Academic Calendar]
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3. Has this or a similar resolution been submitted to the House or Board previously?

In August 2014, when the House of Delegates reviewed the proposed comprehensive set of changes to the ABA Standards and Rules of Procedure for Approval of Law Schools, it referred Interpretation 305-2 back to the Council for further consideration. The proposed change to Interpretation 305-2 responds to the request of the House of Delegates at the August 2014 meeting to reconsider the Council’s action on that Interpretation.

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 and Rules of Procedure for Approval of Law Schools.

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

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

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

The Council will notify ABA-approved law schools and other interested entities of the approved changes to the ABA Standards and Rules of Procedure for Approval of Law Schools. The Council and the Managing Director’s Office will prepare guidance memoranda and training materials regarding the revised Standards.

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 posted on the Section’s website and circulated for Notice and Comment to the following interested persons and entities: ABA Standing and Special Committees, Task Forces, and Commission Chairs; ABA Section Directors and Delegates; Conference of Chief Justices; National Conference of Bar Presidents; National Association of Bar Executives; Law Student Division; SBA Presidents; National Conference of Bar Examiners;
University Presidents; Deans and Associate Deans; 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)

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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 Christine M. Durham
Justice
Supreme Court of Utah
Scott Matheson Courthouse
450 South State Street
Salt Lake City, UT 84114
Ph: 801-238-7945 / Cell: 801-550-0161
Email: jdurham@email.utcourts.gov

The Honorable Ruth V. McGregor
7601 North Central Ave., Unit 23
Phoenix, AZ 85020
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Email: ruthvmcgregor@gmail.com

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EXECUTIVE SUMMARY

1. Summary of the Resolution

RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated August 2015 to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Definition (17) and Standard 106 [Separate Locations and Branch Campuses]
2. Standard 105 [Acquiescence for Major Change in Program or Structure] and Rule 29(a) [Application for Acquiescence in Major Change]
4. Standard 304 [Simulation Courses and Law Clinics]
5. Standard 305(e)(6) and Interpretation 305-3 [Field Placements and Other Study Outside the Classroom]
6. Interpretation 305-2 [Field Placements and Other Study Outside the Classroom]
7. Standard 311(a) and Interpretation 311-1 [Academic Program and Academic Calendar]
8. Standard 311(e) [Academic Program and Academic Calendar] and Standard 308(a) [Academic Standards]
9. Interpretation 311-4 [Academic Program and Academic Calendar]
10. Standard 502(b)(2) [Educational Requirements]
11. Interpretation 303-3 [Admission Test]
12. Standard 505(b) [Granting of J.D. Degree Credit for Prior Law Study]
13. Rule 27 [Application for Provisional or Full Approval] and Rule 28 [Reapplication for Provisional or Full Approval]
14. Rule 29(b-g) [Application for Acquiescence in Major Change]
15. Rule 30 [Major Changes Requiring a Reliable Plan]

2. Summary of the Issue that the Resolution Addresses

In August 2014, the Council approved and the HOD concurred in a comprehensive set of changes to the ABA Standards and Rules of Procedure for Approval of Law Schools. The HOD referred Interpretation 305-2 back to the Council for further consideration.

Following the completion of the comprehensive review, the Council asked the Standards Review Committee (SRC) to continue to discuss two issues that had been part of the comprehensive review: Standard 206 on Diversity and Inclusion, and Interpretation 305-2, which prohibits granting credit for participation in a field placement program for which a student receives compensation. The Council also requested that the SRC continue to review the Standards to identify technical corrections and modifications that may be needed following the comprehensive review and to recommend possible courses of action. In addition, the Council circulated a request for ideas and suggestions regarding issues the SRC might consider during the academic year.
The majority of the proposed amendments are technical corrections or clarifications of changes made in the comprehensive review.

The proposed change to Interpretation 305-2 responds to the request of the House of Delegates at the August 2014 meeting to reconsider the Council’s action on that Interpretation.

The proposed changes to Standard 205 bring the Standard into conformity with current ABA goals and policies by explicitly recognizing the importance of equality with respect to sexual orientation and gender identity.

The proposed changes to Standard 206 focus on the broader purpose of the Standard, which is to promote cross-cultural understanding, help break down stereotypes, and enable students to understand persons of different backgrounds.

3. **Please Explain How the Proposed Policy Position will address the issue**
   
The proposals amend the 2015-2016 ABA Standards and Rules of Procedure for Approval of Law School.

4. **Summary of Minority Views**
   
   None of which the Council is aware.

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3. **Please Explain How the Proposed Policy Position will address the issue**
   
The proposals amend the 2015-2016 ABA Standards and Rules of Procedure for Approval of Law School.

4. **Summary of Minority Views**
   
   None of which the Council is aware.
1. RESOLVED, That the American Bar Association adopts the black letter of the *ABA Standards for Criminal Justice: Monitors*, dated August 2015.
THE AMERICAN BAR ASSOCIATION

STANDARDS FOR CRIMINAL JUSTICE: MONITORS

Presented by the CRIMINAL JUSTICE SECTION for Adoption by the House of Delegates Annual Meeting, Chicago, IL August 2015

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INTRODUCTION

Monitors, known by a variety of names including external compliance officers and Independent Private Sector Inspectors General (IPSSIGs), have become a common judicial, regulatory, and conflict resolution tool. In many instances, a Monitor is installed by agreement between a company or other public or private entity (referred to in these standards as the Host Organization) and a state or federal government department or agency (The Government). The agreement between the parties (the Agreement), often resulting from some concern about fraud, misconduct, or regulatory violation, often enables the host organization to mitigate, suspend or avoid government actions or penalties, such as debarment, administrative charges, or indictment, through the host organization’s commitment to perform the actions enumerated in the Agreement.

In some cases, the Monitor may be imposed by a court as a condition of probation or as part of a civil remedial action or settlement. Typically, the Host Organization will enter into an Engagement Letter (Engagement Letter) with the Monitor setting forth the responsibilities and authorities of the Monitor and obligations of the Host Organization.

Once in place, a Monitor may serve a variety of functions. These frequently involve remedial measures within the Host Organization’s corporate compliance and ethics program, but vary greatly in accordance with the underlying issues giving rise to the Agreement. For example, the Monitor may advise an organization on the implementation of a compliance program, audit the organization’s compliance with its Agreement with the Government, investigate the organization’s compliance with law, as well as acting to reduce waste, abuse, and fraud and increase the Host Organization’s economy, efficiency, and effectiveness. In some cases, the efforts of Monitors may be intended to result in a change to the Host Organization’s cultural environment.

Although Monitors may serve these and other functions, they have certain central features in common, including being independent of both the Government and the Host Organization, and having an obligation to report to the court, the Government, or both, concerning the Host Organization’s conduct. These Standards provide guidance both to court-ordered Monitors and to Monitors installed by Agreement between the Government and the monitored entity, distinguishing between the two circumstances as appropriate.

A host organization may also voluntarily enter into an Engagement Letter with a Monitor in order to ensure or measure the host organization’s compliance with laws, regulations, and codes of conduct. While these standards will almost always be applicable to a Monitor engaged voluntarily, the lack of an Agreement with the Government or a Court Order technically takes such a situation outside the definitions as used herein.

I. DEFINITIONS

For purposes of these standards:

A. “Agreement” means an agreement between the Host Organization and the Government in which the Host Organization agrees to utilize the services of a Monitor and which establishes the scope of the monitorship.

B. “Compliance Program” means the system of policies and procedures implemented by the Host Organization to encourage ethical behavior and to reasonably prevent, detect, and respond to misconduct by employees or agents of the organization.

...
C. “Court Order” means an administrative or court order that provides for the Host Organization to utilize the services of a Monitor.

D. “Engagement Letter” means the contract between the Host Organization and the Monitor entered into in connection with the Agreement or Court Order.

E. “Financial Interest” means any material financial interest that could potentially be affected by the financial decisions of, or the success or failings of, the Host Organization, whether held directly or indirectly or by a family member. The interest is material if it is of sufficient value that a reasonable person might believe it has the capacity to affect one’s judgment in serving as a Monitor.

F. “Government” means (1) a public department or agency; or (2) any other entity that has oversight over the Host Organization due to regulatory authority, contractual agreement, or court order.

G. “Host Organization” means the organization that engages the Monitor.

H. “Monitor” means a person or entity:
   • Engaged by a Host Organization pursuant to a Court Order or an Agreement and Engagement Letter.
   • Who is independent of both the Host Organization and the Government;
   • Whose selection is approved by the Government or ordered by a court; and
   • Whose responsibilities and authority are established by Court Order or by the terms of the Agreement and the Engagement Letter.

I. “Monitorship Team” means those individuals or organizations engaged by, and operating under the authority and supervision of, the Monitor in assisting in the discharge of the duties of the Monitor as described in the Court Order or the Agreement. The Team includes, inter alia, employees, subcontractors, and consultants engaged by the Monitor.

J. “Work Plan” means a written analysis of the responsibilities and authority of the Monitor and how the Monitor intends to fulfill those responsibilities and exercise that authority.

To the extent possible, the Work Plan should outline the specific tasks to be undertaken and a realistic timeline for each to be completed.

II. MONITOR SELECTION

A. General Principles

The Government, Host Organization, and court, for Monitors appointed subject to a Court Order, should consider what qualifications are necessary for a Monitor to effectively conduct the monitoship based on the specific facts and circumstances of the matter. The Monitor selection process should ensure that the Monitor is a highly competent person or entity for the specific assignment and that the Monitor possesses the qualifications set forth under these standards. Absent extraordinary circumstances, both the Host Organization and the Government should be allowed to have a significant role in the selection process.

B. Candidate Pool

The selection process should encourage consideration of a broad range of Monitor candidates that should not be artificially limited by demographic, professional, and geographic factors. When possible, the Government should announce the decision to select a Monitor so that appropriate persons or entities may submit indications of interest.
C. Pre-qualified Monitor Pool

It may be appropriate for the Government to establish, and update on a regular basis, a pre-qualified pool of Monitors who are capable of handling an expected Monitor role where:

1. The Government expects the Monitors to have substantially similar assignments;
2. The Government expects that the timely selection of a Monitor will be of significant importance; or
3. The Government determines that there is a need to be able to provide names of potential Monitors to Host Organizations when requested.

D. Selection Criteria

When determining the necessary qualifications of the Monitor and when reviewing Monitor candidates, the following factors should be considered:

1. Qualifications
   a) The integrity, credibility and professionalism of the Monitor.
   b) The expertise or experience in the industry or specific subject matter of the monitoship.
   c) The relevant skills and experience necessary to discharge the duties of the Monitor as described in the Court Order or the Agreement.
   d) The expected structure of the Monitoship Team and the ability of the Monitor to access and deploy resources as necessary to discharge the duties of the Monitor as described in the Court Order or the Agreement.
   e) The commitment to serving as the Monitor for the entire monitoship term.

2. Costs
   a) The Monitor’s cost structure for the Monitoship Team.
   b) The Monitor’s projected costs to discharge the duties of the Monitor as described in the Court Order or the Agreement.
   c) Any other costs expected to be imposed on the Host Organization by reason of a particular Monitor’s selection.

3. Mandatory Exclusions
   The following persons should not be permitted to serve as Monitors:
   a) Former Government employees who, while employed by the Government, were involved in the matter giving rise to the monitoshhip.
   b) Any person who was involved in, supervised persons involved in, or otherwise had responsibility over the activity giving rise to the monitoship.
   c) Any person who was involved in structuring, reviewing, supervising, or providing advice regarding the Compliance Program or the internal controls related to the wrongdoing and in place at the time of the wrongdoing, where an objective review of that Compliance Program or system of internal controls pursuant to the Monitor’s mandate might reasonably call into question the efficacy and value of that work or the implementation thereof.
   d) The Government expects the Monitors to have substantially similar assignments;
   e) The Government expects that the timely selection of a Monitor will be of significant importance; or
   f) The Government determines that there is a need to be able to provide names of potential Monitors to Host Organizations when requested.

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   c) Any person who was involved in structuring, reviewing, supervising, or providing advice regarding the Compliance Program or the internal controls related to the wrongdoing and in place at the time of the wrongdoing, where an objective review of that Compliance Program or system of internal controls pursuant to the Monitor’s mandate might reasonably call into question the efficacy and value of that work or the implementation thereof.
4. Potential Exclusions

When determining the severity of the following potential conflicts of interest and the extent to which each could impair, or be perceived to impair, the Monitor’s judgment or independence, as balanced against the qualifications of that Monitor, the following factors should be considered:

a) Prior, non-Monitor work with the Host Organization that was unrelated to the activity, or the investigation of the activity, giving rise to the monitorship, with appropriate consideration given to the significance and nature of the work, and the time period during which the work occurred.

b) Prior Monitor work for the Host Organization, including independent monitoring work initiated by the Host Organization in response to the discovery of the wrongful acts that gave rise to the monitorship or work as a private sector inspector general.

c) Prior affiliation with a firm that provided legal or other professional services to the Host Organization during the time of that affiliation.

d) Any other factor that could bias or impair, or be perceived to bias or impair, the Monitor’s judgment, objectivity or independence.

E. Duty to Disclose

The Monitor should ascertain whether it, or any member of the Monitorship Team, has any potential conflicts of interest. The Monitor should disclose any identified conflicts of interest to the Government, Host Organization, and court, within adequate time for those parties to consider whether the potential conflict requires or warrants exclusion under these standards.

III. Establishing the Monitorship

A. General Principles

The Court Order or the Agreement and the Engagement Letter should clearly define the responsibilities and authority of the Monitor, Host Organization, and Government, and the goals and scope of the monitorship. The Court Order or the Agreement should state a length of time and projected resources necessary for the monitorship, which should be adequate to achieve its goals. The Government, Host Organization, and Monitor should commit, for the duration of the monitorship, the time and resources required by the monitorship.
B. Modifications

1. Monitorships Imposed by Court Order

Monitorships imposed by Court Order may be modified, extended, or terminated early to the extent permitted by the court, after hearing from the Government, the Host Organization, and the Monitor.

2. Monitorships Established by Agreement

a) Substantive Modifications

When the monitorship is established by Agreement, the Agreement should provide that any modifications should be in writing and agreed to by the Government, Monitor, and Host Organization. The Agreement should specify the process and conditions, under which the Host Organization, the Government and the monitor may seek modifications of the scope or nature of the monitorship.

b) Extensions

The Agreement may allow for extensions to the monitorship. The Agreement should state the criteria for determining when an extension is appropriate, state how to determine when those criteria are met, require that there is a clearly articulated reason for the extension, and create a process for resolving any objections by the Host Organization.

c) Early Termination

The Agreement should allow, and state the criteria for, a Monitor to recommend granting an early termination and for the Host Organization to apply for early termination. The Agreement should require that the Monitor or Host Organization provide a clearly articulated reason for early termination before it is granted. If the Agreement does not address early termination, and the Monitor or Host Organization believes that the monitorship is no longer beneficial to the Host Organization and that the Host Organization has met its obligations under the terms of the Agreement, then the Monitor may recommend early termination or the Host Organization may apply for early termination.

C. Monitor Work Plan

1. The Court Order or the Agreement ordinarily should require that the Monitor create a Work Plan at the outset of the monitorship, and that it be developed in consultation with the Host Organization and Government.

2. When the Monitor is required to make material changes to the Work Plan, either due to changing circumstances, new information, or modifications to the Court Order, the Agreement, or the Engagement Letter, the Monitor should disclose the changes to the Government, and, if appropriate, to the Host Organization.

3. If disclosure of the Work Plan, or any subsequent changes to it, to the Host Organization would hinder a Monitor’s ability to effectively perform its duties under the Agreement, then selected aspects of the Work Plan may be disclosed to the Government only.
D. Monitor Compensation and Billing

1. Estimates of Fees and Expenses

During the selection and approval process, prospective Monitors should provide a reasonable estimate of fees and expenses, including the use of third party resources, expected to be incurred to achieve the objectives of the monitorship.

2. Reasonable Fees and Expenses

a) The Monitor should incur only costs that are reasonably necessary for carrying out the monitorship. Where appropriate, the Monitor should look to utilize the Host Organization’s resources to reduce costs.

b) During the course of the monitorship, if fees and expenses are expected materially to exceed estimates, and if appropriate and practicable, the Monitor should inform the Host Organization before incurring those expenses. If the increase in fees and expenses is due to investigative aspects of the monitorship and the Monitor determines it is not appropriate to disclose these changes to the Host Organization, then the Monitor should consult with the Government, and if appointed pursuant to Court Order, the court, as soon as practicable.

c) The Court Order or Engagement Letter should provide for payment to the Monitor for its reasonable costs and time if the Monitor is required to testify or perform some other function related to the monitorship not otherwise addressed.

3. Invoices

a) The Monitor should maintain records that accurately reflect the work performed and the fees and expenses incurred.

b) The Monitor should prepare and issue invoices to the Host Organization that are sufficiently detailed to provide an understanding of the type of work performed and the expenses incurred, unless the parties agreed otherwise or disclosure of detailed invoices would hinder a Monitor’s ability to effectively perform its duties under the Court Order or the Agreement.

4. Disputing Fees and Expenses

For Monitors appointed subject to a Court Order, the Order should provide that any dispute over fees and expenses will be resolved by the court. For Monitorships established by Agreement, the Agreement and/or the Engagement Letter should set forth a dispute resolution process to resolve disputes over fees and expenses that takes into account the Government’s interest in the secrecy of investigations and the Host Organization’s interest in the protection of proprietary or confidential information.

5. Fund to Cover Future Fees and Expenses

Where appropriate, The Court Order, the Agreement, or the Engagement Letter may provide for the creation of a replenishing fund that would cover expected periodic fees and expenses of the Monitorship Team.
E. Public Disclosure of Fees and Expenses

Unless otherwise required by law, the Host Organization should have discretion not to disclose to the public the Monitor’s fees and expenses incurred during the monitorship.

IV. CONDUCTING THE MONITORSHIP

A. Professionalism

1. Independence

The Monitor is independent of both the Host Organization and the Government. To be independent, the Monitor should be impartial and objective in all of its activities, and avoid any conduct that may impair, or appear to impair, the Monitor’s impartiality and objectivity. The Monitor should not allow the prospect of future monitorship engagements or other economic considerations to influence its independence.

a) Except for reasonable fees and expenses, the Monitor should not accept anything of value from the Host Organization, unless the value is nominal or it mitigates costs to the Host Organization.

b) The Monitor should agree not to provide, or offer to provide, any services to the Host Organization for a period of at least one year from the date the monitorship is terminated, other than serving in a monitoring role not objected to by the Government. During the course of the monitorship, the Monitor and Host Organization may not discuss the possibility of future employment, including serving in a monitoring role.

c) Any expansion of the Monitor’s duties that increases the compensation of the Monitor should be in compliance with the Court Order or the Agreement as modified under these Standards.

2. Professional Codes

Each member of a Monitorship Team should be familiar with and responsive to the professional codes, rules and/or governing legislation of its profession; should comply with such, and should promptly seek professional guidance when a compliance question arises.

3. Supervision

The Monitor should take reasonable measures to ensure that members of the Monitorship Team comply with the relevant provisions of these standards.

B. Access to Records, Persons and Information

1. Obligations of the Host Organization

a) The Monitor should have access to all information that is reasonably necessary to fulfill the duties of the Court Order or the Agreement, as determined by the Monitor.
b. The Court Order or the Agreement should clearly state the types of information and records to be made available to the Monitor, and how and under what circumstances the Host Organization is required to give access to certain individuals for interviews with the Monitor, including, among others, employees, past employees, vendors, and subcontractors.

2. Proprietary and Confidential Information

a. Notwithstanding subsection (1), the Host Organization should not be required to disclose information that is subject to the attorney-client privilege or the attorney work-product doctrine, or the disclosure of which would otherwise be inconsistent with applicable law.

b. Monitors should respect the Host Organization’s proprietary and confidential information and take reasonable measures to protect that information. The Monitor should not use the Host Organization’s proprietary and confidential information for personal gain or for any purpose beyond the scope of the monitorship.

c. The Engagement Letter should specify the process, at the termination of the monitorship, for the Monitor to return to the Host Organization any confidential information that is the property of the Host Organization and is not required to be maintained by the Court Order or the Agreement, by applicable law, or by any other provision of these standards.

3. Dispute Resolution

For Monitors appointed subject to a Court Order, the order should specify that the court will resolve any disputes to the Monitor’s access to information. For Monitorships established by Agreement, the Agreement and/or Engagement Letter should specify a process for resolving any disputes as to the Monitor’s access to information that takes into account the Government’s interest in the secrecy of investigations and the Host Organization’s interest in the protection of proprietary or confidential information.

4. Interviewing Employees

a. The Court Order, the Agreement, or the Engagement Letter should address issues of employee rights that may arise during the monitorship, including, but not limited to, privacy rights and the right to counsel. In addition, Monitors should familiarize themselves with rights of employees of the Host Organization that may not have been addressed in the Agreement or the Engagement Letter.

b. Unless such disclosure would hinder the Monitor’s ability to effectively perform its duties under the Court Order or the Agreement, the Monitor should fully disclose its identity during interviews, and if appropriate have available documentation that establishes the Monitor’s status and authority. The Monitor should inform the interviewee why it is collecting the information, and what the Monitor is authorized or required to do with the information.

c. Monitors should respect a represented employee’s right to counsel, and if the employee, whether represented or unrepresented, is a subject or target of a Monitor’s investigation, the employee should be made aware of this status and should be provided

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c. Monitors should respect a represented employee’s right to counsel, and if the employee, whether represented or unrepresented, is a subject or target of a Monitor’s investigation, the employee should be made aware of this status and should be provided
the opportunity to have counsel present at the interview. Monitors should not suggest to
the Host Organization that the employee should receive any adverse treatment solely as a
consequence of the employee's decision to have counsel present during the interview.
This provision does not apply if the employee is not aware that the Monitor is
interviewing the employee, such as during the course of an undercover investigation.
d) The Court Order or the Agreement should afford the Monitor sufficient
authority to collect information confidentially, or otherwise protect the identity of persons
providing information, as deemed appropriate by the Monitor.
e) The Monitor should inform employees of the level of confidentiality afforded
them, if any, when providing information to the Monitor and that:

i) Statements given to the Monitor do not constitute notice to the Host
Organization on those matters;

ii) Statements given to the Monitor are not privileged communications; and

iii) Statements given to the Monitor may be disclosed to the Government.

C. Scheduled Reports and Other Reports and Communications

1. Scheduled Reports

a) The Court Order or the Agreement should require the Monitor to submit to the
Government and the court, for Monitors appointed subject to a Court Order, scheduled,
written reports that state the Monitor’s findings, conclusions, and recommendations.
b) The Court Order or the Agreement should specify the form and frequency of
the Monitor’s written reports. The requirements on frequency should balance the
Government’s need to be informed against the costs of creating the reports or otherwise
impairing the efficiency of the monitorship.
c) The Court Order or the Agreement should state if, and when, the Host
Organization may receive a copy of the final written report, as well as any preliminary
drafts of the report.
d) The Monitor is responsible for the report. Unless otherwise stated in the Court
Order or the Agreement, or otherwise inappropriate, the Monitor may allow the Host
Organization and the Government to make suggested changes to the report or produce
evidence that challenges the Monitor’s preliminary findings, but neither the Host
Organization nor the Government has or should be given the authority to modify the
Monitor’s report.

2. Other Written Reports and Communications

a) The Court Order or the Agreement should authorize the Monitor to
communicate freely with the Government for purposes of discussing any aspect of the
monitorship.
b) Notwithstanding subsection (a), due to the time and expense necessary to draft
formal, written reports, the Monitor should produce interim reports only if the Court
Order or the Agreement provides for them.
c) The Court Order or the Agreement should specify the types of communications
that must be disclosed to the Host Organization.
3. Reporting Misconduct

a) The Court Order or the Agreement should specify the types of observed or discovered wrongdoing that the Monitor should report and specify when and how the wrongdoing should be reported to the Host Organization, the Government, or both.

b) The Monitor should have the discretion to determine whether observed or discovered misconduct that is not specified in the Court Order or the Agreement, and is unrelated to the subject matter of the monitoring, should be reported to the Government, the Host Organization, or both.

4. Confidentiality of Monitor Reports

a) The Court Order or the Agreement should state whether the Monitor’s report is to be confidential or whether it is to be made available to the public, in part or in whole. For reports that are to remain confidential, the Government may decide whether other government agencies or departments may have access to the report, unless the Court Order or the Agreement provides otherwise. Any government agency or department that receives the report should keep it confidential. Unless the Government objects or the Court Order or the Agreement provides otherwise, the Host Organization should have the right to disclose to third parties any written report it receives.

b) If a written report may be publicly disclosed or provided to third parties, the Monitor should consult with the Government and Host Organization, or if appointed by a court, the court, for purposes of protecting against the disclosure of sensitive or disparaging information concerning individuals who may be named in the report, and the disclosure of proprietary, confidential, or competitive business information.

5. Basis of Findings and Conclusions

The Monitor’s findings and conclusions should be determined fairly, objectively and impartially, and based on relevant evidence. The Monitor should state the factual basis of all findings and conclusions, and maintain records sufficient to show that factual basis, including any material facts that do not support the Monitor’s findings and conclusions.

6. Curing of Reporting Errors and/or Inaccuracies

If after issuing a report the Monitor determines that it contains material errors or inaccuracies, then the Monitor should formally notify all recipients of the report.

D. Monitor Recommendations

1. Appropriateness and Impact

The Monitor’s recommendations should be pragmatic, reasonable, and designed to achieve the objectives of the Court Order or the Agreement. When developing recommendations, the Monitor should, as appropriate, consider such factors as the length of time required to implement the recommendations, costs, existing internal controls and Compliance Programs, the culture of the organization, the likelihood of the recommendations to be sustainable post-monitorship, and their impact on the Host Organization’s operations.

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2. Responsiveness to Host Organization

Absent exceptional circumstances, the Monitor should work cooperatively with the Host Organization in developing recommendations. The Monitor should consider the Host Organization’s existing plans, recommendations, and concerns. The Monitor should consider any reasonable changes proposed or made by the Host Organization, and if rejecting a proposal, the Monitor should articulate the reasons for the rejection.

3. Disputes

The Court Order or the Agreement should specify a process by which the Host Organization or Government may challenge any of the Monitor’s findings, conclusions, or recommendations. The Monitor should in good faith attempt to resolve any differences with the Host Organization or Government on the necessity of implementing any of the Monitor’s recommendations.

E. Indemnification

The Court Order, Agreement, or Engagement Letter should specify the conditions under which the Host Organization must indemnify and hold harmless the Monitor from claims arising from the Monitor’s performance of its duties under the Court Order or the Agreement.

F. Withdrawal

1. The Court Order, Agreement, or Engagement Letter should address the circumstances under which the Monitor could or should withdraw from the monitorship. The Engagement Letter should address the withdrawal process, notice, timing, disclosure, and other implications of withdrawal, including financial matters.

2. If during the course of the monitorship, the Monitor develops or discovers a Financial Interest or any other conflict of interest that impairs the Monitor’s independence, the Monitor should provide full disclosure. Following full disclosure, the Monitor should begin the withdrawal process unless the conflict of interest is cured, or is waived by the Host Organization and the Government, and where appropriate the waiver is approved by the court.

3. The Monitor should begin the withdrawal process if the Monitor determines that it does not have and cannot obtain the expertise, resources, or ability necessary to conduct the monitorship effectively and within the appropriate time frame.

4. The Monitor may begin the withdrawal process if the Host Organization fails to compensate the Monitor in compliance with the Court Order, the Agreement, or the Engagement Letter, or the Host Organization acts in a manner that prevents the Monitor from appropriately fulfilling its obligations under the Court Order or the Agreement.

5. The Monitor should confer with the Government and the Host Organization, and provide the reasons for the proposed withdrawal.

6. The Court Order or the Agreement should state the process for selecting a new Monitor in the event that the existing Monitor withdraws. That process should seek to minimize the costs to the Host Organization and the disruption of the monitorship.

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6. The Court Order or the Agreement should state the process for selecting a new Monitor in the event that the existing Monitor withdraws. That process should seek to minimize the costs to the Host Organization and the disruption of the monitorship.
G. Removal of the Monitor

1. Monitors Appointed by Agreement

a) Where a Monitor has been appointed subject to an Agreement, the Agreement should give only the Government the power to remove a Monitor.

b) The Agreement should establish a process for the Government to raise any concerns about the performance of the Monitor with the Host Organization and the Monitor before initiating the removal process. The process should allow the Host Organization and the Monitor to respond to any performance concerns and, where appropriate, allow the Monitor to cure any performance deficiencies before removing the Monitor.

c) The Government may require removal of the Monitor if the Monitor fails to conduct the monitorship effectively, fails to comply with the Agreement or these standards, or is no longer qualified. The Government’s exercise of discretion should not be arbitrary, capricious, or otherwise an abuse of discretion. The Government should consider any negative impact the removal of the Monitor would have on the Host Organization or on the independence of the Monitor.

d) The Agreement should establish a process for the Host Organization to raise concerns about the performance or qualifications of the Monitor to the Government.

e) The Agreement should state the process for selecting a new Monitor in the event that the existing Monitor is removed. The process should seek to minimize the costs to the Host Organization and the disruption of the monitorship.

2. Monitors Appointed by Court Order

Where the Monitor has been appointed subject to a Court Order, only the court may remove the Monitor, on its own motion or pursuant to an application by the Government or the Host Organization. The court’s removal determination should be guided by the considerations in subsection G (1).

H. Evaluation of Monitorships

1. The Government should evaluate the effectiveness of each of its ongoing monitorships on a regular basis, and should meet separately with both the Monitor and the Host Organization to discuss concerns or suggestions for improvement.

2. The Government should compare similar ongoing monitorships on a regular basis to explore the possibility of common issues that it should address or best practices it can share.

3. At the conclusion of a monitorship, the Government should evaluate the effectiveness of the monitorship, including the performance of the Monitor. The results of that analysis should be used in the consideration of that Monitor for future assignments and by the Government in designing future monitorships.
REPORT

History of the ABA Standards for Criminal Justice

The idea of developing the *ABA Standards for Criminal Justice* was formulated in 1963. The various chapters in the first edition of the Standards were approved by the ABA House of Delegates between 1968 and 1973. They were described by Chief Justice Warren Burger as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history."

Beginning in 1978, the ABA House of Delegates approved revisions to the Standards. Publications of its second edition occurred in 1980. Since that time, periodic changes have been made to the Standards and publication of these Prosecution Function and Defense Function Standards would begin the Fourth edition of the Standards.

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.

Definition and Role of Monitors

For the purpose of this set of Standards a monitors is defined as a person or entity who is engaged by a host organization pursuant to a court order or an agreement and engagement letter; and who is independent of both the host organization and the government, whose selection is approved by the Government or ordered by a court; and whose responsibilities and authority are established by court order or by the terms of the agreement and the engagement letter.

A monitor may serve a variety of functions. These frequently involve remedial measures within the host organization’s corporate compliance and ethics program, but vary greatly in accordance with the underlying issues giving rise to the agreement. For example, the monitor may advise an organization on the implementation of a compliance program, audit the organization’s compliance with its agreement with the government, investigate the organization’s compliance with law, as well as acting to reduce waste, abuse, and fraud and increase the host organization’s economy, efficiency, and effectiveness. In some cases, the efforts of monitors may be intended to result in a change to the host organization’s cultural environment. These Standards serve to give guidance to those who are appointed as monitors, as well as those working on behalf of a host organization or the government.

Background

The proposed black letter standards in these chapters emerge from an effort of more than two years, begun with the work of a task force in October 2012 charged with the job of creating draft Standards. The Task Force was appointed by the Criminal
Justice Standards Committee, a Standing Committee of the Criminal Justice Section. The Task Force first met in October 2012 to chart direction. After several meetings the Task Force submitted a draft to the Criminal Justice Section Standards Committee in Summer 2014. After a Standards Committee meeting, the draft was submitted to the Criminal Justice Section Council for review at the Fall 2014 Meeting. After two Council meetings the Criminal Justice Section Council approved these revised Standards at its April 2015 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.

Conclusion

The Criminal Justice Section urges that the House of Delegates adopt the proposed Monitors Standards as part of the Fourth Edition of the ABA Standards for Criminal Justice.

Respectfully submitted,

Jim Felman and Cynthia Orr, Chairs
Criminal Justice Section
August 2015
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: James Felman and Cynthia Orr., Chairs

1. Summary of Resolution(s). The Criminal Justice Section recommends that the ABA adopt the black letter standards, dated August 2015, of the American Bar Association Standards for Criminal Justice: Monitors.

2. Approval by Submitting Entity. This resolution was approved by the Criminal Justice Section Council at its Spring meeting on April 25, 2015.

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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? No existing Association policies are relevant to this Resolution.

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


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The policy will be distributed to various criminal justice stakeholders as a tool to offer guidance on the role of Monitors. 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 Judiciary
Governmental Affairs
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  
   Fax: 202-662-1501  
   Email: kevin.scruggs@americanbar.org

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

   Stephen A. Saltzburg, Section Delegate  
   George Washington University Law School  
   2000 H Street, NW  
   Washington, DC 20052-0026  
   Phone: (202) 994-7089; (202) 489-7464  
   Email: ssaltz@law.gwu.edu

   Neal R. Sonnett, Section Delegate  
   2 S. Biscayne Boulevard, Suite 2600  
   Miami, FL 33131-1819  
   Phone: (305) 358-2000  
   Email: nrslaw@sonnett.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Criminal Justice Section recommends that the ABA adopt the black letter standards, dated August 2015, of the American Bar Association Standards for Criminal Justice: Monitors.

2. Summary of the Issue that the Resolution Addresses

This set of Standards will outline best practices for the appointment and retention of monitors. It will also detail best practices for conducting a monitorship from creation through withdrawal. This set of standards is designed to serve as a guide for monitors, judges, prosecutors, defense attorneys and academics interested in these issues.

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

The proposed Standards provide a framework through which monitors, legislatures, courts acting in their supervisory capacity, and administrative agencies can make the difficult decisions regarding the development and implementation on a monitorship.

4. Summary of Minority Views

None are known.
RESOLVED, That the American Bar Association urges Congress to restore Pell Grant eligibility for prisoners who qualify under existing need-based criteria in order to facilitate re-entry and reduce recidivism.
This Resolution urges Congress to restore Pell Grant funding for prisoners. Pell Grants are not loans and do not have to be repaid. Undergraduate students are eligible for Pell Grants, but incarcerated prisoners are not eligible for the grants. This source of funding was revoked for prisoners two decades ago when Congress passed the Violent Crime Control and Law Enforcement Act of 1994. A provision of this Act overturned a section of the Higher Education Act of 1965, which permitted prisoners to receive Pell funding for postsecondary education while incarcerated. The provision reads: “No basic grant shall be awarded under this subpart to any individual who is incarcerated in any federal or state penal institution.” The ABA must press Congress to act to reverse this failed law and policy.

Two primary rationales support this Resolution. First, in the decades since its enactment, there is little indication that removing prisoners from Pell eligibility has produced any tangible benefits for society; on the contrary, the law may reduce public safety and exact severe social and financial costs. Second, support for reinstatement of Pell funding is consistent with, and expands upon, Association policy on education in prison and moves toward actualizing it. There is no illusion that reinstating Pell Grant funding is a cure-all to the question of funding for postsecondary education in prison, but it is a step in the right direction. There is growing recognition for this issue, and most recently a Department of Education note has clarified that some incarcerated individuals are still eligible for Pell Grants. The time is ripe for the Association to lend its voice for reform.

Restoring the Pell Grant—Increasing Public Safety, Cutting Cost

Congress revoked Pell Grant funding for prisoners two decades ago, yet there is little evidence that the law has enhanced public safety, reduced recidivism, or produced taxpayer savings. More certainly, recidivism rates across the country have been dismal, yielding both high financial and social costs. Pell Grant funding directly counters these problems by helping to equip individuals for reintegration into society successfully, with diplomas, skills and certification.

Prisoners first became eligible for federal funding in 1972, when legislation directly allowed for imprisoned individuals to apply for Pell Grants. The path to include prisoners for Pell eligibility was consistent with the grant’s design to assist economically challenged Americans working toward postsecondary study and training. For over two decades, prisoners were rightly seen as a part of the economic underclass in America, with the average inmate being impoverished and undereducated.

Even prior to entering prison, the men and women living in the correctional system face disadvantage and under-resourcing. According to a 2003 study, approximately 41 percent of prison and jail inmates had not completed high school. A decade prior, it was claimed that academic failure and criminal delinquency are welded to “reading failure.” More recent data by the Begin to Read Project suggests that 60 percent of all inmates in U.S. prisons and jails are functionally illiterate.

With such deficiencies among prisoners, the ban on Pell funding was a bombshell for postsecondary education in prison. Although the grant helped to create a robust and growing infrastructure of college and vocational programs in prison, the 1994 legislation single-handedly decimated it. Figures show that in 1990, there were several hundred college programs in prison; following the 1994 legislation, nearly every program disappeared. Today, the situation is in survival mode with few prisons offering in-person instruction for degrees and certificates.

Unlike the legislation’s leveling of higher education in prison, the penological outcomes are less certain. There has been little improvement in public safety, with one study showing that from 1994 to 2007, recidivism rates have remained stagnant. This situation is unfortunate given the high rates of recidivism nationwide. According to another study that focused on thirty states, over 75% of released prisoners were rearrested within five years of their release. With new offenses and new social harms being committed at such high rates, society continues to bear the brunt of recidivism. Thus, despite other uncertainties about the legislation’s impacts, in the area of reducing social harm, it has scarcely made a difference.

The financial returns of the legislation are equally uncertain. To be sure, the quest to revoke Pell funding was partially based on the pretext of saving taxpayer money, yet determining
“costs” and “savings” is complicated. Understanding lost educational opportunity and its effects on recidivism rates is complex, or as one prison instructor describes, “No one will ever know the extent of the loss in unrealized educational goals and dashed dreams of freedom, good jobs, and a crime-free future.”

Prison institutions stand to benefit in other important ways. For example, inmates in college programs have their time occupied with course attendance and homework, which combats inmate idleness. As such, education as programming curtails behavior that jeopardizes the safety of staff and other inmates. There is less time to participate in the facility subculture of deviance because inmates are busy with class, homework, and mentoring possibilities presented by tutors, all of which contributes to a safer and humane environment for both staff and inmates.

Reaffirming Association Policy

This Resolution reaffirms commitment to previous Association policy, which supports the distribution of “grant funds that may be available for correctional education within the Department of Education.” Such funds are needed now more than ever to assist the 700,000 individuals who exit prison each year, only the tiniest fraction of whom experience higher education. Prior to the 1994 legislation, prisoners received less than one-half of one percent of the entire Pell budget. This number is tiny due to the general under-education of prisoners, who typically do not have a high school diploma or GED, and thus cannot take advantage of Pell funding in the first place.

Reaffirming this policy simultaneously disavows the misguided political efforts that led to the ban on Pell funding for prisoners. Paramount among these were the dogmatic adherence to “nothing works” penal philosophy, distortions about the cost of Pell funding, and short-sightedness about the penal tradeoffs. Revocation of Pell funding was more political than pragmatic and should not enjoy Association support.

As scholars have documented, the claim that “nothing works” became a slogan within a pessimistic narrative of prisoner rehabilitation. The study used to substantiate the slogan in


fact pointed to penal strategies that enjoyed some success. Although the study recognized potential for inmate rehabilitation, “nothing works” became a penal mantra, one that implicitly made educating inmates pointless. Finally, after several attempts to push similar bills through Congress, the 1994 legislation became a legal symbol of this view.

At that time there was limited knowledge about the relationship between education and rehabilitation, but that has been changing. Since, there has been greater indication that education in prison is a preventative to reincarceration. According to one study in 1997 that focused on 3,200 prisoners in Maryland, Minnesota, and Ohio, simply attending school behind bars reduces the likelihood of reincarceration by 29 percent. In 2000, the Texas Department of Education conducted a longitudinal study of 883 men and women who earned college degrees while incarcerated, finding recidivism rates between 27.2 percent (completion of a BA degree) and 7.8 percent (completion of a BA degree) compared to a system-wide recidivism rate between 40 and 43 percent. One report, sponsored by the Correctional Education Association, focused on recidivism in three states and concluded that education prevented crime. Although these studies were regional, they suggest that education is an antidote to recidivism. Furthermore, they suggest that an expanded system of higher education nationwide has the potential to impact stagnant recidivism rates positively by lowering them.

College and vocational training assists prisoners in what is arguably the greatest challenge to successful reintegration to society—finding gainful employment. It enhances their marketability for the task of staying out of prison. Such views were propounded well before the 1994 legislation, including data presented by Professor James Gilligan in his 1991 Erickson Lectures at Harvard University, declaring that “of all the programs available to prisoners in Massachusetts, the one that was most effective in preventing violence (i.e., recidivism, or (re)offending after they had left prison) was the obtaining of a college degree.” Most recently, meta-analysis of programs that provide education to inmates indicates significantly reduced recidivism and greater likelihood of finding employment after release.

Immediately after the law took effect, the U.S. Department of Education pronounced that the reduction of postsecondary education opportunities would be detrimental to efforts to prevent reincarceration. The Department issued a publication that made a clear argument for the benefit of higher education in prison and its potential to combat recidivism, stating “Pell Grants help

25 Id. at 121.
28 Banka, supra note 19, at 49.

fact pointed to penal strategies that enjoyed some success. Although the study recognized potential for inmate rehabilitation, “nothing works” became a penal mantra, one that implicitly made educating inmates pointless. Finally, after several attempts to push similar bills through Congress, the 1994 legislation became a legal symbol of this view.

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inmates obtain the skills and education needed to acquire and keep a job following their eventual release. 26

Like misguided slogans, false claims about Pell funding must be repudiated. One senator claimed that giving Pell Grants to prisoners shortchanged 100,000 students with no criminal record who were denied because of lack of funds. 27 However, according to a study by the General Accounting Office, Pell Grants awarded to prisoners did not affect availability of grants to nonincarcerated students: "If incarcerated students received no Pell grants, no student currently denied a Pell award would have received one and no award amount would have been increased." 28 Everyone with qualifying need received some grant amount, which made the senator's claim absolutely false. The same Senator stated that prisoners received $200 million in Pell Grant funding, which was later debunked. 29

Whether the legislation produces savings is uncertain when factoring in tradeoff costs of forsaken college and vocational training. Research has shown that Pell funding results in a net savings of taxpayer funds and that education may be a better deal than previously imagined, particularly in an environment where basic literacy is a challenge. 30 One government study claimed that every dollar spent on education returned more than two dollars to the citizens in reduced prison costs. 31

Pell funding fills a critical need for more education in prison in general. Already noted is the low level of education among prisoners, but there has been further reduction in educational resources overall. According to one influential study that compared the number of correctional and educational staff in American prisons, from 1979 to 1995, the prison population tripled while educational staff stayed the same size, resulting in a 60% cut in educational staff per inmate. 32

Restoring Pell funding will give more individuals the chance to gain needed social and vocational skills. Educational opportunity does not just help prevent return to prison, but helps in molding citizens who are fully willing and able to participate in our communities. Higher education, whether it is administered within a prison or on a traditional college campus, involves self-discovery, the development of critical thinking skills, and the acquisition of the social and intellectual competencies necessary to navigate the world beyond the campus or prison. Religious studies specifically may be a strong impetus to character change, which involves issues

26 Karpowitz & Kenner, supra note 18, at 6–7.
30 See Ibrahim, supra note 16 (advocating for reinstating Pell funding for prisoners and reporting "overwhelming consensus among public officials that postsecondary education is the most successful and cost-effective method of preventing crime").
31 Ubal & Robinson, supra note 20, at 3.
32 Bruce Western, Punishment and Inequality in America 175 (2006).
of morality, discipline, and reflecting theologically on one’s own incarceration.35

Other considerations support this Resolution, including the strong advocacy for restoring Pell eligibility for prisoners.34 The recent Department of Education announcement provided greater clarification for determining “Pell Grant eligibility for students confined or incarcerated in locations that are not federal or state penal institutions.”32 The clarification works to maximize the number of individuals who, while under custody, are still eligible for funding.

Restoring prisoner eligibility also advances racial justice. As African Americans and Latinos are disproportionately represented in prison, the elimination of Pell funding equates to greater loss for these specific groups.36 The point was not lost on the NAACP when it urged Congress in 2007, through a formal resolution, to restore prisoner Pell Grant eligibility.37

Finally, restoring Pell eligibility restores the vision of Senator Pell himself who championed the cause of educational opportunity for all—not just those who can pay for it. Pell’s daughter, Dallas Pell, has also urged Congress to honor her father’s legacy by restoring Pell funding to prisoners, which, she writes, “strengthens underserved communities as formerly incarcerated people are most often released into communities that lack the capacity to provide them with employment or reentry assistance.”38

36 See Robert Bruce Slater, Locket in But Locked Out: Death Sentence for the Higher Education of Black Prison Inmates?, 6 THE JOURNAL OF BLACKS IN HIGHER EDUCATION 102 (1999-95) (Citing ten states in which Blacks make up two thirds or more of all inmates and stated that cuts in Education grants “will have a hugely disproportionate impact on Blacks”).
The ABA urges Congress to reinstate the Pell Grant to prisoners without qualification. By doing so, Congress will honor the legacy of the grant’s namesake and embrace expanded educational opportunities as convergent with both penal and public interests.

Respectfully submitted,

Jim Felman and Cynthia Orr, Chairs
Criminal Justice Section
August 2015

The ABA urges Congress to reinstate the Pell Grant to prisoners without qualification. By doing so, Congress will honor the legacy of the grant’s namesake and embrace expanded educational opportunities as convergent with both penal and public interests.

Respectfully submitted,

Jim Felman and Cynthia Orr, Chairs
Criminal Justice Section
August 2015
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section
Submitted By: James Felman and Cynthia Orr., Chairs

1. Summary of Resolution(s). The resolution urges Congress to restore Pell Grant eligibility for prisoners who qualify under existing need-based criteria.

2. Approval by Submitting Entity. This resolution was approved by the Criminal Justice Section Council at its Spring meeting on April 25, 2015.

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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This resolution is consistent with, and expands upon, resolution 15C passed at the 1990 Midyear meeting.

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


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The policy will be distributed to various criminal justice stakeholders as a tool urging grant prisoners access to Pell Grants. 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 Judiciary
   Governmental Affairs
   Legal Aid and Indigent Defendants
   Public Education
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Criminal Justice Section recommends that the ABA urge Congress to restore Pell Grant eligibility for prisoners who qualify under existing need-based criteria.

2. Summary of the Issue that the Resolution Addresses

This Resolution urges Congress to restore Pell Grant funding for prisoners. This source of funding was revoked for prisoners two decades ago when Congress passed the Violent Crime Control and Law Enforcement Act in 1994. The provision of this Act overturned a section of the Higher Education Act of 1965, which permitted prisoners to receive Pell funding for postsecondary education while incarcerated. The provision reads: “No basic grant shall be awarded under this subpart to any individual who is incarcerated in any federal or state penal institution.” Congress must act on this failed law and policy.

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

Two primary rationales support this Resolution. First, in the decades since its enactment, there is little indication that removing prisoners from Pell eligibility has produced any tangible benefits for society; on the contrary, the law may reduce public safety and exact severe social and financial costs. Second, support for reinstatement of Pell funding is consistent with Association policy on education in prison and moves toward actualizing it. There is no illusion that reinstating Pell Grant funding is a cure-all to the question of funding for postsecondary education in prison, but it is a step in the right direction. There is growing momentum for this issue, and most recently a Department of Education note has clarified that some incarcerated individuals are still eligible for Pell Grants. The time is ripe for the Association to lend its voice for reform.

4. Summary of Minority Views

None are known.

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4. Summary of Minority Views

None are known.
RESOLVED, That the American Bar Association urges the federal government to adopt legislation and appropriate full funding to support the U.S. Department of Education Office for Civil Rights, in support of its efforts to enforce Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.) and other activities designed to promote access to education free from gender-based violence;

FURTHER RESOLVED, That the American Bar Association urges colleges and universities handling intimate partner violence, stalking, and sexual assault allegations in campus administrative hearings to create and maintain fair and just hearing processes that adhere to due process and sound evidentiary principles;

FURTHER RESOLVED, That the American Bar Association urges colleges and universities to strictly adhere to the spirit and principles of victim privacy, confidentiality, and autonomy, as described in Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.) and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 U.S.C. §1092(f)), and disapproves the use of universal mandated reporting of abuse by campus employees or students;

FURTHER RESOLVED, That the American Bar Association urges colleges and universities to develop and maintain working relationships with state and local civil and criminal justice systems and community-based victim resources (such as rape crisis centers, domestic violence support groups, crime victim services, or independent counseling services), and to provide complainants with direct referrals to, but not mandate participation with, these resources;

FURTHER RESOLVED, That the American Bar Association urges colleges and universities to allow the use of attorneys and legal advocates for complainants and alleged perpetrators at all stages of the campus hearing process, and urges attorneys to provide such services pro bono;

FURTHER RESOLVED, That the American Bar Association urges law schools to provide pro bono assistance to complainants and alleged perpetrators in campus administrative hearings and processes, and to provide assistance to university administration with the creation or revision of such processes.
Introduction
Intimate partner violence, stalking, and sexual assault are rampant on United States campuses. The most widely used statistic indicates that approximately one out of five women will be sexually assaulted while attending a college or university.1 Nearly half of female victims (47%) and more than one-third of male victims (39%) are between 18 and 24 years of age when they first experience violence by an intimate partner.2 Over 37% of female victims and 27% of male victims are between 18 and 24 years of age when they first experience stalking victimization.3 While not all college-age victims attend college or university, under Title IX of the Education Amendments of 1972, colleges and universities have a unique obligation to keep their communities safe from gender-based violence.4

Outside of college and university campuses, there are two legal approaches for handling gender-based violence: civil or criminal courts. On campuses, a third option is available: the campus administrative hearing. Though not a legal process, the campus hearing is a quasi-judicial proceeding because of the nature of the complaint and the ramifications for both the complainant and the alleged perpetrator. Each campus has its own internal grievance process and array of punishments and protections if the proceedings result in a finding against the alleged perpetrator. There are a variety of reasons why a victim of gender-based violence might choose to initiate a campus administrative hearing, in lieu of, or in addition to, traditional legal proceedings. Avoiding the disruption, expense, and emotional turmoil of a legal proceeding might be one reason. Also, campus hearings have the unique advantage of being able to offer campus-specific remedies that may be more suitable and appealing to the complainant, such as permission to drop a class or withdraw altogether without penalty, to change dorm rooms or parking spaces, to alter a class or dining schedule, or even to seek expulsion of an offender.

Campus administrative hearings are recommended and regulated by existing federal civil rights laws like Title IX; however, campuses may be ill-prepared to address such serious allegations as rape, stalking or dating violence in administrative proceedings which have traditionally addressed matters such as academic dishonesty and class pranks. The harshest punishment of expulsion has significant collateral economic consequences for the alleged perpetrator. Additionally, the grievance proceeding can re-traumatize the complainant if not conducted in accordance with established best practices. While colleges and universities continue handling gender-based violence complaints through these quasi-judicial proceedings, the American Bar Association urges all campuses to utilize legal best practices to ensure fairness, due process, and justice.


4 For the purposes of this policy, gender-based violence encompasses sexual harassment, sexual violence, intimate partner violence, and stalking.

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Rules of Law

The following are enacted federal laws that address and/or affect campus gender-based violence.

Title IX

Title IX of the Education Amendments of 1972 prohibits sex discrimination and states the following.\(^1\)

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Pursuant to Title IX, colleges and universities that receive federal funding cannot discriminate on the basis of sex.\(^2\) Sexual harassment, sexual violence, intimate partner violence, and stalking are forms of sex-based discrimination.\(^3\) Furthermore, federally-funded schools must ensure that all students are able to participate in and/or benefit from educational programs and activities, and are not denied that opportunity on the basis of sex.\(^4\)

Gender-based violence creates a hostile environment on campus that “interferes with the student’s ability to participate in and benefit from the school’s program.”\(^5\) In order to maintain Title IX compliance, colleges and universities must respond promptly and effectively to address gender-based violence once the school knows or should know that the violence is occurring on campus. Regardless of a complaint filed by a student, if the school should have known about gender-based harassment and/or violence on campus, it must promptly investigate to determine what occurred and take appropriate steps to respond.

Title IX, enforced through the Department of Education’s Office for Civil Rights, requires that colleges and universities have the following procedures in place: publish and distribute a policy against sex discrimination; have a Title IX coordinator who oversees all complaints of sex discrimination; and have and make known the procedures for students to file complaints of sex discrimination.\(^6\)

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\(^{1}\) 20 U.S.C.A. § 1681.

\(^{2}\) Title IX is not limited to just colleges and universities, but includes any school that receives any federal financial assistance.

\(^{3}\) 20 USC § 1681.

\(^{4}\) Dept. of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, (last visited April 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qap-201404-title-ix.pdf.

\(^{5}\) Id.

Clergy Act

The "Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act" (Clergy Act)11 requires that all institutions receiving Title IV student financial aid funding do the following:

- publish an Annual Security Report (ASR);
- maintain a public crime log;
- disclose crime statistics for incidents that occur within defined geography;
- report on crimes in seven major categories;
- issue timely warnings about Clergy Act crimes;
- devise an emergency response, notification and testing policy;
- compile and publish an annual fire safety report;
- enact policies and procedures to handle reports of missing students.12

Included in the major crime categories are sexual violence, dating violence, domestic violence, and stalking.13 The Campus Sexual Assault Victims’ Bill of Rights is a 1992 amendment to the Clergy Act and requires the following:

Survivors shall be notified of their options to notify law enforcement; accuser and accused must have the same opportunity to have others present; both parties shall be informed of the outcome of any disciplinary proceeding; survivors shall be notified of counseling services; and survivors shall be notified of options for changing academic and living situations.14

The Clergy Act is a separate and different requirement from the requirements of Title IX. Although Title IX and the Clergy Act do not conflict, requirements for school compliance with the Clergy Act and Title IX differ. For example, the Clergy Act governs reporting requirements of certain criminal acts that occur on or near campus or campus property; therefore Clergy does not require the reporting of sexual harassment. Under Title IX, sexual harassment is considered a form of sex-based discrimination and can trigger federal protections and requirements.

The Clergy Act strives to promote campus safety and crime prevention while Title IX addresses and promotes equal opportunities by prohibiting discrimination on the basis of sex. Because the Clergy Act and Title IX both address sexual violence, it is important to understand a school’s complete responsibility as it relates to their respective requirements.

Campus Sexual Violence Elimination (SaVE) Act

In March 2013, the Campus Sexual Violence Elimination (SaVE) Act was signed into law under the Violence Against Women Reauthorization Act of 2013. CampusSaVE further amended the Clergy Act and expanded it to include additional rights to campus victims of sexual violence, dating violence, domestic violence, and stalking. In many ways, Campus SaVE codified key

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elements of a Dear Colleague: Sexual Violence guidance letter released by the Department of Education Office for Civil Rights ("OCR") in April 2011. Many of the requirements are rooted in the law or trigger the principles of fairness grounded in constitutionally-protected rights of due process.

Campus SaVe requires that institutions receiving Title IV student financial aid provide students the following information:

- a statement of policy regarding procedures that will be followed once an incident of domestic violence, sexual assault, or stalking has been reported including the standard of evidence that will be used during any institutional conduct proceeding arising from such report;
- information in writing about the importance of preserving evidence;
- to whom the alleged offense should be reported;
- options regarding law enforcement and campus authorities, including notification of the victim's option to notify law enforcement (on-campus and local police);
- the option to decline to notify such authorities, and, where applicable; and
- the rights of victims and the institution's responsibilities regarding orders of protection.

Additionally, Campus SaVe requires that procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault and stalking include a clear statement that proceedings shall:

- provide a prompt, fair, and impartial investigation and resolution;
- be conducted by officials who receive annual training on issues related to domestic violence, dating violence, sexual assault, and stalking, and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability;
- protect the confidentiality of victims and explain how;
- provide written notification of students about existing counseling, health, mental health, advocacy, legal assistance, and other services available for victims on-campus and in the community; and
- provide written notification of victims about options for, and available assistance in, changing academic, living, transportation, and working situations, if requested by the victim and such accommodations are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.

The accuser and the accused are entitled to the same opportunity to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice. Both the accuser and the accused shall be simultaneously informed, in writing, of

- the outcome of the institutional disciplinary proceeding;
- the institution's procedures for the accused and the victim to appeal the results;
- any change in the results that occurs prior to the time the results become final;
- when the results become final.
Campus Administrative Hearings: 
Federal Requirements and ABA Recommendations

Funding: The Department of Education Office for Civil Rights ("OCR") is charged with removing barriers to students’ full participation in every facet of educational life. OCR is responsible for ensuring equal access to education by enforcing federal civil rights laws and implementing regulations that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age in all educational programs or activities that receive federal financial assistance.

As of April 6, 2015, 106 colleges and universities were under investigation for alleged Title IX violations. Some schools have multiple investigations and therefore, the number of investigations is at 113. The number of investigations nearly doubled over a one-year span and is likely to continue to rise.

In order to properly and promptly investigate the current allegations of Title IX violations, as well as future allegations, the Office for Civil Rights ("OCR") requires adequate funding.

Recommendation: That the American Bar Association urges the federal government to adopt legislation and appropriate full funding to support the U.S. Department of Education Office for Civil Rights, in support of its efforts to enforce Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.) and other activities designed to promote access to education free from gender-based violence.

Due Process, Fairness, and Justice: Campus administrative hearings are internal and non-legal, but that does not exempt them from the need to be unprejudiced, transparent, and just. Over centuries of practice, the U.S. legal system has evolved tested principles of due process and evidentiary soundness which can and should inform the campus hearing process, without imposing unrealistic expectations of legalism on lay practitioners.

For example, the OCR finds the following elements critical for Title IX compliance:

- Notice to students of the grievance procedures;
- Application of the grievance procedures to complaints filed by students or on their behalf alleging gender-based violence carried out by employees, other students, or third parties;
- Provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to present witnesses and evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process; and
- Written notice to the complainant and alleged perpetrator of the outcome of the complaint.

16 Id.
17 Dep’t of Educ., Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, (last visited April 29, 2015), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

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The aforementioned requirements are rooted in fairness and justice for both the complainant and the alleged perpetrator, beginning with notice of proceedings as well as having proceedings in a timely and fair manner. OCT also provides that the evidence must allow "adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence." 18

To maintain a high level of care and professionalism, campus administrative hearings on gender-based violence need to use the aforementioned evidentiary principles. Failure to do so could lead to the use of prejudicial evidence against the complainant or alleged perpetrator and can lead to a failure to adhere to due process.

**Recommendation:** The American Bar Association urges colleges and universities handling gender-based violence allegations in campus administrative hearings to create and maintain fair and just hearing processes that adhere to due process and sound evidentiary principles.

**Privacy, confidentiality, autonomy:** Rigorously maintaining victim privacy, confidentiality, and autonomy are core principles of successful gender-based violence intervention, and thus are reflected in the ABA Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection Order Cases, adopted as ABA policy in August 2007. 19

**Recommendation:** The American Bar Association urges colleges and universities to strictly adhere to the spirit and principles of victim privacy, confidentiality, and autonomy, as described in Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.) and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 U.S.C. §1092(j)), and disapproves the use of universal mandated reporting of abuse by campus employees or students.

**Off-campus resources and referrals:** After an incident, the campus might be the first and only point of contact that a victim may have. This gives the campus a unique opportunity to provide an array of resources to a victim. In cases of gender-based violence, empowerment is incredibly important. After a traumatic event where a victim may feel completely powerless, it is vital that the victim begin to feel and regain power, control, and agency over his/her own life. A good way to begin this process is by providing options and allowing the victim to come to his/her informed decision, without pressure or coercion.

When dealing with campus gender-based violence, there are various community providers in addition to campus-based services. The usual service providers outside of the campus are the following: medical, legal, police, and advocacy based. Depending on the location of the campus, there may or may not be an accessible, local rape crisis organization.

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In order to provide the most comprehensive services, it is best that all of the professionals involved facilitate their response in order to improve overall responses for the victim. The most effective and comprehensive services are those that are coordinated. The aftermath of gender-based violence is beyond traumatic and additional interactions with service providers can add to the trauma. Each service provider functions to provide the victim with a specific service. For example, police officers want to enforce the law and keep communities safe. With this objective in mind, police officers might struggle with a victim who does not want to report. With a coordinated community-based response, an informed and trained police officer would understand the reasons why victims do not always report and might make it clear to the victim that he/she has this option available when he/she is ready. As with any traumatic event, repeating details of the event can cause the victim to re-experience the trauma. Particularly with gender-based violence, the constant repetition of answering similar questions might cause a victim to feel that the person investigating or inquiring does not find him/her credible. Coordinating responses, with the consent of the victim, can help alleviate this situation.

The campus is often an insulated community. Its uniqueness has both advantages and challenges. Campuses can readily and easily provide services such as classroom changes and dorm room changes that perhaps, another community provider could not provide. However, students who wish to pursue a criminal case, receive counseling outside of the campus setting, or explore other options should have this information and other viable resource readily available upon contact with the school after a gender-based violence.

Recommendation: The American Bar Association urges colleges and universities to develop and maintain working relationships with state and local civil and criminal justice systems and community-based victim resources (such as rape crisis centers, domestic violence support groups, crime victim services, or independent counseling services), and to provide complainants with direct referrals to, but not mandate participation with, these resources.

Pro bono service: According to the Office for Civil Rights, if the school permits one party to have an attorney during a campus administrative hearing, the other party must have this same opportunity. However, the school need not permit attorneys at all. Attorney representation for both the complainant and the alleged perpetrator can only enhance the implementation of fairness since the very relationship between a client and attorney is a fiduciary one.

However, the complainant and the alleged perpetrators might not be able to afford an attorney. With that in mind, an advocate from a community resource center or a law school might be a resource for assisting students during a campus gender-based violence disciplinary hearing.

If a victim wants to know his/her civil legal options, it is best to refer to a pro bono attorney, Legal Aid office, law clinic, or local gender-based violence coalition. If a victim wants to know his/her criminal legal options, it is best to refer to a local police department.

Part of creating an effective referral process is the existence of pre-existing relationships or clear communication on what services are available and who the best point of contact would be.

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Part of creating an effective referral process is the existence of pre-existing relationships or clear communication on what services are available and who the best point of contact would be.
Recommendation: The American Bar Association urges colleges and universities to allow the use of attorneys and legal advocates for complainants and alleged perpetrators at all stages of the campus hearing process, and urges attorneys to provide such services pro bono;

Special Relationship of Law Schools: Many law schools are connected to a larger university community, which includes undergraduate programs. Law school is different from most other educational programs since its focus is preparation for students to become licensed attorneys. There are ethical and professional requirements for becoming a licensed attorney because of the fiduciary relationship an attorney has with his/her client. Law school is the first step on this path and students often receive both theoretical and practical training while in law school.

As future lawyers, law students attending a larger university have a special relationship with the undergraduate program. Campus SaVE requires that schools use trained officials for campus disciplinary hearings addressing gender-based violence. In addition to this, law students can assist with these hearings, particularly when addressing matters that stem from the Federal Rules of Evidence. Law students, with their fresh knowledge and access to legal research resources, have a special responsibility to assist their immediate community with addressing gender-based violence on campus.

Moreover, law schools have faculty expert in civil and criminal process, Constitutional law, the Federal Rules of Evidence, and other relevant areas of law. These faculty members may be useful to the larger university in creating or revising its administrative procedures for adjudicating gender-based violence.

Recommendation: The American Bar Association urges law schools to provide pro bono assistance to for complainants and alleged perpetrators in campus administrative hearings and processes, and to provide assistance to university administration with the creation or revision of such processes.

Conclusion

Through Title IX, campuses are empowered to internally handle gender-based violence complaints. In some ways, campuses are able to offer campus-specific services such as classroom and dorm room changes with ease, that perhaps a judge might not be able to order. Additionally, campus hearings may offer an avenue for adjudication less intimidating to victims than a court of law, should a victim not wish to pursue civil and/or criminal remedies, as well.

However, gender-based violence is a devastating crime with serious legal consequences in both criminal and civil courts. Campus administrative hearings are not judicial, yet the very handling of gender-based violence cases places those who hear these cases in a quasi-judicial capacity. Many schools consider the finding of gender-based violence to be a violation of the school’s honor code, the result of which can be expulsion for the offender.

Even the Department of Education relies on pillars of the law including due process and the presentation of evidence in an adversarial context. Campus administrative hearings must have a high level of care and professionalism, due to the allegations, the possible disciplinary actions, and the uniqueness of campus community. The aforementioned resolutions can help ensure justice and fairness for gender-based violence victims and alleged perpetrators.

Recommendation: The American Bar Association urges colleges and universities to allow the use of attorneys and legal advocates for complainants and alleged perpetrators at all stages of the campus hearing process, and urges attorneys to provide such services pro bono;

Special Relationship of Law Schools: Many law schools are connected to a larger university community, which includes undergraduate programs. Law school is different from most other educational programs since its focus is preparation for students to become licensed attorneys. There are ethical and professional requirements for becoming a licensed attorney because of the fiduciary relationship an attorney has with his/her client. Law school is the first step on this path and students often receive both theoretical and practical training while in law school.

As future lawyers, law students attending a larger university have a special relationship with the undergraduate program. Campus SaVE requires that schools use trained officials for campus disciplinary hearings addressing gender-based violence. In addition to this, law students can assist with these hearings, particularly when addressing matters that stem from the Federal Rules of Evidence. Law students, with their fresh knowledge and access to legal research resources, have a special responsibility to assist their immediate community with addressing gender-based violence on campus.

Moreover, law schools have faculty expert in civil and criminal process, Constitutional law, the Federal Rules of Evidence, and other relevant areas of law. These faculty members may be useful to the larger university in creating or revising its administrative procedures for adjudicating gender-based violence.

Recommendation: The American Bar Association urges law schools to provide pro bono assistance to for complainants and alleged perpetrators in campus administrative hearings and processes, and to provide assistance to university administration with the creation or revision of such processes.

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Respectfully Submitted,

Angela Vigil, Chair
ABA Commission on Domestic & Sexual Violence
August 2015
GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence

Submitted By: Angela Vigil, Chair

1. Summary of Resolution(s). The Resolution seeks to address domestic violence, dating violence sexual assault and stalking on campuses by: urging adequate funding for the federal offices charged with enforcing Title IX; urging campuses to implement administrative hearing processes that adhere to due process; urging campuses to respect legal principles of privacy, confidentiality and autonomy; urging campuses to offer referrals to off-campus resources, without mandating participation; and finally, urging lawyers and law schools to offer pro bono service in this area.


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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? None.

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

6. Status of Legislation. (If applicable) n/a

7. I have 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 to offer training and technical assistance to campuses to help them in implementing the goals of this policy.

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

9. Disclosure of Interest. (If applicable) n/a

10. Referrals. Individual Rights and Responsibilities, Criminal Justice, Commission on Youth at Risk, Commission on Women, Commission on Sexual Orientation and Gender Identity, Center on Human Rights

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address) Vivian Huelgo, Chief Counsel, Commission on Domestic & Sexual Violence, 1150 Connecticut Avenue, NW, Suite 400, Washington, DC 20036, (202) 662-8637, vivian.huelgo@americanbar.org
12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)
Angela C. Vigil, Esq., Baker & McKenzie, L.L.P., Sabadell Financial Center, 1111 Brickell Avenue, Suite 1700, Miami, FL. 33131, 305-789-8904, angela.vigil@bakermckenzie.com
1. Summary of the Resolution
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2. Summary of the Issue that the Resolution Addresses
Outside of college and university campuses, there are two legal approaches for handling gender-based violence: civil or criminal courts. On campuses, a third option is available: the campus administrative hearing. Though not a legal process, the campus hearing is a quasi-judicial proceeding because of the nature of the complaint and the ramifications for both the complainant and the alleged perpetrator. Each campus has its own internal grievance process and array of punishments and protections if the proceedings result in a finding against the alleged perpetrator. There are a variety of reasons why a victim of gender-based violence might choose to initiate a campus administrative hearing, in lieu of, or in addition to, traditional legal proceedings. Avoiding the disruption, expense, and emotional turmoil of a legal proceeding might be one reason. Also, campus hearings have the advantage of being uniquely able to offer campus-specific remedies that may be more suitable and appealing to the complainant, such as permission to drop a class or withdraw altogether without penalty, to change dorm rooms or parking spaces, to alter a class or dining schedule, or even to seek expulsion of an offender.

However, campuses may be ill-prepared to address such serious allegations as rape, stalking or dating violence in administrative proceedings which have traditionally addressed matters such as academic dishonesty and class pranks. The harshest punishment of expulsion has significant collateral economic consequences for the alleged perpetrator. Additionally, the grievance proceeding can re-traumatize the complainant if not conducted in accordance with established best practices.

3. Please Explain How the Proposed Policy Position will address the issue
While colleges and universities continue handling gender-based violence complaints through these quasi-judicial proceedings, the American Bar Association urges all campuses to utilize legal best practices to ensure fairness, due process, and justice.

4. Summary of Minority Views
None reported.
AMERICAN BAR ASSOCIATION
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, territorial, local, and tribal
governments to enact civil protection order statutes regarding domestic, intimate partner, sexual,
dating, and stalking violence that extend protection to Lesbian, Gay, Bisexual, and Transgender
individuals.
REPORT

Introduction

Domestic violence, sexual assault and stalking are epidemics in our society with dramatic, negative effects on individuals, families and communities. These crimes know no economic, racial, ethnic, religious, age, gender, sexual orientation or gender identity limits. By conservative estimates, nearly 7 million women in the United States are assaulted by their intimate partners every year. One in three women in this country will experience sexual violence in her lifetime; two in six women will be stalked. Over 5 million men are physically assaulted by an intimate partner annually in the United States, four in one women are killed, and one in nineteen men is killed in his lifetime. The need for protection from violence cannot be underestimated.

Civil protection orders for victims of domestic or intimate partner violence are available in every state and the District of Columbia. A majority of states also provide protection for victims of sexual assault and rape, but only if the perpetrator is a current or former intimate partner or family member. Though states have begun to enact statutes specifically creating civil protection orders for victims of sexual assault and stalking, a minority of states have not established civil protection orders for victims of domestic or intimate partner violence. The prosecution of these crimes know no economic, racial, ethnic, religious, age, gender, sexual orientation or gender identity limits. By conservative estimates, nearly 7 million women in the United States are assaulted by their intimate partners every year. One in three women in this country will experience sexual violence in her lifetime; two in six women will be stalked. Over 5 million men are physically assaulted by an intimate partner annually in the United States, one in four women are killed, and one in nineteen men is killed in his lifetime. The need for protection from violence cannot be underestimated.

Civil protection orders for victims of domestic or intimate partner violence are available in every state and the District of Columbia. A majority of states also provide protection for victims of sexual assault and rape, but only if the perpetrator is a current or former intimate partner or family member. Though states have begun to enact statutes specifically creating civil protection orders for victims of domestic assault and stalking, a minority of states have not established civil protection orders for victims of domestic or intimate partner violence.


2 Id. at 2.

3 Id.

4 Id. at 38.

5 Id. at 18-19.

6 Id. at 2.

7 In this context, domestic violence and intimate partner violence are being interchanged.


9 All but 8 states have civil protection order statutes that explicitly cover sexual assault/rape in the context of an intimate partner or family relationship. These 8 exceptions are (see code, above): Arizona, Arkansas, Colorado, Connecticut, Illinois, Iowa, Michigan, and South Dakota. Colorado (COLO. REV. STAT. ANN. § 13-14-102 (2011)), Illinois (740 ILL. COMP. STAT. ANN. 220/1 (2011)), and South Dakota (SD CODIFIED LAWS §§ 22-19A-8 (2011)), however, provide separate access to protection for victims of sexual assault and rape.
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protection orders and fewer still have civil protection orders available for victims of non-intimate partner sexual assault.

State or tribal civil courts typically issue civil protection orders using a two-prong approach, although the analysis varies among jurisdictions. First a court must determine if there is an eligible relationship before them, as determined by statute. Second, a court must find a showing of abuse or violence and/or the likelihood of imminent harm. A court’s order may include a variety of provisions that vary from jurisdiction to jurisdiction requiring, inter alia, that the perpetrator (1) stay a certain distance from the victim, (2) not assault or otherwise abuse the victim, and (3) refrain from direct or indirect contact with the victim. Civil protection orders vary in their duration (e.g., emergency, temporary or “permanent”), and in many jurisdictions may include remedies such as emergency monetary assistance, temporary child custody and support, and housing. Similarly, in every jurisdiction there is an enforcement mechanism whereby the victim may call upon law enforcement to enforce the provisions of the civil protection order when it is violated. In these ways, civil protection orders are intended to provide tangible, specific protection for victims who have experienced domestic violence, sexual assault or stalking.

LGBT Victims

Lesbian, gay, bisexual and/or transgender (LGBT) people experience domestic and intimate partner violence and sexual violence at rates similar to or higher than heterosexual and/or cisgendered people.14 A groundbreaking National Center for Disease Control study from January of 2013 found that the lifetime prevalence of physical violence, rape, and/or stalking by an intimate partner was 61.1% for bisexual women, 43.8% for lesbian women, and 35.0% for heterosexual women.15 Additionally, 26.0% of gay men, 37.3% of bisexual men, and 29.0% of heterosexual men reported violence by an intimate partner.16 While there is a need for more in-depth research on intimate partner violence against transgender people, studies confirm that significant numbers of transgender people are subjected to intimate partner violence. Assessments of transgender people in large cities reveal high percentages of reported violence in their lifetime perpetrated by an intimate partner (56.3% of respondents in Philadelphia, 66.0% in Chicago).17 A staggering 64% of transgender people report experiencing sexual assault.18

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16 Id. at 2.
15 Id.
14 Gretchen P. Kenagy, Transgender Health: Findings from Two Needs Assessment Studies in Philadelphia, 30 HEALTH AND SOCIAL WORK 19, 23 (2005); Gretchen P. Kenagy & Wendy B. Bostwick, Health and Social Service Needs of Transgender People in Chicago, 8 INTERNATIONAL JOURNAL OF TRANSGENDERISM 57, 62 (2005). In an online survey from San Francisco, 37% of transgender women reported physical abuse within the last year, 44% of them were abused by an intimate partner; among transgender men, 27% reported physical abuse within the past year, 30% of those men were abused by an intimate partner. San Francisco Department of Public Health, The Transgender Community Health Project 5, 9 (1999), available online at http://hivsite.ucsf.edu/ishl/7?page=cfg-02-02 (last visited April 29, 2015). Other studies show similar rates of victimization. See, e.g., Diana Courvan & Loree Cook-Daniels, Trans and Interssex Survivors of Domestic Violence: Defining Terms, Barriers and Responsibilities 3
The National Coalition of Anti-Violence Programs (NCADV) promulgates annual reports on the rates of intimate partner violence and hate violence in LGBT communities across the United States. In 2013, NCADV logged 2,697 reports of LGBT intimate partner violence (IPV).16 More than half of the IPV survivors who reported their race to NCADV identified as people of color.17 NCADV documented 21 intimate partner violence homicides in 2013, the highest recorded level for two years in a row.18 LGBT youth and young adults, people of color, gay men, bisexual survivors, and transgender...
The law is less clear in North Carolina, Virginia and Louisiana, and leaves the application of laws to LGBT victims in the discretion of judges. North Carolina allows for domestic violence protective orders between people who have a "personal relationship," however it defines a personal relationship as being between married couples, people of the opposite sex who live together, blood relatives, persons with a child in common, current or former household members, and persons in an opposite-sex dating relationship.27 North Carolina does not allow for same-sex "dating partners" to be covered; however, victims with a "same-sex" abusive partner can obtain relief as a "current or former household member."28 This protection for cohabitants was thrown into question after the passage of North Carolina Amendment 1 in 2012, which amended the North Carolina Constitution to define marriage as between "one man and one woman," and banned any other type of "domestic legal union" such as civil unions and domestic partnerships.29 Amendment 1 was struck down by General Synod of the United Church of Christ v. Resinger, which held that same-sex marriage bans violated the Due Process and Equal Protection Clauses.29 General Synod is currently on appeal to the Fourth Circuit.29

Virginia is silent on whether LGBT victims are entitled to civil protection orders. Family Abuse protective orders are available only against a "family or household member,"30 which includes couples who have "cohabited" together within the past 12 months.31 The statute does not specifically define the word "cohabit," but courts have generally interpreted it to apply to unmarried couples who live together in a romantic or intimate relationship. In 2006, the Office of the Attorney General of Virginia issued an opinion that, while discussing related matters, assumed that a court could consider same-sex couples to be "cohabiting" for purposes of the family abuse definition.32 This should mean that same-sex couples who have lived together within the last twelve months are eligible for protective orders if there has been an act of family abuse but anecdotal evidence has demonstrated that not all judges are granting same-sex domestic violence petitioners relief. The law does not explicitly address whether same-sex couples are included in this term, but it does not explicitly exclude them either, and with same-sex marriage rights in flux, it is unclear how the marriage definition applies.33

In Louisiana, only adults of the opposite sex who are living together may be seen as intimate partners.34 LGBT victims may still be able to obtain relief pursuant to Louisiana's dating violence statute,35 however, due to the household members exception, this does not allow LGBT...

28 Id.
29 See generally, North Carolina Same-Sex Marriage, Amendment 1 (May 2012) http://ballotpedia.org/North_Carolina_Same-Sex_Marriage_Amendment_1_%28May_2012%29 (last visited May 1, 2015).
30 Id.
31 Id.
33 Id.
34 2006 Va. AG LEXIS 34 (September 14, 2006); 2006 WL 4286442 Opinion No. 06-00, September 14, 2006. Practice varies by jurisdiction.
35 In Bostic v. Schaefer, Virginia's prohibition on marriage licenses for same-sex couples was ruled unconstitutional. 760 F.3d 352 (4th Cir. 2014). Even though this means that same-sex couples can be granted marriage licenses, the status of a same-sex partner's eligibility for protective orders is still in development.
victims equal access to benefits that come from family civil protection orders that are up to judicial discretion, and dating violence may only qualify as a misdemeanor crime, not a felony. LGBT victims who live in New Orleans also are able to obtain relief under the municipal domestic violence definition, which is gender inclusive. Depending on the outcome of the federal marriage case, married LGBT people may become eligible for a Louisiana order of protection.

While most states use gender neutral language in their court protective order statutes, and in most of these states civil protection orders may be obtained against same-sex intimate partners, the lack of explicit protections can leave LGBT petitioners vulnerable to hostile court personnel or personnel requiring training on the dynamics of LGBT intimate partner violence. Importantly, depending on a person’s gender identity and legal sex, a transgender person may or may not be considered by the court to be in a “same-sex” relationship. Therefore some transgender individuals with opposite sex intimate partners may be able to access civil protection orders, while others may not, depending on how a state defines a person’s gender.

Further, while all states allow for a married person to get a protective order against their spouse, marital status has been a contested category for same-sex couples with some states recognizing same-sex marriages and others not. In fact, many states have passed Defense of Marriage Acts (DOMA) to prevent their state from recognizing same-sex marriages from other jurisdictions. As of 2013, 36 States had passed DOMA laws that barred recognition of same-sex marriages, although many of these state laws have since been struck down, and there is a pending Supreme Court opinion in Obergefell v. Hodges that will address these DOMAs this term. The court will decide whether states must be required to license marriages between two people of the same-sex, and whether states shall be required to recognize legal same-sex marriages from other states. Regardless of the outcome of that case, there may still remain barriers for people in same-sex non-marital relationships that need protective orders.

Anti-LGBT Animals Is Leading To A Denial Of Safety For Victims

In addition to the states above with restrictive civil protection order statutes, legislation across the country targeting the civil legal rights of LGBT people is aimed at new barriers to safety for victims. For example, House Bill 3022 introduced in South Carolina bars public funds to enforce court orders that involve recognizing same-sex marriage. This is just one of many state legislative efforts to fight back against the trend of court rulings for same-sex marriage. Texas

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5 New Orleans, Louisiana, Code of Ordinances Chapter 54 ARTICLE VIII § 54-525.

36 See supra, note 15.

37 For an example of how a state’s definition of gender affects a transgender person’s rights see Daniel Buronds, Woman Destined Male at Birth Allowed to Marry Woman in Texas, NEW YORK LAWYER, May 5, 2010 (describing how a transgender woman was permitted to marry her female partner because her birth certificate listed her as male).


and Oklahoma state legislatures have introduced similar bills to South Carolina’s House Bill 3022. Even with advancements in some jurisdictions for opening the civil institution of marriage to same-sex couples, the “backlash” to same-sex marriage equality has many serious consequences for LGBT victims of domestic violence. While the upcoming Obergefell Supreme Court ruling may open up same-sex marriage nationwide, recognition of other types of relationships is likely to remain complicated for years to come.

This uncertainty leaves some LGBT victims of intimate, domestic, sexual and/or stalking violence without legal remedies to keep themselves and their families safe, and to hold perpetrators of violence accountable. With the passage of the LGBT-inclusive Violence Against Women Reauthorization Act of 2013 on February 28, 2013, LGBT survivors in these jurisdictions are even more blatantly disenfranchised as organizations must provide them with comprehensive services, even though they may be denied legal protections otherwise available except that the victim in these situations was abused by a person of the same gender.

The ABA Opposes Anti-LGBT Animus

The ABA previously has taken a clear position against LGBT discrimination and harassment, and supported the rights of LGBT victims within the Violence Against Women Act. This Resolution is necessary to address the current trend by state legislatures and judges to eliminate access to legal remedies for victims of domestic, intimate partner, sexual, dating, and/or stalking violence on the basis of their sexual orientation or gender expression.

Conclusion

Access to justice is essential to ensuring that victims of domestic violence, sexual assault and stalking receive the protection and remedies necessary to prevent and minimize the lifelong, devastating effects of these crimes. The ABA has already ratified 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). The Standards recognize the importance of victims’ full access to the civil protection order remedies available to them. States cannot exclude LGBT victims of domestic, intimate partner, sexual, dating, and/or stalking violence in their CPO laws, policies and practices.

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51 1989 MY 8 (Resolves that the American Bar Association 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), 1996 AM 10A (Recommends that state and local bar associations study bias in their community against gays and lesbians within the legal profession and justice system) and 2006 AM 121B (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).
52 Resolution 115.

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52 Resolution 115.
Respectfully Submitted,

Angela Vigil, Chair
ABA Commission on Domestic & Sexual Violence
August 2015
1. Summary of Resolution(s). The Resolution urges federal, state, territorial, local, and tribal governments to enact civil protection order statutes regarding domestic, intimate partner, sexual, dating, and stalking violence that extend protection to Lesbian, Gay, Bisexual, and Transgender individuals.


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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA previously has taken a clear position against LGBT discrimination and harassment, and supported the rights of LGBT victims within the Violence Against Women Act (2010 MY 115). The Association has extensive policy regarding domestic violence and its legal implications for victims. The Commission has cataloged these policies on its website at http://www.abanet.org/domviol/policy.html. None of these policies would be adversely affected by the adoption of the proposed policy.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? 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. Upon adoption, the Commission on Domestic & Sexual Violence will work with the ABA Government Affairs office to ensure that no victim of domestic or dating violence, sexual assault or stalking is denied access to a civil protection order due to their sexual orientation or gender identity.

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

9. Disclosure of Interest. (If applicable) n/a

10. Referrals. Commission on Sexual Orientation and Gender Identity, Center on Human Rights, Individual Rights and Responsibilities, Commission on Youth at Risk, Commission on Women

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address) Vivian Huelgo, Chief Counsel, Commission on Domestic & Sexual Violence, 1150 Connecticut Avenue, NW, Suite 400, Washington, DC 20036, (202) 662-8637, vivian.huelgo@americanbar.org
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1. **Summary of the Resolution**

The Resolution urges federal, state, territorial, local, and tribal governments to enact civil protection order statutes regarding domestic, intimate partner, sexual, dating, and stalking violence that extend protection to Lesbian, Gay, Bisexual, and Transgender individuals.

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

Unfortunately, in a number of jurisdictions people who are abused by a partner of the same legal sex are unable to access vital legal protections. This means that same-sex partners who are dating or even cohabitating are not eligible for protection orders.

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

The proposed resolution will urge state, local, territorial and tribal governments to enact civil protection order statutes that extend protection to Lesbian, Gay, Bisexual, and/or Transgender individuals who are victims of domestic, intimate partner, sexual, dating, and/or stalking violence. The ABA previously has taken a clear position against LGBT discrimination and harassment, and supported the rights of LGBT victims within the Violence Against Women Act. This Resolution is necessary to address the current trend by state legislatures and judges to eliminate access to legal remedies for victims of domestic, intimate partner, sexual, dating, and/or stalking violence on the basis of their sexual orientation or gender expression.

4. **Summary of Minority Views**

None reported.
RESOLVED, That the American Bar Association recognizes freedom from domestic, dating and
sexual violence and stalking and all other forms of gender-based violence as a fundamental
human right.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial,
local, and tribal governments to recognize freedom from domestic, dating and sexual violence
and stalking, and all other forms of gender violence, as a fundamental human right, and to enact
and adopt resolutions affirming the right of all women, men and children to live free from
domestic, dating and sexual violence and stalking.
REPORT

Introduction
The American Bar Association ("ABA") has a long history of national and international leadership in the evolution of the legal profession and advocacy for the protection of universal liberty and justice. In the area of domestic and sexual violence, the American Bar Association Commission on Domestic & Sexual Violence ("Commission") is at the forefront of national-level legislation and policy decisions that affect the safety and security of survivors and strive for perpetrator accountability. With support from the ABA House of Delegates, the Commission has sponsored wide-reaching resolutions, from recommending the implementation of Violence Against Women Act provisions to urging the adoption by private industry of employer policies and procedures to address domestic and sexual violence experienced by employees.1

Despite progress, the pervasiveness of gender-based violence, and in particular domestic, dating and sexual violence and stalking, warrants further action by local, state, national and international entities to affirmatively protect women, men and children from these forms of violence and play an active role in domestic, dating and sexual violence and stalking prevention and response. To that end, the Commission urges the ABA to adopt this resolution, declaring freedom from domestic, dating and sexual violence and stalking as a fundamental human right, and encouraging localities and states to enact resolutions affirming the same.

The Current Landscape: Domestic and Sexual Violence in the United States
Despite decades of advocacy by women’s rights and battered women’s movements, domestic, dating and sexual violence remain pervasive, in the United States and abroad. Roughly one-third of women worldwide experience violence, with intimate partner violence the most common,2 and each year there are an estimated 12 million victims of domestic and sexual violence and stalking in the United States.3 The Centers for Disease Control and Prevention report that 1 in 4 women and 1 in 7 men have experienced severe physical intimate partner abuse; 1 in 6 women and 1 in 19 men have experienced stalking; and 1 in 5 women and 1 in 59 men have experienced rape over the course of their lifetime.4 As a public health issue, interpersonal violence carries grave implications for society, including: physical and mental health complications; intergenerational consequences and perpetration of cycles of violence; economic ramifications in lost productivity both within the workforce and at home; and premature mortality.5 The American

1 Beginning in 1996 with resolution 100 AM (recommending implementation of the “full faith and credit” provisions of the Violence Against Women Act) through August, 2014 resolution 112A (the need for workplace policies) to address domestic, dating, sexual and stalking violence).

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The American Bar Association ("ABA") has a long history of national and international leadership in the evolution of the legal profession and advocacy for the protection of universal liberty and justice. In the area of domestic and sexual violence, the American Bar Association Commission on Domestic & Sexual Violence ("Commission") is at the forefront of national-level legislation and policy decisions that affect the safety and security of survivors and strive for perpetrator accountability. With support from the ABA House of Delegates, the Commission has sponsored wide-reaching resolutions, from recommending the implementation of Violence Against Women Act provisions to urging the adoption by private industry of employer policies and procedures to address domestic and sexual violence experienced by employees.1

Despite progress, the pervasiveness of gender-based violence, and in particular domestic, dating and sexual violence and stalking, warrants further action by local, state, national and international entities to affirmatively protect women, men and children from these forms of violence and play an active role in domestic, dating and sexual violence and stalking prevention and response. To that end, the Commission urges the ABA to adopt this resolution, declaring freedom from domestic, dating and sexual violence and stalking as a fundamental human right, and encouraging localities and states to enact resolutions affirming the same.

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Psychological Association estimates that on average, three women are killed each day by a husband or intimate partner. An untold number of victims of domestic violence might also be victims of human trafficking – involuntary servitude in marriage, forced prostitution and sex work, or other forced labor.

Within marginalized and minority communities, rates of domestic, dating and sexual violence and stalking are equivalent to or higher than national-level prevalence data suggests. For instance, Native American women experience rates of sexual violence victimization nearly double that of women across all racial groups. Additionally, survey data indicates that the perpetrators of rape and sexual violence against Native American women are overwhelmingly non-Native men, which further complicates accountability and rates of prosecution for sexual violence among Native Americans. African-American women and men experience higher rates of intimate partner violence and sexual violence, as compared to their white or Hispanic counterparts, and coupled with a history of racism, sexism and institutional oppression, face greater barriers to seeking and receiving law enforcement and other support.

Immigrant women are also particularly vulnerable to domestic and sexual violence in the United States. A New York City Department of Health and Mental Hygiene study concluded that 51 percent of intimate partner homicide victims were foreign-born. Abusers may use a victim's immigration status as a means to maintain power and control, and immigrant victims often struggle to access resources due to language, cultural or legal barriers. High rates of victimization persist among women living with disabilities, who similarly face barriers to accessing protection and support yet experience a 40 percent greater risk of intimate partner violence as compared to women without disabilities. Additionally, individuals who identify as lesbian, gay, bisexual or transgender (“LGBT”) represent another subset of victims who

8 http://www.justice.gov/ovw/tribal-communities

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experience equivalent or higher rates of victimization. For instance, the National Intimate Partner and Sexual Violence Survey, conducted by the Centers for Disease Control and Prevention, concluded that bisexual men and women report higher rates of intimate partner violence, including rape, physical violence and stalking, than their heterosexual counterparts. Similarly, the National Coalition of Anti-Violence Programs, in their nationwide 2014 report, found that transgender victims were nearly twice as likely to experience physical violence and nearly four times more likely to experience discrimination within the confines of an abusive intimate partner relationship than their non-transgender counterparts.

Finally, rape and other sexual coercion and harassment of male and female soldiers by other military personnel occurs at a rate higher than the general population. The Department of Defense reported that for 2012 of those surveyed 6.1% of female active duty soldiers and 1.2% of male soldiers reported having been sexually assaulted. These statistics are considered low, but even at the reported rates, the number of soldiers reporting sexual assault is 26,000.

**Human Rights Protections**

The modern-day codification of international human rights law began with the ratification by the United Nations of the Universal Declaration of Human Rights ("Declaration"), in 1948. Drafted primarily as a response to the atrocities committed during World War II, the Declaration is a testament to the notion that there exist basic, inalienable rights and fundamental freedoms that belong to and should be freely enjoyed by all human beings. Regardless of nationality, residence, gender, ethnicity, religion, race or color, language, sexual orientation or any other status, all persons are deserving of dignity and justice. In the years since the Declaration was ratified, there have emerged numerous international treaties that further enumerate and expand upon the fundamental rights and freedoms of all people.

Recognizing the fundamental right of all persons to live free from violence and abuse, including sexual and intimate partner violence, has long been enshrined in international human rights law. Under Article 3 of the Universal Declaration of Human Rights ("UDHR"), all persons have the right to "life, liberty and security of person." This inalienable right is founded in numerous international covenants and treaties pertaining to international human rights norms, including the International Covenant on Civil and Political Rights ("ICCPR"), and Convention on the

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18 http://www.sagc.org/html/docs/2013/FY13_Doi_SAGC_Annual_Report_on_Sexual_Assault.pdf


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Elimination of All Forms of Discrimination against Women ("CEDAW"), 22 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 23 Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), 24 and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Pará"), 25 among other regional human rights instruments. 26 While the articulation of a fundamental right does not alone ensure that all people will live free from violence, recognizing the grave implications that domestic and sexual violence have on the lives of victims paves the way for establishing greater accountability for perpetrators, enhanced protection for victims, and societal intolerance of gender-based violence.

In fact, domestic and sexual violence affect more than just the health or well-being of a single survivor: the emotional and physical effects are profound, so too is the impact on subsequent generations, 27 the reduction in worker productivity and subsequent economic costs, 28 and the degradation of the fabric of our communities. As a means to improving state and governmental response to domestic and sexual violence, adopting a human rights-based approach to responding to incidents of domestic and sexual violence can yield improved results in violence reduction and violence prevention. In fact, the international community has explicitly called for member states and governments to take concrete measures to eliminate domestic and sexual violence committed against women and men around the globe. 29

Embracing a "human rights-based approach" to the issue of gender-based violence, domestic violence and sexual assault requires local, state and national governments to adopt policies that focus on ensuring access to and protection of fundamental rights. This can include everything:

23 Convention against Torture, see General Comment No. 2. Available at: http://www.un.org/depts/hr/cat/general_comments/cat-gencom2.html
24 The Convention specifically addresses forms of gender-based violence that target or disproportionally affect members of ethnic, racial or other minorities. See Convention on the Elimination of All Forms of Racial Discrimination. Available at: http://www.oichr.org/EN/ProfessionalInterest/Pages/CRPD.aspx
26 See, e.g., American Declaration on the Rights and Duties of Man and African Charter on Human and People’s Rights.
Domestic and Sexual Violence Law and Human Rights in the United States

All jurisdictions in the United States contemplate both criminal and civil legal options for domestic violence and sexual assault survivors, though the scope and consequence of those options may vary. In most jurisdictions, whether or not criminal charges are pursued in a case depends upon the state prosecutor, but a victim and his or her advocate may also encourage prosecution by actively participating in any criminal investigation and subsequent legal case. Additionally, specific crimes of domestic violence and sexual assault may vary between states, particularly as to how criminal acts are defined and what constitute aggravating circumstances.

Civil remedies are much broader, and range from civil protection orders to torts actions. While protection orders are, as the name suggests, focused on protecting victims and preventing further acts of violence, torts claims provide an avenue for financial redress to victims of crimes of violence. As with criminal law, the precise scope of civil protection orders—as to which victims they protect and the remedies available—vary by state by state. Some states offer broad protections to youth, LGBT and sexual assault victims, while other states prescribe that protection orders are only available to married heterosexual adult victims who have experienced violence.

Civil protection orders, as civil injunctions, are only as successful as the mechanisms in place to enforce compliance with the orders. Thus, for civil protection orders to fulfill their intended function of protection and deterrence, police and law enforcement must act to enforce protection orders by arresting perpetrators in violation of those orders, and prosecutors and the court system must subsequently hold perpetrators accountable by imposing criminal sanctions for violations. Civil protection orders can only function as a deterrent to future violence and abuse if the localities and officials obligated to enforce them actually do so.

However, despite the critical importance of police enforcement of civil protection orders in protecting victims of domestic and sexual violence and their families, jurisdictions across the United States are not consistent in ensuring access to police protection and enforcement. In the city of Castle Rock, Colorado, Jessica Lenahan (formerly Gonzales) obtained a restraining order against her estranged husband, Simon Gonzales. While the order protected Ms. Lenahan and her children, it also permitted Mr. Gonzales to have visitation with the three girls. However, in 1999, Mr. Gonzales abducted the girls from Lenahan’s yard, failing to respond to her calls to him for her children to be returned. Ms. Lenahan repeatedly called the police, implored them to enforce the restraining order and locate her husband and children, but they demurred, insisting that they children were “probably safe” because they were with their father. In the early morning hours of June 23, 1999, Mr. Gonzales pulled up to the Castle Rock Police Department, opened fire, and

from public education and awareness-building campaigns to improving police and law enforcement practices, encouraging broad legal remedies and guaranteeing access to social services. Additionally, by incorporating human rights principles into domestic law, governments assume partial responsibility for ending gender-based violence, rather than focusing exclusively on the conduct of individual perpetrators or victims. Finally, adopting a human rights perspective at the governmental level can initiate and even shape public norms-shifting, so that gender-based violence ceases to be legitimized and perpetuated by certain sectors of society.

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See ABA Commission on Domestic & Sexual Violence Statutory Charts. Available at: http://www.americanbar.org/groups/domestic_violence/resources/statutory_summary_charts.html

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was subsequently shot and killed by the police. Ms. Lenahan’s three girls were found dead in the back of the truck. [11]

Ms. Lenahan brought Fourteenth Amendment due process claims against the town of Castle Rock, alleging that police department failure to enforce her restraining order violated her right to due process. In 2005, in Town of Castle Rock v. Jessica Gonzales, the U.S. Supreme Court held that the police have no constitutionally-mandated duty to enforce restraining and protection orders, as protection orders are procedural remedies that do not create property rights. [2] In 2011, Ms. Lenahan filed a complaint before the Inter-American Commission on Human Rights ("Inter-American Commission"), alleging human rights violations by the local Castle Rock police, who failed to protect her and her children, and by U.S. courts, which collectively failed to provide her with a remedy. [3]

The Inter-American Commission has established that violence against women, including domestic violence, is a form of discrimination against women. States therefore bear the burden of "due diligence" in responding to and preventing acts of violence. [3] Under this standard, states must be held accountable where they "know or should have known of real and immediate risks to an individual by another person" and the state "failed to take reasonable steps to prevent that harm." [3] Accordingly, in Gonzales v. United States, the Inter-American Commission held that the Castle Rock Police Department failed to act with due diligence in enforcing Ms. Lenahan’s restraining order. [6] The Inter-American Commission noted that the Castle Rock Police Department was aware that the restraining order existed, and thus should have reasonably been expected to have investigated an allegation of a violation of the order, and acted appropriately. The Inter-American Commission concluded:

[The State failed to act with due diligence to protect Jessica Lenahan and [children] from domestic violence, which violated the State’s obligation not to discriminate and to provide for equal protection before the law under Article II of the American Declaration. The State also failed to undertake reasonable measures to prevent the death[s] of [the Gonzales children] in violation of their right to life under Article I of the American Declaration, in conjunction with their right to special protection as girl-child[ren] under Article VII of the American Declaration. Finally, the Commission concludes that the State violated the right to judicial protection of Jessica Lenahan and her next-of-kin under Article XVIII of the American Declaration.

In recommendation, the Inter-American Commission urged the United States to adopt substantive protections under the law to protect survivors of domestic violence and to provide appropriate training to service providers. These recommendations mirror those of the UN Special Rapporteur on Violence Against Women which also found the United States’ response to

32 Id.
33 REPORT No. 80/11 CASE 12.626 MERITS JESSICA LENAHAN (GONZALES) ET AL. UNITED STATES July 21, 2011.
37 Supra, note 20, Par. 199.

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domestic violence inadequate. In particular, the Special Rapporteur observed a “lack of legally binding federal provisions providing substantive protection or prevention of acts of violence against women. This lack of substantive protective legislation, combined with inadequate implementation of some laws, policies and programmes [sic], has resulted in the continued prevalence of violence against women and the discriminatory treatment of victims, with a particularly detrimental impact on poor, minority and immigrant women.”

Despite federal government reluctance to formally bind the United States to international obligations under various human rights treaties and conventions, states and localities are not without the power to adopt local ordinances and resolutions to enforce the fundamental human rights of women and men to live their lives free from domestic and sexual violence. In fact, human rights legislation on the local and state levels can ensure that police departments and local law enforcement act in a manner consistent with enforcement of protection and restraining orders designed to protect victims from further violence.

U.S. Domestic Adoption of Human Rights Principles and Laws

As noted, state, territorial, local and tribal governments can adopt laws and policies incorporating or adopting human rights principles into local law. In fact, in 2005, the American Bar Association (“ABA”) House of Delegates adopted Resolution 114, which urged “federal, state, territorial, local, and tribal governments to reduce domestic violence by enforcing orders of protection as required under federal, state, local and territorial law.” Specifically, the ABA called on localities to ensure that: perpetrators in violation of existing protective orders are arrested; and that law enforcement officers, in a timely manner, respond to and conduct thorough investigations of, domestic violence calls asserting violations of protection orders. While the language of Resolution 114 is not human rights-specific, the principles enshrined in the Resolution, which calls upon states, localities and territories to ensure the enforcement of domestic violence protections in their jurisdictions, reflects the deep-rooted notion of one’s fundamental right to live free from domestic violence.

In response to the Inter-American Commission decision in the Gonzales case, gender-based violence advocates throughout the United States have sought creative ways to implement the decision, in the absence of broad-based federal action. Numerous cities and localities across the country have adopted and implemented human rights ordinances, declaring the right to live free from domestic and sexual violence as a fundamental human right deserving of protection.

35 Id.
38 Id.
39 See, e.g., Alameda City Council, Resolution No. 6-5, April 17, 2013; Albany County, Executive Order and Directive 12-05, October 31, 2012; Baltimore City Council, Council Bill 12-0034R, March 19, 2012; Boston City Council, May 7, 2014; Cincinnati City Council, Resolution No. 47-2011, October 5, 2011; DC City Council, domestic violence inadequate. In particular, the Special Rapporteur observed a “lack of legally binding federal provisions providing substantive protection or prevention of acts of violence against women. This lack of substantive protective legislation, combined with inadequate implementation of some laws, policies and programmes [sic], has resulted in the continued prevalence of violence against women and the discriminatory treatment of victims, with a particularly detrimental impact on poor, minority and immigrant women.”

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While the precise impact of these resolutions will unfold over the ensuing years, these local ordinances and resolutions have the potential to serve several very important functions. In the first instance, they can underscore or create the duty of law enforcement officers to affirmatively enforce protection orders, and hold perpetrators accountable for violations of those orders. Establishing this duty through local (or state) law and policy places a duty on the police department, and could potentially establish a cause of action should officers not fulfill their official obligations. Finally, incorporating human rights language into local law creates the basis for a societal norms-shifting, whereby the language of – and respect for – human rights, and the right of women and men to live free from domestic and sexual violence, becomes a principle accepted and defended by all.

In the wake of the twentieth anniversary of the Violence Against Women Act and the founding of the ABA Commission on Domestic & Sexual Violence, using the language of human rights to reaffirm the fundamental right of all persons to live free from the grave consequences of domestic and sexual violence and abuse is paramount. In fact, President Barack Obama recently invoked international human rights norms, as he issued a proclamation in October 2014 recognizing the twentieth anniversary of VAWA and stating, “[W]e reaffirm the basic human right to be free from violence and abuse.”

The ABA, with its profound and unparalleled influence on the legal profession, should unequivocally affirm the fundamental human right of all women, men and children to live free from domestic, dating and sexual violence and stalking and all other forms of gender-based violence by firmly encouraging federal, state, territorial, local, and tribal governments to do the same. The ABA has a long history of supporting measures to prevent domestic, dating and sexual violence and stalking and to serve as a champion of human rights. As the most influential national organization representing lawyers and promoting the rule of law, the American Bar Association is a unique position to urge governmental protection of fundamental human rights, and safeguard the lives of domestic and sexual violence victims throughout the country.

Respectfully Submitted,

Angela Vigil, Chair
ABA Commission on Domestic & Sexual Violence
August 2015

“Ceremonial Resolution,” June 4, 2013; Erie County Legislature, Report No. 12, October 2, 2012; Miami-Dade County Board of Commissioners, Resolution No. 11(A)(X2), July 17, 2012; Seattle Human Rights Commission, Resolution No. 12-03, September 6, 2012.


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While the precise impact of these resolutions will unfold over the ensuing years, these local ordinances and resolutions have the potential to serve several very important functions. In the first instance, they can underscore or create the duty of law enforcement officers to affirmatively enforce protection orders, and hold perpetrators accountable for violations of those orders. Establishing this duty through local (or state) law and policy places a duty on the police department, and could potentially establish a cause of action should officers not fulfill their official obligations. Finally, incorporating human rights language into local law creates the basis for a societal norms-shifting, whereby the language of – and respect for – human rights, and the right of women and men to live free from domestic and sexual violence, becomes a principle accepted and defended by all.

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The ABA, with its profound and unparalleled influence on the legal profession, should unequivocally affirm the fundamental human right of all women, men and children to live free from domestic, dating and sexual violence and stalking and all other forms of gender-based violence by firmly encouraging federal, state, territorial, local, and tribal governments to do the same. The ABA has a long history of supporting measures to prevent domestic, dating and sexual violence and stalking and to serve as a champion of human rights. As the most influential national organization representing lawyers and promoting the rule of law, the American Bar Association is a unique position to urge governmental protection of fundamental human rights, and safeguard the lives of domestic and sexual violence victims throughout the country.

Respectfully Submitted,

Angela Vigil, Chair
ABA Commission on Domestic & Sexual Violence
August 2015

“Ceremonial Resolution,” June 4, 2013; Erie County Legislature, Report No. 12, October 2, 2012; Miami-Dade County Board of Commissioners, Resolution No. 11(A)(X2), July 17, 2012; Seattle Human Rights Commission, Resolution No. 12-03, September 6, 2012.


8
GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence
Submitted By: Angela Vigil, Chair

1. Summary of Resolution(s). The Resolution urges the ABA to recognize freedom from gender-based violence to be a fundamental human right; and urges federal, state, territorial, local, and tribal governments to do the same.


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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? None.

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

6. Status of Legislation. (If applicable) n/a

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 incorporate human rights law into its training and programming for attorneys who represent domestic, sexual, dating violence and stalking victims in order to build a broader understanding of the fundamental violations of human dignity and safety that these victims suffer. We will also advocate for a similar approach by others.

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

9. Disclosure of Interest. (If applicable) n/a

10. Referrals, Center on Human Rights, Individual Rights and Responsibilities, International Law, Commission on Youth at Risk, Commission on Women

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address) Vivian Huelgo, Chief Counsel, Commission on Domestic & Sexual Violence, 1150 Connecticut Avenue, NW, Suite 400, Washington, DC 20036, (202) 662-8637, vivian.huelgo@americanbar.org

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.) Angela C. Vigil, Esq., Baker & McKenzie, LLP, Sabadell Financial Center, 1111 Brickell Avenue, Suite 1700, Miami, FL 33131, 305-789-8904, angela.vigil@bakermckenzie.com

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges the American Bar Association to recognize freedom from domestic, dating and sexual violence and stalking, and all other forms of gender-based violence, to be a fundamental human right.

The resolution further asks that the American Bar Association urge federal, state, territorial, local, and tribal governments to do the same.

2. Summary of the Issue that the Resolution Addresses

Victims of domestic, dating, and sexual violence and stalking, along with victims of other forms of gender-based violence, often report being unable to rely upon respectful and responsive police protection, including enforcement of protection orders. The resolution seeks to acknowledge the harms suffered by these victims and to frame these acts as violations of fundamental and inalienable human rights, not just as violations of statutes prohibiting these crimes. As such, it is the obligation of the state to treat victims in ways that respect their dignity and ensure the state’s protection.

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

The proposed resolution will urge state, local, territorial and tribal governments to recognize domestic, dating, sexual violence and stalking, along with other forms of gender-based violence, as violations of the victim’s human rights.

4. Summary of Minority Views

None reported.
RESOLUTION

RESOLVED, That the American Bar Association encourages the Council of the Section of Legal Education and Admissions to the Bar to mandate through the ABA Standards for the Approval of Law Schools enhanced financial counseling for students (prospective and current) on student loans and repayment programs.

FURTHER RESOLVED, That the American Bar Association urges all participants in the student loan business and process, including law schools, to develop and publish easily understood versions of the terms of various loan and repayment programs.

FURTHER RESOLVED, That the American Bar Association encourages the Council of the Section of Legal Education and Admissions to the Bar to return to collecting expenditure, revenue, and financial aid data annually for each law school.

FURTHER RESOLVED, That the American Bar Association encourages the Council of the Section of Legal Education and Admissions to the Bar to make public the information on legal education it currently maintains and information it collects going forward.

FURTHER RESOLVED, That the American Bar Association encourages law schools to be innovative in developing ways to balance responsible curricula, cost effectiveness, and new revenue streams.
REPORT

I. The Task Force and Its Charge

The Task Force on the Financing of Legal Education was created by American Bar Association (ABA) President James Silkenat on May 6, 2014, in the wake of the Report of American Bar Association Task Force on the Future of Legal Education. Among the earlier Task Force’s recommendations was the establishment of a task force to “examine and recommend reforms concerning the price and financing of law school education,” an issue not addressed in detail by that Task Force.1

This is a critical time for legal education as schools face declining enrollments and revenues, and their students face increasing tuition and debt along with a job market that has seen only modest recovery. Then ABA President James Silkenat charged this Task Force with addressing these timely and important issues, and its work has been encouraged and supported by his successor as ABA President – William Hubbard. The Task Force undertook this work with an acute awareness of the significance of the legal profession to individual clients as well as to the larger society.

The Task Force on the Financing of Legal Education has now completed its work, which this report sets out. The report’s recommendations and conclusions begin on page 36 of this document. These recommendations and conclusions are further reflected in the resolutions that the Task Force is proposing to the American Bar Association House of Delegates for its consideration at the 2015 ABA Annual Meeting in August in Chicago, Illinois. The resolutions presented, along with the recommendations and conclusions in the report, are supported and explained by the detailed sections of this report. Those sections examine matters related to the cost of legal education for students and how law schools operate and are financed.

Dennis W. Archer, a former president of the American Bar Association, chaired the Task Force on the Financing of Legal Education and was joined by fourteen distinguished members, including lawyers, deans, young lawyers, and others active in business and consulting related to financing legal education.2 Dr. Stephen Daniels, Senior Research Professor at the American Bar

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2 The Members of the Task Force are:
   DENNIS W. ARCHER, Chairman Emeritus, Dickinson Wright, Detroit MI [Chair]
   LUKE BIERMAN, Dean & Professor of Law, Elon University School of Law, Greensboro NC
   CHRISTOPHER P. CHAPMAN, President & CEO, Access Group, West Chester PA
   WILLIAM J. CURRY, Partner, Sullivan & Worcester, Boston MA
   HEATHER JARVIS, Student Loan Advisor, askheatherjarvis.com, Wilmington NC
   HON. GOODWIN H. LUI, Justice, California Supreme Court, San Francisco CA
   RACHEL F. MORAN, Dean and Michael J. Connell Distinguished Professor of Law, UCLA School of Law, Los Angeles CA
   LUCIAN T. PERA, Partner, Adams and Reese LLP, Memphis TN
   ERICA D. ROBINSON, Associate, Gregory, Doyle, Callahan & Rogers, Stryma GA

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Foundation, served as Consultant to the Task Force. Barry Currier, Managing Director of Accreditation and Legal Education at the ABA, provided staff support.

The Task Force held four meetings and additional conference calls over the last year as it completed its work. Two of those meetings were two-day public hearings, one at the 2014 American Bar Association Annual Meeting in Boston, Massachusetts, and the other at the 2015 American Bar Association Midyear Meeting in Houston, Texas. In seeking a broad array of viewpoints, the Task Force sent letters of invitation to a wide range of interested parties who might have insights and opinions on the issues the Task Force was considering. Among the invitees were the President of the United States, who had made a statement on the structure of law school programs and the expense of law school; student leaders of the American Bar Association Law Student Division, who offered testimony to the Task Force; members of the United States Supreme Court; state Supreme Court justices; and leaders of the bar and bar organizations, including the American Bar Association.

Further, the Task Force heard from law school deans and faculty members, and received testimony from writers and commentators on the state of legal education. The Task Force expresses thanks to the many who took time to prepare written comments and to testify before it. Its work is better for their ideas, observations, and data. Additionally, since the Task Force was to conduct as much research as possible on the issues at the heart of its charge, Managing Director Currier provided to the Task Force Consultant access on a confidential basis to material not publicly available from the annual questionnaires submitted to the ABA Section of Legal Education by ABA-approved law schools.

The Task Force’s charge included a broad range of issues and key among them were: the cost of legal education for students; the financing of and business models for law schools; student loans and educational debt; and law school practices regarding tuition discounting, merit-based grants/scholarships, and need-based grants/scholarships. Dollars and cents are the clear focus of these issues and their connections to the current criticisms of and challenges facing legal education — both those from within legal education and those from without — are also clear.

Among the prominent dollars and cents concerns the Task Force heard about at its public meetings were claims about: the current availability of loans contributing to the increasing price of legal education; the heavy debt burden for students making law school inaccessible and

PHILIP G. WILCOX, Dean & Professor of Law, University of South Carolina School of Law, Columbia SC

3 See Brian Tamahana, Failing Law Schools (Chicago: University of Chicago Press, 2012

affecting career and life choices; and tuition discounting based on merit which tends to benefit those students who are more likely to have financial resources entering law school or better economic outcomes after graduation. The Task Force also heard much about the perverse effects of law school ranking schemes, with the race for higher rankings contributing to the increasing price of legal education. The Task Force heard about certain proposals for change such as imposing caps on student loans or even eliminating the current federal student loan program altogether (as one presenter argued). These are all relevant issues for continued discussion and inquiry.

It is important to note that many of the most critical commentaries and most drastic solutions proposed came at the nadir of the recent economic downturn, when anxieties about the job market ran high and the realities showed fewer opportunities for new law school graduates and lay-offs for recent graduates. Since then there have been important market corrections, many of which are still underway. As this report will later show, law school enrollments have significantly declined, the rate of increase for tuition has slowed, and the amount of tuition discounting has increased. Some even see glimpses of improvement in the job market. Noting this timing is not meant as a way to minimize the challenges facing legal education, but as a caution about responding too reflexively.

The Task Force’s charge also included deeper and even more fundamental concerns – the challenges posed by such dollars and cents issues to the unique role the legal profession plays in our political system and in maintaining and fostering the rule of law. As the preamble to the ABA’s Model Rules of Professional Conduct begins, “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Without a robust system of legal education that is open to and accessible by all segments of American society, the profession withers and looks less and less like society itself. Consequently, its ability to play its unique role becomes increasingly problematic.

The opening line of Alfred Reed’s now almost century-old, groundbreaking study of legal education still resonates today regarding the broader importance of legal education beyond any private gain on the part of an individual law student: “Our contemporary American system of legal education, although it contains elements of great value, is generally recognized to be defective in many ways. Efforts to improve it cannot accomplish their full purpose unless certain fundamental considerations are borne in mind.” He continues:


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Foremost among these determining factors is the position that lawyers occupy in the state. Whatever incidental purposes are cherished by particular law schools, the main end of legal education is to qualify students to engage in the professional practice of the law. This is a public function, in a sense that the practice of other professions ... is not. Practicing lawyers do not merely render to the community a social service, which the community is interested in having them render well. They are part of the governing mechanism of the state. Their functions are in a broad sense political ... [and spring] ... fundamentally from the fact, early discovered, that private individuals cannot secure justice without the aid of a special professional order to represent and advise them. To this end lawyers are instituted, as a body of public servants, essential to the maintenance of private rights.8

This same idea of the practice of law as a public good is echoed in the report of the Task Force on the Future of Legal Education: "Society has a deep interest in the competence of lawyers, in their availability to serve society and clients, in the broad public role they can play, and in their professional values. This concern reflects the centrality of lawyers in the effective functioning of ordered society."9

In light of the role played by the legal profession, Reed was also concerned with access to legal education – and especially with the basic principle that now underlies our contemporary efforts to diversify legal education and the legal profession. While perhaps a man of his times, his guiding idea is clear: “Humanitarian and political considerations unite in leading us to approve of efforts to widen the circle of those who are able to study law. The organization of educational machinery especially designed to abolish economic handicaps – intended to place the boy (sic), so far as possible, on equal footing with the rich – constitutes one of America’s fundamental ideals. It is particularly important that the opportunity to exercise an essentially governmental function should be open to the mass of our citizens.”10 Today we would say the young person (or, indeed, any person seeking a legal education) of any color or background.

Reed’s views are echoed by a contemporary statement, this one from U.S. Supreme Court Justice Sandra Day O’Connor’s opinion for the Court in Grutter v. Bollinger. Justice O’Connor said:

[Universities, and in particular law schools, represent the training ground for a large number of our Nation’s leaders. Sweatt v. Painter, 339 U.S. 629, 634 (1950) (describing law school as a “proving ground for learning and practice”) ... In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and

8 Id.  
9 Report and Recommendations, supra note 1 at 6.  
10 Id. at 398.
institutions with which law interacts. See Swette v. Painter, supra, at 634. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.11

This statement, like Reed's, with its pointed emphasis on the fundamental significance of access tells us why the subject of the Task Force's work is so important.

In addressing contemporary concerns, no matter how urgent they may seem, we cannot and should not lose sight of the fundamentals. If we do, they may be undermined in dealing with more immediate issues, even with the best of intentions. This Task Force has a special obligation to set a tone for acting and doing so responsibly. Financing legal education, like financing higher education generally, does not admit to simple definitions of a problem or to simple solutions. One law school dean when asked by a Task Force member what's the problem facing legal education could only answer, after thinking for a minute, "It's a nuanced question." Real change is needed and will require a concerted effort. Acting responsibly means recognizing the complexities of the legal (and higher) education enterprise and the nuance and then moving forward with this in mind.

The next section will summarize in outline form the Task Force's main findings. The following section will describe those findings in detail. After that will be a consideration of some matters of context shaping the issues, possible solutions, and the interpretation of the findings. The concluding section will present a summary and recommendations—short-term and longer-term, some of which form the basis for the resolutions the Task Force is presenting to the House of Delegates.

II. Outline of the Task Force's Main Findings

This section describes the data that the Task Force gathered to inform its work; the limits of those data, and the key findings that emerged from the analyses. These findings focus on enrollments, the job market, tuition increases, increased reliance on tuition discounting, student borrowing and debt, and law school expenditures.

1. Bringing Information to Bear

Because of the importance of the issues at the heart of this Task Force's charges—and in light of the lament of the Task Force on the Future of Legal Education at not being able to conduct the kind of research needed12—the members approached those issues with the idea of bringing to bear what research they could. This was also an idea urged on the Task Force by some of those who testified before it. One long-time observer who is very concerned about the

institutions with which law interacts. See Swette v. Painter, supra, at 634. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.11

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financing of legal education told the Task Force at one its meetings that so much of the debate is emotional and based on inaccurate information that even basic information is needed. Another concerned observer said that one important thing the Task Force could do is to “shed light” on the issues by gathering data and sharing it, especially mining the available data.

The Task Force invited a number of commentators to present their research findings and/or submit written materials. Among other things, the Task Force received information related to tuition increases, student debt, employment prospects, curricular innovations, and factors that may drive costs. In addition, the Task Force consultant conducted a substantial amount of research and analysis using the available materials related to the Task Force’s charges. The Task Force took seriously the idea that mining and analyzing the available data was itself an important service that would help move the discussion forward in constructive ways as well as inform the Task Force's work.

The Task Force discovered how frustrating this effort could be. It found that systematic and reliable information needed to assess the claims and criticisms about the financing of legal education – or to just to get a good working sense of what is going on in legal education – is scarce. One Task Force member even called the situation appalling given the importance of the issues to be addressed. In light of the Task Force’s timetable and resources, exploiting the best available information was the only practical course. Most (but not all) of what the Task Force utilized is from the American Bar Association’s Section of Legal Education and Admissions to the Bar, which operates the ABA law school accreditation process separately and independently of the ABA itself. The primary data come from the annual surveys accredited schools are required to complete. These data, of course, are collected and managed for the purpose of operating an effective accreditation process and do not have as a primary goal the gathering of information necessary to conduct an effective institutional research program about legal education. Some of the detailed material presented to the Task Force orally or in writing relied on publicly available ABA information.

Much of this information is not in easily usable form and requires a substantial investment of time to categorize for any kind of analysis. Additionally, the material collected by the ABA has changed over time and some important material is no longer collected (such as data on school expenditures, the amount of grants/scholarship monies, and their allocation for need v. merit, among others). At best only a partial picture of the current state of affairs is possible, but given the importance of the issues this is valuable in moving forward.

2. The Outline

The outline of findings below is divided into six broad areas with more statements about key findings within each area. Some of the findings may seem obvious. Nonetheless it is important to document them as a part of the context needed to move forward on financing legal education. Again, the next section will provide the details.

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2. The Outline

The outline of findings below is divided into six broad areas with more statements about key findings within each area. Some of the findings may seem obvious. Nonetheless it is important to document them as a part of the context needed to move forward on financing legal education. Again, the next section will provide the details.
A. Enrollment

Enrollments are declining. Between AY2009-10 (AY means Academic Year) and AY2014-15, 30% fewer people entered a private law school; and 18% fewer entered a public law school. With fewer people attending law school there are fewer tuition dollars to help run a school’s operations.

Overall, minority enrollment (in raw numbers) has not yet declined in the face of the overall enrollment decline. There are signs that enrollment is declining for some classifications within the category. Regardless of the current numbers, people of color remain significantly under-represented in law school and in the legal profession.

B. Jobs and the Future

The near-term job market for new law school graduates appears far from robust, although some see signs of at least modest improvement. For the public law school class of 2013, 63% landed a permanent, full-time, bar passage-required job; for the private law school class of 2013 the figure was 57%.

Despite the cost, the best available evidence suggests a significant lifetime income premium for those with a law degree compared to those with a bachelor’s degree.

C. Tuition

Law schools are JD tuition-dependent for their revenues, and some are heavily – if not exclusively – tuition-dependent. Looking at all law schools, the average was 69% of revenue in AY2012-13, with 25% of schools receiving at least 88% of their revenue from tuition.

Inflation-adjusted tuition has consistently increased over time. This is true whether viewed in terms of an inflation adjustment made on the basis of the cost of living or the price to the consumer. Using the higher education price index (referred to as HEPI) private law school tuition increased 29% between AY1999-00 and AY2014-15, and public law school in-state tuition increased 104%. Using the familiar consumer price index (referred to as CPI) the increases were 46% and 132%, respectively. Importantly, one must keep in mind that the increases in public law school tuition, in all likelihood, reflected declines in state funding during this period.

13 The Commonfund Institute has created the specialized price index designed for higher education’s cost of doing business – the Higher Education Price Index (HEPI). HEPI is built around the major cost drivers for higher education. Since there does not appear to be a price index specifically for legal education, the Commonfund’s HEPI is the most appropriate alternative for use when looking at the cost of doing business. The CPI remains the best calculator to use in terms of the consumer buying the service. See https://www.commonfund.org/CommonfundInstitute/HEPI/Pages/default.aspx.

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C. Tuition

Law schools are JD tuition-dependent for their revenues, and some are heavily – if not exclusively – tuition-dependent. Looking at all law schools, the average was 69% of revenue in AY2012-13, with 25% of schools receiving at least 88% of their revenue from tuition.

Inflation-adjusted tuition has consistently increased over time. This is true whether viewed in terms of an inflation adjustment made on the basis of the cost of doing business or the price to the consumer. Using the higher education price index (referred to as HEPI) private law school tuition increased 29% between AY1999-00 and AY2014-15, and public law school in-state tuition increased 104%. Using the familiar consumer price index (referred to as CPI) the increases were 46% and 132%, respectively. Importantly, one must keep in mind that the increases in public law school tuition, in all likelihood, reflected declines in state funding during this period.

13 The Commonfund Institute has created the specialized price index designed for higher education’s cost of doing business – the Higher Education Price Index (HEPI). HEPI is built around the major cost drivers for higher education. Since there does not appear to be a price index specifically for legal education, the Commonfund’s HEPI is the most appropriate alternative for use when looking at the cost of doing business. The CPI remains the best calculator to use in terms of the consumer buying the service. See https://www.commonfund.org/CommonfundInstitute/HEPI/Pages/default.aspx.
D. Discounting and Net Tuition

Stated tuition price is not, however, the whole story. Tuition discounting through grants and scholarships occurs, is widespread, and is generally increasing. For private schools, the net tuition in Ay1999-00 meant a discount of 16% in inflation-adjusted dollars (CP1).
In Ay2013-14 the discount had increased to 25%. For public schools the discount in Ay1999-00 was 22% and it increased to 28%.

With increasing discounting, fewer students are paying full tuition. The percentage paying full tuition in private law schools declined from 57% in Ay1999-00 to 38% in Ay2013-14. For public law schools the figures are 58% and 40%.

With respect to the allocation of discounts, more money goes to pure merit (i.e., solely on LSAT scores) than to pure, demonstrated financial need. While money for pure need has not disappeared, the trend is less money being deployed for this purpose and more going to pure merit and to need plus other factors. Generally speaking, compared to private schools, public law schools devote a larger percent of their grant/scholarship monies to need and need plus other factors and less to pure merit.

While the percentage of students paying full tuition has decreased and the discount rate increased, inflation-adjusted net tuition itself has not always followed suit. Full tuition prices have increased at a greater rate than discounts. In inflation-adjusted dollars (CP1) private law school students saw net tuition increase 29% from 1999-00 to 2013-14. Most of this increase, however, came between Ay1999-00 and Ay2009-10 – a 28% increase. Public law school students saw net tuition increase by 102% between Ay1999-00 and Ay2013-14. Again, the greatest increase came between Ay1999-00 and Ay2009-10, when net tuition increased by 84%.

E. Student Borrowing and Debt

Despite the deeper discounting and the smaller percentage of students paying full tuition, most students still borrow to help finance their legal educations – almost 90%.

Because law schools are tuition-dependent for revenue and nearly all students use student loans to pay tuition, law schools are also student loan-dependent for revenue.

The amount borrowed by students has increased substantially in recent years even after adjusting for inflation, reflecting the inflation-adjusted increase in tuition and the accessibility of loan funds. Using inflation-adjusted (CP1) 2014$, the average debt for private law school students increased from $102,000 in Ay2005-06 to $127,000 in Ay2012-13; for public law school students the figures are $66,000 and $88,000.

The current student loan programs assist students in financing their education and provide repayment options and plans that assure broad access to legal training. True need-based programs that could enhance access because they do not require repayment are, of course, another matter.
Greater loan accessibility has come as the federal government became the lender for graduate school and professional school students through Grad Plus, which offers both high approval rates due to minimal credit underwriting requirements and a variety of borrower-friendly repayment programs, some of which take income into account.

Among those federal loan repayment programs is the Public Service Loan Forgiveness program for graduates who go into lower-paying public service positions. For law graduates this program is especially important in supporting not only access to legal education but also access to justice itself.

Greater loan accessibility and variety put a premium on financial counseling. Evidence suggests that students do not always take advantage of the services law schools offer for financial counseling related to borrowing and long-term debt, and that some of the students who do take advantage of these services are not that satisfied with them.

F. Increasing Law School Expenditures as the Cost Driver

An immediate driver for tuition increases is the inflation-adjusted increase in law school expenditures per full-time equivalent (FTE) student. Three areas of expenditure stand out and together they account for one-half of the total per FTE: instructional salaries, administrative salaries, and grants/scholarships. All increased, but the greatest percentage increase came in grants/scholarships to use in discounting tuition. Between AY2004-05 and AY2012-13 the average increase for public law school grants/scholarships expenditures was 99%, while for private law schools the average increase was 44%.

III. Matters of Context Shaping the Issues, Possible Solutions, and the Interpretation of the Findings

In pursuing its work the Task Force confronted a number of broad factors that will shape and influence any efforts moving forward.

1. The Higher Education Context

Institutionally, law schools are deeply rooted in higher education and share not only a number of higher education’s challenges but many of its key characteristics as well. Cost, student debt, teaching loads, scholarly research, diversity, discounting, rankings, and value – matters on the list of challenges facing legal education – are all on the list of challenges facing higher education generally. Perhaps one of the most important general challenges is one shared by all public institutions of higher learning, including law schools – the drastic cuts in state support. A 2012 report from the College Board noted, “state appropriations are a major source of revenue for public colleges and universities. Over the decade 1988-99 to 2008-09, the average share of


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revenues coming from state and local appropriations decreased and the average share of revenues coming from net tuition increased for all types of public institutions. State colleges and universities—including their law schools—are finding it harder to remain the site of accessible higher education.

In short, many of the most important criticisms of and challenges facing law schools are not entirely unique to legal education. As one dean told the Task Force, “law schools are just the canary in the coal mine,” and this speaks to the depth of the challenges. Some challenges cannot be adequately defined and addressed by a set of assumptions based on a law-school-only perspective.

This is reinforced by the fact that most law schools (over 90%) are not independent and are instead a part of larger educational institutions. This often limits what they can do on their own. Their relationships with larger institutions are complex and varied, with some schools having little autonomy and others more. Improvements in the financing of legal education must take these relationships into account.

2. The Law School Context

Law schools in the United States are very different from each other, and, consequently, one-size-fits-all solutions may not be constructive. The most obvious difference, but not the only important one, is between public and private schools. The differences in their operating models and sources of revenues can have profound effects on tuition, discounting, student borrowing, and expenditures.

The issue of financing legal education cannot easily be separated from what law schools do, how they structure their curricula, and how curricula may be changing in the face of the shrinking market for students and changes in the legal profession itself. Curricular choices and innovation have budgetary consequences—a again, the largest proportion of law school expenditures goes to instructional salaries. Ideally, these inter-connected matters would be examined in an integrated fashion in an effort to find cost-effective ways to innovate. The details of curricular issues, however, were not within this Task Force’s purview, and time and resource constraints prevented the Task Force from expanding the scope of its work.

In testimony and materials reviewed by the Task Force, the issue of law school rankings arose repeatedly. Law school deans acknowledged that pressure to climb the rankings can shape decisions about student financial aid, faculty hiring, and myriad other dimensions of law schools in subtle and not-so-subtle ways. A 2010 ABA special committee reported that the U.S. News and World Report ranking methodology tends to increase the cost of legal education for students, to discourage the award of financial aid based upon need, and to reduce incentives to enhance diversity in the legal profession. While acknowledging the pressure exerted by rankings, the

Task Force was not presented with any realistic solution for eliminating the rankings. To the extent such rankings produce incomplete or irrelevant information, the antidote would appear to be the provision of more complete and better information in the marketplace for students to consider in choosing whether and where to attend law school and how to pay for it.

3. A Dynamic Environment

The Task Force addressed its charge in the midst of a dynamic environment, and this is an especially important matter of context. Schools are looking hard at their curricula and innovations are being planned and/or instituted to meet increasingly important challenges. It is also an environment in which market forces are very much at work and they are starting to exact an unpleasant toll on some schools. As noted, enrollments (and hence revenues) are down in recent years for many schools, and for some significantly so. In the wake of these declines, some schools are facing extinction.17 Two schools are merging18 and an independent school recently merged with a university.19 Another university-based law school was recently purchased outright by a different university that had long been in the market for a law school.20

At the same time, schools are trying different ways of delivering the services they provide. William Mitchell College of Law is instituting a hybrid program allowing students to take more classes online.21 The University of New Hampshire School of Law has an honors program based around a two-year practicum that is designed to give students intensive, hands-on training.22 The University of Denver’s Sturm College of Law is offering a broader program that allows any student “to spend a full year of their law school career in real or simulated legal practice” and guarantees every student “dynamic, hands-on client interactions outside of the classroom via clinics and externships.”23

23 See the University of New Hampshire School of Law’s Daniel Webster Scholar Honors Program, https://law.unh.edu/academics/id-degree/daniel-webster-scholars.
24 See the University of Denver Sturm College of Law’s Experiential Advantage program, https://www.law.du.edu/index.php/experiential-advantage. The Task Force Consultant spent one year as a visiting professor at the Sturm College of Law, and subsequently assisted (on a volunteer basis) with an internal student survey related to the Experiential Advantage program.

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A number of schools have instituted so-called three-plus-three programs that allow qualified students to complete their undergraduate and law degrees in six years instead of seven. The program at the Sturm College of Law even includes an option allowing highly qualified high school seniors to apply for its three-plus-three program as they apply to the university for undergraduate admission.24 In addition, a number of schools without their own law schools are entering into three-plus-three agreements with nearby law schools. LeMoyne College in Syracuse, New York, for instance, has three-plus-three agreements with law schools at Syracuse University and at Fordham University.

Schools are revising their third-year curricula to better prepare their graduates to compete in a changing employment market. One school has revised its third year to allow for a form of specialization. New York University School of Law has a series of "Facility-designed Professional Pathways [that] guide students in a focused area of study and skill development in particular areas of law, the bulk of which will pursue during their 3L year. Pathways are designed to help students who have developed interest in a particular career area and make them highly competitive in the job market for that field."25 And the Elon University School of Law now requires its JD students to complete full-time, course connected residencies-in-practice as part of a highly experiential curriculum that is two and one-half years long and 20% less expensive than the average cost of a private law school.26 Among the best-known third-year innovations is Washington and Lee’s, which is an entirely experiential program.27 Praised for its innovative nature, 28 the program, however, has not prevented serious enrollment and employment declines29 along with budgetary deficits. To address these challenges, the law school recently announced a rescue plan—the School of Law Strategic Transition Plan—to return it to a sound footing.

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co-op approach, and Baylor University Law School has its even longer-standing Practice Court Program, required of all third-year students. Northwestern University School of Law has its Accelerated JD program in which students “complete the same number of credit hours as traditional three-year JD students in five semesters over the course of two calendar years.” And, a number of prominent individuals have called for a true two-year degree, which requires fewer credit hours. Among them are Northwestern Law School Dean Daniel Rodriguez and New York Law School Professor Samuel Estreicher as well as President Barack Obama. In addition, new schools with differing missions are still opening. For example, the new University of North Texas/Dallas College of Law seeks to provide a low-cost legal education geared to practice-related competencies, with a teaching-focussed faculty, and an emphasis on diversity. Belmont University, located in Nashville, Tennessee, has a different vision for its new law school as a part of university that “brings together the best of liberal arts and professional education in a Christian community of learning and service.” This is not an exhaustive list, but just examples. They — and others — are important because, in many respects, they are natural experiments in which different kinds of schools are trying to devise ways of responding to changes in the world around them. In short, they are market-driven experiments that can include important curricular and pedagogical innovations. They must be watched closely and analyzed, since they are likely to have much to add to the discussion of financing legal education and its relationship to curriculum. They are the incubators of new directions and an exacting market proving ground. Moving forward such experiments may well be the source of possible solutions and models, allowing others to see what can be done, how, and with what success. They can also show what may not work, and this is equally important. Recognizing this diversity of approaches, the Task Force looked skeptically upon inflexible mandates or one-size-fits-all solutions that would constrain innovation and experimentation at a time when they are most needed.

4. The Scarcity of Data

As noted earlier, the scarcity of systematic, reliable, and detailed information needed to address the issues at hand is a particular frustration. In light of the Task Force’s timetable and resources, exploiting the best available information was the only practical course. At best only a partial picture of the current state of affairs is possible, but even this — as the observer noted earlier told the Task Force — is important and valuable.

IV. Detailed Overview of Specific Findings

This section presents the details for the findings outlined above in section II; and will follow the same organization. Unless otherwise noted, the information underlying the more specific findings in the next section come from ABA sources, and multiple sources were often utilized in reaching a single finding. Some of this information is publicly available from individual law school annual informational (or 509) disclosures available on the ABA website and the Law School Admission Council’s website’s Official Guide Archives. Most data-driven discussions of legal education also draw from these sources. Additionally, some of the information comes from ABA Takeoff Reports, which are reports derived from annual questionnaires that ABA-approved law schools are required to file as part of the ABA law school accreditation process. Much of this information is not publicly available. In recognition of the fact that not all law schools are the same, the discussion of the specific findings will regularly distinguish between private and public schools.

Because of the differences within each type — public or private — the discussion will in some instances make further distinctions among groups of schools within each. This is important because there are key differences among schools that are relevant to the issues surrounding the financing of legal education. Rather than relying on any existing scheme, we have divided schools (public and private together) into five groups based upon the average of a school’s median LSAT (Law School Admission Test) score for full-time students for the years 2000 to 2010. The groups will be designated simply as G1 through G5, with G1 schools having the lowest LSAT scores and G5 schools the highest.

To briefly illustrate the differences among the groups, G1 schools (public or private) tend to have the lowest tuition, to admit the largest percentage of applicants, and to have the highest employment


39 The cut-offs for the five groups are: Group 1 — ≤152.0; Group 2 — 152.0-154.39; Group 3 — 154.4-157.5; Group 4 — 157.6-161.5; Group 5 — >161.5. The number of schools per group changed marginally over time as new schools came on line. For 2010, the numbers — going from Group 1 to Group 5 — are 41, 40, 39, 41, and 35. Not included are the three law schools in Puerto Rico and the Judge Advocate General’s school. See Stephen Daniels, “Exploring Longitudinal Patterns in LSSES Data,” presentation at the LSSES Symposium, St. Louis University Law School, November 6-7, 2014. The number of G5 schools was too small to include them in the analysis of the LSSES data.

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1. Declining Enrollments Overall

There are preliminary matters that must be noted before directly addressing the financing of legal education. The first is declining enrollment. Fewer people are attending law school generating fewer tuition dollars to run a school’s operations. As Figure 1 below shows, enrollments have declined in the last few years, and especially so for private schools. As we will see later, these schools have higher tuition rates than the in-state tuition rates for public law schools. Comparing AY2014-15 to AY2009-10 (AY means academic year), the decline in Figure 1 for private schools equals a 19% difference in total enrollment. Most important is the decline in new students (designated as 1Ls in Figure 1) entering law school in those academic years — 30% fewer people were starting in a private law school in AY2014-15 compared to AY2009-10. For public schools the overall decline in enrollment between AY2009-10 and AY2014-15 was 13%, with an 18% decline in 1Ls.

Figure 1. Declines in Law School Enrollment

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Among the five different groups of public schools (G1 to G5), the greatest declines in
total enrollment were for G4 and G5 schools, the schools with higher full tuition price: down
15% and down 10%, respectively. Declines were lower in the other three groups, but substantial
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groups. As we will see later, the private G4 and G5 schools tend to offer the most in
financial aid and hence the best discounts from stated tuition among all schools. Discounting will
be discussed in detail later.

The question that this Task Force could not answer, but that must be answered, is what
role increasing tuition – along with other factors including financial aid, debt, and job prospects
plays in students’ decisions to attend law school, not to attend, or to attend one school rather
than another. And there is the subsidiary question of what may happen to diversity and whether
law school will be accessible to the socio-economically disadvantaged of any color or
background. Affordability is an important, much discussed, but elusive concept when talking
about the cost of any kind of professional training. Answering the question about the role of
increasing tuition – in combination with those other factors will help understand the practical,
real-world meaning of affordability and what may be done to enhance it.

One takeaway, however, is that to the extent affordability and, as discussed below,
weakness in the job market present a major concern to students considering law school, demand
for law education appears to adjust in response. This, in turn, has prompted some law schools to
downszie, close, or merge with other entities, while spurring others to cut costs, reduce tuition, or
innovate toward greater efficiency. The ordinary operation of market pressures should induce a
measure of caution in considering any regulatory responses to problems in the financing of legal
education.

Minority enrollments have not declined in the face of the overall enrollment decline –
yet. Yet – because there are signs that it could. Figure 2 shows that the number of law students in
public and in private schools identifying themselves as being among one of the minority
categories tracked by the ABA has not declined along with the overall enrollment decline (the
higher numbers for private law schools in Figure 2 simply reflect the fact that more students
attend private schools than public schools).

The percentage of all students in public law schools identifying themselves as minority has increased from 21% in AY1994-05 to 27% in AY2013-14. However, the percentage increase in the number of minority students has slowed for
public schools in recent years. From AY2004-05 to 2009-10 the number increased by 9%, but from
2009-10 to AY2014-15 it increased by only 3%.

The pattern for private law schools is similar in that the percentage of students
identifying as minority has increased – from 19% in AY1994-95 to 30% in AY2014-15.

40 The figures used here are for all minority categories tracked by the ABA and the discussion here goes beyond
2009. Evidence provided to the Task Force shows statistics essentially the same as those used here; see Michael
41 Some of this may be a result of bans on affirmative action in a number of states.
42 The latter figure may reflect, in part, declines in non-minority students as a part of the overall enrollment decline
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public schools in recent years. From AY2004-05 to 2009-10 the number increased by 9%, but from
2009-10 to AY2014-15 it increased by only 3%.

The pattern for private law schools is similar in that the percentage of students
identifying as minority has increased – from 19% in AY1994-95 to 30% in AY2014-15.

40 The figures used here are for all minority categories tracked by the ABA and the discussion here goes beyond
2009. Evidence provided to the Task Force shows statistics essentially the same as those used here; see Michael
41 Some of this may be a result of bans on affirmative action in a number of states.
42 The latter figure may reflect, in part, declines in non-minority students as a part of the overall enrollment decline
in private schools.
However, unlike the situation for public law schools, the percentage increase in the number of minority law students in private law schools has not declined, but has stayed relatively stable at 11%-12% in recent years. While these trends appear relatively benign, there still is cause for concern. As one recent commentator noted, the increasing percentages in minority enrollment “is due mostly to deep declines in white law students, and black and Hispanics remain profoundly underrepresented in legal education and the profession.”

Regardless of the current picture of minority enrollment, the concern is whether the trends identified will or can lead to law school student bodies or a legal profession that more closely reflects American society at large. Both now reflect a substantial under-representation of people of color. ABA demographic statistics show a profession that is overwhelmingly White/non-Hispanic – well over 80%. U.S. Census figures show the percent of the population.


that is White/non-Hispanic at about 63%.

By mid-century that percentage is projected to drop below 50%.

And, those same ABA demographic figures show a noticeable gender imbalance with the percentage of females in the profession being well below 50%. Again, the question of what role cost may be playing in driving law school enrollments down is one this Task Force could not answer, but answering is especially important for understanding the future of diversity in legal education and in the legal profession.

The commentator quoted above raises another level of concern regarding minority enrollment in the face of the overall enrollment challenges faced by law schools. His concern is that some schools may be using increased minority enrollment as a “survival strategy” that has potentially disturbing consequences. He found that schools with the lowest median LSAT scores were the ones increasing minority enrollment, especially African-American and Hispanic students. He sees this as a “critical component of the enrollment management calculus for [such] schools … and could very well have saved some of these schools – at least for now.”

Enrollments for white and Asian students, in contrast, went down or stayed stable in these schools. At the other end of the spectrum, the percentages of white and Asian students increased at schools with higher LSAT scores, while the percentages of African-American and Hispanic students decreased. The conclusion is blunt: “Put simply, black and Hispanic students have increased their proportions among law schools considered least prestigious while essentially being shut out of the schools considered most prestigious. White and Asian students, on the other hand, have reaped the benefits of the increasingly competitive admissions climate.” Such a trend will have a potentially negative affect on career opportunities for many students of color.

2. The Weak Job Market

The job market for new law school graduates is far from robust, although some see signs of at least modest improvement.

The most recent ABA reports on employment show only a very slight increase in the already unexceptional percentage of graduates landing a permanent, full-time, bar-requirement job (the job for which every law school designs its curriculum). For the public law school class of 2013, the figure was 63%; for the class of 2012, 64%; and for the class of 2011, 62%; for the private law school class of 2013, the figure was 57%; for the class of 2012, 56%; and for the class of 2011, 55%. Unfortunately, comparable figures are not 0


Taylor, supra note 43 at 30.

For all material and quotations in this paragraph, see id. at 30-31. This is somewhat different concern then one voiced in a 2009 study that looked at the prospect of black and Mexican-American students making up a smaller percentage of the law school population. That study reported a decline in the number of black law students from 2142 in 1993 to 2,392 in 2008, and a decline in the number of Mexican-American law school students from 710 in 1993 to 673 in 2008. See Conrad Johnson, “A Disturbing Trend in Law School Diversity,” 2009, Lawyering in the Digital Age, Columbia Law School, http://blogs.law.columbia.edu/salt/.

Wall Street Journal, April 9, 2014, http://www.wsj.com/articles/SB1000142405270230387604579492002452690422; but also see Merritt, supra note 5.

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available for earlier years. The ABA instituted more detailed and stringent reporting requirements for schools in light of concerns about the clarity of some of the earlier categories.

Figures 3a and 3b show employment figures for the five private school groups and for the five public school groups, respectively. Again, the figures report on the percentage of graduates landing a permanent, full-time, bar passage-required job. The idea here is to present an added level of detail about employment rates and in doing so to illustrate the difference among groups of schools (and why such information is useful, especially for prospective law students). For the public schools and for the private schools, the highest employment rates for the years 2011, 2012, and 2013 for such jobs were for G5 schools. G1 schools – public and private – had the lowest employment rates. Noticeably, the rates for the private G1 schools actually declined from 2011 to 2013, and the rate declined for public G1 schools from 2012 to 2013.

**Figure 3a. Percentage of Private Law School Graduates by Group Employed Full-Time Bar Pass Required**

<table>
<thead>
<tr>
<th>Group</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group 1</td>
<td>47%</td>
<td>43%</td>
<td>49%</td>
</tr>
<tr>
<td>Group 2</td>
<td>52%</td>
<td>50%</td>
<td>51%</td>
</tr>
<tr>
<td>Group 3</td>
<td>53%</td>
<td>55%</td>
<td>52%</td>
</tr>
<tr>
<td>Group 4</td>
<td>54%</td>
<td>50%</td>
<td>52%</td>
</tr>
<tr>
<td>Group 5</td>
<td>81%</td>
<td>77%</td>
<td>80%</td>
</tr>
</tbody>
</table>
A similar analysis can be done using figures for graduates with full-time, permanent positions classified as JD-advantage: “A position in this category is one for which the employer sought an individual with a JD, and perhaps even required a JD, or for which the JD provided a demonstrable advantage in obtaining or performing the job, but itself does not require bar passage or an active law license or involve practicing law.” 50 For private law schools, the highest percentages of graduates landing these kinds of positions increased from 2011 to 2013 for each group of schools, but the percentages were not high. In 2013, they ranged from a high of 13% for G2 schools (also the highest in 2011 – 11%) to a low of 6% for G5 schools (also the lowest in 2011 – 5%).

For public law schools the picture with respect to JD-advantage placements is essentially the same – an increase from 2011 to 2013, except for G5 schools. For them the percentage remained unchanged – 8%. For the other groups the percentage of graduates landing such positions ranged between 9% and 10% and between 11% and 13% in 2013.

Despite the cost, the best available evidence suggests a significant lifetime income premium for those with a law degree compared to those with a bachelor’s degree.51 This holds for those who graduate in a down job market and for those whose earnings place them at the 25th percentile.52


percentiles of the income distribution. Debt, however, can diminish the degree of premium for all law school graduates and so remains a factor to contend with. Still, even with the focus on debt by many commentators, the question is ultimately one of long-term value – and that value is significant.

3. Tuition Dependency

Law schools are tuition-dependent for their revenues, and some are heavily – if not exclusively – tuition-dependent. This is the final preliminary matter. Looking at all law schools, the average was 69% of revenue in AY2012-13 (the last year for which information is available), with 25% of schools receiving at least 88% of their revenue from tuition.

There are important differences among schools in the degree of dependence. Schools with lower tuitions (which are those in the lower groupings for both public and private schools) are more tuition-dependent, and those with higher tuitions (which are those in the higher groupings) are less dependent. Private G1 schools are by far the most tuition-dependent (the same schools noted above for their low employment rates). In AY2012-13 the average was 95% of revenue. Clearly, anything that disrupts the flow of tuition dollars could put some schools in a very precarious position, and private G1 schools had some of the greater declines in enrollment (and these are the schools, as noted above, trying to increase minority enrollment).

Tuition is at the heart of the concern surrounding the financing of legal education, and even viewed in terms of inflation-adjusted dollars tuition has consistently increased over time. This is true whether viewed in terms of an inflation adjustment made on the basis of the cost of doing business (using the higher education price index, referred to as HEPI), or the price to the consumer (using the consumer price index, referred to as CPI).52

Using inflation-adjusted dollars is important because it shows how much costs have increased beyond what may be expected because of inflation alone. Using nominal dollars – not adjusting for increases due to inflation alone – gives a distorted view of changes over time that can adversely affect responses to those changes. Figures 4a and 4b show the difference the inflation adjustment can make. The two figures present material on trends in law school tuition for private schools and for public schools using three different measures. The first uses nominal dollars for both sets of schools and shows truly dramatic increases for both. For private schools, tuition increased by 109% between AY1999-00 and AY2014-15, and it increased by 231% for public schools (in-state tuition).

52 See supra note 13 on the use of HEPI and CPI.

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52 See supra note 13 on the use of HEPI and CPI.
The second measure – the middle bars in each figure – uses the consumer price index with 1983 dollars as its base (using an older year as a starting point works well for examining
trends over an extended period of time). This measure speaks to the consumer's cost and ability to pay for the service. If CPI tuition increases it means that the consumer's ability to pay for the service is not keeping up and the service functionally is costing more than in the past.

What is important in Figures 4a and 4b is the amount of change over time in tuition, keeping in mind that those increases are not because of inflation. The figures show that CPI tuition did not increase as sharply as nominal tuition, but the increases are still quite substantial. CPI tuition increased 46% for private schools between 1999-00 and 2014-15, and 132% for public schools. Even taking consumer inflation into account, tuition has become much more expensive. By way of perspective, inflation-adjusted per capita income in the United States actually declined by 6% between 1999 and 2013 (with a noticeable drop between 2008 and 2009).

The third measure – the far right-hand bars in each figure – uses the higher education price index with 1983 as its base. This measure speaks to the schools' cost of doing business and takes into consideration inflation in the key cost factors for higher education.31 If HEPI tuition increases it means tuition is increasing faster than inflation in those cost factors. The figures show that HEPI tuition did not increase as sharply as either nominal tuition or CPI tuition, but it still increases markedly. HEPI tuition for private schools increased by 29% between 1999-00 and 2014-15, and increased by 104% for public schools (again, decreases in state funding need to be kept in mind). And in light of CPI tuition and per capita income, this only reinforces the concern that law school – public or private – has become increasingly expensive.

Generally speaking and using either version of inflation-adjustment, private and public school tuition increases going from G1 schools to G5 schools. G1 schools have the lowest tuitions and G5 schools have the highest. All groups of schools have steadily increasing inflation-adjusted tuition over time, as the consumer's ability to pay has not kept pace.

4. Discounting and Full Tuition Price

Full price tuition, however, is not the whole story. Tuition discounting occurs, is widespread, and is generally increasing for both private and public schools. A school’s net tuition is the figure that counts – it is a concise figure that allows for schools to be compared in a meaningful way with regard to the price for their service. School-level net tuition takes into consideration the typical amount of grants/scholarships (financial aid that requires no repayment) as well as the percentage of students receiving grants/scholarships money and the percentage still paying full price.32 Figures 5a and 5b use the same three measures in Figures 4a and 4b to show

31 Id.
32 The higher education literature offers a number of possibilities, but they are typically designed for undergraduate institutions and may not be transfer well to law schools. One recent approach to the long-time scholar of higher education is intended to be more straightforward and generally applicable. See Robert Zemsky and Susan Shuman, “It’s Still a Market,” Working Paper 9-15-2-2014, The Consumer-Based Institutional Market Segmentation Project, The Alliance for Higher Education And Democracy, University of Pennsylvania. With a very minor revision – based on the availability of data for law schools – it can be used for law schools. Its strength is including in its formula both those receiving free money and those receiving none. As used it works in three steps:

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trends in net tuition and they show net tuition increasing for both private and public schools. But care must be taken in interpreting the increases. Even though net tuition (using net 1983 CPI) increased between AY1999-00 and AY2013-14 — 29% for private schools and 94% for public schools — there is something else important going on.\(^{55}\) The increase itself will be addressed later. What is important here is net tuition’s percentage of the stated tuition because it allows us to easily calculate a figure that demonstrates the magnitude of the discount (simply subtract from 100% the net tuition’s percentage of sticker price).\(^{56}\) The magnitude of discounting has been increasing, meaning that discounts have become deeper. For private schools, the net tuition in AY1999-00 meant a discount of 16% in inflation-adjusted dollars (CPI). In AY2013-14 the discount had increased to 25%. For public schools the discount in AY1999-00 was 22% and it increased to 28%. One dean testifying before the Task Force said his school’s discount rate was about 10-15% when started his deanship and is now at 40%. Generally speaking, the discounts have been greater for private schools because of their higher tuitions. For each of the five groups of private schools the trend over time has been one of deeper discounts. The deepest discount for private schools in 2013-14 was for G4 schools — a 31% discount. The smallest discount for private schools in 2013-14 was for G1 schools at 21% — again, the schools most tuition-dependent, with the lowest employment rates, and some of the greater enrollment declines. For public schools, G3 schools had the deepest discount in 2013-14 — 29%.

\(^{55}\) It is especially important to note, again, that the increases in public in-state tuition — even net tuition — came as state governments were cutting their appropriations to institutions of higher education. See Ma and Baum, supra note 15. If net 1983 HEPI is used the increases are 15% and 80%, respectively.

\(^{56}\) For example, take a sticker price of $500 and a net tuition of $350 — the net tuition is 70% of the sticker price, and subtracting 70% from 100% yields a discount of 30%; alternatively the formula can be (sticker – net)/sticker.

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First, subtract the median award from the sticker price and multiply that figure by the percentage of full-time students receiving free money. Second, multiply the sticker price by the percentage of students paying sticker price. Finally, to get a school’s overall net price add together the figures from the first two steps.

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With increased discounting, fewer students in both public and private schools are paying full tuition than in the recent past. As Figure 6 shows, that percentage steadily declined for private schools from 57% in AY1999-00 to 38% in AY2013-14. Looking more closely, the percentage of students paying full price declined in each of the five private school groups. Generally speaking, G4 and G5 schools – which had the highest full tuition prices – had lower percentages of students paying full price, and those in the other groups somewhat higher percentages. For public schools Figure 6 again shows a steadily declining percentage of students paying full price – 58% in AY1999-00 to 40% in AY2013-14. Again, those schools in the higher groups with the higher tuitions have lower percentages of students paying full price.

Figure 6. Trends in Percent of Students Paying Full Tuition

While the percentage of students paying full price has decreased and the discount rate increased, inflation-adjusted net tuition itself has not always followed suit. Figures 5a and 5b above presented inflation-adjusted figures for CPI net tuition and they show that the actual amount of money schools expect students to pay, in many situations, has still increased. Simply put, stated tuition prices have increased at a greater rate than discounts.

In inflation-adjusted dollars (CPI), private law school students saw their schools’ net tuition increase 29% from 1999-00 to 2013-14. Most of this increase, however, came between AY1999-00 and AY2009-10 – a 28% increase. There was very little change from 2009 to 2014 (a mere 1%). Generally speaking, the patterns for net tuition follow the grouping of private law schools. G1 schools are the least expensive having the lowest inflation-adjusted net tuition at each point in time. G5 schools are the most expensive having the highest at each point in time. For G3 and G4 schools net tuition actually declined slightly between 2009-10 and 2013-14 (2% increase).
and –1%, respectively), and for the other three groups the increase was 4% or less. Whether this may reflect a permanent bend in the cost curve remains to be seen.

For public law schools inflation-adjusted (CPI) net tuition is lower, but it increased more dramatically than net tuition for private schools (again, importantly, this reflects the declines in state appropriations). Public law school students saw their schools’ net tuition increase by 102% between AY1999-00 and AY2013-14. Again, the greatest increase came between AY1999-00 and AY2009-10, when net tuition increased by 84%. As was the case with the private schools, G1 public schools were consistently the least expensive having the lowest net tuition at each point in time. G5 public schools were the most expensive having the highest net tuition. No public law school group saw a decline in net tuition.

With respect to discounting, more money goes to pure merit (i.e., for LSAT scores and no consideration of other factors) than to pure need (i.e., need demonstrated by financial aid materials submitted by the student with no consideration of other factors). While money for pure need has not disappeared, the trend is less money being used for this purpose and more going to pure merit and to a third, mixed category of need plus other factors (such as prior public service activities or an interest in such work).

Using the only data available, Figures 7a and 7b show this pattern quite clearly in comparing AY2004-05 and AY2009-10 (the ABA stopped collecting this information in 2011). Both public and private schools devoted less to need in AY2009-10 than in AY2004-05 and more to merit, but there were important differences as well. Most obviously, the two figures show that private schools devote a much larger share of grant/scholarship money to merit. And public schools devote larger shares to need and need plus other factors.
Although the patterns are not always entirely clear, G5 schools – both public and private – devoted less grant/scholarship money to pure merit and more to pure need and to need-plus. Again, these are the schools with the highest tuitions. In 2009-10, private G5 schools devoted between 27% and 37% to each of the need categories. For the other private school groups pure merit was much more important, ranging from 83% of grant/scholarship money for G1 schools to 67% for G4 schools. For the public schools, the 2009-10 pattern for pure merit is quite clear – the percentage of money devoted to merit consistently declines from 75% in G1 schools to 27% in G5 schools. Need-plus consistently increases from 10% in G1 schools to 49% in G4 schools and then drops to 37% in G5 schools (G5 schools had the largest percentage devoted to pure need at 35%).

Figure 8 looks at grant/scholarship money in a different way. Figures 7a and 7b show the percentage allocation among the three categories – merit, need, and need-plus – for the two points in time. Figure 8 shows the inflation-adjusted (CPI) percent increase from AY2004-05 to AY2009-10 in the amount of money devoted to each of those three categories for both types of schools. Schools are clearly investing more money in grants/scholarships. For private schools, the total amount of money devoted to grants/scholarships increased by 43%, but with a mere 2% increase in money for pure need. The substantial increases went to merit and especially to need-plus. For public schools, the total amount of money devoted to grants/scholarships also increased – by 49%. Again, pure need saw less of an increase while the other two categories saw substantial increases. The Task Force heard testimony from law school deans that is consistent with this finding. One noted that pursuing the best students in a competitive market leads his school and others to offer the most money to high-achieving students rather than those with the most need. Another spoke of a “merit scholarship arms race.”
5. Student Borrowing Increasing

Despite the increases in grant/scholarship money, the deeper discounting, and the smaller percentage of students paying full price, most students still borrow to help finance their legal educations. The average student debt by school in 2014 dollars is in excess of $127,000 for private schools and in excess of $88,000 for public schools (the ABA collects information on the average student debt by school, not the average individual student debt). In the face of these levels of debt, evidence presented to the Task Force indicates that law students rarely default on their student loans—a 2-year cohort default rate below 2%. This is lower than the rate for masters/doctoral/professional students generally and a rate lower than for bachelor degree students and below. A recent survey suggests that most practicing attorneys feel their incomes have justified the cost of their legal education and that most law students see good value in their legal education even with the money borrowed.57

The amount borrowed in inflation-adjusted dollars has increased. That increase in student borrowing reflects the growth in tuition even adjusting for inflation and the accessibility of loan funds. As Figure 9 shows, these figures represent an increase over the amount of student debt by school in the recent past. In inflation-adjusted dollars, private school debt increased by 25%.

57 See Simkovic, supra note 40 at 44. The 2-year cohort default rate is the percentage of borrowers who enter repayment during a federal fiscal year and default prior to the end of the next one to two fiscal years; cf: a lifetime cohort default rate, which measure the lifetime default of a given cohort.

between AY2005-06 (the first year for which data are available) and AY2012-13 (the most recent year for which data are available), and public school debt increased by 34%. Periodic surveys of individual students by the U.S. Department of Education show that individual law student debt—adjusting for inflation—increased by 56% from 2004 to 2012. Cumulative debt—undergraduate plus law school—increased by 44%. And, figures from the annual Law Student Survey of Student Engagement (LSSSE) show that few 3rd and 4th year students, perhaps less than 15%, expect to graduate with no law school debt.59

![Figure 9. Trends in Student Debt in Inflation-Adjusted Dollars (2014$)](image)

While the amount borrowed is higher in private schools because of the higher tuitions, the inflation-adjusted amount borrowed increased more for public law schools as their tuitions increased (again, perhaps a result of tuition increases that came in the wake of reduced state support). The greatest increase for public schools came between 2009-10 and 2012-13—a 21% increase compared to a 15% increase for all private schools. And during this time period, for both public and private schools the increases in borrowing were the greatest for students in G1 schools (22% increase for G1 private and 30% for G1 public), but these were still the schools with the lowest amount borrowed and the lowest tuitions.

60 See Daniels, supra note 39, using data from a sample of 59 schools that participated consistently in LSSSE between 2005 and 2013, and all respondents within that sample of 59 schools—a total of 134,000-plus respondents.
With programs first instituted in 2006-07, the federal government has become the lender for graduate school and professional school through Grad Plus. Students can borrow the full cost of attendance – tuition plus a school’s stated living expenses. There are a variety of borrower-friendly repayment programs, some of which take income into account. The details of the various options, however, can be complex. The complexities are so great that the Young Lawyers Division presented a resolution and report to the House of Delegates at the 2015 ABA Midyear Meeting – which was adopted – calling for “comprehensive debt counseling and debt management education” on the part of law schools and bar associations.63

Access Group® staffs a free loan repayment assistance call center available to law students and graduates and has recently published a comprehensive guide to the various programs – Federal Student Loans: Repayment 101. The current student loan programs assist students in financing their education and provide repayment options and plans that assure broad access to legal training. True need-based programs that could enhance access because they do not require repayment are, of course, another matter.

Among those federal loan programs is the Public Service Loan Forgiveness Program for graduates who go into lower-paying public service positions. For aspiring law students and graduates this program supports not only access to legal education but also access to justice itself. This program “is intended to encourage individuals to enter and continue to work full-time in public service jobs. Under this program, borrowers may quality for forgiveness of the remaining balance of their Direct Loans after they have made 120 [ten years’ worth of] qualifying payments on those loans while employed full time by certain public service employers.”65

Ecking the concerns of the Young Lawyers Division, evidence suggests that students do not always take advantage of the services law schools offer for financial counseling and that some of the students who do are not satisfied with the service. This is particularly important in light of the potential consequences of incurring long-term debt as a means of paying for one’s legal education. Annual LSSE surveys from AY2004-05, AY2009-10, and AY2012-13 show that about one-fifth of 3rd and 4th year students in a sample of 59 schools did not even use the services available (this sample did not include any G5 schools). Of those who did use the services available (this sample did not include any G5 schools). Of those who did use the

63 American Bar Association Young Lawyers Division, Report to the House of Delegates, Resolution 106, 2015 Midyear Meeting, Houston, TX.
62 "Founded in 1983, Access Group is a nonprofit membership organization comprised of 197 nonprofit and State-affiliated ABA-approved law schools. Access Group works to further access, affordability and the value of legal education through research, policy advocacy, and direct member and student educational services.” https://www.accessgroup.org/about-us, Christopher Chapman, president and CEO of Access Group, is a member of this Task Force.
61 Also available at: https://www.accessgroup.org/federal-student-loans-repayment-101. See the Access Group’s website for other user-friendly tools explaining the federal loan programs that include calculators to estimate the cost of borrowing and payments under the various options: https://www.accessgroup.org.
services in those years, the surveys show that around one-third in each year said they were unsatisfied or very unsatisfied with the services.\textsuperscript{65} Increased student borrowing can be seen in another way, one that speaks to the importance of tuition as a source of revenue for law schools and to the importance of loans to pay that tuition. While a crude measure, it still sends an important message about schools' - not just students' - reliance on loans. Looking at the most recent figures - for AY2012-13 (well after the federal loan programs were firmly established) - as a percentage of all tuition collected, loans accounted for 123% for public schools and 86% for private schools. The figure can exceed 100% because the current federal loan programs allow students to borrow for living expenses as well as tuition. The higher percentage for public schools may reflect, along with more loan accessibility, sharper tuition increases that outpaced discounting. The percentage of tuition and living expenses that is covered by student loans increases going from G1 schools to G5 schools. The pattern holds for both public and private schools, with G1 schools having the highest percentage and G5 schools the lowest. In other words, both private and public G1 schools are not only the most tuition-dependent schools, but the most loan-dependent as well.

6. Increasing Law School Expenditures as the Cost Driver

Tuition has increased more than would be expected simply because of the effects of inflation on the cost of doing business for law schools. The immediate driver for the inflation-adjusted increase is the growth in law school expenditures.

The most appropriate way to look at expenditures is to normalize them using inflation-adjusted (HEIP) expenditure per full-time equivalent (FTE) enrollment, since raw expenditures will be higher or lower due to higher or lower enrollments. Doing so shows that total inflation-adjusted expenditures per FTE have increased for both public and private schools, but more so in public schools. The greatest increase for public schools came between AY2004-05 and AY2009-10 - at 20%, with an additional 8% increase between AY2009-10 and AY2012-13. For private schools the increase was 11% for each time period (11% plus another 11%).

Figures 10a and 10b break down total expenditures and report on the three areas of expenditure that accounted for the largest proportions of the total in each of the time periods covered by the figures: instructional salaries (which would take into account faculty/student ratio and teaching load), administrative salaries, and grants/scholarships in each time period.\textsuperscript{66} Since the figures for instructional salaries cannot be disaggregated (they include all instructors and not just full-time, tenure-line faculty), no conclusions can or should be drawn from them regarding


\textsuperscript{66} Data are available for fringe benefits only for 2012-13. They make up 10% of budget for public law schools and 11% for private law schools.
full-time, tenure-line faculty salaries as a significant cause. Detailed data on these professors’ salaries are not available. On the other hand, student/faculty ratios have decreased, meaning more instructors per student – something generally seen as good, but that increase costs.

Together instructional salaries, administrative salaries, and grants/scholarships consistently made up one-half of the total inflation-adjusted expenditures for both public and private schools. Generally speaking, instructional salaries and administrative salaries each made up a larger proportion of total expenditures in public schools compared to private schools and grant/scholarship money a smaller proportion.

The percentage of total expenditures for each of these three areas did not change significantly for private law schools, as Figure 10a shows – with only a slight decrease for instructional salaries and a slight increase for grant/scholarship money. For public law schools, Figure 10b shows a somewhat greater and consistent decrease in the percentage of total expenditures going to instructional salaries and a consistent increase of total expenditures going to grant/scholarship money. With few exceptions, for both public and private schools inflation-adjusted total expenditures per FTE were highest for G4 and G5 schools (the schools with higher tuitions).

Figure 10a. Trends in Major Areas of Private Law School Expenditure: Inflation-Adjusted (HEPI) per FTE

Figure 10b. Trends in Major Areas of Private Law School Expenditure: Inflation-Adjusted (HEPI) per FTE

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67 Although there have been anecdotal reports of high salaries for a small number of full-time, tenure-line law professors at some schools, evidence presented to the Task Force using Bureau of Labor Statistics data on salaries show that inflation-adjusted median salaries for post-secondary law instructors (a category that includes law professors as well those teaching in other venues) have not increased; see Simkovic, supra note 40 at 27.

68 See Simkovic, supra note 40 at 24.
The amount of inflation-adjusted expenditure per FTE has increased for both public and private schools, 30% and 23%, respectively as Figure 11 shows. The greatest increases in the amount of inflation-adjusted expenditure per FTE were for grant/scholarship money, especially for public law schools. Among public schools the smallest increase in grants/scholarships was 45% for G3 schools, the largest 77% for G4 schools. But in terms of absolute spending, G5 schools spent the most on grant/scholarship money. For private schools, G4 schools spent the most on grant/scholarship money. The next largest increase in expenditure was for administrative salaries for both public and private schools.
The best available data on expenditures per FTE are for AY2012-13. A statistical analysis, which includes all areas of expenditure per FTE that accounted for at least 5% of total expenditures per FTE for both public and private schools, allows for at least a sense of the relative importance of each area for the total. Such an analysis (stepwise regression) shows how much of the variance in expenditures per FTE among schools is explained by any factor while controlling for the effect of other factors. In doing so, this method can tell us whether adding the effects of additional variable actually helps to explain more of the variance in total expenditure.

For public schools, the analysis shows the most important areas to be, in order, instructional salaries (again which take into account teaching load and faculty ratio), grant/scholarship money, and administrative salaries. Instructional salaries alone explain 68% of the variance among schools in total expenditures per FTE for all public schools. Adding grant/scholarship money explains a total of 86% of the variance, and adding administrative salaries brings the amount explained to 89%. For private schools the order is different – instructional salaries alone explain 84% of the variance, adding administrative salaries explains 87%, and adding grant/scholarship money explains 89%. In short, to effect meaningful change in total expenditures it would be necessary to make changes in one or more of these three areas. Doing so would obviously involve hard, and potentially painful, choices.
V. Conclusion and Recommendations

1. Summary

As noted at the start of this report the charge of the Task Force on the Financing of Legal Education includes a broad range of issues. Key among them are: the cost of legal education for students; the financing of and business model for law schools; student loans and educational debt; and law school practices regarding tuition discounting, merit-based grants/scholarships, and need-based grants/scholarships. These are important matters that cannot be ignored and that charge covers not only the examination of these issues but also, where possible, the development of constructive recommendations – some of which would be resolutions to the American Bar Association’s House of Delegates.

Through its hearings, meetings, and research efforts the Task Force has examined these and related issues. Its findings are clear. Tuition costs have increased beyond what would be expected from inflation, whether viewed in terms of an inflation adjustment made on the basis of the cost of doing business or the price to the consumer. (Again, for public schools we must keep in mind the decreases in state support.) Full tuition prices are not, however, the whole story. Tuition discounting may mitigate those increases. Discounting does occur, it is widespread, and it is increasing. This means fewer students are paying full tuition, with increasing monies going to students for merit rather than need.

Despite the increasing use of discounting, students are still paying more because inflation-adjusted net tuition (tuition taking the discount into account) has still been growing. Simply put, full tuition prices have increased at a greater rate than discounts. As a result, most students still borrow to help finance their legal education. And, the amount borrowed in inflation-adjusted dollars is increasing. That increase reflects the growth in inflation-adjusted net tuition and the accessibility of loan funds.

The current student loan programs assist students in financing their education and provide repayment options and plans that assure broad access to legal training. The federal government has become the lender for graduate school and professional school students through Grad Plus, which offers a variety of borrower-friendly repayment programs, some of which take income into account. Still, deciphering and successfully navigating those programs is a daunting process that can undermine a student’s ability to take advantage of the benefits available.

The implications of these findings may lead people to gravitate toward some of the changes proposed to the Task Force by those who appeared before it. Among them are capping law student loans, requiring law schools to have “skin in the game” by being responsible for loan repayment in certain situations, and even scrapping the current federal student loan program altogether (as one presenter urged). The hope with such proposals is that a kind of fiscal tough love will force schools to become more financially responsible and reduce cost. Proposals such as these deserve careful and serious analysis. But such analyses were beyond the time and resources of the Task Force, if for no other reason than the fact that these proposals involve the cost and financing of higher education more generally and not just legal education. Other
proposed changes go in a different direction, like cutting the cost to the student by allowing a true two-year program with reduced credit hour requirements or by three-plus-three programs that allow students to enroll in law school after three years of college.

The implications of the Task Force’s findings strongly suggest, moving forward, the need to look beyond the usual changes proffered and to reconsider law school business models themselves in light of their relationship to the curriculum, its cost, its increasing reliance on discounting, its even heavier reliance on student loans for revenue, and the resultant student debt. In reality, there seems to be little need to impose the kind of tough love some want because the market is already doing it — in some instances brutally. Enrollments are declining and not just marginally. With those declines come the declines in the tuition dollars that fuel law school operations, and this is occurring at a time of more limited job prospects for many graduates. Some may not be surprised if schools see as marginal by the “cognoscenti” start to teeter on the edge, but schools of all kinds are facing the challenge and many are grappling with the possible ways forward. Such a reconsideration will need to be a broad one including stakeholders in legal education, in the profession, and beyond.

A start on this reconsideration has already begun with the natural experiments already underway, and experimentation should be encouraged and fostered. As noted earlier, these are market-driven experiments that can include important curricular and pedagogical innovations. They are the incubators of new directions and an exciting market proving ground. Moving forward such experiments may well be the source of practical solutions and models, allowing others to see what can be done, how, and with what success. They can also show what may not work, and this is equally important.

The experiments must be watched closely and analyzed if they are to play a constructive role. Analyzing and evaluating these experiments must be done independently and outside of the ABA, and this might mean the development of one or more ongoing entities to research, share information, and regularly report on legal education. Importantly, the experiments, analyses, and evaluations must not lose track of the unique role played by the legal profession and the importance of access and diversity to that role.

2. Recommendations

From its work, the Task Force sees short-term and longer-term strategies moving forward.

A. Short-Term

Short-term strategies address more immediate issues. The first ones deal with the federal loan programs, which are the key to access to legal education.

It is obviously important that students who borrow student loans to fund their legal education be informed consumers. The United States Department of Education requires accrediting agencies it recognizes to require institutions that they accredit provide debt...
counseling at the outset of the program and again at graduation. The Council of the ABA Section of Legal Education and Admissions to the Bar, which is the recognized accreditor of J.D. programs, requires that counseling in its Standards (see ABA Standard 507). The Task Force understands that the counseling required is the minimum required by the rules.

In light of the complexities in the federal student loan program, the responsibilities students accept in borrowing for their education, and the amount of borrowing that students do to fund their legal educations, the Task Force recommends that the ABA encourage the Council to develop and adopt Standards requiring more of accredited law schools than the minimum debt counseling required by the U.S. Department of Education’s requirements. An enhanced standard could require more of schools at the stage that students are applying for admission to law school, and ongoing efforts throughout a student’s law school career.

Further, given the complexities of the loans and the various repayment programs that are in effect, the Task Force urges all actors in the student loan business, including law schools, to produce “plain English” versions of the terms and conditions of these programs in a user-friendly format.

Finally, the report has considered the importance of the Public Service Loan Forgiveness (PSLF) program as a means of encouraging and supporting students who elect to work in the public interest sector after graduation. There is no need for the Task Force to recommend a resolution on this matter. There is existing ABA policy supporting these PSLF programs. The Task Force does encourage others – bar associations and educators – to continue to this program, as well. This is an important access to justice issue.

The second set of short-term recommendations deal with information related to the financing of legal education. In light of the Task Force’s concern with the scarcity of data and in the interest of transparency, accountability, and better understanding of the state of legal education and its challenges, the Task Force recommends that the American Bar Association Section of Legal Education and Admissions to the Bar, which collects and is the custodian of law school accreditation-related data, make that data public, and do so in an easily available spreadsheet format.

To further these purposes, the Task Force also recommends that the ABA Section of Legal Education and Admissions to the Bar return to annually collecting for each law school expenditure data – at the least for institutional salaries, administrative salaries, grants/scholarships, operational expenses like information technology and libraries, and where relevant university charges. The Task Force also recommends a return to collecting information on revenues – at the least JD tuition, non-JD tuition, gifts, endowment income, and where relevant state and/or local government contributions. The Task Force further recommends a return to collecting information on the amount and percentage of financial aid distributed by law schools based on need, merit, and a combination of both criteria.

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B. Longer-Term

The longer-term strategies look to the reconsideration of law school business models and experimentation. The Task Force strongly encourages experimentation by law schools. Schools that undertake experimentation are the incubators of new directions that operate in an exacting market proving ground. The Task Force further recommends that schools seek appropriate variances from the Council and Section when needed and that the Council and Section give such requests serious and open-minded consideration.

Experimentation requires analysis and evaluation and the Task Force recommends the independent analysis and evaluation of these experiments by entities and researchers outside of the ABA. This may include the development of one or more ongoing entities to conduct research, share information, and regularly report on legal education. This research, among other things, should focus on what role increasing tuition -- along with other factors including financial aid, debt, and job prospects -- plays in students’ decisions to attend law school, not to attend, or to attend one school rather another. This research should also include special attention to diversity. The kind of research outlined here can provide a real-world meaning of affordability and what may be done to enhance it.

3. Outline of Recommendations Related to Proposed Resolutions

A. Proposed resolutions on debt counseling:

Encourage the Council of the ABA Section of Legal Education to mandate more than the minimum debt counseling now required by U.S. Department of Education regulation.

Encourage the development and publication of “plain English” disclosures about student loans and repayment options in a user-friendly format.

B. Proposed resolutions on data collection:

Encourage the ABA Section of Legal Education and Admissions to the Bar to make public the information on legal education it currently maintains and collects going forward (including the information below).

Encourage the ABA Section of Legal Education to return to annually collecting:

- Expenditure data for each law school;
- Revenue data for each law school; and
- Information on the amount and percentage of financial aid distributed by law schools based on need, merit, and a combination of both criteria.

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C. Proposed resolution on innovation:

The ABA Section of Legal Education and Admissions to the Bar should strongly encourage experimentation by law schools in finding new ways to balance sound curriculum, cost-effectiveness, and new revenue streams.

The ABA Section of Legal Education and Admissions to the Bar should strongly encourage schools to seek appropriate variances from the Council/Section when needed and that the Council/Section should give such requests serious and open-minded consideration.

The ABA Section of Legal Education and Admissions to the Bar should strongly encourage the independent analysis and evaluation of these experiments and this may include the development of one or more ongoing entities to research, share information, and regularly report on legal education.

If such research entities are established, they should pursue research on why students are or are not choosing to attend law school, with a special emphasis on diversity, to help assess the importance of cost, debt, tuition discounting, job prospects on those decisions, and with a special emphasis on diversity.

The Task Force’s findings and conclusions paint a sobering picture and much to the Task Force’s frustration offer no easy answers for the challenges facing legal education. Hopefully, the Task Force has added useful information to help focus and improve the discussion of issues at the heart of legal education’s and the legal profession’s future.

Respectfully submitted,

Dennis W. Archer, Chair
Task Force on the Financing of Legal Education
August 2015

C. Proposed resolution on innovation:

The ABA Section of Legal Education and Admissions to the Bar should strongly encourage experimentation by law schools in finding new ways to balance sound curriculum, cost-effectiveness, and new revenue streams.

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Respectfully submitted,

Dennis W. Archer, Chair
Task Force on the Financing of Legal Education
August 2015
1. Summary of Resolution(s).

The Task Force on the Financing of Legal Education offers five resolutions. In light of the complexities in the federal student loan program, the responsibilities students accept in borrowing for their education, and the amount of borrowing that students do to fund their legal educations the first two resolutions deal with loans and repayment programs. One encourages the Council of the Section of Legal Education and Admissions to the Bar to mandate -- through the ABA Standards for the Approval of Law Schools -- enhanced financial counseling for students (prospective and current). The other -- in the interest of fuller disclosure -- urges the development and dissemination of easily understood ("plain English") versions of the various loan and repayment programs. This is addressed to all participants in the student loan business and process, including law schools.

The second two resolutions deal with information gathering and dissemination relevant to the financing of legal education. They address the scarcity of needed information and serve the interests of transparency, accountability, and better understanding of the state of legal education and its challenges. One (the third of the five resolutions) simply encourages the Council of the Section of Legal Education and Admissions to the Bar to return to collecting expenditure, revenue, and financial aid data annually for each law school. This information was collected in the past. The other (the fourth of five resolutions) encourages the Council of the Section of Legal Education and Admissions to the Bar to make public, in an easily available spreadsheet format, the information on legal education it currently maintains and collects going forward.

The fifth and final resolution strongly encourages experimentation by law schools in finding innovative ways to balance sound curriculum, cost-effectiveness, and new revenue streams. Schools are the incubators of new directions and an exacting market proving ground.

2. Approval by Submitting Entity.

The Task Force approved the resolutions and report at its meeting on April 20 and a series of follow-up email exchanges.
3. Has this or a similar resolution been submitted to the House or Board previously?

No

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

There are two Association policies/positions related to the Task Force work. Neither would be affected by this Resolution. The first is ABA policy supporting the existing federal Public Service Loan Forgiveness Program, which has been in place for nearly a decade. The second is a resolution passed in February 2015 (Resolution 106) encouraging schools and bar associations to increase the amount of loan counseling and debt management services available to students and young lawyers. This Resolution is addressed to the Council of the Section of Legal Education and Admissions to the Bar and encourages it to adopt new Standards or additional language in the Standards to impose a greater obligation on law schools to provide these programs.

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 Task Force will forward its report to the Council of the Section of Legal Education and Admissions to the Bar and request an opportunity to appear before the Council to present the recommendations the Resolution makes that are relevant to the Council’s work.

The Task Force will publish and circulate the report widely and, through this effort, bring the recommendations in the resolution to the attention of law schools and participants in the student loan business, who are the other parties to whom the Resolution is addressed.

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

There are minimal costs, both direct and indirect, in following up on the recommendations made in the Resolution. There will be some staff time from those who work in the Section of Legal Education and Admissions to the Bar and in the Media and Communications group related to the distribution of the Task Force report. There is no plan to publish hard copies of the report. It will be available on the americanbar.org website and linked to in a number of places.
9. Disclosure of Interest. (If applicable)

Not applicable.

10. Referrals.

The report and Resolution will be referred to ABA Sections, Committee, Forums, and any other relevant group for comments and feedback. The report will be widely distributed to the press and groups/entities within the legal education community.

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.)

Dennis W. Archer
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500 Woodward Ave., Ste. 4000
Detroit, MI 48226-5403
Ph: (313) 223-3630 / (313) 683-6692
Email: darcher@dickinson-wright.com
EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

The Task Force on the Financing of Legal Education offers five resolutions. In light of the complexities in the federal student loan program, the responsibilities students accept in borrowing for their education, and the amount of borrowing that students do to fund their legal educations the first two resolutions deal with loans and repayment programs. One encourages the Council of the Section of Legal Education and Admissions to the Bar to mandate – through the ABA Standards for the Approval of Law Schools – enhanced financial counseling for students (prospective and current). The other – in the interest of fuller disclosure – urges the development and dissemination of easily understood (“plain English”) versions of the various loan and repayment programs. This is addressed to all participants in the student loan business and process, including law schools.

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The fifth and final resolution strongly encourages experimentation by law schools in finding innovative ways to balance sound curriculum, cost-effectiveness, and new revenue streams. Schools are the incubators of new directions and an exacting market proving ground.

2. Summary of the Issue that the Resolution Addresses

The Task Force on the Financing of Legal Education’s charge included a broad range of issues, key among them were: the cost of legal education for students; the financing of and business models for law schools; student loans and educational debt; and law school practices regarding tuition discounting, merit-based grants/scholarships, and need-based grants/scholarships. Dollars and cents are the clear focus of these issues and their connections to the current criticisms of and challenges facing legal education—both those from within legal education and those from without—are also clear.
3. Please Explain How the Proposed Policy Position will address the issue

The Resolution addresses three primary conclusions of the report: (1) for students, the report recommends increased and required counseling and education related to student debt for law school and plain English versions of complex documents to promote wise borrowing; (2) the lack of consistent and sufficient data to permit careful and in-depth study of the financing of law schools will be addressed by encouraging the collection of more data and the public reporting of data; and (3) the need for law schools to be more innovative in program changes and improvements related to the cost of legal education is addressed by encouraging schools to develop new programs and by encouraging the Council of the Section of Legal Education to be receptive to them.

4. Summary of Minority Views

There are two separate statements filed with the report from Task Force members. They generally agree with the recommendations of the report but offer some clarification and elaboration on some of the matters the report addresses.
1 RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish a privilege for confidential communications between a client and a lawyer referral service, ensuring that a client consulting a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer may refuse to disclose, or prevent the lawyer referral service from disclosing, those confidential communications.

2 RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish a privilege for confidential communications between a client and a lawyer referral service, ensuring that a client consulting a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer may refuse to disclose, or prevent the lawyer referral service from disclosing, those confidential communications.
I. Introduction

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish a privilege for confidential communications between a client and a lawyer referral service ("LRS") for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new LRS-client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients and should also protect other confidential client information relating to the representation, such as the identity of the client, which may not technically be privileged in many jurisdictions. Such a privilege should provide that a person who consults a LRS for the purpose of retaining a lawyer or obtaining legal advice may refuse to disclose the substance of that consultation and may prevent the lawyer referral service from disclosing that information as well. As with other privileges, the client contacting the LRS would have the authority to waive the LRS-client privilege, and each jurisdiction may wish to apply certain recognized exceptions to the attorney-client privilege and/or duty of confidentiality to this new privilege.

II. Background on Lawyer Referral Services

Lawyer referral services help connect people seeking legal advice or representation with attorneys who are qualified to assist the individual client with their specific legal needs. In addition to providing an important service to the public, LRSs provide an important service for attorneys by helping them to get new clients and grow their practices.

LRSs are usually non-profit organizations affiliated with a bar association, local or state. There are hundreds of these organizations nationwide, and they assist hundreds of thousands of clients every year. Some state governments and/or bar associations regulate and certify local LRSs, such as in California. In addition, the ABA offers its own accreditation to LRSs nationwide. While some LRSs are directed by attorneys, most of the staff who do “intake” (answering phone calls from clients or speaking with people who walk-in) are not attorneys and do not typically act under the direct supervision of attorneys.

The lawyer referral process begins when the client contacts the lawyer referral service, usually by phone or email, to explain a problem, and ends when the LRS either provides the client with contact information for one or more attorneys whose expertise is appropriate to the problem or directs the client to a legal services program, government agency, or other potential solution. In the course of this interaction, confidential information is often provided by the client to the LRS to ensure that the client is routed to the appropriate attorney or other service provider.

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1 “Client” as used throughout the Resolution and Report means a client of the lawyer referral service, not a client of a lawyer who may later represent the person contacting the lawyer referral service.
II. Background on the Attorney-Client Privilege and the Lawyer's Duty to Protect Client Confidentiality

The concepts of attorney-client privilege and lawyer confidentiality both concern information that the lawyer must keep private and are protective of the client’s ability to confide freely in his or her lawyer, but the concepts are not synonymous.\(^3\)

The attorney-client privilege protects any information communicated in a confidential conversation between a client and an attorney for the purpose of seeking or obtaining legal assistance, and it usually extends to communications between a prospective client and an attorney (even if the attorney is not ultimately retained). Originally established through the common law and now codified in many state rules of evidence, the attorney-client privilege allows the client and attorney to refuse to reveal such communications in a legal proceeding. The underlying purpose of the attorney-client privilege is to encourage clients to seek legal advice freely and to communicate candidly with lawyers, which, in turn, enables the clients to receive the most competent legal advice from fully-informed counsel. The privilege belongs to the client, not to the lawyer, and so the client is always free to waive the privilege.

On the other hand, the principle of confidentiality is set out in the legal ethics rules adopted by each state and other jurisdictions and in ABA Model Rule of Professional Conduct 1.6.\(^4\) These rules generally prohibit lawyers from revealing information relating to the representation of a client in the absence of the client’s informed consent, and violations of the rules may lead to disciplinary sanctions.

Although these concepts are closely related, the scope of the lawyer’s ethical duty of client confidentiality is somewhat broader than the scope of the attorney-client privilege. While the attorney-client privilege only protects confidential communications and information given for the purpose of obtaining legal representation or advice (i.e., privileged communications and information), the duty of confidentiality protects both privileged information and other non-privileged—but confidential—information relating to the representation, including such things as the identity of the client (which is only privileged in a minority of states). However, despite these and other subtle differences, both the attorney-client privilege and the ethical duty of client confidentiality contribute to the trust that is the hallmark of the confidential lawyer-client relationship.

\(^3\) Michmerhuizen, Sue, ABA Center for Professional Responsibility, "Confidentiality, Privilege: A Basic Value in Two Different Applications," May 2007, available online at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney_confidentiality_checklists.pdf

\(^4\) Id. See also ABA Model Rule of Professional Conduct 1.6 (“Confidentiality of Information”), 2015 Edition, and the related Comments, available online at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html
relationship and encourage the client to seek legal assistance and to communicate fully and frankly with the lawyer.4

Both the attorney-client privilege and the duty of confidentiality are sometimes subject to exceptions, such as when disclosure may be necessary to prevent death, substantial bodily harm, or substantial injury to the financial interests or property of someone, or when the communication with the lawyer was for the purpose of committing a crime or defrauding others (the so-called “crime-fraud” exception). These exceptions vary somewhat from state to state and can also vary between the privilege and the duty of confidentiality within each state.

IV. The Problem and the Solution

If a client reveals confidential information to a LRS in an effort to obtain legal advice or counsel, it is unclear under existing case law whether any statutory or common law privilege would protect that communication (except in California, which passed a statute creating such a privilege in 2013). As noted above, most LRS staff are not attorneys, nor are most of these staff directly supervised by attorneys. Moreover, the LRS client typically seeks to obtain a referral to an attorney, not legal advice or representation from the LRS itself. Thus, some courts may conclude that neither the attorney-client privilege nor the broader ethical duty of client confidentiality apply to communications between clients and LRSs (though it should be noted that we have found no published case where a court made a finding on this issue).

This is a problem for at least two reasons. First, it hampers communications between some clients and LRSs, making it difficult for the LRS to gather the information necessary to make a referral to the appropriate lawyer. Clients sometimes ask LRSs whether their communications are privileged, and in most states, the current answer is “we don’t know, but the communications may not be protected.” It is crucial that clients feel comfortable sharing as much information as possible with a LRS in order to facilitate a referral to the best possible attorney (or agency) for their particular legal issue. Second, in a number of instances, litigants have sought discovery from a LRS with respect to confidential communications with a client, and it is likely this will continue to occur.

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation establishing a new privilege for confidential communications between a client and a LRS in order to eliminate any uncertainty as to the privileged status of such communications from a client seeking legal counsel. It would enable LRSs to reassure clients and thereby maintain the kind of honest and open communication required to make a good referral. It would also eliminate the possibility that an opposing lawyer might attempt to subpoena documents and/or seek testimony from a LRS concerning its confidential communications with the other party.

It should also be noted that the ABA previously expressed support for the goals and substance of this proposal in August 1993 when it adopted the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information

4 See ABA Model Rule 1.6, Comments 2 and 3.
Service Quality Assurance Act. Rule XIV of the Model Supreme Court Rules and Section 6 of the Model Act both state that:

“A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.”

In addition, the Commentary to Rule XIV and Section 6 both state that “since a client discloses information to a lawyer referral service for the sole purpose of seeking the assistance of a lawyer, the client's communication for that purpose should be protected by lawyer-client privilege.”

The ABA also adopted related policy in February 2001 stating that confidential client information held by legal aid and other similar programs should remain privileged and confidential and should not be provided to funding sources absent client consent. In particular, ABA Resolution 8A states in pertinent part that:

“...a funding source should not have access to records which contain information protected by the attorney-client privilege, or by ethical provisions prohibiting the disclosure of confidential information obtained by a client, or by statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the funding source.”

Since the ABA Model Supreme Court Rules and the ABA Model Act urging that LRS-client communications be accorded privileged status were adopted in August 1993, however, only one state (California) has taken action on this issue. Therefore, it is time for the ABA to revise and aggressively implement the substance of its existing policy by adopting the proposed resolution urging courts and legislatures to adopt rules or enact legislation establishing a new privilege for confidential communications between a client and a LRS for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.

Respectfully Submitted,

C. Elisia Frazier, Chair
Standing Committee on Lawyer Referral and Information Service
August 2015

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GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Lawyer Referral and Information Service

Submitted By: C. Elisia Frazier, Chair

1. **Summary of Resolution(s).** This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new privilege for confidential communications between a client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new LRS-client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients and should also protect other confidential client information relating to the representation, such as the identity of the client, which may not technically be privileged in many jurisdictions.

2. **Approval by Submitting Entity.** Standing Committee on Lawyer Referral Services, by email on April 17, 2015

3. **Has this or a similar resolution been submitted to the House or Board previously?** A similar principle was incorporated into the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Quality Assurance Act, previously adopted by the ABA House of Delegates as policy in August 1993 (See ABA Resolution 10D). However, while Resolution 10D urged state supreme courts and legislatures to apply the attorney-client privilege to confidential communications between clients and lawyer referral services, the proposed resolution would urge federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation establishing a new privilege for confidential communications between clients and lawyer referral services.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** This resolution is generally consistent with and would implement the substance of ABA Resolution 10D adopted in August 1993, which adopts Rule XIV of the ABA Model Supreme Court Rules Governing Lawyer Referral Services and Section 6 of the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Both Rule XIV and Section 6 provide as follows:

   "A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication."

   **Commentary**

   Since a client discloses information to a lawyer referral service for the sole purpose of seeking the assistance of a lawyer, the client's communication for that purpose should be protected by lawyer-client privilege.

   In addition, the proposed resolution is generally consistent with ABA Resolution 8A, adopted in February 2001, which urges that confidential client information held by legal...
aid and other similar programs should remain privileged and confidential and should not be provided to funding sources absent express client consent. ABA Resolution 8A states in pertinent part that:

“...a funding source should not have access to records which contain information protected by the attorney-client privilege, or by ethical provisions prohibiting the disclosure of confidential information obtained by a client, or by statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the funding source.

Furthermore, because the proposed resolution would call for the establishment of a new lawyer referral service-client privilege that is similar to the attorney-client privilege, the resolution is also generally consistent with ABA Resolution 111, adopted in August 2005, which supports the preservation of the attorney-client privilege as essential to maintaining the confidential relationship between client and lawyer required to encourage clients to discuss their legal matters freely and candidly with their counsel.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? This is not a late report, but there is urgency for House action nonetheless. Lawyer referral services get questions from clients about this issue on a regular basis, such as, “Before I tell you about my case, is this conversation privileged and confidential?” Lawyer referral services need to maintain the confidentiality of specific details and protect the confidentiality of the communication between a client and a lawyer referral service in order to reassure such clients and facilitate the kind of open communication required to make the right referral to the right lawyer. Without such a specific privilege, litigants will continue to seek inappropriate discovery of these confidential communications between clients and lawyer referral services.


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Lawyer referral services and their respective state and local bars around the country would hopefully urge their respective state supreme courts and legislatures to adopt rules or pass laws recognizing this privilege. In addition, the ABA’s sponsoring entities, in coordination with the ABA’s Governmental Affairs Office and the ABA Center for Professional Responsibility, would urge the federal courts and Congress to approve similar rules and legislation at the federal level.

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

9. Disclosure of Interest. (If applicable) None

10. Referrals. None
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

C. Elisia Frazier  
114 Grand View Drive  
Pooler, GA 31322-4042  
Cef1938@hargray.com  
912-450-3695

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

C. Elisia Frazier  
114 Grand View Drive  
Pooler, GA 31322-4042  
Cef1938@hargray.com  
912-450-3695
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new privilege for confidential communications between a client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new LRS-client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients and should also protect other confidential client information relating to the representation, such as the identity of the client, which may not technically be privileged in many jurisdictions.

2. Summary of the Issue that the Resolution Addresses

Lawyer referral services provide a public service in helping clients to find legal representation (and attorneys find clients). In order to provide this service, lawyer referral services must first obtain information from each client about their case or issue, to ensure that they are referred to the appropriate attorney for their specific legal needs. In most states, it is unclear under existing case law whether any statutory or common law privilege would protect these confidential communications between a client and a lawyer referral service, meaning that they are potentially subject to compelled discovery and disclosure. Lawyer referral services are regularly questioned by clients about this issue, and most are unable to reassure clients that their communications are clearly privileged. This can hamper the kind of open communication required to make the right referral. Moreover, in a number of instances, litigants have sought discovery into such communications.

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

This resolution would urge federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new privilege for confidential communications between a client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It would enable lawyer referral services to reassure their clients and thereby maintain the kind of open communications required to make a good referral. It would also eliminate, or at least minimize, the risk that an opposing lawyer might subpoena documents or seek testimony from a lawyer referral service concerning its confidential communications with the other party.

3. Summary of Minority Views

None as of this writing.
RESOLUTION

RESOLVED, That the American Bar Association recognizes that lesbian, gay, bisexual, transgender, and queer (LGBTQ) people have the right to be free from attempts to change their sexual orientation or gender identity;

FURTHER RESOLVED, That the American Bar Association urges all federal, state, local, territorial and tribal governments to enact laws that prohibit state-licensed professionals from using conversion therapy on minors; and

FURTHER RESOLVED, That the American Bar Association urges all federal, state, local, territorial and tribal governments to protect minors, particularly minors in their care, from being subjected to conversion therapy by state-licensed professionals.
The American Bar Association ("ABA") has a long history of advocating for the rights of those discriminated against on the basis of race, gender, national origin, disability, age, sexual orientation, and gender identity/expression. The ABA has been a leader in opposing and eradicating bigotry and prejudice against LGBTQ people. It has adopted policies urging the repeal of laws that criminalize private, consensual sexual conduct between consenting adults (1973); condemning hate crimes, including those based on sexual orientation, and urging prosecution of the perpetrators (1987); and calling on the governments of countries with discriminatory laws, regulations, and practices to repeal them and ensure the safety and equal protection under law of all LGBTQ people (2014).

I. Conversion Therapy Causes Serious Harms to LGBTQ People and Especially to LGBTQ Children and Youth

A. The Practices of Conversion Therapy

The practices used in conversion therapy are sometimes referred to as reparative therapy, ex-gay therapy, or sexual orientation change efforts ("SOCE"). In the past, some mental health professionals resorted to extreme measures such as forced institutionalization, forced medication, castration, and electroconvulsive shock therapy to try to stop people from being LGBTQ.

According to a 2009 report of the American Psychological Association (the "APA"), the techniques therapists have used to try to change sexual orientation and gender identity include inducing nausea, vomiting, or paralysis while showing the patient homoerotic images; providing electric shocks; having the individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts; using shame to create aversion to same-sex attractions; orgasmic reconditioning; and satiation therapy.

Other techniques have included trying to make patients' behavior more stereotypically feminine or masculine, teaching heterosexual dating skills, and using hypnosis to try to redirect desires and arousal—all based on the scientifically discredited premise that being LGBTQ is a psychological defect or a disorder that calls for eradication. The current practice guidelines for the National Association for Research & Therapy of Homosexuality (NARTH), which is a group of therapists who endorse and practice conversion therapy in the United States, encourage its use.

1 The term "LGBTQ" refers to lesbian, gay, bisexual, transgender, and queer individuals. "Queer" is an umbrella term sometimes used by LGBTQ people to refer to the entire LGBTQ community; genderqueer.


4 See id.; see generally Timothy F. Murphy, Redirecting Sexual Orientation: Techniques and Justifications, 29 J. Sex Research 301 (1992).

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members to consider techniques that include hypnosis, behavior and cognitive therapies, sex therapies, and psychotropic medication, among others.\textsuperscript{5}

Today, while some counselors still use aversive conditioning, the techniques most commonly used include a variety of behavioral, cognitive, psychoanalytic, and other practices that try to change or reduce same-sex attraction or alter a person’s gender identity. These methods are as equally devoid of scientific validity as the techniques relied upon in the past and pose similarly serious dangers to patients—especially to minors, who are often forced or coerced into undergoing them by their parents or legal guardians, and who are at especially high risk of being harmed. The use of conversion therapy on children and adolescents poses particular ethical problems because minors cannot effectively refuse or resist treatment wanted by their parents or other authorities.

B. Medical and Child Welfare Experts Have Condemned Conversion Therapy as Ineffective, Unsafe, and Completely Out-of-Step with the Current Scientific Understanding of Sexual Orientation and Gender Identity

The nation’s leading medical and mental health organizations have concluded that attempts to change a person’s sexual orientation or gender identity lack any scientific basis and present significant risks of physical and mental harm to patients who undergo them. For example, the APA has warned that sexual orientation change efforts can pose critical health risks, including “confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, [and] suicidality,” among other negative consequences.\textsuperscript{6} In particular, the APA determined that “[t]he potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior.”\textsuperscript{7} And the American Academy of Child and Adolescent Psychiatry found that “there is no evidence that sexual orientation can be altered through therapy,” and that “there is no medically valid basis for attempting to prevent homosexuality, which is not an illness.”\textsuperscript{8}

Other professional organizations with similar policy statements include the American Academy of Pediatrics, American Association for Marriage and Family Therapy, American Counseling Association, American Medical Association, American Psychiatric Association, American Psychological Association, American School Counselor Association, American School Health Association, National Association of Social Workers, and the Pan American Health Organization (a regional office of the World Health Organization). These organizations have stated that sexual orientation change efforts (1) are unnecessary and offer no therapeutic benefit because they

\textsuperscript{4} Glassgold et al., supra note 3, at 50.

\textsuperscript{6} Glassgold et al., supra note 5, at 50.
attempt to “cure” something that is not an illness and requires no treatment, (2) are contrary to the modern scientific understanding of sexual orientation, (3) are ineffective, and (4) carry a risk of serious harm to patients.9

Many survivors report that the conversion therapy was ineffective and succeed only in causing them great pain and anxiety. For example, one man who underwent sexual orientation change efforts beginning when he was six years old because his parents were concerned that he was “too feminine” explains that he “was made to feel by doctors that there was something wrong with him” and “was made to feel shame and engage in a fruitless labor that left him sad and broken.”10 Another survivor reports that his experiences with conversion therapy as a teenager drove him “to the brink of suicide” and led to “depression, periods of homelessness, and drug abuse.”11

Saddly, other young people who have undergone conversion therapy have not survived. The recent death by suicide of Leelah Alcorn, a transgender teenage girl who was forced to undergo conversion therapy by her parents, further underscores the urgent need to protect LGBTQ youth from these dangerous and discredited practices.12 Statutory prohibitions on conversion therapy protect young people like her from being subjected to these harmful practices and protect families from the terrible pain of discovering that they have been defrauded and


11 Id.


attempt to “cure” something that is not an illness and requires no treatment, (2) are contrary to the modern scientific understanding of sexual orientation, (3) are ineffective, and (4) carry a risk of serious harm to patients.9

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mislead by licensed therapists who abuse their state licenses to harm vulnerable families and children.

C. Conversion Therapy Is Particularly Dangerous for Minors

Conversion therapy constitutes a particularly grave health risk for LGBTQ youth. As documented by Dr. Caitlin Ryan’s research through the Family Acceptance Project, conversion therapy often occurs within the context of other rejecting behaviors and attitudes within the family. As Ryan explains, “[g]parents who reject their LGBT children are typically motivated by trying to help, not hurt them,” which makes parents vulnerable to false and misleading claims by therapists that treatment can change a child’s sexual orientation or gender identity. Ryan’s research found that “[m]any families respond to their LGBT and gender diverse children by isolating them, preventing access to support, sending them to clergy and providers to try to change their LGBT identity and using religion to condemn or deny their LGBT identity.” Parents are “often surprised and even shocked to learn that their gay children experience these reactions as rejection and abuse.” This is an enormous source of familial conflict, and puts children at risk of psychological stress, loss of hope, depression, and poor self-esteem.

Family conflict over a youth’s sexual orientation and gender identity places youth at high risk of serious, long-term negative impacts on their health and well-being. As documented by Ryan and others, there is a strong correlation between family acceptance and lasting positive impacts on a young person’s health and well-being. Conversely, LGBTQ youth who are rejected by their families because of their sexual orientation or gender expression/identity are at a dramatically increased risk of significant negative health outcomes, including serious depression, substance abuse, HIV infection, and suicide attempts.

See Wilber, supra note 12.


See Ryan & Rees, supra note 14.


id

Rees & Ryan, supra note 14, at 8.

id at 9.

Caitlin Ryan et al., Family Rejection as a Predictor of Negative Health Outcomes in White and Latina/Latino, Gay, and Bisexual Young Adults, J. of Am. Acad. of Pediatrics 346, 350-51 (2009).
According to Ryan’s research, gay, lesbian, and bisexual young adults who experienced high levels of family rejection in adolescence based on their sexual orientation—of which conversion therapy is one form—are 8.4 times more likely to report having attempted suicide and 5.9 times more likely to report high levels of depression than peers from families reporting no or low levels of rejection.21 Transgender youth are at even higher risk of depression and suicide attempts—45% of transgender people between the ages of 18 and 24 report at least one suicide attempt—and exposure to conversion therapy only heightens suicidality.22

Moreover, while family acceptance of LGBTQ youth is increasing, the younger age at which youth are identifying at LGBTQ has created a heightened window of vulnerability, exposing more children to the risk of family rejection at earlier ages. In its 2006 study, the National Gay and Lesbian Task Force reported that 50% of gay teens experienced a negative reaction from their parents when they came out.23 Notably, in its 2009 investigation of conversion therapies, the APA noted that it undertook that study in part based upon “concerns about the resurgence of individuals and organizations that actively promoted the idea of homosexuality as a deviant, defective or a spiritual and moral failing and that advocated psychotherapy and religious ministry to alter homosexual feelings and behavior.”24

Family rejection is also a significant factor leading to homelessness and entrance into the child welfare and juvenile justice systems, where LGBTQ youth are at risk of being subjected to efforts to change their sexual orientation or gender identity.25 According to one study, 26% of LGBTQ teens were kicked out of their homes when they disclosed their sexual orientation to their parents.26 This contributes to an epidemic of homelessness among this population. According to the United States Interagency Council on Homelessness, an estimated 20-40% of homeless youth are LGBTQ, more than double the number of LGBTQ people in the general population.27

21 Id.

22 Jaime M. Grant et al., National Transgender Discrimination Survey (2011).


27 Id.
Similarly, LGBTQ youth are also dramatically overrepresented in the juvenile justice system and those who enter the juvenile justice system are “twice as likely to have experienced family conflict, child abuse, and homelessness as other youth.”

In addition to being at heightened risk of ending up in the child welfare and juvenile justice systems, LGBTQ youth are at heightened risk of being subjected to attempts—both by therapists and others—within those systems. Community organizations and state agencies designed to assist youth who have been rejected by their families are often not trained to provide culturally competent care and assistance to LGBTQ youth. As the Center for American Progress documented in its 2012 report, programs such as “foster care [placements], health centers, and other youth-serving institutions” are often ill-prepared or unsafe for gay and transgender youth due to institutional prejudice, lack of provider and foster-parent training, and discrimination against gay and transgender youth by adults and peers.29 While no hard data exists, many juvenile justice advocates and youth who have been in the juvenile justice system report that LGBTQ youth are often pressured to change their sexual orientation or gender identity, including by judges, therapists, and other staff.30

II. Legal Protections from Conversion Therapy

Despite being overwhelmingly rejected by the medical community, currently only three jurisdictions in the United States protect families from mental health professionals—licensed and authorized to practice by the state—engaging in efforts to change a young person’s sexual orientation or gender identity.31

In 2012, California became the first state to prohibit state-licensed mental health professionals from practicing conversion therapy on minors.32 New Jersey followed in 2013.33 Most recently in 2014, the District of Columbia became the third jurisdiction to pass such a law. The D.C. Council approved the bill unanimously on December 2, 2014, and Mayor Vincent Gray signed the bill into law on December 22, 2014.34 These laws prohibit state-licensed therapists from


Id.


D.C. Code §§ 7-1231.02(25A), 7-1231.14a, see also Conversion Therapy for Minors Prohibition Amendment Act of 2013, D.C. Act 20-530 (2014).

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engaging in scientifically discredited and dangerous practices that try to change a young person’s sexual orientation or gender identity.

The prohibitions in California, the District of Columbia, and New Jersey describe the practice of conversion therapy as “sexual orientation change efforts” (SOCE), which is the scientific term used by the American Psychological Association and other groups that have warned patients about these dangerous practices. These laws provide that state-licensed mental health providers may not engage in sexual orientation change efforts with a patient under the age of eighteen.

The legal definition of SOCE encompassed by these bills includes any practices by mental health providers that seek to change an individual’s sexual orientation or gender identity. This includes efforts to change behaviors or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex. The laws also state that SOCE do not include therapies that provide acceptance, support, and understanding of clients or the facilitation of clients’ coping, social support, and identity exploration and development, including sexual orientation-neutral efforts to prevent or address unlawful conduct or unsafe sexual practices. They specifically exempt therapy designed to aid a person in a transition from one gender to another.

III. Litigation Involving Conversion Therapy

A. Litigation Defending Laws Protecting Minors from Conversion Therapy

Two federal courts of appeals have upheld state laws prohibiting licensed mental health professionals from subjecting minor patients to conversion therapy against challenges arguing that such laws violate the First Amendment or the right of parents to control their children’s upbringing. These courts have concluded that these statutes are a valid exercise of the state’s power to regulate the medical profession and to protect public health and safety. Comparable to other laws that protect the public against ineffective and unsafe treatment by licensed professionals, these laws ensure that state-licensed mental health providers cannot subject minor patients to dangerous, ineffective, and discredited practices. Further, they ensure that those providers cannot defraud and mislead vulnerable parents—who count on the law to regulate medical professionals—into unknowingly placing their children at risk of such serious harms. These state statutes are grounded in existing state licensing protocols and administrative mechanisms that regulate licensed mental health professionals.

i. Pickup v. Brown: Upholding California SB 1172

State and federal courts have upheld prohibitions against conversion therapy and allowed state regulation of its practitioners. In Pickup v. Brown, the Ninth Circuit upheld a California law prohibiting licensed mental health practitioners from providing conversion therapy to children under the age of eighteen. The law was supported by a large and diverse group of prominent mental health professional organizations and social services providers, including the California Psychological Association, the California Division of the American Association for Marriage


and Family Therapy, the National Association of Social Workers, and others. Nevertheless, a small group of therapists and parents wishing to provide conversion therapy to their minor patients and children challenged the law.

In response to constitutional claims raised by the challengers, the Ninth Circuit found that “[p]ursuant to its police power, California has authority to regulate licensed mental health providers’ administration of therapies that the legislature has deemed harmful.” Because the California prohibition regulated treatment, not protected speech, and the legislature had determined, based upon the overwhelming consensus of medical authority, that conversion therapy is ineffective and unsafe, the state had the authority to prevent licensed therapists from using the practice on minor children.

ii. King v. Christie: Upholding New Jersey AB 3371

The Third Circuit came to similar conclusions in King v. Christie, upholding a New Jersey law that prohibited state-licensed therapists from trying to change the sexual orientation or gender identity of minor patients. The court upheld New Jersey’s prohibition on conversion therapy as a permissible restriction on professional speech. The court found that mental health providers’ communications with their patients in the course of providing treatment constituted professional speech, and that restrictions on that speech trigger intermediate scrutiny under the First Amendment. The court ruled that New Jersey’s prohibition on this type of professional speech easily passed review under intermediate scrutiny because it is not too far a leap in logic to conclude that a minor client might suffer psychological harm if repeatedly told by an authority figure that her sexual orientation—a fundamental aspect of her identity—is an undesirable condition. Further, if [conversion therapy] counseling is ineffective—which, as we have explained, is supported by substantial evidence—it would not be unreasonable for a legislative body to conclude that a minor would blame herself if her counselor’s efforts failed.

Given the “substantial evidence” of harm presented to state legislators, the court found that their concern about conversion therapy—and thus, the regulation—was valid.

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37 Pickup, 740 F.3d at 1229.
38 Id.
39 King v. Christie, 767 F.3d 216 (3d Cir. 2014).
40 Id. at 233.
41 Id. at 239.
42 Id.
B. Affirmative Litigation

In early 2015, a New Jersey Superior Court concluded that "any expert opinion based on the initial premise that homosexuality is a mental disorder or abnormal is unreliable and . . . barred." The lawsuit charged that a pre-conversion therapy organization, Jews Offering New Alternatives for Healing ("JONAH"), its founder, and a counselor violated New Jersey's Consumer Fraud Act by claiming that their counseling services could cure clients of being gay. The court excluded experts from testifying that homosexuality is a disorder, finding that "the generally accepted scientific theory is that homosexuality is not a mental disorder and not abnormal" given the removal of homosexuality from the Diagnostic and Statistical Manual of Mental Disorders ("DSM") and the "countless organizations [that] have followed the [American Psychiatric Association]s' lead in removing homosexuality from its listings of mental disorders." The court went on to rule that professional claims that being LGBTQ is a curable mental disorder constitute consumer fraud.

C. Criminal Cases

Criminal charges have been brought in some cases where the mistreatment conversion therapy survivors have experienced rises to the level of criminal conduct.

i. Jeff White

Criminal charges are pending in cases of alleged sexual abuse by practitioners of conversion therapy, such as a case involving allegations by Jeff White against his former school, the Bethel Baptist School in Walls, Mississippi. White's parents sent their son to Bethel Baptist because the school claimed that they could cure their son of his homosexuality. White, now an adult, says that one of his teachers would regularly schedule "appointments" with White each Wednesday in his classroom or an office and would force him to have oral or anal sex because of his sexual orientation. "He would rape me because I was gay and because it would make me hate men and make me change," White said. White endured this abuse from 1996 to 1999. White is now the executive director of the Mississippi Gulf Coast Rainbow Center, the first LGBTQ center in the state.

44 Id. at 23, 26.
47 Id.
48 Id.
49 Id.
50 Id.
In December 2014, a grand jury indicted five members of a church in Spindale, North Carolina for felony charges related to the attack and beating of a fellow church member, Matthew Fenner, who identifies as gay.35 The charges result from at least three instances where church members attacked Fenner in attempts to change his sexual orientation.33 In a January 2013 incident, Fenner was threatened with confinement for two days, slapped, strangled and verbally assaulted to “free” him from “homosexual demons.”32 Fenner said that as many as fifteen to twenty college-age men assaulted him, screaming and shaking him, punching his chest and grabbing his head while telling him to repeat certain phrases.32 “I honestly thought I was going to die,” said Fenner.32 “My head was like being flung back, my vision was going brown and black, I couldn’t breathe and I’m sitting here thinking if I don’t get out of this, I’m probably going to die.”35

The church, the Word of Faith Fellowship (WOFE), has faced numerous accusations of abuse and cult-like behavior over three decades, including other allegations of abusive attempts at conversion therapy that spurred a Department of Justice hate crime investigation in 2012.36

In sum, the trend of litigation in this area underscores how discredited the practice of conversion therapy has become. Federal and state courts and law enforcement agencies now acknowledge that conversion therapy on minors can be regulated as a harmful practice by state governments, that false claims that a person’s sexual orientation or gender identity can be changed are actionable under state consumer protection laws, and that in some instances extreme efforts to change a person’s sexual orientation or gender identity can constitute criminal conduct.

IV. Conclusion

The purpose of this resolution is to put the American Bar Association on record as recognizing the basic right of LGBTQ people to be free from harmful and ineffective “treatments” to change the core of who they are. It calls on lawyers to take action to protect LGBTQ people from these dangerous and discredited practices through legislation, litigation, and diplomacy and to support those engaging in these efforts. Before we can be truly equal, the very right of LGBTQ people to exist must be made law.


35 Schlatter, supra note 50.

36 Id.


38 Id.

39 Schlatter, supra n. 62.
Respectfully submitted,
Jim Holmes, Chair
ABA Commission on Sexual Orientation and Gender Identity
August 2015
GENERAL INFORMATION FORM

Submitting Entity: ABA Sexual Orientation and Gender Identity Commission ("SOGI")

Submitted By: Jim Holmes, Chair, SOGI

1. Summary of Resolution(s). The proposed Resolution is to put the American Bar Association on record as recognizing that lesbian, gay, bisexual, transgender, and queer (LGBTQ) people have the right be free from attempts to change their sexual orientation or gender identity, which have been condemned as ineffective and harmful by every major medical and mental health association in the country. Moreover, it would also put the ABA on record as supporting the safety, development, and affirmation of all LGBTQ young people, which furthers the ABA’s goals of promoting the human rights protections for all persons, irrespective of who they are or who they love. Finally, it would put the ABA on record as urging all federal, state, territorial, and local legislative bodies and governmental agencies to enact laws protecting minors from being forced or coerced into conversion therapy at the hands of state-licensed mental health professionals.

2. Approval by Submitting Entities. The Commission on Sexual Orientation and Gender Identity vote to support this recommendation and resolution on April 14, 2015 via teleconference.

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? Previously, the ABA recognized through its 2014 Resolution that LGBTQ people have a human right to be free from discrimination, threats, and violence based on their LGBT status. Through this 2014 Resolution, the ABA condemned all laws, regulations, rules, or practices that discriminate individuals on the basis of LGBT identity. Moreover, the ABA’s 2014 Resolution urged the governments of other nation-states to repeal any discriminatory laws, rules, regulations, or practices prejudicial to LGBT individuals or denied LGBT people the safety and equal protection of the law.

This 2015 Resolution therefore buttresses the goals and initiatives of the ABA’s 2014 Resolution because conversion therapy denigrates the psychological well-being and personal dignity of LGBTQ people. Conversion therapy falsely purports to claim that there is something fundamental pathological, deviant, and abhorrent about being LGBT. Modern science firmly recognizes that being LGBT is not a mental disorder. This 2015 Resolution, asking the ABA to denounce conversion therapy, therefore supports the ABA’s prior efforts aimed at eradicating discrimination, prejudice, and violence directed at LGBT people.

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

Resolution H.Con.Res. 36 was introduced in the U.S. House on April 14, 2015. The Resolution Expresses the sense of Congress that conversion therapy, including efforts by mental health practitioners to change an individual’s sexual orientation, gender identity, or gender expression, is dangerous and harmful and should be prohibited from being practiced on minors. The Resolution was assigned to the House Energy and Commerce Committee.

H.R. 2450: was introduced by Rep. Ted Lieu (DCA) in the U.S. House on May 19, 2015. The bill would prohibit, as an unfair and deceptive act or practice, commercial sexual orientation conversion therapy.

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 advocacy organizations across the United States to promote the foundational goal that all LGBTQ people deserve to be free from the coercive practices and pressures of conversion therapy. The approval of this recommendation and resolution will greatly enhance the ABA’s ability to educate the public about the dangerous and discredited practices of conversion therapy. In particular, the ABA will be able to increase its influence on the legal profession across the United States, underscoring the importance of sexual and gender equality and justice for all individuals.

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 and reviewing reports on conversion therapy, meetings with lawyers, advocates, and policymakers from LGBT legal advocacy organizations to develop and implement comprehensive training materials about the dangers of conversion therapy, and disseminating this literature to interested individuals and groups.

9. Disclosure of Interest. (If applicable) There are no conflicts of interest.

10. Referrals. This recommendation and resolution is in the process of being referred to all Sections and Divisions.
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The proposed Resolution is to put the American Bar Association on record as recognizing that lesbian, gay, bisexual, transgender, and queer (LGBTQ) people have the right be free from attempts to change their sexual orientation or gender identity, which have been condemned as ineffective and harmful by every major medical and mental health association in the country, and as supporting legislation, regulation, and litigation to bring an end to conversion therapy, including laws protecting minors from being subjected to conversion therapy by state-licensed mental health professionals.

2. Summary of the Issue that the Resolution Addresses

This proposed Resolution addresses the discredited and dangerous practice of conversion therapy, which exposes LGBTQ people to harmful, unethical, and fraudulent attempts to pathologize their sexual and gender identities. These practices are especially dangerous for LGBTQ youth, who experience them as family rejection. LGBTQ youth who are subjected to conversion therapy are at high risk of serious, lasting harms, including depression, substance abuse, and suicide attempts.

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

The proposed Resolution would put the ABA on record as: supporting the efforts of lawmakers and policy makers to protect LGBTQ people from conversion therapy through appropriate laws and regulations; supporting the efforts of attorneys, legal organizations, and prosecutors to bring appropriate tort, consumer protection, and criminal cases to vindicate the rights of those harmed by these practices; and supporting the efforts of the United States to put an end to conversion therapy through legislation, agency action, and diplomacy.

4. Summary of Minority Views

Not aware of any minority views at this time.
RESOLVED, That the American Bar Association adopts and urges prompt implementation by
the Administration, Congress, state governments, and tribal governments of the following
recommendations contained in the November 2014 report of the U.S. Attorney General’s
Advisory Committee on American Indian/Alaska Native (AI/AN) Children Exposed to Violence,
etitled Ending Violence so Children Can Thrive (Ending Violence Report):

1.3 Congress should restore the inherent authority of American Indian and Alaska Native
(AI/AN) tribes to assert full criminal jurisdiction over all persons who commit crimes
against AI/AN children in Indian country.

1.4 Congress and the executive branch shall direct sufficient funds to AI/AN tribes to bring
funding for tribal criminal and civil justice systems and tribal child protection systems
into parity with the rest of the United States and shall remove the barriers that currently
impede the ability of AI/AN Nations to effectively address violence in their communities.
The Advisory Committee believes that treaties, existing law and trust responsibilities are
not discretionary and demand this action.

2.1 The legislative and executive branches of the federal government should ensure Indian
Child Welfare Act (ICWA) compliance and encourage tribal-state ICWA collaborations.

3.1 The White House Native American Affairs Office and executive branch agencies that are
responsible for addressing the needs of AI/AN children, in consultation with tribes,
should develop a strategy to braid (integrate) flexible funding to allow tribes to create
comprehensive violence prevention, intervention, and treatment programs to serve the
distinct needs of AI/AN children and families.

4.1 Congress should authorize additional and adequate funding for tribal juvenile justice
programs, a grossly underfunded area, in the form of block grants and self-governance
compacts that would support the restructuring and maintenance of tribal juvenile justice
systems.
4.2 Federal, state, and private funding and technical assistance should be provided to tribes to develop or revise trauma-informed, culturally specific tribal codes to improve tribal juvenile justice systems.

4.3 Federal, tribal, and state justice systems should provide publicly funded legal representation to AI/AN children in the juvenile justice systems to protect their rights and minimize the harm that the juvenile justice system may cause them. The use of technology such as videoconferencing could make such representation available even in remote areas.

4.4 Federal, tribal, and state justice systems should only use detention of AI/AN youth when the youth is a danger to themselves or the community. It should be close to the child’s community and provide trauma-informed, culturally appropriate, and individually tailored services, including reentry services. Alternatives to detention such as “safe houses” should be significantly developed in AI/AN urban and rural communities.

4.5 Federal, tribal, and state justice systems and service providers should make culturally appropriate trauma-informed screening, assessment, and care the standard in juvenile justice systems. The Indian Health Service (IHS) in the Department of Health and Human Services (HHS) and tribal and urban Indian behavioral health service providers must receive periodic training in culturally adapted trauma-informed interventions and cultural competency to provide appropriate services to AI/AN children and their families.

4.6 Congress should amend the Indian Child Welfare Act (ICWA) to provide that when a state court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in state delinquency proceedings, ICWA should be amended to require notice to the tribe and a right to intervene. As a first step, the Department of Justice (DOJ) should establish a demonstration pilot project that would provide funding for three states to provide ICWA-type notification to tribes within their state whenever the state court initiates a delinquency proceeding against a child from that tribe which includes a plan to evaluate the results with an eye toward scaling it up for all AI/AN communities.

4.7 Congress should amend the Federal Education Rights and Privacy Act (FERPA) to allow tribes to access their members’ school attendance, performance, and disciplinary records.

5.2 The Department of Justice (DOJ) and the Department of Interior (DOI) should provide recurring base funding for Alaska Tribes to develop and sustain both civil and criminal tribal court systems, assist in the provision of law enforcement and related services, and assist with intergovernmental agreements.

5.3 The state of Alaska should prioritize law enforcement responses and related resources for Alaska Tribes, and recognize and collaborate with Alaska tribal courts.
The Administration for Child and Families (ACF) in the Department of Health and Human Services (HHS) and the State of Alaska Office of Children’s Services (OCS) should jointly respond to the extreme disproportionality of Alaska Native children in foster care by establishing a time-limited, outcome-focused task force to develop real-time, Native inclusive strategies to reduce disproportionality.

The Department of Interior (DOI) and the State of Alaska should empower Alaska Tribes to manage their own subsistence hunting and fishing rights, remove the current barriers, and provide Alaska Tribes with the resources needed to effectively manage their own subsistence hunting and fishing.

FURTHER RESOLVED, That the American Bar Association urges governmental entities, law schools, bar associations, and legal service providers to develop training which educates the legal profession on the issues and recommendations contained in the *Ending Violence So Children Can Thrive* Report, and to help promote the practices adopted above.
REPORT

I. Introduction: Building Upon Current ABA Policy

Every single day, a majority of American Indian and Alaska Native (AI/AN) children are exposed to violence. This exposure not only contradicts traditional understanding that children are to be protected and viewed as sacred, but it leaves hundreds of children traumatized and struggling to cope over the course of their lifetime.1

In 2011, the U.S. Department of Justice (“DOJ”) commissioned the U.S. Attorney General’s National Task Force on Children Exposed to Violence. Their December 2012 Defending Childhood Report provided fifty-six recommendations for how best to improve our current justice and social service systems to serve children who have been exposed to any sort of violence or trauma. The American Bar Association (“ABA”) adopted all fifty-six recommendations as ABA policy in 2013.2

While the Defending Childhood Report made recommendations for systemic change across federal, state, tribal and territorial systems that serve youth, recommendation 1.2 called for a distinct federal task force to examine the needs of American Indian/Alaska Native (AI/AN) children exposed to violence.

American Indian/Alaska Native (AI/AN) children have an exceptional degree of unmet needs for services and support to prevent and respond to the extreme levels of violence they experience. Although this task force could not adequately address the complexity of the issue, it recognizes the urgent need for further attention.3

The Attorney General’s Task Force on American Indian and Alaska Native Children Exposed to Violence was established in 2013. The Task Force was anchored by an Advisory Committee consisting of experts in the area of AI/AN children exposed to violence and federal officials from key agencies. Their November 2013 Report, entitled Ending Violence So Children Can Thrive, provides thirty-one (31) recommendations addressing issues concerning AI/AN children exposed to violence.


2 ABA, Recommendation, Report. No. 11IB (2013) (regarding implementation of the December 2012 Defending Childhood report recommendations, which call for trauma-informed approaches and practices in regard to juvenile system-involved children and youth who have been exposed to violence).

While many of the Ending Violence So Children Can Thrive Report recommendations are thematically similar to the Defending Childhood Report recommendations, they provide additional insight into the particular needs of AI/AN children and the systems that serve them. This resolution adopts fifteen (15) of those thirty one (31) recommendations as ABA policy.

At the February 2015 Mid-Year Meeting, the ABA adopted Resolution 111A, which adopted as ABA policy all thirty four recommendations (except for the new circuit court provision of recommendation 1.2) of the Indian Law and Order Commission’s (“ILOC”) 2013 Final Report, A Roadmap for Making Native America Safer. The Advisory Committee relied heavily upon the ILOC report. Consequently, many of the Advisory Committee Report recommendations are already policies previously approved by the American Bar Association House of Delegates.

The remaining fifteen (15) recommendations adopted by this resolution are directly aligned with policies previously approved by the American Bar Association House of Delegates. For these reasons, the ABA urges prompt implementation of recommendation numbers 1.3, 1.4, 2.1, 3.1, 4.1-4.7, and 5.2-5.5, of the Advisory Committee Report as a policy matter and as a signal of their importance. These specific recommendations of the Ending Violence So Children Can Thrive Report are timely and significant; each is specifically referenced in Appendix I. While all thirty one Ending Violence So Children Can Thrive Report recommendations are consistent with ABA policy, this resolution and report specifically adopts the fifteen recommendations which are most directly connected to ABA issues and existing ABA policy.

I. Recommendation 1.3: Expanding Tribal Criminal Jurisdiction to Include Crimes Committed Against AI/AN Children in Indian Country

The concept of tribal sovereignty is woven through each and every issue affecting AI/AN children including the primacy of tribal governments in responding to violence experienced or witnessed by Indian children. AI/AN people have, for more than five hundred years, endured physical, emotional, social, and spiritual genocide from European and American colonialist policy. Today, both state and federal tribes face impedes from exercising full authority and marshalling their full potential to address violence against children. The result is a violent crime rate in Indian country that is more than 2.5 times the national rate. Native youth are 2.5 times more likely to experience trauma than their non-Native peers and are experiencing post-

4 ABA, Recommendation, Report No. 111A (Feb. 2015) (adopting all of the recommendations contained in the Indian Law and Order Commission’s 2013 report, except for the new circuit court provision of recommendation 1.2). Note that while the ABA did not specifically adopt the new circuit court provision of recommendation 1.2, the ABA did adopt the remaining provisions of the recommendation, including the need for Congress to provide a federal forum, preferably designed in consultation between the U.S. government and tribal governments, that can provide a consistent, uniform, and predictable body of case law.
5 ILOC REPORT, recommendations 1.1-1.4.
6 Id., at 41.
8 Id., at 40.
10 Id., at 38, citing ILOC REPORT at 151.

While many of the Ending Violence So Children Can Thrive Report recommendations are thematically similar to the Defending Childhood Report recommendations, they provide additional insight into the particular needs of AI/AN children and the systems that serve them. This resolution adopts fifteen (15) of those thirty one (31) recommendations as ABA policy.

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5 ILOC REPORT, recommendations 1.1-1.4.
6 Id., at 41.
8 Id., at 40.
10 Id., at 38, citing ILOC REPORT at 151.
traumatic stress disorder at a rate of 22 percent; the same rate as veterans returning from Iraq and Afghanistan.\textsuperscript{11} The current “institutionally complex” criminal justice system in Indian country “lacks coordination, accountability, and adequate and consistent funding.”\textsuperscript{12} Jurisdiction is cumbersoned divided between sovereigns,\textsuperscript{13} tribal courts are restrained in their authority,\textsuperscript{14} and federal prosecutors are declining to exercise theirs,\textsuperscript{15} resulting in a debilitated system unable to respond to the many and diverse needs of its children. The Advisory Committee’s recommendation 1.3 recommends that Congress restore the inherent authority of AI/AN tribes to assert their full criminal jurisdiction over all persons who commit crimes against AI/AN children in Indian country.\textsuperscript{16}

Congress has already taken significant steps towards this recognition. In 2010, in the Tribal Law and Order Act (TLOA), Congress relaxed the tribal court sentencing restriction from one year imprisonment to three years imprisonment.\textsuperscript{17} In 2013, in the Violence Against Women Reauthorization Act (VAWA), Congress re-affirmed tribal criminal jurisdiction over non-Indians for certain crimes of domestic violence, dating violence, and stalking.\textsuperscript{18} The ABA provided support for the enactment of both TLOA,\textsuperscript{19} and the tribal provisions of VAWA,\textsuperscript{20} as well as for full tribal territorial jurisdiction.\textsuperscript{21} These expressions of support were

\textsuperscript{11} Id., at 38, citing ILOC REPORT at 154.

\textsuperscript{12} ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT, 47.

\textsuperscript{13} The General Crimes Act, 18 U.S.C. § 1152 (providing that federal courts have jurisdiction over intercalary crimes committed in Indian country); the Assimilative Crimes Act, 18 U.S.C. § 1; the Major Crimes Act, 18 U.S.C. § 1153 (providing federal criminal jurisdiction over ten enumerated crimes committed in Indian country that is exclusive of the states); Public Law 83-280, 18 U.S.C. § 1162 (delegating federal jurisdiction to six states over most crimes throughout most of Indian country within their state borders); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribes lack criminal jurisdiction over non-Indian defendants). Violence Against Women Reauthorization Act of 2013, S. 47, 113th Congress, Title IX (2013) (expanding tribal criminal jurisdiction to non-Indians for the crimes of domestic violence, dating violence and the violation of protection orders so long as the defendant has certain ties to the community and the tribe prosecution.

\textsuperscript{14} Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (limiting a tribe’s sentencing authority to a term of imprisonment of 1 year and/or a $5,000 fine, or up to 3 years and/or a $15,000 fine so long as the tribe provides five additional due process protections).


\textsuperscript{17} Tribal Law and Order Act (TLOA), Public Law 111-221, 25 U.S.C. § 1902(a)/(7)(C); § 1902(b)-(d).

\textsuperscript{18} Violence Against Women Reauthorization Act (VAWA), Pub. L. No. 113-4, tit. IX (2012).


\textsuperscript{22} From 2005-2009, the Government Accountability Office (GAO) found that U.S. Attorneys declined to prosecute nearly 52% of violent crimes in Indian country. U.S. GAO, U.S. Department of Justice Decisions of Indian Country Criminal Matters, Report No. GAO-11-167R, 3 (2010). Prior to the enactment of TLOA, United States Attorneys were not required to report their declination rates. Section 212 of TLOA now requires that they submit an annual report to Congress detailing their declination rates. According to their first report, United States Attorney Offices declined to prosecute 37% of all Indian country submissions for prosecution in 2011, and 31% in 2012. U.S. Dep’t of Justice, Indian Country Investigation and Prosecutions 2011-2012 2 (2013).

only the latest iterations of a long line of ABA policy supporting tribal sovereignty and the ability of tribes to improve justice in Indian country.22

However, neither of these prior Congressional actions adequately addresses AI/AN children exposed to violence. Specifically, the Ending Violence So Children Can Thrive Report notes that despite numerous and horrific findings that non-Indians are committing sexual assault in Indian country,23 VAWA does not extend criminal jurisdiction over non-Indians for the crime of sexual assault, or any other crimes that may have been committed in conjunction with the domestic violence. Moreover, this expansion of criminal jurisdiction also does not include the crimes of sexual and physical abuse of AI/AN children in Indian country. This is especially alarming when 70 percent of violent crimes committed against AI/ANs involve an offender of a different race.24 National studies indicate that men who batter their companion also abuse their children in 40 to 70 percent of the cases.25 Furthermore, the Pascua Yaqui Tribe, after implementing VAWA jurisdiction for a year, found that a majority of their VAWA incidents involved children.26 In some cases, children were the "reporting party" and one child was assaulted by the victim for reporting the incident. Unfortunately, however, VAWA jurisdiction does not include the authority to charge non-Indians for crimes that endanger, threaten, or harm children.

In light of this immense jurisdictional gap, the Advisory Committee calls for an end to this jurisdictional barricade. Congress should recognize a tribe’s authority to choose to "opt out" of the current federal and/or state criminal jurisdiction and exercise criminal jurisdiction over all persons within the tribe’s lands.

The ABA has a long and robust history of supporting the authority and development of tribal justice systems,27 which the ABA recently strengthened by enacting Resolution 111A,28 adopting


23 ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT, 49.


27 ABA, Recommendation, Report No. 1114 (2013) (urging the full implementation of, and compliance with, the Indian Child Welfare Act (25 U.S.C. §§ 1901-63); ABA Recommendation, Report No. 301 (Aug. 2012) (urging Congress to strengthen tribal jurisdiction to address crimes of gender-based violence on tribal lands that are committed by non-Indian perpetrators who have specific ties to the tribe, while ensuring that due process rights are
II. **Recommendations 1.4, 3.1, and 4.1: Bringing Tribal Justice Funding into Parity**

Funding for tribal government systems is limited. However, funding for child maltreatment prevention and child protection efforts is especially limited in Indian country. Meanwhile, states receive proportionately more funding for prevention and child protection, while tribes are not even eligible for the two major programs: Title XX of the Social Services Block Grant and the Child Abuse Prevention and Treatment Act. Instead tribes are forced to compete with each other for limited and inconsistent grants. This is all while the United States continues to have a trust responsibility to AI/AN tribes to provide basic governmental services in Indian country, which is not discretionary but mandatory.

With no tax base and inadequate funding from the Bureau of Indian Affairs (BIA), the Advisory Committee recommends that Congress authorize additional and adequate funding for tribal juvenile justice programs in the form of block grants and self-governance compacts that would support the restructuring and maintenance of tribal juvenile justice systems. In recommendations 1.4 and 4.1, the Advisory Committee calls for an end to this disparaging under-investment through detailed calls to action. These include that Congress should replace provided; Letter to House Representatives, from Thomas Susman, Director of the Governmental Affairs Office of the ABA (July 20, 2010) (urging all House Representatives to vote YES for Senate Amendments to H.R. 725 specifically because it "provides[ ] tools to tribal justice officials to fight crime in their own communities"); ABA Section of Individual Rights and Responsibilities, Coalition for Justice, and National Native American Bar and Association, Recommendation, Report No. 11714 (Aug. 2008) (urging Congress to support quality and accessible justice by ensuring adequate, stable, long-term funding for tribal justice systems).

34 ABA, Recommendation, Report No. 11714 (Feb. 2015) (adopting all of the recommendations contained in the Indian Law and Order Commission’s 2013 report, except for the new circuit court provision of Recommendation 1.2). Note that while the ABA did not specifically adopt the new circuit court provision of Recommendation 1.2, the ABA did adopt the remaining provisions of the recommendation, including the need for Congress to provide a federal forum, preferably designed in consultation between the U.S. government and tribal governments, that can provide a consistent, uniform, and predictable body of case law.

35 ILOC REPORT, Recommendations 1.1-1.4.


37 Title I of the Social Security Act is the Social Security Disability-Insurance program, in which states are provided block grants to achieve a wide range of social policy goals, including to reduce dependency; to prevent or remedy neglect, abuse, or exploitation of children; to preserve and reunite families; and to provide community-based care.


39 ID., Recommendation 4.1.

40 ID., Recommendation 4.1.
discretionary competitive funding with mandatory base funding for all tribes.\textsuperscript{35} Congress should actually appropriate, not simply authorize this funding;\textsuperscript{36} that the authority to enter into 638 self-determination and self-governance compacts to a broad range of federal agencies, a minimum 10 percent tribal set-aside for Justice Department Office of Justice Programs and Victims of Crime Act funding, and tribal consultation to determine the feasibility of consolidating tribal criminal justice programs into a single Justice Department “Indian country component”.\textsuperscript{37}

Recommendation 4.1 implementation mechanisms can include federal agencies consulting with tribes, working with treatment organizations to ensure services are trauma-informed, and integrating exposure to violence and suicide screening into medical, juvenile justice, and social service intakes.

Recommendation 4.1 implementation mechanisms can include a 10 percent tribal set-aside for Office of Juvenile Justice and Delinquency Prevention funding, federal funding for state juvenile consultation with tribes and consolidation within one federal agency for funding for both the construction and operation of jails and juvenile detention facilities.

In tandem, the Advisory Committee recommends that Congress maximize existing resources, by making them more efficiently available, with fewer limitations. Recommendation 3.1 calls for the integration, or braiding, of flexible funding that would allow tribes to create comprehensive programming, rather than ineffective silos. This finding should be provided for the assessment of local needs, to ensure treatments are trauma-informed, and ensure that violence trauma screening and suicide screening are part of services offered to AI/AN children during any medical, juvenile justice, and/or social service intake.\textsuperscript{38}

The Advisory Committee’s calls for adequate and fair resources align with the ABA’s consistent call for investment in the justice system. In 2001, the ABA recognized the inherent disparity of limiting tribal eligibility to the Social Services Block Grant, and urged Congress to amend Part E of Title IV to provide direct access for foster care and adoption services for Indian children under
tribal court jurisdiction. In an August 2008 resolution, the ABA urged Congress to "support quality and accessible justice by ensuring adequate, stable, and long-term funding for tribal justice systems." The report specifically noted that tribal courts play an important role in Native American communities, confronting not only issues of self-determination and sovereignty, but also many of the same problems as state and federal courts, but often with considerably fewer resources. In fact, the federal, state, and tribal court systems are interconnected, and when tribal courts are unable to deal with tribal jurisprudence, some of these matters end up being adjudicated in either the state or federal courts, sometimes with disparate results for Native Americans.

In the ABA’s February 2015 resolution supporting the ILOC Report, the ABA similarly called for a consolidation of duplicative tribal criminal justice programs within the DOJ and the ability to contract directly this new consolidated agency; the end of all grant-based competitive funding in favor of permanent, recurring base funding; and actual appropriation of funding by Congress to fully fund the needs of tribal justice systems. These are the legacy of the ABA’s long and robust history of supporting the authority and development of tribal justice systems.

III. Recommendation 2.1 and 4.6: Implementing the Indian Child Welfare Act

The Indian Child Welfare Act (ICWA) established minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes.

42 ABA, Recommendation, Report No. 105C (Aug. 2001) (urging Congress to amend Part E of Title IV of the Social Security Act to provide direct access for foster care and adoption services for tribal courts).
44 Id. at 2.
46 ILOC REPORT, Recommendations 3.8, 3.9, and 3.10.
homes which will reflect the unique values of Indian culture. If AI/AN children today are to be provided with a reliable safety net, the letter and spirit of ICWA must be enforced. Unfortunately, many states do not comply with the letter or spirit of ICWA. Cultural bias, racism, and a misunderstanding of poverty reflected in legal definitions and workers’ decisions to substantiate allegations of neglect make AI/AN families susceptible to biased treatment in child welfare systems.79 Plainly, a decrease in ICWA compliance has resulted in an increase in foster care and adoption rates for AI/AN children.80

In recommendation 2.1, the Advisory Committee recommends that both the legislative and executive branches of the federal government should encourage tribal-state ICWA compliance, with specific recommendations for how best to achieve this compliance.81 Specifically, the Advisory Committee seeks to remedy the fact that ICWA is the only federal child welfare law that does not include legislatively mandated oversight or periodic review.82 Implementation mechanisms of Recommendation 2.1 include federal agency and tribal collaboration to develop a unified data-collection system on AI/AN children who are placed into foster care, and federal agency collaboration to monitor and ensure state compliance with ICWA.

In recommendation 4.6, the Advisory Committee recommends that ICWA should be extended to allow the notice, intervention, and transfer provisions of ICWA to apply not just when an Indian child is removed from their home, but also when a state court initiates any delinquency provision.83 The Defending Childhood Report explicitly recommends compliance with the letter and spirit of ICWA.84 In addition to supporting the Defending Childhood Report, the ABA, also distinctly called for the full implementation of and compliance with ICWA.85 The ABA’s Commission on Youth at Risk identified many of these issues in their 2008 resolution on racial disparities in the child welfare system.86 The Ending Violence So Children Can Thrive Report extends this policy by providing specific guidance on how the executive and legislative branches can ensure this compliance.

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87 ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT at 75, citing Written Testimony of Tierry Cross, Hearing of the Task Force on American Indian/Alaska Native Children Exposed to Violence, Fort Lauderdale, FL, April 16, 2014 at 65.
88 Id. at 79, citing Written Testimony of Sarah Hick Kanelis (Ahtna), Hearing of the Task Force on American Indian/Alaska Native Children Exposed to Violence, Anchorage AK, June 11, 2014 at 23.
89 Id., Recommendations 2.1, 2.1.A, 2.1.B, 2.1.C, and 2.1.D (calling for a modernized unified data-collection system for ICWA and tribal dependency data, collaboration between the Administration for Children and Families and Bureau of Indian Affairs, the issuance of ICWA guidelines, and the creation of an ICWA Specialist within the Department of Justice).
90 Id. at 79, citing Written Testimony of Sarah Hick Kanelis (Ahtna), Hearing of the Task Force on American Indian/Alaska Native Children Exposed to Violence, Anchorage AK, June 11, 2014 at 23.
91 Id., Recommendation 4.6.
92 DEFENDING CHILDHOOD REPORT, Recommendation 4.10.
IV. Recommendations 4.2-4.5, and 4.7: Strengthening Juvenile Justice

Children entering the juvenile justice system are exposed to violence at staggeringly high rates. Native youth offenders are disproportionately incarcerated in both state and federal systems. Tribes suffer with comparable statistics of incarcerating their own Native youth. Yet many tribal communities have no tribal juvenile court system or juvenile code, and oftentimes lack the supporting service delivery system necessary to meet the specific needs of their youth. In addition, the status of AI/AN youth is unique; they may be prosecuted in three distinct justice systems: federal, tribal, and state. The Advisory Committee concluded that the standard way of juvenile justice is a failure and re-traumatizes AI/AN children.

In response, the Advisory Committee recommends a substantial reform of the juvenile justice system.

- 4.2. Firstly, developing a tribal juvenile justice system requires developing tribal codes that fit the culture and community. Federal state and private funding and technical assistance should be provided to develop or revise trauma-informed, culturally specific tribal codes to improve tribal juvenile justice systems.

- 4.3. While access to counsel in criminal proceedings is generally considered an essential facet of due process, youth in particular need to be provided with counsel due to the impact of immaturity, the effects of exposure to violence and trauma, and caregivers who are no more likely to understand the system, rights, and process than they youth. Federal, state, and tribal justice systems should provide legal representation to AI/AN children in the juvenile justice systems.

- 4.4. The use of juvenile detention as a deterrent to delinquent behavior, risky behavior, or truancy has simply been shown to be ineffective. Rather, detention of AI/AN youth should be limited to only when the youth is shown by clear evidence to be a danger to themselves or the community.

- 4.5. Behavioral health services for AI/AN youth may be handled by different agencies with different priorities. Culturally appropriate, trauma-informed screening and are must become the standard in all juvenile justice systems that impact AI/N youth, including the for screening, assessment, and care in juvenile justice systems.

- 4.7. Tribal access to the tribal youths’ school attendance, performance, and disciplinary records.

Like other issues affecting the core of due process, the ABA has significant policy supporting the development of juvenile justice systems, specifically policies that distinguish minors are distinct from adults. For example, in February of 2015, the ABA passed a resolution to support

56 Id., Recommendation 4.2.
57 Id., Recommendation 4.3.
58 Id., Recommendation 4.4
59 Id., Recommendation 4.5.
60 Id., Recommendation 4.7.
government-appointed counsel for unaccompanied children in immigration proceedings, and a resolution urging government to refrain from using shackles on juvenile in court, unless a judge orders otherwise. In 2014, the ABA adopted policy urging the development and adoption of trauma-informed, evidenced-based approaches and practices on behalf of justice system-involved children and youth who have been exposed to violence. In 2012, the ABA Center on Children and the Law helped to develop and publish a practice guide for attorneys who work with children and youth, entitled, Identifying Polyvictimization and Trauma Among Court-Involved Children and Youth: A Checklist and Resource Guide for Attorneys and Other Court-Appointed Advocates. Moreover, the ABA adoption of the Defending Childhood Report recommendations includes support for the use of trauma-informed practices for youth in the juvenile justice system. The Defending Childhood Report recommends that youth entering the juvenile justice system be screened for exposure to violence in accordance with trauma-informed practices.

V. Recommendations 5.2: 5.5: Serving Alaska Natives

Issues related to Alaska Native children exposed to violence are different from other American Indian children for a variety of reasons, including regional vastness and geographical isolation, extreme weather, exorbitant cost of transportation, lack of economic opportunity and access to resources, and a lack of respect for Alaska Native history and culture. Alaska Natives are disproportionately affected by violent crime and Alaska Native children are, of course, disproportionately exposed to that violence. Less than ½ of remote Alaska village are served trained state law enforcement, and the centralized state judicial system operates only a handful of staffed magistrate courts outside of hub communities. Congress has repeatedly exempted Alaska from significant tribal legislation, including recent legislation aimed at reducing violent crime in Indian country—and thereby reducing AI/AN children’s exposure to that violent.

The Advisory Committee recommends Alaska Tribes are best positioned to effectively address the issues facing their communities, and that they should be empowered to do so:

63 ABA Recommendation, Report No. 1113 (Feb. 2015) (supporting government-appointed counsel for unaccompanied children in immigration proceedings, specifically urging immigration courts to not conduct hearings unless an unaccompanied minor has an opportunity to consult with counsel).
64 ABA Recommendation, Report No. 1074 (Feb. 2015) (urging government to refrain from using shackles on juveniles in court, unless a judge orders otherwise).
65 ABA Recommendation, Report No. 1069B (Feb. 2014) (urging the development and adoption of trauma-informed, evidenced-based practices for on behalf of justice system-involved children and youth).
68 DEFENDING CHILDHOOD REPORT, at 176 (recommending that “trauma-informed screening, assessment, and care” should be “the standard in juvenile justice services”).
69 ENDING VIOLENCE SO CHILDREN CAN THRIVE, REPORT, 130.
70 While only 17.3% of the child population, Alaska Native children constitute 50.1% of all children in out-of-home placements and 62.3% of all children in foster care. Id. at 132-33.
71 Id. at 133, citing S. 1474, 113th Cong. 2d. Sess. (2014), Sec. 2(A)(9)(11).
72 Id. at 130.
5.2. The development, enhancement, and sustainment of Alaska tribal courts, and truly cooperative relationships between the State of Alaska and Alaska tribes are absolutely essential in reducing violent crime and protecting Alaska Native children from violence and exposure to violence. The Department of Justice and the Department of Interior, should provide recurring base funding for Alaska Tribes to develop and sustain their tribal court systems and assist in the provision of law enforcement;\(^{73}\)

5.3. Only a handful of tribes in Alaska have any law enforcement presence. The State of Alaska should prioritize law enforcement responses for Alaska tribes, and recognize and collaborate with Alaska tribal courts,\(^{74}\) which should include following existing federal law requiring the State of Alaska to enforce tribal protection orders without first having the victim "register" or "file" that protection order.\(^{75}\)

5.4. Alaska Native children constitute 17.3 percent of the state child population; however, Alaska Native children comprise 62.3 percent of all children in out-of-home placements.\(^{76}\) The federal government and the State of Alaska should jointly respond to the extreme disproportionality of Alaska Native children in foster care by establishing a time-limited, outcome-focused task force to develop real-time, Native inclusive strategies to reduce disproportionality.\(^{77}\)

5.5. Subsistence hunting, fishing, and gathering are not only a part of everyday life for Alaska Natives, but for many Alaska Natives it is literally the subsistence on which their families survive. Like language and cultural traditions, it has been passed down from one generation to the next and is an important means of reinforcing tribal values and traditions. The Department of Interior and the State of Alaska should empower Alaska Tribes to manage their own subsistence hunting and fishing rights, remove the current barriers, and provide Alaska Tribes with the resources needed to effectively manage their own subsistence hunting and fishing.\(^{78}\)

Implementation mechanisms of these recommendations can include providing state law enforcement officials onsite in villages, prioritizing village-based services, State of Alaska recognition and collaboration with Alaska tribal courts, self-governance intergovernmental agreements with Alaska tribes, sufficient DOJ and DOI funding to meet these needs, and better federal, State and tribal collaboration on public safety measures.

The ABA has already endorsed the Advisory Committee’s recommendation 5.1 when it adopted the Indian Law and Order Commission’s recommendations. This includes that Congress take legislative action to ensure that Alaska Native lands are treated as Indian country, like most other tribal land in the United States.\(^{79}\) Beyond the ILOC Report, the ABA has repeatedly identified Alaska Natives as distinct peoples in possession of inherent sovereignty worthy of protection.\(^{80}\)

\(^{73}\) Id., Recommendation 5.2.
\(^{74}\) Id., Recommendation 5.3.
\(^{75}\) Id., Recommendation 5.3.C and at 145.
\(^{76}\) Id. at 146.
\(^{77}\) Id., Recommendations 5.4.
\(^{78}\) Id., Recommendations 5.5.
\(^{79}\) ILOC REPORT, Recommendations 2.1, 2.2, and 2.3.
\(^{80}\) See ABA, Recommendation Report No. 1088 (Feb. 2006) (supporting federal recognition for a Native Hawaiian governing entity by arguing for Hawaiian self-determination and self-governance at least equal to that which Alaska
VI. Conclusion

The recommendations of the Ending Violence So Children Can Thrive Report regarding AI/AN children exposed to violence seek to better identify and serve our future Native. These recommendations include embracing culturally-relevant evidenced-based practices, easing the restraints on tribal sovereignty, and bring tribal investment into parity with state and territories. These approaches align with ABA policy that has long stood for both a responsive juvenile justice system and meaningful tribal self-determination. These recommendations address ills that have afflicted Indian country for over 200 years. It is incumbent that we enable tribal governments to provide for their children in their own communities.

Mark I. Schickman, Chair
ABA Section of Individual Rights and Responsibilities
August 2015
APPENDIX I
ENDING VIOLENCE TO CHILDREN CAN THRIVE RECOMMENDATIONS

Chapter 1 – Building a Strong Foundation

1.1 Leaders at the highest levels of the executive and legislative branches of the federal government should coordinate and implement the recommendations in this report consistent with three core principles—Empowering Tribes, Removing Barriers, and Providing Resources—identified by the Advisory Committee.

1.2 The White House should establish—no later than May 2015—a permanent fully-staffed Native American Affairs Office within the White House Domestic Policy Council. This new Native American Affairs Office should include a senior position specializing in AI/AN children exposed to violence. This office should be responsible for coordination across the executive branch of all services provided for the benefit and protection of AI/AN children and the office lead should report directly to the Director of the Domestic Policy Council as a Special Assistant to the President. The Native American Affairs Office should have overall executive branch responsibility for coordinating and implementing the recommendations in this report including conducting annual tribal consultations.

1.3 Congress should restore the inherent authority of American Indian and Alaska Native (AI/AN) tribes to assert full criminal jurisdiction over all persons who commit crimes against AI/AN children in Indian country.

1.4 Congress and the executive branch shall direct sufficient funds to AI/AN tribes to bring funding for tribal criminal and civil justice systems and tribal child protection systems into parity with the rest of the United States and shall remove the barriers that currently impede the ability of AI/AN Nations to effectively address violence in their communities.

1.4.A Congress and the executive branch shall provide recurring mandatory, not discretionary, base funding for all tribal programs that impact AI/AN children exposed to violence, including tribal criminal and civil justice systems and tribal child protection systems, and make it available on equal terms to all federally recognized tribes, whether their lands are under federal jurisdiction or congressionally authorized state jurisdiction.

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79 REPORT OF THE ATTORNEY GENERAL’S ADVISORY COMMITTEE ON AMERICAN INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE, U.S. Department of Justice’s Office of Juvenile Justice and Delinquency Prevention (Nov. 2014) [hereinafter ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT], available at: www.justice.gov/ojdp/report-american-indian-and-alaska-native-children-exposed-violence. Please note that all of the recommendations of the Ending Violence So Children Can Thrive Report are listed here, and that this ABA resolution adopts all of these recommendations. However, notes and other commentary to these recommendations found in the Ending Violence So Children Can Thrive Report have been omitted here.

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1.4.B Congress shall appropriate, not simply authorize, sufficient substantially increased funding to provide reliable tribal base funding for all tribal programs that impact AI/AN children exposed to violence. This includes tribal criminal and civil justice systems and tribal child protection systems. At a minimum, and as a helpful starting point, Congress shall enact the relevant funding level requests in the National Congress of American Indians (NCAI) Indian Country Budget Request for FY 2015.

1.4.C Congress shall authorize all federal agencies, beginning with the Department of Justice (DOJ), to enter into 638 self-determination and self-governance compacts with tribes to ensure that all tribal system funding, including both justice and child welfare, is subject to tribal management. Further, the Department of Health and Human Services (HHS) should fully utilize its current 638 self-determination and self-governance authority to the greatest extent feasible for flexible funding programs in the Department of Health and Human Services (HHS) beyond the Indian Health Service (IHS) and seek additional legislative authority where needed.

1.4.D Congress shall end all grant-based and competitive Indian country criminal justice funding in the Department of Justice (DOJ) and instead establish a permanent, recurring base funding system for tribal law enforcement and justice services.

1.4.E Congress shall establish a much larger commitment than currently exists to fund tribal programs through the Department of Justice’s Office of Justice Programs (OJP) and the Victims of Crime Act (VOCA) funding. As an initial step towards the much larger commitment needed, Congress shall establish a minimum 10 percent tribal set-aside, as per the Violence Against Women Act (VAWA) tribal set-aside, from funding for all discretionary Office of Justice Programs (OJP) and Victims of Crime Act (VOCA) funding making clear that the tribal set-aside is the minimum tribal funding and not in any way a cap on tribal funding. President Obama’s annual budget request to Congress has included a 7 percent tribal set-aside for the last few years. This is a very positive step and Congress should authorize this request immediately. However, the tribal set-aside should be increased to 10 percent in subsequent appropriations bills. Until Congress acts, the Department of Justice shall establish this minimum 10 percent tribal set-aside administratively.

1.4.F The Department of Justice (DOJ) and Department of Interior (DOI) should, within one year, conduct tribal consultations to determine the feasibility of implementing Indian Law and Order Commission (ILOC) Recommendation 3.8 to consolidate all DOI tribal criminal justice programs and all DOI Indian country programs and services into a single “Indian country component” in the DOI and report back to the President and AI/AN Nations on how tribes want to move forward on it.

1.5 The legislative branch of the federal government along with the executive branch, under the direction and oversight of the White House Native American Affairs Office, should provide adequate funding for and assistance with Indian country research and data collection.
1.6 The legislative and executive branches of the federal government should encourage tribal-state collaborations to meet the needs of AI/AN children exposed to violence.

1.7 The federal government should provide training for tribal sovereignty, working with tribal governments, and the impact of historical trauma and colonization on tribal Nations within the first sixty days of their job assignment.

Chapter 2 – Promoting Well-Being for American Indian and Alaska Native Children in the Home

2.1 The legislative and executive branches of the federal government should ensure Indian Child Welfare Act (ICWA) compliance and encourage tribal-state ICWA collaborations.

2.1.A Within two years of the publication of this report, the Administration for Children and Families (ACF) in the Department of Health and Human Services (HHS), the Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI), and tribes should develop a modernized unified data-collection system designed to collect Adoption and Foster Care Analysis and Reporting System (AFCARS) (ICWA and tribal dependency) data on all AI/AN children who are placed into foster care by their agency and share that data quarterly with tribes to allow tribes and the BIA to make informed decisions regarding AI/AN children.

2.1.B The Secretaries of the Department of Interior (DOI) and Health and Human Services (HHS) should compel BIA and ACF to work together collaboratively to collect data regarding compliance with ICWA in state court systems. The ACF and BIA should work collaboratively to ensure state court compliance with ICWA.

2.1.C The BIA should issue regulations (not simply update guidelines) and create an oversight board to review ICWA implementation and designate consequences of noncompliance and/or incentives for compliance with ICWA to ensure the effective implementation of ICWA.

2.1.D The Department of Justice (DOJ) should create a position of Indian Child Welfare Specialist to provide advice to the Attorney General and DOJ staff on matters relative to AI/AN child welfare cases, to provide case support in cases before federal, tribal, and state courts, and to coordinate ICWA training for federal, tribal, and state judges; prosecutors; and other court personnel.

2.2 The Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI), the Administration for Children and Families (ACF) in the Department of Health and Human Services (HHS), and tribes, within one year of the publication of this report, should develop and submit a written plan to the White House Domestic Policy Council, to work collaboratively and efficiently to provide trauma-informed, culturally appropriate tribal
child welfare services in Indian country

2.3 The Administration for Children and Families (ACF) in the Department of Health and Human Services (HHS), Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI), and tribes should collectively identify child welfare best practices and produce an annual report on child welfare best practices in AI/AN communities that is easily accessible to tribal communities.

2.4 The Indian Health Service (IHS) in the Department of Health and Human Services (IHS), state public health services, and other state and federal agencies that provide pre- or postnatal services should provide culturally appropriate education and skills training for parents, foster parents, and caregivers of AI/AN children. Agencies should work with tribes to culturally adapt proven therapeutic models for their unique tribal communities (e.g., adaptation of home visitation service to include local cultural beliefs and values).

2.5 The Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI), tribal social service agencies, and state social service agencies should have policies that permit removal of children from victims of domestic violence for “failure to protect” only as a last resort as long as the child is safe.

2.6 The Secretary of Health and Human Services (HHS) should increase and support access to culturally appropriate behavioral health and substance abuse prevention and treatment services in all AI/AN communities, especially the use of traditional healers and helpers identified by tribal communities.

Chapter 3 – Promoting Well-Being for American Indian and Alaska Native Children in the Community

3.1 The White House Native American Affairs Office (see Recommendation 1.2) and executive branch agencies that are responsible for addressing the needs of AI/AN children, in consultation with tribes, should develop a strategy to braid (integrate) flexible funding to allow tribes to create comprehensive violence prevention, intervention, and treatment programs to serve the distinct needs of AI/AN children and families.

3.1.A The White House Native American Affairs Office, the U.S. Attorney General, the Secretaries of the Department of Interior (DOI) and Health and Human Services (HHS), and the heads of other agencies that provide funds that serve AI/AN children should annually consult with tribal governments to solicit recommendations on the mechanisms that would provide flexible funds for the assessment of local needs, and for the development and adaptation of promising practices that allow for the integration of the unique cultures and healing traditions of the local tribal community.

3.1.B The White House Native American Affairs Office and the U.S. Attorney General should work with the organizations that specialize in treatment and services for traumatized children, for example, National Child Traumatic Stress Network, to ensure that services for AI/AN children exposed to violence are trauma-informed.
3.1.C The White House Native American Affairs Office should coordinate the development and implementation of federal policy that mandates exposure to violence trauma screening and suicide screenings be a part of services offered to AI/AN children during medical, juvenile justice, and/or social service intakes.

3.2 The Department of Justice’s National Institute of Justice (NIJ) and other Justice Department agencies with statutory research funding should set aside 10 percent of their annual research budgets for partnerships between tribes and research entities to develop, adapt, and validate trauma screens for use among AI/AN children and youth living in rural, tribal, and urban communities. Trauma screens should be tested and validated for use in schools, juvenile justice (law enforcement and courts), mental health, primary care, Defending Childhood Tribal Grantee programs, and social service agencies and should include measures of trauma history, trauma symptoms, recognizing trauma triggers, recognizing trauma reactions, and developing positive coping skills for both the child and the caregivers.

3.3 The White House Native American Affairs Office and responsible federal agencies should provide AI/AN youth-serving organizations such as schools, Head Starts, daycares, foster care programs, and so forth with the resources needed to create and sustain safe places where AI/AN children exposed to violence can obtain services. Every youth-serving organization in tribal and urban Native communities should receive mandated trauma-informed training and have trauma-informed staff and consultants providing school-based trauma-informed treatment in bullying, suicide, and gang prevention/intervention.

3.4 The Secretary of Housing and Urban Development (HUD) should designate and prioritize Native American Housing Assistance and Self-Determination Act (NAHSDA) funding for construction of facilities to serve AI/AN children exposed to violence and structures for positive youth activities. This will help tribal communities create positive environments such as shelters, housing, cultural facilities, recreational facilities, sport centers, and theaters through the Indian Community Development Block Grant Program and the Housing Assistance Programs.

3.5 The White House Native American Affairs Office should work with the Congress and executive branch agencies in consultation with tribes to develop, promote, and fund youth-based afterschool programs for AI/AN youth. The programs must be culturally based and trauma-informed, must partner with parents/caregivers, and, when necessary, provide referrals to trauma-informed behavioral health providers. Where appropriate, local capacity should also be expanded through partnerships with America’s volunteer organizations, for example, AmeriCorps.

3.6 The White House Native American Affairs Office and the Secretary of Health and Human Services (HHS) should develop and implement a plan to expand access to Indian Health Service (IHS), tribal, and urban Indian centers to provide behavioral health services to AI/AN children in schools. This should include the deployment of behavioral health services providers to serve students in the school setting.

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3.6 The White House Native American Affairs Office and the Secretary of Health and Human Services (HHS) should develop and implement a plan to expand access to Indian Health Service (IHS), tribal, and urban Indian centers to provide behavioral health services to AI/AN children in schools. This should include the deployment of behavioral health services providers to serve students in the school setting.
Chapter 4 – Creating a Juvenile Justice System that Focuses on Prevention, Treatment, and Healing

4.1 Congress should authorize additional and adequate funding for tribal juvenile justice programs, a grossly underfunded area, in the form of block grants and self-governance compacts that would support the restructuring and maintenance of tribal juvenile justice systems.

4.1.A Congress should create an adequate tribal set-aside that allows access to all expanded federal funding that supports juvenile justice at an amount equal to the need in tribal communities. As an initial step towards the much larger commitment needed, Congress should establish a minimum 10 percent tribal set-aside, as per the Violence Against Women Act (VAWA) tribal set aside, from funding for all Office of Juvenile Justice and Delinquency Prevention (OJJDP) funding making clear that the tribal set-aside is the minimum tribal funding and not in any way a cap on tribal funding. President Obama’s annual budget request to Congress has included a 7 percent tribal set aside for the last few years. This is a very positive step and Congress should authorize this request immediately. However, the tribal set-aside should be increased to 10 percent in subsequent appropriations bills. Until Congress acts, the Department of Justice should establish this minimum 10 percent tribal set-aside administratively.

4.1.B Federal funding for state juvenile justice programs should require that states engage in and support meaningful and consensual consultation with tribes on the design, content, and operation of juvenile justice programs to ensure that programming is imbued with cultural integrity to meet the needs of tribal youth.

4.1.C Congress should direct the Department of Justice (DOJ) and the Department of Interior (DOI) to determine which agency should provide funding for both the construction and operation of jails and juvenile detention facilities in AI/AN communities, require consultation with tribes concerning selection process, ensure the trust responsibilities for these facilities and services are assured, and appropriate the necessary funds.

4.2 Federal, state, and private funding and technical assistance should be provided to tribes to develop or revise trauma-informed, culturally specific tribal codes to improve tribal juvenile justice systems.

4.3 Federal, tribal, and state justice systems should provide publicly funded legal representation to AI/AN children in the juvenile justice systems to protect their rights and minimize the harm that the juvenile justice system may cause them. The use of technology such as videoconferencing could make such representation available even in remote areas.

4.4 Federal, tribal, and state justice systems should only use detention of AI/AN youth when the youth is a danger to themselves or the community. It should be close to the child’s community and provide trauma-informed, culturally appropriate, and individually tailored services, including reentry services. Alternatives to detention such as “safe houses” should be significantly developed in AI/AN urban and rural communities.
4.5 Federal, tribal, and state justice systems and service providers should make culturally appropriate trauma-informed screening, assessment, and care the standard in juvenile justice systems. The Indian Health Service (IHS) in the Department of Health and Human Services (HHS) and tribal and urban Indian behavioral health service providers must receive periodic training in culturally adapted trauma-informed interventions and cultural competency to provide appropriate services to AI/AN children and their families.

4.6 Congress should amend the Indian Child Welfare Act (ICWA) to provide that when a state court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in state delinquency proceedings, ICWA should be amended to require notice to the tribe and a right to intervene. As a first step, the Department of Justice (DOJ) should establish a demonstration pilot project that would provide funding for three states to provide ICWA-type notification to tribes within their state whenever the state court initiates a delinquency proceeding against a child from that tribe which includes a plan to evaluate the results with an eye toward scaling it up for all AI/AN communities.

4.7 Congress should amend the Federal Education Rights and Privacy Act (FERPA) to allow tribes to access their members’ school attendance, performance, and disciplinary records.

Chapter 5 – Empowering Alaska Tribes, Removing Barriers, Providing Resources

5.1 The federal government should promptly implement all five recommendations in Chapter 2 (Reforming Justice for Alaska Natives: The Time Is Now) of the Indian Law and Order Commission’s 2013 Final Report, A Roadmap for Making Native America Safer, and assess the cost of implementation. This will remove the barriers that currently inhibit the ability of Alaska Native Tribes to exercise criminal jurisdiction and utilize criminal remedies when confronting the highest rates of violent crime in the country.

5.1.A (Indian Law and Order Commission Recommendation 2.1): Congress should overturn the U.S. Supreme Court’s decision in Alaska v. Native Village of Venetik Tribal Government, by amending the Alaska Native Claims Settlement Act (ANCSA) to provide that former reservation lands acquired in fee by Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA are Indian country.

5.1.B (Indian Law and Order Commission Recommendation 2.2): Congress and the President should amend the definitions of Indian country to clarify (or affirm) that Native allotments and Native-owned town sites in Alaska are Indian country.

5.1.C (Indian Law and Order Commission Recommendation 2.3): Congress should amend the Alaska Native Claims Settlement Act to allow a transfer of lands from Regional Corporations to Tribal governments; to allow transferred lands to be put into trust and included within the definition of Indian country in the Federal criminal code; to allow Alaska Native Tribes to put tribally owned fee simple land similarly into trust; and to

5.2 The federal government should promptly implement all five recommendations in Chapter 2 (Reforming Justice for Alaska Natives: The Time Is Now) of the Indian Law and Order Commission’s 2013 Final Report, A Roadmap for Making Native America Safer, and assess the cost of implementation. This will remove the barriers that currently inhibit the ability of Alaska Native Tribes to exercise criminal jurisdiction and utilize criminal remedies when confronting the highest rates of violent crime in the country.

5.2.A (Indian Law and Order Commission Recommendation 2.1): Congress should overturn the U.S. Supreme Court’s decision in Alaska v. Native Village of Venetik Tribal Government, by amending the Alaska Native Claims Settlement Act (ANCSA) to provide that former reservation lands acquired in fee by Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA are Indian country.

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channel more resources directly to Alaska Native Tribal governments for the provision of governmental services in those communities.

5.1.D (Indian Law and Order Commission Recommendation 2.4): Congress should repeal Section 910 of Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), and thereby permit Alaska Native communities and their courts to address domestic violence and sexual assault committed by Tribal members and non-Natives, just as in the lower 48.

5.1.E (Indian Law and Order Commission Recommendation 2.5): Congress should affirm the inherent criminal jurisdiction of Alaska Native Tribal governments over their members within the external boundaries of their villages.

5.2 The Department of Justice (DOJ) and the Department of Interior (DOI) should provide recurring base funding for Alaska Tribes to develop and sustain both civil and criminal tribal court systems, assist in the provision of law enforcement and related services, and assist with intergovernmental agreements.

5.2.A As a first step, the DOJ and the DOI should—within one year—conduct a current inventory and a needs/cost assessment of law enforcement, court, and related services for every Alaska Tribe.

5.2.B The DOI and the DOI should provide the funding necessary to address the unmet need identified, and ensure that each Alaska Tribe has the annual base funding level necessary to provide and sustain an adequate level of law enforcement, tribal court, and related funding and services.

5.2.C Congress should enact legislation along the lines of the current bipartisan bill sponsored by both Alaska senators (S. 1474 to be titled Alaska Safe Families and Villages Act of 2014) that supports the development, enhancement, and sustainability of Alaska tribal courts including full faith and credit for Alaska tribal court acts and decrees and the establishment of specific Alaska tribal court base funding streams and grants to Alaska Native Tribes carrying out intergovernmental agreements with the state of Alaska.

5.2.D The federal government should work together with Alaska Tribes and the state of Alaska to improve coordination and collaboration on a broad range of public safety measures that cause Alaska Native children to be exposed to high rates of violence.

5.3 The state of Alaska should prioritize law enforcement responses and related resources for Alaska Tribes, and recognize and collaborate with Alaska tribal courts.

5.3.A The state of Alaska should prioritize the state law enforcement response and resources for Alaska Tribes. At a minimum, there must be at least one law enforcement official onsite in each village.
5.3.B The state of Alaska should prioritize the provision of needed village-based services including village-based women’s shelters (which allow children to stay with their mothers), child advocacy centers, and alcohol and drug treatment services.

5.3.C The state of Alaska should recognize and collaborate with Alaska tribal courts including following existing federal laws designed to protect Alaska Native children and families such as VAWA protection order authority, which requires states to recognize and enforce tribal protection orders that have been issued by tribal courts—including Alaska Native tribal courts—without first requiring a state court certification of the tribal protection order.

5.3.D The state of Alaska should enter into self-governance intergovernmental agreements with Alaska Tribes in order to provide more local tools and options to combat village public safety issues and address issues concerning Alaska Native children exposed to violence.

5.4 The Administration for Child and Families (ACF) in the Department of Health and Human Services (HHS) and the State of Alaska Office of Children’s Services (OCS) should jointly respond to the extreme disproportionality of Alaska Native children in foster care by establishing a time-limited, outcome-focused task force to develop real-time, Native inclusive strategies to reduce disproportionality.

5.5 The Department of Interior (DOI) and the State of Alaska should empower Alaska Tribes to manage their own subsistence hunting and fishing rights, remove the current barriers, and provide Alaska Tribes with the resources needed to effectively manage their own subsistence hunting and fishing.
1. Summary of Resolution(s):
This Resolution and Report urges the United States Administration, the United States Congress, state governments, and tribal governments to promptly implement specific identified recommendations contained in the November 2014 Report of the U.S. Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, entitled Ending Violence So Children Can Thrive. This Resolution and Report also calls on the American Bar Association to work with governmental entities, law schools, bar associations, and legal service providers to develop training which educates the legal profession on the issues and recommendations contained in the Ending Violence So Children Can Thrive Report, and to help promote the practices proposed in the Report.

2. Approval by Submitting Entity.
The Council of the Section of Individual Rights and Responsibilities approved the filing of this Resolution and Report during its spring meeting on April 25, 2015.

The Council of the Section of State and Local Government Law approved the filing of this Resolution and Report during its spring meeting, April 23-26, 2015.

The Commission on Domestic and Sexual Violence voted to approve the filing of this Resolution and Report on May 5, 2015.

The Commission on Youth at Risk voted to approve the filing of this Resolution and Report on April 30, 2015.
The Law Student Division approved the filing of this Resolution and Report.

The National Native American Bar Association approved the filing of this Resolution and Report during its annual meeting on April 8, 2015.

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

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?
   This Resolution builds upon the fifty-six recommendations contained in the December 2012 Defending Childhood Report prepared by the National Task Force on Children Exposed to Violence, which were adopted as ABA policy in 2013 (2013 AM 111B), for how best to improve our current justice and social service systems to serve children who have been exposed to any sort of violence or trauma. While many of the Ending Violence So Children Can Thrive Report recommendations are thematically similar to the Defending Childhood Report recommendations, they provide additional insight into the particular needs of AI/AN children and the systems that serve them. This Resolution also builds upon the thirty-four recommendations contained in the November 2013 A Roadmap for Making Native America Safer Report prepared by the Indian Law and Order Commission, which were adopted (except for the new circuit court provision of recommendation 1.2) as ABA policy in 2015 (2015 MM 111A).

5. If this is a late Report, what urgency exists which requires action at this meeting of the House?
   The Report is not late filed, but the Resolution should be considered at the 2015 Annual meeting because many of the Ending Violence So Children Can Thrive Report recommendations are directly aligned with policies previously approved by the American Bar Association House of Delegates. The fifteen identified recommendations of the Ending Violence So Children Can Thrive Report are timely and significant.

   There is no relevant legislation pending.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
   The sponsoring entities will work with the ABA’s Governmental Affairs Office to actively engage in federal and state legislative activities related to this issue.

   None.

   There are no known conflicts of interest.

The Law Student Division approved the filing of this Resolution and Report.

The National Native American Bar Association approved the filing of this Resolution and Report during its annual meeting on April 8, 2015.

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

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?
   This Resolution builds upon the fifty-six recommendations contained in the December 2012 Defending Childhood Report prepared by the National Task Force on Children Exposed to Violence, which were adopted as ABA policy in 2013 (2013 AM 111B), for how best to improve our current justice and social service systems to serve children who have been exposed to any sort of violence or trauma. While many of the Ending Violence So Children Can Thrive Report recommendations are thematically similar to the Defending Childhood Report recommendations, they provide additional insight into the particular needs of AI/AN children and the systems that serve them. This Resolution also builds upon the thirty-four recommendations contained in the November 2013 A Roadmap for Making Native America Safer Report prepared by the Indian Law and Order Commission, which were adopted (except for the new circuit court provision of recommendation 1.2) as ABA policy in 2015 (2015 MM 111A).

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   The sponsoring entities will work with the ABA’s Governmental Affairs Office to actively engage in federal and state legislative activities related to this issue.

   None.

   There are no known conflicts of interest.
10. **Referrals.**

This Resolution and Report has been referred to the following entities:

- Section of Tort Trial and Insurance Practice
- Section of Litigation
- Criminal Justice Section
- Judicial Division
- Young Lawyers Division
- Government and Public Sector Lawyers Division
- Solo, Small Firm and General Practice Division
- Center for Racial and Ethnic Diversity
- Coalition on Racial and Ethnic Justice
- Council for Racial & Ethnic Diversity in the Educational Pipeline

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This Resolution and Report urges the United States Administration, the United States Congress, state governments, and tribal governments to promptly implement specific recommendations contained in the November 2014 Report of the U.S. Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, entitled *Ending Violence So Children Can Thrive*. This Resolution and Report also calls on the American Bar Association to work with governmental entities, law schools, bar associations, and legal service providers to develop training which educates the legal profession on the issues and recommendations contained in the *Ending Violence So Children Can Thrive* Report, and to help promote the practices proposed in the Report.

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

   The Attorney General’s Task Force on American Indian and Alaska Native Children Exposed to Violence was established in 2013. The Task Force was anchored by an Advisory Committee consisting of experts in the area of AI/AN children exposed to violence and federal officials from key agencies. Their November 2013 Report, entitled *Ending Violence So Children Can Thrive*, provides sixty recommendations on addressing issues around AI/AN children exposed to violence.

   The *Ending Violence So Children Can Thrive* Report focuses its recommendations on empowering tribes to better serve AI/AN children exposed to violence. However, because tribal governments are vastly implicated by federal laws, many of the *Ending Violence So Children Can Thrive* recommendations are directed at specific legislative and/or executive action.

   The Advisory Committee’s recommendations call upon both the executive and the legislative branches of government to coordinate in implementing the Report’s recommendations that are consistent with three core principles—(1) empowering tribes, (2) removing barriers, and (3) providing resources.

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

   This Resolution will encourage the U.S. Administration and Congress, as well as state, local, and tribal governments, to promptly implement all the recommendations offered in the *Ending Violence So Children Can Thrive* Report, and urges the American Bar Association to work with governmental entities, law schools, bar associations, and legal service providers to develop training on the issues and recommendations contained in the Report and to help promote the practices proposed in the Report.

4. **Summary of Minority Views**

   No minority views or opposition have been identified at this time.
RESOLVED, That the American Bar Association supports observation of elections in the
United States by observers duly selected by the Organization for Security and Cooperation in
Europe (OSCE), and other international organizations of which the United States is a member;

FURTHER RESOLVED, That the ABA urges federal, state, local, territorial and tribal
legislative bodies and governmental agencies to enact laws and adopt rules, regulations and
policies that expressly permit the direct observation of the election process by OSCE observers;
and

FURTHER RESOLVED, That the ABA urges federal, state, local, territorial and tribal
elected officials and political leaders to welcome accredited international election observers of
the OSCE and support them in their voting observation missions in accordance with the agreed
commitments of the United States Government as a participating State in the OSCE.
I. INTRODUCTION

The Organization for Security and Cooperation in Europe (OSCE) is the “world’s largest security-oriented intergovernmental organization.” There are 57 participating states in the OSCE. The United States (U.S.) is a participating state, and an original founder of the OSCE. Election monitoring is one of the various areas in which the OSCE is engaged. As part of their OSCE commitments, all participating states agree to allow for observation of their own elections by observers recruited from the other OSCE countries. These commitments are political agreements of the U.S. Government, but are not legally binding obligations under a treaty or international agreement. This mutual commitment to election observation is an important tool for promoting democracy.

U.S. observers routinely participate in missions to observe the elections of the other OSCE countries. In return, international election observers from the OSCE have observed general elections in the United States, at the invitation of the U.S. State Department, from 2002 to 2012. In 2010, the National Association of Secretaries of State (NASS) passed its most recent resolution encouraging federal, state and local election officials to permit international observers access to polling places.\(^1\)

Observers of elections, including those from the OSCE, are bound by the Declaration of Principles for International Observation (Principles) and the Code of Conduct for International Observers (Code). OSCE, through the Office of Democratic Institutions and Human Rights (ODIHR) endorsed the Principles and Code in 2005. The Declaration states: “International election observation, which focuses on civil and political rights, is part of international human rights monitoring and must be conducted on the basis of the highest standards for impartiality concerning national political competitors and must be free from any bilateral or multilateral considerations that could conflict with impartiality.” One of the principles is “[i]nternational election observation missions must actively seek cooperation with host country electoral authorities and must not obstruct the election process.” Principles, ¶ 10. The Code further instructs observers to respect the laws and authority of electoral bodies and not to obstruct the election process. Each observer is required to read, understand and sign a pledge to follow the Code.

In October 2012, the Attorney General of Texas, citing Texas law that does not provide for observation by representatives of international organizations, publicly threatened to arrest OSCE election observers if they attempted to enter polling locations. The threat of arrest was widely reported in the media and was interpreted as an expression of hostility toward international election observers. The Governor of Texas made similar statements, as did the Iowa Secretary of State.

\(^1\) http://www.nass.org/component/docman/?task=cat_view&gid=82&limit=50&order=hits&dir=DESC&limitstart=art=0&itemid.
OSCE observation is consistent with the American Bar Association’s (ABA) mission and goal to "advance the rule of law throughout the world." The OSCE observes elections in all participating countries, not just those transitioning to democracy. Suspicion toward OSCE election observers is unwarranted and potentially damages the perception of the electoral process in the United States. Forces opposed to legitimate democratic elections outside the United States can be emboldened by statements of state officials that call into question the legitimacy and impartiality of OSCE observation. A clear statement from the ABA on the issue of international election observation of U.S. elections is needed in order to support the important work of the OSCE and other international organizations, improve the quality of U.S. elections through observation and reporting by international observers, and protect the credibility of the ABA’s own efforts to promote the rule of law abroad. The ABA recognizes that some current state laws may be interpreted by some as not being compatible with OSCE observation. The ABA urges states with these views to consider amending local laws and regulations consistent with permitting full OSCE observation.

II. BRIEF HISTORY OF THE OSCE AND U.S. PARTICIPATION

The OSCE is one of the legacies of the Cold War. In 1973, during a period of détente between the U.S. and the Soviet Union, 35 countries participated in the newly formed Conference on Security and Cooperation in Europe (CSCE) to discuss a variety of security issues. The Helsinki Final Act, the concluding document of the conference, enumerated a set of political commitments undertaken by each country to provide a certain level of conduct for its citizens in the areas of politics and the military, the economy and the environment, and human rights.

From 1975 with the publication of the Helsinki Final Act to 1990 with the fall of the Berlin Wall, the CSCE served primarily as a forum for periodic conferences that addressed countries’ adherence to, and implementation of, past commitments and facilitated the negotiation of new commitments. Responding to the end of the Cold War and the breakup of the Soviet Union, in 1994, the CSCE was reorganized into a permanent institution with an administrative structure and renamed the OSCE in order to better manage the new security challenges facing Europe. Since then, the OSCE has grown to include 57 participating countries, becoming the largest regional security organization aimed at strengthening and fostering cooperation and development in the three key areas of political-military affairs, economic and environmental affairs, and human rights.

The U.S. was a founding member of the CSCE and continues to play an important role within the OSCE. Specifically, it actively participates in three bodies of the OSCE: the Joint Consultative Group on the Treaty on the Conventional Armed Forces in Europe; the Forum for Security Cooperation and its Conference and Security Building Measures; and the Open Skies Consultative Commission and the implementation of the Treaty on Open Skies. The U.S. also supports the work done by other OSCE agencies including ODHIR.

ODIHR is a body within the OSCE that is tasked with addressing a broad range of human rights, rule of law, and discrimination issues and providing resources and aid to countries to enable them to raise their standards. One of the main areas of the ODIHR’s work is in

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election observation. Committed to ensuring that "elections respect fundamental freedoms and are characterized by equality, universality, political pluralism, confidence, transparency and accountability," ODHIR sends election observer teams to all OSCE-participating countries.2

The basis for these observations is contained in the 1990 Copenhagen Document that helped transition the OSCE into a post-Cold War institution. The document contains a list of election standards that countries must uphold when conducting democratic elections.3 To ensure compliance with these standards, the countries also promise to allow for international monitoring of their elections. To guarantee legitimacy, impartiality, and non-interference in all participating countries, OSCE election monitoring teams are required to comply with all national laws and a strict internal conduct codes including the Principles and Code, discussed above.

This type of election monitoring and assistance was initially directed primarily towards countries transitioning to democracy after the fall of communism. However, the observation of elections in well-established democracies with a history of free and fair elections has become more frequent. Aside ODHIR. Aside from countries' obligation to allow international access to the monitoring teams and commitment to the continued promotion of high election standards, even established democracies can benefit from international expertise and best practices to help rectify any problems that may arise during the election period. Conversely, observation provides an opportunity for international observers to learn from the U.S. expertise in the conduct of regular, free and fair elections.

The U.S. has been a willing participant in OSCE election observations since 2002, when the OSCE monitoring team reported on the Congressional elections. Teams were sent to the U.S. again in 2006 for the general election, 2008 for the general election, 2010 for the Congressional elections, and in 2012 for the general election.

Many states permit OSCE observers access to their polling places.4 The most recent OSCE observation mission, in 2012, encountered resistance from several states. In the U.S., the right to conduct elections is provided for in individual state laws; not all states, however, expressly permit international monitors. Additionally, members of the monitoring team—consisting of 13 election experts from 10 OSCE countries based in Washington, D.C. and 44 election observers stationed around the country—were not welcomed in all states and were actively impeded from accessing polling stations.5 In Texas, the Attorney General published a

5 Alabama, Alaska, Florida, Iowa, Michigan, Mississippi, Ohio, Pennsylvania, Tennessee, and Texas. Id.
letter threatening OSCE observers with criminal charges if they continued to pursue their mission.6

Those states which challenge the OSCE observation mission are acting contrary to the U.S. commitments as a member of the OSCE to ensure that states have incorporated all of the requirements of the 1990 Copenhagen Document into their legislation. These states’ approach is also contrary to the previously established cooperation between the U.S. and the OSCE and harmful to the relationship between the U.S. and the OSCE. Most importantly, it is detrimental to the legitimacy that OSCE election observation teams have in other, less-democratic OSCE member states.

III. NUMEROUS AMERICAN BAR ASSOCIATION RESOLUTIONS AND POLICIES SUPPORT ELECTION ADMINISTRATION ISSUES

For decades the ABA has offered insight and advice on matters pertaining to the administration of elections. The ABA maintains an interest in promoting and improving the integrity of elections, in line with international standards. The promotion of observation by the OSCE is an extension of these efforts by the ABA.

a) The ABA’s Support Regarding Election Administration.

In 1989, the ABA adopted the Ballot Integrity Standards Applying to Election Officials (Standards). The Standards addressed proposed rules and guidelines for voter registration, absentee voting, Election Day officials and ballot integrity.

The Standards also included guidelines for poll watchers. Under the Standards, poll watchers could be authorized to represent political parties, candidates and civic groups. They did not have to live in the precinct or election jurisdiction. The Standards advised that poll watchers should be permitted to observe all official acts and records at polling sites, challenge unqualifed voters and challenge improper voting practices. The Standards encouraged bar associations to encourage attorneys to serve as election officials, and for bar associations to assign attorneys to assist with programs that ensure the integrity of the election process.

Because of the widely reported issues in the 2000 presidential elections, the ABA considered election administration anew and adopted the Election Administration Guidelines in August 2001 (the 2001 Guidelines). The 2001 Guidelines addressed voting education and rights, voter registration, ballot integrity and post-election issues. The 2001 Guidelines provide similar recommendations regarding poll watchers as the Standards, though notably the Guidelines add that state and federal government must ensure that voters are not challenged in contravention of the Civil Rights Act and the Voting Rights Act.

In August 2005 the Association adopted the Election Administration Guidelines and Commentary resolution to supplant the Standards and the 2001 Guidelines (Current Guidelines).

The Current Guidelines were updated again in 2008 and 2009 to respond to problems that emerged in administration of subsequent elections. The ABA has recommended that all election officials ensure the integrity of the election process through the adoption, use, and enforcement of the Current Guidelines. Further, the ABA urges federal, state, local and territorial government provide adequate funding to ensure the integrity and efficiency of the electoral process.

b) The ABA’s Support Regarding Voting Rights.

Over the years the ABA has adopted a number of resolutions that pertain to voting rights. In addition to the voting rights provisions contained in the Standards and the Current Guidelines, the ABA has adopted resolutions that concern voting rights for specific groups of people. For example, in 1992 the ABA adopted a resolution supporting amendment of the U.S. Constitution to provide for people living in U.S. territories to be able to vote in national elections. In 1993 the ABA adopted a resolution to support efforts to ensure the participation of homeless persons in elections. In 2007 the ABA adopted a resolution urging the government to improve the administration of elections to facilitate voting for people with disabilities. In addition, noting that members of minority groups still face discrimination in exercising their right to vote, the ABA adopted a resolution in 2005 urging Congress to reauthorize the Voting Rights Act.

c) The ABA’s Support Regarding Ballot Integrity.

The ABA has addressed ballot integrity in both the Standards and the Current Guidelines. The ABA has also adopted resolutions regarding use of provisional ballots. In August 2003, the Model Statutory Language on Provisional Balloting and Commentary were developed to inform and guide drafting of the earliest provisional ballot statutes by providing uniform standards for affidavits, presentation and verification of provisional ballots. In the resolution amending the Current Guidelines that was adopted in 2009, changes were made to include greater detail concerning the administration of provisional ballots on Election Day.

d) The ABA’s Support Regarding Voter Registration.

The ABA has made a concerted effort to address voter registration. In August 1974 the ABA adopted a resolution on voter registration by mail. In 1990, noting a continued reduction in voter participation in elections, the ABA adopted a resolution to: support efforts to increase voter registration through state and local agencies, to make voting easy and convenient, and to support voter education.

In August 1999 the ABA adopted a resolution opposing legislation that would repeal the National Voter Registration Act. Further, to increase the number of registered voters and the number of registered voters voting in elections, this 1999 resolution supported: voter registration by mail, additional registration facilities at easily accessible locations and open during convenient times, and provision by employers of time and opportunity for employees to vote.

In August 2010 the ABA adopted a resolution to support state and federal initiatives to modernize and improve voter registration practices, databases and networks. The resolution noted that the stability and reliability of our voter registration systems is the foundation of our
ability to ensure that citizens are afforded the right and opportunity to vote in our elections. The 2000 presidential election exposed the weaknesses in the technologies for vote recording and tabulation and for maintaining voter registration files. Accordingly, the resolution was focused on technical and technological improvements.

Finally, in 2011 the ABA adopted a resolution to support efforts to improve voter registration. The resolution focused on measures to ensure accuracy of voter registration rolls and streamline the procedures by which changes to voter registration rolls are made.

IV. IT IS IMPORTANT FOR THE ABA TO SUPPORT THE PRESENCE OF OSCE OBSERVERS IN THE U.S. TO PROTECT THE ABA’S CREDIBILITY AND REPUTATION IN PROMOTING THE RULE OF LAW ABROAD

According to the ABA: “Addressing this global rule of law deficit is not only the most important calling of the world’s legal community; it must also become an urgent priority for world leaders, international institutions and citizens committed to making this a just, peaceful and prosperous world.” Therefore, the ABA has been actively engaged in promoting the rule of law in foreign countries since 1990 when it established the Central European and Eurasian Law Initiative (CEELI) after the fall of the Berlin Wall. The CEELI program sent ABA volunteers to many of the OSCE member states to provide legal advice and assistance to governments and community leaders. In 2007, the ABA consolidated its various overseas rule of law programs, including CEELI, into the ABA Rule of Law Initiative (ROLI).

The ABA’s CEELI and ROLI programs have worked closely with OSCE field missions throughout Eastern Europe and Central Asia, including work to support election-monitoring teams in Armenia in 2007 and the training of judges in Moldova in 2008. The Helsinki Final Act, and other OSCE documents, is routinely cited in ABA ROLI reports on issues related to human rights and the rule of law.

ABA ROLI currently implements legal reform programs in roughly 60 countries in Africa, Asia and the Pacific, Europe and Eurasia, Latin America and the Caribbean, and the Middle East and North Africa.

This work is jeopardized by attacks on international institutions, such as the OSCE, by political leaders in the United States. Dictators, tyrants and those opposed to the defense of liberty and the delivery of justice are emboldened by statements made by prominent Americans that undermine the credibility of people who are legitimately promoting the rule of law by observing elections in the U.S. ABA volunteers working in foreign countries, sometimes with governments that are hostile to the very principle of the rule of law, are also undermined by such attacks. It is important for the ABA to express its strong support for the presence of OSCE observers in the United States in order to protect the ABA’s credibility and reputation in promoting the rule of law abroad.

V. CONCLUSION

Therefore, for the foregoing reasons, the ABA should fully support observation of elections in the U.S. by the OSCE, and other international organizations of which the U.S. is a member. Additionally, the ABA should: 1) urge all federal, state, territorial, and local political leaders and elected officials to welcome international election observers and to provide access to the election process to the fullest extent of the law; 2) urge all federal, state, territorial, and local legislative bodies and governmental agencies to enact laws and adopt rules, regulations and policies that expressly permit the direct observation of the election process by OSCE observers who have been invited by the U.S. State Department to observe U.S. elections; and 3) support the OSCE as a legitimate international organization working to promote the rule of law in the United States and abroad.

Respectfully Submitted,

Marcelo E. Bombau
Chair, Section of International Law
August 2015
1. Summary of Resolution(s).

The proposed Resolution urges the American Bar Association to support observation of elections in the United States by observers duly selected by the Organization for Security and Cooperation in Europe (OSCE), and other international organizations of which the United States is a member. It would also have the ABA urge all federal, state, territorial, and local legislative bodies and governmental agencies to enact laws and adopt rules, regulations and policies that expressly permit the direct observation of the election process by OSCE observers, and in addition, to urge all federal, state, territorial, and local elected officials and political leaders would welcome accredited international election observers of the OSCE and support them in their voting observation missions in accordance with the agreed commitments of the United States Government as a participating State in the OSCE.

2. Approval by Submitting Entity.

The Council of the Section of International Law approved this recommendation and resolution at its Meeting on February 6, 2015 and the Council of the Standing Committee on Election Law approved this recommendation and resolution at its Meeting on April 16, 2015.

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

No.

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

In 1989, the ABA adopted the Ballot Integrity Standards Applying to Election Officials (Standards), which addressed proposed rules and guidelines for voter registration, absentee voting, Election Day officials and ballot integrity along with guidelines for poll watchers. The ABA adopted Election Administration Guidelines in August 2001 (the 2001 Guidelines), which address voting education and rights, voter registration, ballot integrity and post-election issues. In August 2005 the Association adopted the Election Administration Guidelines and Commentary resolution to supplant the Standards and the 2001 Guidelines (Current Guidelines). The Current Guidelines were updated again in 2008 and 2009 to respond to problems that emerged in administration of subsequent elections. The ABA has adopted a number of resolutions that support voting rights of those in U.S. territories to vote in national elections (adopted in 1992); urge more participation of homeless persons (adopted in 1993); encourage better minority groups
voting representation by U.S. government reauthorization of the Voting Rights Act (adopted in 2005); and urge government improvement of the administration of elections to facilitate voting for people with disabilities (adopted in 2007). In August 2003, the Model Statutory Language on Provisional Balloting and Commentary was adopted to protect ballot integrity. In August 1974 the ABA adopted a resolution on voter registration by mail. In 1990, noting a continued reduction in voter participation in elections, the ABA adopted a resolution to: support efforts to increase voter registration through state and local agencies, to make voting easy and convenient, and to support voter education. In August 1999 the ABA adopted a resolution opposing legislation that would repeal the National Voter Registration Act. In August 2010 the ABA adopted a resolution to support state and federal initiatives to modernize and improve voter registration practices, databases and networks. Finally, in 2011 the ABA adopted a resolution to support efforts to improve voter registration. The resolution focused on measures to ensure accuracy of voter registration rolls and streamline the procedures by which changes to voter registration rolls are made.

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 applicable.

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 be able to more strongly support the credibility of OSCE observers not only in the United States, but also abroad. ABA’s Rule of Law Initiative has worked with OSCE field missions in the past in an effort to promote the rule of law and fair elections practices, but this work is jeopardized by attacks on international institutions, such as the OSCE. With the ABA’s support, the sponsors can more readily urge the acceptance of OSCE election monitors in the U.S., especially given that the U.S. was a founding member of the institution, which will lend more credibility to their efforts and reputations abroad.

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

None

9. Disclosure of Interest. (If applicable)

None applicable.
10. Referrals

This recommendation and resolution has been referred to the Standing Committee on Election Law and the Section of State and Local Government Law, both of which approved co-sponsorship.

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The proposed Resolution would have the American Bar Association support observation of elections in the United States by observers duly selected by the Organization for Security and Cooperation in Europe (OSCE), and other international organizations of which the United States is a member. It would also have the ABA urge all federal, state, territorial, and local legislative bodies and governmental agencies to enact laws and adopt rules, regulations and policies that expressly permit the direct observation of the election process by OSCE observers, and in addition, to urge all federal, state, territorial, and local elected officials and political leaders would welcome accredited international election observers of the OSCE and support them in their voting observation missions in accordance with the agreed commitments of the United States Government as a participating State in the OSCE.

2. Summary of the Issue that the Resolution Addresses

All participating states agree to allow for observation of their own elections by observers recruited from the other OSCE countries; the U.S. is a participant of OSCE and original founding member. These commitments are political agreements of the U.S. Government, but are not legally binding obligations under a treaty or international agreement. This mutual commitment to election observation is an important tool for promoting democracy.

The U.S. has been a willing participant in OSCE election observations since 2002, but the most recent OSCE observation mission, in 2012, encountered resistance from several states. In the U.S., the right to monitor elections is provided for in individual state laws; not all states, however, expressly permit international monitors. Those states which challenge the OSCE observation mission are acting contrary to the previously established cooperation between the U.S. and the OSCE and harmful to the relationship between the U.S. and the OSCE. Most importantly, it is detrimental to the legitimacy that OSCE election observation teams have in other, less-democratic OSCE member states.

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

ABA’s Rule of Law Initiative has worked with OSCE field missions in the past in an effort to promote the rule of law and fair elections practices, but this work is jeopardized by attacks on international institutions, such as the OSCE. With the ABA’s support, the sponsors can more readily urge the acceptance of OSCE election monitors in the U.S., which will lend more credibility to their efforts and reputations abroad. A clear statement from the ABA on the issue of international election observation of U.S. elections is needed in order to support the important work of the OSCE and other international organizations, improve the quality of U.S. elections through the observation and reporting by international observers, and protect the credibility of the ABA’s own efforts to promote the rule of law abroad.

EXECUTIVE SUMMARY

1. Summary of the Resolution

The proposed Resolution would have the American Bar Association support observation of elections in the United States by observers duly selected by the Organization for Security and Cooperation in Europe (OSCE), and other international organizations of which the United States is a member. It would also have the ABA urge all federal, state, territorial, and local legislative bodies and governmental agencies to enact laws and adopt rules, regulations and policies that expressly permit the direct observation of the election process by OSCE observers, and in addition, to urge all federal, state, territorial, and local elected officials and political leaders would welcome accredited international election observers of the OSCE and support them in their voting observation missions in accordance with the agreed commitments of the United States Government as a participating State in the OSCE.

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ABA’s Rule of Law Initiative has worked with OSCE field missions in the past in an effort to promote the rule of law and fair elections practices, but this work is jeopardized by attacks on international institutions, such as the OSCE. With the ABA’s support, the sponsors can more readily urge the acceptance of OSCE election monitors in the U.S., which will lend more credibility to their efforts and reputations abroad. A clear statement from the ABA on the issue of international election observation of U.S. elections is needed in order to support the important work of the OSCE and other international organizations, improve the quality of U.S. elections through the observation and reporting by international observers, and protect the credibility of the ABA’s own efforts to promote the rule of law abroad.
4. **Summary of Minority Views**

No minority views have been identified in opposition.
RESOLVED, That the American Bar Association urges the National Commission on Forensic Science to develop a model curriculum in the law and forensic science, and to provide training in that curriculum for federal, state, local, territorial and tribal judges.
REPORT

The National Academy of Sciences (NAS) Report Strengthening Forensic Science – A Path Forward, identified the problem of judges and lawyers who often lack the scientific expertise necessary to comprehend and evaluate forensic evidence. Since the report has been issued, Congress has not taken action to address the need for further education in this area. Therefore it is incumbent upon the judiciary and profession to move forward.

Judges, lawyers, practitioners, and the general public all need education on the strengths and limits of forensic disciplines and, more generally, on the law governing expert witness testimony and evidence. Judges routinely request education in forensic science evidence. While some education programs work when attended by both judges and lawyers, judges prefer and may benefit more when the education program is limited to the members of the judiciary as attendees.

The National Commission on Forensic Science has a subcommittee evaluating whether to make recommendations to the Attorney General on educational resources and programs addressing forensic discipline evidence, and, in particular, forensic science education for judges.

A Forensic Science Judicial Curriculum development process should be established starting as a three-year pilot program for selected “thought leader” federal, state, territorial and tribal judges, from both trial and appellate courts. It is anticipated that these judges would meet for between two and four days a year rotating over three years at three different law schools working together to ensure informed development of curriculum and pedagogical methods. In addition to a day each year covering core forensic science curriculum for judges on issues such as statistics, validity, reliability, “gate keeping” legal standards, “human factor” issues, and the role of experts, each subsequent day would provide a balanced but in depth review of one or two forensic science disciplines which have been questioned by the 2009 NAS Report or that are novel that would likely come before courts. The subject matter areas under consideration by the National Institute of Standards and Technology and Justice Departments’ Organization of Scientific Area Committees (OSAC) as well as other challenging “gate keeping” science areas such as eyewitness identification evidence. The National Academy of Sciences or a similar entity would be responsible for assisting in developing the science curriculum and “modular” presentations by experts for the conference that could be brought back to state and federal jurisdictions and publicly distributed. The discussion among the judges themselves at these meetings would be private.

The “thought leader” judges who attend the conference, in conjunction with the Federal Judicial Center, the National Judicial College, and state judicial educators, would be encouraged to make their own arrangements to replicate the four-day Conference based on the curriculum for judges in their own jurisdictions over the course of an entire year. This structure has a built-in multiplier effect that would assure a wide dispersion of a

balanced, first-rate forensic science curriculum throughout the legal profession in a cost-effective fashion.

Funding for the NAS to develop curriculum would be pursued through private foundation sources. Funding would be needed for conference expenses – travel, lodging and expenses for instructors and attendees for at least the first three years – and would be pursued through private foundations as well as state and federal grants.

Respectfully submitted,
Hon. David J. Waxse, Chair
Judicial Division
August 2015
GENERAL INFORMATION FORM

Submitting Entity: Judicial Division
Submitted By: Hon. David D. Waxse, Chair, Judicial Division

1. Summary of Resolution(s).

This Resolution calls for the American Bar Association to urge the National Commission on Forensic Science to develop a model curriculum in the law and forensic science and to provide of training in that curriculum for federal, state, territorial, local and tribal judges.

2. Approval by Submitting Entity.

The Judicial Division approved this resolution by vote on its Judicial Division Council conference call that took place on May 5, 2015.

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

While there has been no exact resolution submitted to the House or Board previously, the resolutions explained below in question/answer “4.”, which have all been adopted by the House of Delegates in the past, would all support the adoption of this Resolution.

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

The ABA has implemented certain policy adopting and reaffirming the majority of the 2009 National Academy of Sciences report on “Strengthening Forensic Science in the United States: A Path Forward.” Relevant ABA policies include the following and would only be strengthened by the adoption of this Resolution:

101C (February 2013) calls for a checklist of items that judges should consider when determining whether to admit forensic evidence.

101D (February 2012) calls for judges to consider potential jurors actual understanding of the forensic science, bias included, when forming jury voir dire questions in order to be sure of their understanding or capacity for understanding complex issues that may arise.

100D-I (August 2010) 100D asks for sufficient funding and resources for, among other things, scientific research to improve and further develop forensic science disciplines and to annually access and establish a prioritized agenda of and research needs in the area, and enable development of future technologies to assist with forensic science. The resolution and its related resolutions (100E-I) were intended as an integrated series of statements by the ABA and its membership to assist governmental policymakers as they proceed in the legislative implementation process.

GENERAL INFORMATION FORM

Submitting Entity: Judicial Division
Submitted By: Hon. David D. Waxse, Chair, Judicial Division

1. Summary of Resolution(s).

This Resolution calls for the American Bar Association to urge the National Commission on Forensic Science to develop a model curriculum in the law and forensic science and to provide of training in that curriculum for federal, state, territorial, local and tribal judges.

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100D-I (August 2010) 100D asks for sufficient funding and resources for, among other things, scientific research to improve and further develop forensic science disciplines and to annually access and establish a prioritized agenda of and research needs in the area, and enable development of future technologies to assist with forensic science. The resolution and its related resolutions (100E-I) were intended as an integrated series of statements by the ABA and its membership to assist governmental policymakers as they proceed in the legislative implementation process.
100E (August 2010) calls for an examination of standards and certification for labs and those that work in them; implementation of programs to support accreditation and certification of labs and those that work in them, uniformity or “best practices” and adoption of standards and common terminology for clear communication in scientific testing; insurance of independence from internal and external pressure that would negatively affect analysis, a national code of ethics for the forensic science community, which would also be incorporated into the accreditation and certification system; the establishment of a process to regularly assess the adequacy of existing forensic science education and training programs (at all levels) across disciplines against recognized standards, or certification/best practices which takes into consideration (a) relevant research (b) changes or modifications to standards for lab accreditation (c) examiner certification (d) new and developing technologies and protocols for their use and (e) ethical issues to the role of the forensic practitioner; encouragement of and educational opportunities for students in life sciences to focus on forensic science fields; and to facilitate the implementation of training in forensic science for law enforcement, lawyers, and JUDGES, in such subjects as the scientific method, forensic science disciplines, relevant standards laboratory accreditation, certification, ethics and quality assurance and quality control measures.

100F (August 2010) focuses on the need to coordinate and integrate the forensic science community into the national effort aimed at homeland security. The disciplines and techniques involved in the investigation of crime are similarly used in the investigation of terrorist acts, threats, the tracking of terrorists and in the response to mass disasters.

100G (August 2010) focuses on improved professionalism, nationally, in the area of death investigation and continues ABA advocacy in favor of accreditation of medical examiners offices, examiner certification, adequate funding of labs and medical examiners offices.

100H (August 2010) addresses the lack of interoperability among fingerprint databases by asking equipment vendors to collaborate with in creating baseline standards for sharing fingerprint data and a common method of interface; law enforcement agencies to receive sufficient resources needed to transition to the resulting implementations for interface and data sharing; and development of coordinated agreements and policies that will allow broader sharing of data by law enforcement. It also supports operational and technological improvements to the National Integrated Ballistic Information Network, including best practices.

100I (August 2010) supports access to forensic science services and experts by indigent defendants, emphasizing that the ability of a defendant to test, re-test, and consult with testimonial and non-testimonial experts is critical to the reliability and fairness of the criminal justice system.
5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation. (If applicable)

There is no legislation pending at this time.

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

If this Resolution is adopted by the House of Delegates, it is anticipated that implementation would begin with the establishment of a three-year pilot program for selected “thought leader” federal, state, territorial, local and tribal judges, from both trial and appellate courts. The conference would meet for between two and four days a year rotating over three years at three different law schools working together in consortium to ensure informed development of curriculum and pedagogical methods. In addition to a day each year covering a core science curriculum for judges on issues such as statistics, validity, reliability, “gate keeping” legal standards, “human factor” issues, and the role of experts, each subsequent day would provide a balanced but in depth review of one or two forensic science disciplines which have been questioned by the 2009 NAS Report or that are novel that would likely come before courts. The subject matter areas would track disciplines under consideration by the National Institute of Standards and Technology and Justice Departments’ Organization of Scientific Area Committees (OSAC) as well as other challenging “gate keeping” science areas such as eyewitness identification evidence. The National Academy of Sciences or a similar entity would be responsible for developing the science curriculum and “modular” presentations by experts for the conference that could be brought back to state and federal jurisdictions and publicly distributed. The discussion among the judges themselves at the conference would be private.

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

None.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

ABA Criminal Justice Section; Section of Litigation; Tort, Trial & Insurance Practice Section.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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Judge_Waxse@ksd.uscourts.gov
(913) 735-2277
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution calls for the American Bar Association to urge the National Commission on Forensic Science to develop a model curriculum in the law and forensic science and to provide training in that curriculum for federal, state, territorial, local and tribal judges.

2. Summary of the Issue that the Resolution Addresses

The 2009 National Academy of Sciences (NAS) Report Strengthening Forensic Science – A Path Forward identified the problem of judges and lawyers who often lack the scientific expertise necessary to comprehend and evaluate forensic evidence. Since the report has been issued, Congress has not taken an action to address the need for further education in this area; therefore it is incumbent upon the judiciary and profession to move forward. Judges, lawyers, practitioners, and the general public all need education on the strengths and limits of forensic disciplines and, more generally, on the law governing expert witness testimony and evidence. Judges routinely request education in forensic science evidence and this resolution will provide just that, by urging the development of a model curriculum and training in that area.

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

It is anticipated that this Resolution will address the issue explained above by promoting and working to implement the establishment of a three-year pilot program for selected “thought leader” federal, state, territorial, local and tribal judges, from both trial and appellate courts. The conference would meet for between two and four days a year rotating over three years at three different law schools working together in consortium to ensure informed development of curriculum and pedagogical methods. In addition to a day each year covering a core science curriculum for judges on issues such as statistics, validity, reliability, “gate keeping” legal standards, “human factor” issues, and the role of experts, each subsequent day would provide a balanced but in depth review of one or two forensic science disciplines which have been questioned by the 2009 NAS Report or that are novel that would likely come before courts. The subject matter areas would track disciplines under consideration by the National Institute of Standards and Technology and Justice Departments’ Organization of Scientific Area Committees (OSAC) as well as other challenging “gate keeping” science areas such as eyewitness identification evidence. The National Academy of Sciences or a similar entity would be responsible for developing the science curriculum and “modular” presentations by experts for the conference that could be brought back to state and federal jurisdictions and publicly distributed.

4. Summary of Minority Views

There are no known minority views at this time.
RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal legislatures and government agencies to provide the funding necessary to develop, implement, and maintain appropriate cybersecurity programs for the courts and to train court personnel on methods to counter threats and protect judicial information systems from cyber intrusions or data breaches.
I. INTRODUCTION

This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. It urges federal, state, local, tribal and territorial legislatures and government agencies to provide the funding necessary to develop, implement, and maintain appropriate cybersecurity programs for the courts and to train court personnel on methods to counter threats and protect judicial information systems from cyber intrusions or data breaches.

The ABA Resolution is based upon the recognition that adequate funding and training are necessary to protect the public’s interest in the integrity of the courts and the data they hold. Such funding and training should enable the courts to perform a number of important tasks, including the conduct of regular risk assessments of each court’s information security program; updates to security controls; continuous vulnerability monitoring; the development and testing of comprehensive incident response and business continuity/disaster recovery (BC/DR) plans; and the sharing of cyber threat information among the courts and the legal community.

Over the years, the ABA House of Delegates has adopted a number of Resolutions sponsored by the ABA Cybersecurity Legal Task Force and the Section of Science & Technology Law that address cybersecurity threats and urge organizations to follow best practices to address them. In addition, the ABA has adopted Resolutions that address threats within courthouses and are directed toward participants in the judicial system, and any actual or perceived threat that may impede or interfere with access to the justice system and are also a threat to the fair and efficient administration of justice. The ABA has not adopted any policy that addresses the need for funding to develop, implement, and maintain an appropriate cybersecurity program for the courts.

From a security perspective, the courts in recent years have provided resources for building security. For example, the National Center for State Courts (NCSC) has been in the forefront of courthouse building security—a number of highly-publicized incidents of violence in courthouses around the country focused attention on this problem and best practices have been developed to address it.1 Now, as the courts modernize their information systems, adequate funding will be required to develop, implement, and maintain an appropriate cybersecurity program, assess the threats to those systems, and protect the volumes of confidential and sensitive data that the courts collect, use, store, and share.

1 The NCSC has conducted extensive research on the causes and prevention of court building violence and published Steps to Best Practices for Court Building Security ("Steps to Best Practices"), available at http://www.ncsc.org/services-and-experts/areas-of-expertise/media/files/PDF/Service%20and%20Experts/Area%20of%20Expertise/Emergency%20Preparedness/Security_Best%20Practices%20Steps_to_Best_Practices.mspx. These best practices represent collaboration with the Center for Judicial and Executive Security ("CJES") in St. Paul, Minnesota, and the administrative offices of the courts of several states. NCSC encourages the leadership of every court building to strive to achieve and maintain best practices in every area identified in their publication so that every person who works in or visits a court building may do so in the safest environment possible.

I. INTRODUCTION

This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. It urges federal, state, local, tribal and territorial legislatures and government agencies to provide the funding necessary to develop, implement, and maintain appropriate cybersecurity programs for the courts and to train court personnel on methods to counter threats and protect judicial information systems from cyber intrusions or data breaches.

The ABA Resolution is based upon the recognition that adequate funding and training are necessary to protect the public’s interest in the integrity of the courts and the data they hold. Such funding and training should enable the courts to perform a number of important tasks, including the conduct of regular risk assessments of each court’s information security program; updates to security controls; continuous vulnerability monitoring; the development and testing of comprehensive incident response and business continuity/disaster recovery (BC/DR) plans; and the sharing of cyber threat information among the courts and the legal community.

Over the years, the ABA House of Delegates has adopted a number of Resolutions sponsored by the ABA Cybersecurity Legal Task Force and the Section of Science & Technology Law that address cybersecurity threats and urge organizations to follow best practices to address them. In addition, the ABA has adopted Resolutions that address threats within courthouses and are directed toward participants in the judicial system, and any actual or perceived threat that may impede or interfere with access to the justice system and are also a threat to the fair and efficient administration of justice. The ABA has not adopted any policy that addresses the need for funding to develop, implement, and maintain an appropriate cybersecurity program for the courts.

From a security perspective, the courts in recent years have provided resources for building security. For example, the National Center for State Courts (NCSC) has been in the forefront of courthouse building security—a number of highly-publicized incidents of violence in courthouses around the country focused attention on this problem and best practices have been developed to address it.1 Now, as the courts modernize their information systems, adequate funding will be required to develop, implement, and maintain an appropriate cybersecurity program, assess the threats to those systems, and protect the volumes of confidential and sensitive data that the courts collect, use, store, and share.

1 The NCSC has conducted extensive research on the causes and prevention of court building violence and published Steps to Best Practices for Court Building Security ("Steps to Best Practices"), available at http://www.ncsc.org/services-and-experts/areas-of-expertise/media/files/PDF/Service%20and%20Experts/Area%20of%20Expertise/Emergency%20Preparedness/Security_Best%20Practices%20Steps_to_Best_Practices.mspx. These best practices represent collaboration with the Center for Judicial and Executive Security ("CJES") in St. Paul, Minnesota, and the administrative offices of the courts of several states. NCSC encourages the leadership of every court building to strive to achieve and maintain best practices in every area identified in their publication so that every person who works in or visits a court building may do so in the safest environment possible.
As with all organizations, courts must remain forward-looking in managing their cybersecurity program. The threat environment, operational requirements, and innovation are constantly changing. This requires regular assessments of cybersecurity programs, evaluations of the effectiveness of controls and deployed technologies, and adjustments where necessary to maintain a strong security posture. This process necessarily involves a review of funding needs for the security program and updated training.

This is a particularly urgent need for state courts, many of which report having insufficient security budgets. The 2014 Deloitte-NASCIO study emphasized that the cybersecurity landscape for state government is a complex and challenging one, and concluded that unless deliberate action is taken, budgets will continue to be a challenge as cybersecurity threats mount. ABA has been an active proponent of adequate court funding. This Resolution builds on the ABA Resolutions adopted over the past decade that urge governments to provide adequate funding for the courts to ensure their security. As cybersecurity threats grow, the need for adequate funding for the courts to address these risks becomes critically important.

II. COURT TECHNOLOGY INITIATIVES

Courts at the federal, state, and local levels are embracing a variety of new technologies; many courts have undertaken important initiatives to modernize their information systems, measures that are designed to facilitate access, openness, and transparency, increase efficiency, and reduce costs. These initiatives are vitally important to the cause of justice because they can make the courts more accessible and affordable to a diverse body of litigants. The NCSC website provides a summary of technology developments in state courts over the past decade. Important federal and state court technology initiatives are highlighted below.

In the 2014 Year-End Report on the Federal Judiciary, Chief Justice John Roberts announced that the U.S. Supreme Court will launch an online case filing system in 2016. Once the system is implemented, all filings at the Court—petitions and responses to petitions, merits briefs, and all other types of motions and applications—will be available to the legal community and the public without cost on the Court’s website.

Electronic Case Filing and Case Management (CM/ECF)2—The courts have deployed new technologies to automate the filing, acceptance, and retrieval of the vast inflow of litigation documents that reach the courts every day. More than 600,000 attorneys have filed case documents using CM/ECF, and they currently file electronically more than 2.5 million documents each month. This system is not limited to attorneys. By logging onto the Public

5 Id. at 9.

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Access to Court Electronic Records (PACER) system, members of the public can instantly access and review federal court filings located in courthouses across the Nation.  

“Next Gen” CM/ECF—The national roll out of the Next Generation of the CM/ECF has begun in the U.S. courts of appeals. It is designed to increase chambers’ and clerks’ office efficiency and, when fully implemented, will provide a single sign-on that will allow court users and attorneys to file and retrieve information in any federal court using the same login and password, greatly simplifying access to the system. Testing in district and bankruptcy courts will begin in 2015.

Courtroom Modernization—The federal judiciary has likewise modernized courtrooms to take advantage of technological innovations in exchanging information and ideas. Attorneys can rely on computer-assisted graphics, video, and other technological aids to introduce evidence and facilitate communications with judges and juries.

Video conferencing of court hearings is used to save costs and improve security in some situations by eliminating the need to transport prisoners and making it easier to allow victims and child witnesses to testify. Judges use it to conduct hearings remotely.

Computer-assisted legal research has been integrated into the case resolution process. Courts now have access to extensive legal databases and can quickly locate relevant authority through search commands on desktop computers, tablets, and mobile devices.

Integrated Workplace Initiative (IWI)—While the impetus for the IWI was to reduce the judiciary’s real estate footprint, courts are creating a better and more efficient workplace environment by capitalizing on the flexibility that new and emerging technologies provide. IWI examines how court units work, researches work style changes, and identifies successful mobile working situations, for example, where probation officers work remotely in the field rather than in the courthouse.

eVoucher—An automated system for processing and managing vouchers submitted by lawyers appointed to represent indigents under the Criminal Justice Act was developed by the District of Nevada. Through a collaborative effort, the eVoucher system is being adopted for national use and shared with courts throughout the country.

Other systems are being developed to assist litigants, jurors, and members of the public, including:
- Online jury services support
- Centralized and automated payable processes
- Virtual self-help centers to assist self-represented litigants

Additional technology changes are expected in the coming years to enhance court services.

Electronic Discovery—Amendments to the Federal Rules of Civil Procedure have spurred the transformation of litigation through e-discovery. e-Discovery has resulted in the transfer of  


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huge amounts of confidential and sensitive data from companies and other organizations to the courts, law firms, technology companies, and other third party outsourcing entities.

Governments Are Going Paperless—The federal government and the states are transitioning from print-only publishing to either an environment in which legal materials, including judicial decisions and legislation, are published in a mix of formats or one in which legal material are published in electronic format only. To address these developments, the Uniform Law Commission adopted the Uniform Electronic Legal Material Act (UELMA), a model state law that provides for authentication of legal material, and preservation and archiving of this material for the future. This transition creates an immediate need for all federal, state and local courts to protect their electronic records. At the federal level, the Government Publication Office (GPO) is developing best practices for authentication of official documents.

III. TECHNOLOGY CHALLENGES

Sensitive Data at Risk

Litigation often involves sensitive matters: criminal prosecutions, bankruptcy petitions, malpractice suits, discrimination cases, and patent disputes may all lead to the collection of confidential information that should be shielded from public view to protect the safety of witnesses, the privacy of litigants, and the integrity of the adjudicatory process.

--Chief Justice John Roberts, U.S. Supreme Court (2014)

With the opportunities presented by information technology come many challenges and risks that the courts must address. As courts modernize many aspects of their operations, their information systems are becoming interconnected and users are now able to access court services through the Internet. 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 (including the cloud). The proliferation of mobile devices and wireless technologies presents vulnerable points in the flow of sensitive data in computer networks. Services are provided and documents are stored in the cloud. These developments present cybersecurity issues that must be assessed and taken into consideration as the courts determine their funding requirements for court security.

Law Offices, Governments, and the Courts Are Targets of Cyber Attacks

The recent highly-publicized data breaches of leading retail companies, health insurers, and government agencies have caught the attention of the public, politicians, and law enforcement.

The indictment of a Russian national charged in the largest known data breach prosecution provides details of attack methodology used by hackers in several of the largest data breaches. A technique that goes by the name "information is beautiful" provides a visualization of hundreds of the major data breaches over the past decade and serves as a useful resource to identify and learn about the massive data breaches that have affected the private sector and government. Similarly, the courts have suffered data breaches. For example, more than one million driver's license numbers and 160,000 Social Security numbers (SSN) were accessed in a data breach at the Washington State Administrative Office of the Court's website. Citizens booked at a city or county jail, or with a traffic case in a district or municipal court through 2012, or anyone with a DUI citation in the state going back to 1989, may have had their data compromised. The courts have since taken steps to enhance their online security.

It is believed that hackers launched a successful denial-of-service attack against the PACER system that shut down online access for several hours in January 2014. Also, uscourts.gov and various other federal court websites around the country were affected. The U.S. Court of Appeals website in the Middle District of Florida was also not available for an entire afternoon; no one could file or retrieve documents. A spokesperson for the Administrative Office of the U.S. Courts suggested that the outage was the result of a malicious attack, and the European Cyber Army claimed responsibility in a Twitter message.

The Florida Department of Juvenile Justice (DJJ) reported the theft of a mobile device containing youth and employee records in January 2011. The Tallahassee Police Department (TPD) was responsible for investigating the theft. The device, which was stolen from a secure DJJ office, was not encrypted or password-protected as required by DJJ's technology policy.

Both large and small law firms have been the target of hacker attacks in the U.S. as well as abroad. The *ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals (2013)* provides details about the threat landscape of legal organizations. The FBI

11 United States v. Drinkman, et. al., No. 09-626 (JBS) (S-2) (D. N.J.) available at http://www.justice.gov/sites/default/files/opas/press-releases/attachments/2015/02/18/drinkman_vladimir_et_al_indictment_comp.pdf (second superseding indictment); http://www.justice.gov/opa/pr/russian-national-charged-largest-known-data-breach-prosecution-extradited-united-states_February_18_2015/ "This case reflects the cutting-edge problems posed by today's cybercrime cases, where the hackers didn't target just a single company; they infiltrated most of the country's email distribution firms," said Acting U.S. Attorney John Horn in Atlanta. "And the scope of the intrusion is unnerving, in that the hackers didn't stop after stealing the companies' proprietary data—they then hijacked the companies' own distribution platforms to send out bulk emails and reap the profits from email traffic directed to specific websites.


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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.17 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.18

Hackers targeted law enforcement officers from 70 different U.S. law enforcement agencies.19 In August 2011 hackers associated with Anonymous and the disbanded hacktivist group LulzSec published 10 GB of personal data of law officers, including thousands of SSNs and dozens of bank account numbers. Security firm Identity Finder CEO Todd Feitman, who disclosed this breach, characterized it as a "staggering amount of personal data that could cause identity theft problems for years to come."20

Privacy Violations—Personally identifiable information (PII) that can be used for fraud and identity theft is being collected and often stored unprotected, putting many Americans at risk.21 PII, including SSN, has been publicly available through court online filing systems, and even published on court websites. There is a vibrant market for these data, and the harm to individuals from identity theft has been well-documented. As just one example, 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."22

Data breaches of government agencies are occurring with alarming frequency. In the annual report on the Federal Information Security Management Act (FISMA), the Office of Management and Budget (OMB) stated that federal agencies reported nearly 70,000 information security incidents in FY 2014, up 15 percent from FY 2013.23 The Government Accountability Office (GAO) found that the number of reported information security incidents involving PII have more than doubled over the last seven years.24

In a state government breach, about 1,500 computers in the Massachusetts Office of Labor and Workforce Development were infected with the computer virus that was designed to let an


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attacker take control of infected computers and transmit confidential information to the digital thieves.26 Personal financial information, including names, addresses and SSN of up to 210,000 unemployed Massachusetts residents may have been stolen in the data breach in May 2011. In March 2012 hackers from Eastern Europe illegally accessed a Utah Department of Technology Services (DTS) server containing patients’ SSN and data on children’s health plans. It is believed that a weak password lead to the breach of about 780,000 patient files of Medicaid claims.27

Malware on a San Francisco utilities agency server lead to a data breach of customer names, account numbers, addresses, phone numbers and some e-mail addresses for 180,000 customers.27 The agency notified customers that hackers used an open port on an unsecured server to infect it with computer viruses. Improper disclosure of sensitive records is a frequent cause of data breaches. In the State of Texas, 3.5 million records were accidentally published online, including names, addresses, SSN, DOB, and driver’s license numbers.

The problem of data breaches will only become more serious in the future as the courts receive increasing amounts of confidential and sensitive data, reflecting a growing trend in data analytics. 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 data analytics is driving companies to retain it far longer than they would have if it were in paper. Litigation will reflect these trends, resulting in the presentation of large amounts of critical, highly-valuable corporate records, including intellectual property, strategic business data, and litigation-related theories and records collected through e-discovery.

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.28 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. The NCSC launched the eCourts 2014 initiative to raise awareness of cyber threats and educate court personnel about the steps they need to take to secure their information systems and sensitive data.29

http://www.mansa.gov/ldw/

http://www.jasoc.com/elo.org/line/00Courts/2014Materials/Session-6-330pm-Cybersecurity/Bryant.docx

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IV. ABA POLICIES

Cybersecurity

The House of Delegates adopted Resolution 109 during the 2014 Annual Meeting, sponsored by the ABA Cybersecurity Legal Task Force and the Section of Science & Technology Law. Resolution 109 encourages all private and public sector organizations to develop, implement, and maintain an appropriate cybersecurity program that complies with applicable ethical and legal obligations, and is tailored to the nature and scope of the organization, and the data and systems to be protected. The Report that accompanies the Resolution identifies accepted frameworks and standards that can serve as a reference for developing, implementing, and maintaining an appropriately-tailored cybersecurity program.

Risk Assessment—Cybersecurity is based on a systematic assessment of risks that are present in a particular operating environment. Risk assessments are undertaken to identify gaps and deficiencies in a cybersecurity program due to operational changes, new compliance requirements, an altered threat environment, or changes in the system architecture and technologies deployed. 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.30

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. Administrative, technical, organizational and physical controls help ensure the confidentiality, availability, and integrity of digital assets. Such controls should be carefully determined, implemented, and enforced. NIST has published extensive guidance on the selection of controls for government systems.31

Due to the nature of the threat environment, certain activities in a cybersecurity program are ongoing. Continuous monitoring and log analysis are designed to provide data that can enable the early detection of threats. To maintain a proactive security posture, potential threats should be investigated and targeted attacks detected in advance or addressed as they occur. The objective is to address cybersecurity threats and risks in a timely, disciplined, and structured fashion.

Incident Response and Business Continuity/Disaster Recovery (BC/DR)—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 (BC/DR) plans are components of a cybersecurity program. Organizations should be prepared if a cyber attack or data breach occurs or if an event interrupts their operations. Response plans, policies,

and procedures should be able to accommodate the full array of threats, not just data breaches. A cybersecurity incident that is initially handled under an incident response plan may cause a business interruption that requires implementation of business continuity procedures. GAO has recommended key management and operational practices to be included in policies for responding to data breaches of PII.32

The NCSC has focused on the need for emergency planning and response.33

As is the case with most organizations today, data, in electronic as well as hard copy form, have become the life blood of courts. Managing data and files has become an essential court function. [ ] court operations face the risk of disruption that can be caused by many kinds of disasters, both natural and man-made. When a disaster disrupts a court’s data system, the court will be hard pressed to discharge even its most basic and essential responsibilities. Therefore, courts must develop plans not only to prevent disruptions to data systems to the maximum extent feasible, but also to recover such systems as soon and as effectively as feasible after a significant disruption occurs.34

Court Security

Resolution 106C, adopted by the ABA House of Delegates at the Annual Meeting in 2005, made comprehensive recommendations related to federal court security. This Resolution also made recommendations that related to both the federal and state judiciaries, including urging Internet vendors and government entities to voluntarily remove certain personal information about a judge upon request, urging federal and state government departments and agencies to assess security needs of the administrative adjudication programs within their control, supporting the creation of a National Clearinghouse on Federal and State Court Security to facilitate information sharing, and urging Congress to explore ways to assist state courts with enhancing court security. The Resolution expands the scope of ABA policy on court security to fully encompass state, local, and territorial courts, including urging state, local, and territorial legislative bodies and governmental agencies to adopt laws and policies providing for the development and funding of adequate judicial system security protocols and to take the necessary steps to minimize the impact of court-related violence.

The Resolution further emphasizes the importance of applying principles of judicial administration to court security by recommending that courts engage in a comprehensive review of each court’s respective judicial system security needs, create and regularly review judicial system security protocols that fulfill those needs, and seek the funding necessary to implement those protocols. The Resolution also encourages the development of resources to educate those who participate in the justice system how to identify potential security threats related to the administration of justice, and how to be effective first responders in the event of an incident of violence. This multi-faceted approach was designed to enhance court security for all participants, promote fair and impartial courts, and increase public confidence in the judicial system.

34 Id.
Resolution 106C included nine resolved clauses pertaining to court building and judicial security in the federal courts. For example, it urges Congress and the Department of Justice Judicial Security Review Group to review changes to U.S. Marshals Service (USMS) procedures to determine whether security vulnerabilities have been remedied. The resolution also urges Congress to enact legislation requiring the USMS and the Administrative Office of the United States Courts to consult on a continuing basis, and for Congress and the Department of Justice to consider amending existing laws to strengthen court building and judicial security. Resolution 106C also encourages Congress to include sufficient funds in its annual appropriations for the federal judiciary and the USMS so that existing and additional security measures can be fully and effectively implemented.

A 2004 U.S. Department of Justice Office of the Inspector General Report, Resolution 106C, and numerous congressional hearings led to significant changes that benefit the federal courts. The USMS established the National Center for Judicial Security (NCJS) in fiscal year 2008. The goal of the NCJS is to provide educational, operational, and technical functionality in the areas of security not only to federal courts but to all levels of state courts as well. The USMS also established a Threat Management Center within its Office of Protective Intelligence. The purpose of the Threat Management Center is to provide 24/7 response support and information sharing between the USMS and state and local entities. During the 2012 fiscal year the Threat Management Center investigated and analyzed 1,370 threats and inappropriate communications to those protected by the USMS.

Court Funding

Ensuring effective court security at the federal, state, and local levels is in many ways related to funding issues. The ABA has been an active proponent of adequate court funding. The Task Force on Preservation of the Justice System (Task Force), under the leadership of past ABA Presidents Stephen N. Zack and Wm. T. (Bill) Robinson III, convened high-profile symposiums, hearings, and programs on the issue of court funding, and sponsored two Resolutions in 2011 and 2013. The House of Delegates adopted Resolution 302 at the 2011 Annual Meeting. Resolution 302 urges state, territorial, and local bar associations to document the impact of funding cutbacks to the justice system and to publicize those impacts so that the public may be informed of the need to support their court systems. Resolution 302 also urges state, territorial, and local governments to provide stable and predictable levels of funding to justice systems. The Task Force also sponsored Resolution 10C which was adopted at the 2013 Annual Meeting. Resolution 10C urges legislative bodies and governmental agencies to adopt laws or policies to ensure full and adequate court funding. Resolution 10C also adopted the Principles for Judicial Administration, promulgated by NCSC and adopted by CCJ in an effort to assist courts in their efforts to restructure court services and secure adequate funding.

The introduction to the Principles for Judicial Administration states that “[j]udicial leaders have the responsibility to demonstrate what funding level is necessary and to establish administrative

structures and management processes that demonstrate they are using the taxpayers' money wisely. Reflecting that responsibility, this Resolution urges courts to create and review judicial system security protocols on a regular basis. The author urges courts to be proactive in assessing the needs and effectiveness of their judicial security systems so that they may effectively communicate with appropriators and policymakers. As the commentary to Principle 18 explains, "[t]he court management team is in the best position to know what resources are needed to fulfill its constitutional mandate and how best to present and justify its needs for those resources." The proactive assessment of security needs is not only a vital component towards effective communication with appropriators, but is also crucial to the preservation of courts as a separate and co-equal branch of government.

Principle 22 directly addresses the issue of court security, stating that "[r]esponsible funding entities should ensure that courts have facilities that are safe, secure and accessible and which are designed, built and maintained according to adopted courthouse facility guidelines." Courts must examine existing national standards, including the resources discussed above, to determine how best to implement principle 22 in their jurisdictions. Every individual who interacts with the court must have access to proceedings in a safe environment. Adequate court funding is a necessary component in this endeavor. Principle 22 focuses on the importance of technology to provide required security, stating "the court system should be funded to provide technologies needed for the courts to operate efficiently and effectively and to provide the public services comparable to those provided by the other branches of government and private businesses."

V. ABA POLICIES—SUMMARY

This section provides a list of ABA policies related to cybersecurity, court security, and court funding, with a brief summary and citation for each policy.

Cybersecurity

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 those existing ABA policies. These ABA policies include the following:

Resolution 109, Adopted by the House of Delegates at the 2014 Annual Meeting in Boston (August 2014)

Resolution 109, which was sponsored by the Cybersecurity Legal Task Force and the Section of Science & Technology Law, encourages all private and public sector organizations to develop, implement, and maintain an appropriate cybersecurity program that complies with applicable ethical and legal obligations, and is tailored to the nature

38 Id. at 15 (Principle 18 states "Judicial Branch budget requests should be considered by legislative bodies as submitted by the Judicial Branch.").
39 See Principles for Judicial Administration at 4 ("Court leaders, whether state or local, should exercise management control over all resources that support judicial services within their jurisdiction.").

structures and management processes that demonstrate they are using the taxpayers' money wisely. Reflecting that responsibility, this Resolution urges courts to create and review judicial system security protocols on a regular basis. The author urges courts to be proactive in assessing the needs and effectiveness of their judicial security systems so that they may effectively communicate with appropriators and policymakers. As the commentary to Principle 18 explains, "[t]he court management team is in the best position to know what resources are needed to fulfill its constitutional mandate and how best to present and justify its needs for those resources." The proactive assessment of security needs is not only a vital component towards effective communication with appropriators, but is also crucial to the preservation of courts as a separate and co-equal branch of government.

Principle 22 directly addresses the issue of court security, stating that "[r]esponsible funding entities should ensure that courts have facilities that are safe, secure and accessible and which are designed, built and maintained according to adopted courthouse facility guidelines." Courts must examine existing national standards, including the resources discussed above, to determine how best to implement principle 22 in their jurisdictions. Every individual who interacts with the court must have access to proceedings in a safe environment. Adequate court funding is a necessary component in this endeavor. Principle 22 focuses on the importance of technology to provide required security, stating "the court system should be funded to provide technologies needed for the courts to operate efficiently and effectively and to provide the public services comparable to those provided by the other branches of government and private businesses."

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38 Id. at 15 (Principle 18 states "Judicial Branch budget requests should be considered by legislative bodies as submitted by the Judicial Branch.").
39 See Principles for Judicial Administration at 4 ("Court leaders, whether state or local, should exercise management control over all resources that support judicial services within their jurisdiction.").
and scope of the organization, and the data and systems to be protected.

The Resolution and Report are available at:

* * *

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 Resolution and Report are available at:
http://www.americanbar.org/content/dam/aba/administrative/law_national_security/resolution_118.authcheckdam.pdf

* * *

Policy Adopted by the ABA Board of Governors (November 2012)

The ABA Board of Governors approved a policy in November 2012 comprised of five cybersecurity principles developed by the ABA Cybersecurity Legal Task Force.

The Resolution and Report are available at:
http://www.americanbar.org/content/dam/aba/marketing/Cybersecurity/aba_cybersecurity_res_and_report.authcheckdam.pdf

* * *

Resolutions 105 A, B and C, Adopted by the House of Delegates at the 2012 Annual Meeting in Chicago (August 2012)

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. 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.

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* * *

Resolutions 105 A, B and C, Adopted by the House of Delegates at the 2012 Annual Meeting in Chicago (August 2012)

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. 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 Resolutions and 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.authcheckdam.pdf
http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_annual_meeting_105c.doc

Court Security

Resolution 106C, Adopted by the House of Delegates at the 2005 Annual Meeting in Chicago (August 2005)

Resolution 106C made comprehensive recommendations related to federal court security. It includes nine resolved clauses pertaining to court building and judicial security in the federal courts.

The Resolution and Report are available at:
http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_106c.authcheckdam.pdf

Court Funding

Resolution 302, Adopted by the House of Delegates at the 2011 Annual Meeting in Toronto, Canada (August 2011)

Resolution 302 urges state, territorial, and local bar associations to document the impact of funding cutbacks to the justice system and to publicize those impacts so that the public may be informed of the need to support their court systems; and urges state, territorial, and local governments to provide stable and predictable levels of funding to justice systems.
The Resolution and Report are available at:
http://www.americanbar.org/content/dam/aba/administrative/tips/Court%20Funding/2011%20Annual%20Resolution%20302.authcheckdam.pdf

Resolution 10C, Adopted by the House of Delegates at the 2013 Annual Meeting in San Francisco, CA (August 2013)

This Resolution urges legislative bodies and governmental agencies to adopt laws or policies to ensure full and adequate court funding. It also adopted the Principles for Judicial Administration, promulgated by NCSC and adopted by CCJ in an effort to assist courts in their efforts to restructure court services and secure adequate funding.

The Resolution and Report are available at:
http://www.americanbar.org/content/dam/aba/administrative/tips/Court%20Funding/2013%20Annual%20Resolution%2010C.authcheckdam.pdf

VI. CONCLUSION

This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. Now, as the courts modernize their information systems, adequate funding will be required to develop, implement, and maintain an appropriate cybersecurity program, assess the threats to those systems, and protect the volumes of confidential and sensitive data that the courts collect, use, store, and share. This Resolution builds on the ABA Resolutions adopted over the past decade that urge governments to provide adequate funding for the courts to ensure their security. As cybersecurity threats grow, the need for adequate funding for the courts to address these risks becomes critically important. The adoption of this Resolution will enhance court cybersecurity and promote fair and impartial courts.

Respectfully Submitted,

Judith Miller
Harvey Rishikof
Co-Chairs, ABA Cybersecurity Legal Task Force

August 2015
1. Summary of Resolution.

This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. Now, as the courts modernize their information systems, adequate funding will be required to assess the threats to those systems, and protect the volumes of confidential and sensitive data that reside in the courts. This Resolution builds on the ABA resolutions adopted over the past decade that urge governments to provide adequate funding for the courts to ensure their security. As cybersecurity threats grow, the need for adequate funding for the courts to address these risks becomes critically important. The adoption of this Resolution will enhance court security and promote fair and impartial courts.

2. Approval by Submitting Entities.

The Cybersecurity Legal Task Force approved the Resolution on April 10, 2015.

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 April 29, 2015; the Criminal Justice Section voted to co-sponsor this Resolution by vote of the Section Council on April 25, 2015; the International Law Section voted to co-sponsor this Resolution by vote of the Section Council on May 1, 2015; the Judicial Division voted to co-sponsor this Resolution by vote of the Section Council on May 5, 2015; the Criminal Justice Section voted to co-sponsor this Resolution by vote of the Section Council on May 8, 2015; the Standing Committee on Law and National Security voted to co-sponsor this Resolution by vote of the Committee Council on May 16, 2015; and the Standing Committee on Technology and Information Systems voted to co-sponsor this Resolution by vote of the Committee Council on May 21, 2015.

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

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

ABA voted to support the Uniform Law Commission’s Uniform Electronic Legal Material Act (UELMA) on February 6, 2012.

The proposed Resolution is consistent with, and would build upon, several existing ABA policies, including 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.

* * *

Policy Adopted by the ABA Board of Governors (November 2012)

The ABA Board of Governors approved a policy comprised of five cybersecurity principles developed by the ABA Cybersecurity Legal Task Force.

* * *

Resolutions 105 A, B and C, Adopted by the House of Delegates at the 2012 Annual Meeting in Chicago (August 2012)

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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Resolution 302 urges state, territorial, and local bar associations to document the impact of funding cutsbacks to the justice system and to publicize those impacts so that the public may be informed of the need to support their court systems; and urges state, territorial, and local governments to provide stable and predictable levels of funding to justice systems.

* * *

Resolution 10C. Adopted by the House of Delegates at the 2013 Annual Meeting in San Francisco, CA (August 2013)

This Resolution urges legislative bodies and governmental agencies to adopt laws or policies to ensure full and adequate court funding. It also adopted the Principles for Judicial Administration, promulgated by NCSC and adopted by CCJ, in an effort to assist courts in their efforts to restructure court services and secure adequate funding.

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

Although not a later Report, this Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. The threat environment today is highly sophisticated, and massive data breaches are occurring with alarming frequency. Now, as the courts modernize their information systems, adequate funding will be required to develop, implement, and maintain an appropriate cybersecurity program, assess the threats to those systems, and protect the volumes of confidential and sensitive data that the courts collect, use, store, and share.

The only effective defense is a fully-implemented cybersecurity program with 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 had undertaken proper cybersecurity 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 federal, state, local, tribal and territorial court judges and executives, the U.S. Department of Justice and the U.S. Marshals Service, appropriate.
members of federal, state, local, tribal and territorial legislatures and government agencies, and other stakeholders in order to alert them to the ABA’s newly-adopted policy and to encourage them to take action consistent with that policy.

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


10. **Referals.**
    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 on 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 Division, 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)**

   Lucy L. Thomson
   Livingston PLLC
   1455 Pennsylvania Ave., N.W. Suite 400
   Washington, D.C. 20004
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   (703) 798-1001 (cell)

   Judith Miller
   Co-chair, Cybersecurity Legal Task Force
   1050 Connecticut Avenue, Suite 400
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   (202) 341-8127 (cell)
   judith.miller3@gmail.com

   Harvey Rishikof
   Co-chair, Cybersecurity Legal Task Force
   1050 Connecticut Avenue, Suite 400
   Washington, D.C. 20036
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   rishikofh@me.com

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

Judith Miller  
Co-chair, Cybersecurity Legal Task Force  
1050 Connecticut Avenue, Suite 400  
Washington, D.C. 20036  
(202) 341-8127 (cell)  
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Neal Sonnett, nrslaw@sonnett.com  
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Ellen Flannery, eflannery@gov.com  
Lucy Thomson, lucythomson1@mindspring.com  
Delegates, ABA House of Delegates
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. This Resolution urges federal, state, local, tribal and territorial legislatures and government agencies to provide the funding necessary to develop, implement, and maintain appropriate cybersecurity programs for the courts and to train court personnel on methods to counter threats and protect judicial information systems from cyber intrusions or data breaches.

This Resolution builds on the ABA Resolutions adopted over the past decade that urge governments to provide adequate funding for the courts to ensure their security. As cybersecurity threats grow, the need for adequate funding for the courts to address these threats becomes critically important. The adoption of this Resolution will enhance court cybersecurity and promote fair and impartial courts.

2. Summary of the Issue that the Resolution Addresses

This Resolution focuses on cybersecurity threats that affect the judicial system and may pose a risk to the fair and efficient administration of justice. The threat environment today is highly sophisticated, and massive data breaches are occurring with alarming frequency. Now, as the courts modernize their information systems, adequate funding will be required to develop, implement, and maintain an appropriate cybersecurity program, assess the threats to those systems, and protect the volumes of confidential and sensitive data that the courts collect, use, store, and share.

The only effective defense is a fully-implemented cybersecurity program with 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 had undertaken proper cybersecurity planning and implemented appropriate security safeguards.

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

Through this Resolution, the ABA highlights the importance of adequate funding for the courts to address cybersecurity threats. This Resolution and Report will educate stakeholders, heighten their sensitivity to cybersecurity risks, and help the courts effectively evaluate their own specific risks and request adequate funding on behalf of their organizations.

4. Summary of Minority Views

This Resolution and Report have been revised in response to input received from several ABA entities. No minority views have come to our attention with respect to the Report.
RESOLVED, That the Association policies set forth in Attachment 1 to Report 400A, dated August 2015, 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.
12. Veteran Representation  
   Pennsylvania Bar Association  
   February, 2005

17. Inventor Rights  
   Section of Intellectual Property Law  
   February, 2005

19. Grant Accreditation  
   Standing Committee on Specialization  
   February, 2005

41. Pew Commission on Children in Foster Care  
   Los Angeles County Bar Association  
   August, 2005
12. Veteran Representation  
Pennsylvania Bar Association  
February, 2005 Report 8A

RESOLVED, That the American Bar Association supports legislation to repeal the statutory provision preventing veterans from paying an attorney to represent them in connection with their claims for federal benefits.

17. Inventor Rights  
Section of Intellectual Property Law  
February, 2005 Report 102

RESOLVED, That the American Bar Association supports enactment of legislation providing that the right to a patent shall belong to the inventor who first files an application for patent containing an adequate disclosure under 35 U.S.C. §112 of the invention or, in the event of an assignment of rights, shall belong to the assignee thereof;

FURTHER RESOLVED, That the American Bar Association supports concomitant efforts to conclude international patent harmonization agreements that incorporate such principles.

19. Grant Accreditation  
Standing Committee on Specialization  
February, 2005 Report 101

RESOLVED, That the American Bar Association accredits the Social Security Disability Law program of the National Board of Trial Advocacy of Wrentham, Massachusetts, as a designated specialty program for lawyers.

41. Pew Commission on Children in Foster Care  
Los Angeles County Bar Association  
August, 2005 Report 10B

RESOLVED, That the American Bar Association urges Congress, the States and territories to enact and/or adopt the following laws and policies, consistent with recommendations of the national bipartisan May 2004 Pew Commission on Children In Foster Care, for improving outcomes for abused and neglected children under dependency court jurisdiction:  
(a) All dependent youth should be on equal footing with other parties in the dependency proceeding and have the right to quality legal representation, not simply an appointed lay guardian ad litem or lay volunteer advocate with no legal training, acting on their behalf in this court process;  
(b) Foster youth should be notified of and afforded the opportunity to participate in the proceedings in their own dependency case;
(c) States should attract and retain effective, trained, and qualified lawyers in the dependency practice area by: (i) development and implementation of reasonable compensation for dependency counsel, that isn’t tied to the volume of cases or clients a lawyer represents; (ii) establishment of loan forgiveness programs for attorneys who enter or currently practice in this area; (iii) development and implementation of national protocols and standards for reasonable attorney caseloads; (iv) federal and state support for attorney training; and (v) development, implementation of, and funding for, qualification and training standards for dependency counsel;
(d) Greater federal and state resources should be provided for this part of the court system. Policies and resources should be developed to ensure that dependency courts have enhanced and high quality training; outcome-focused data tracking and performance measurement capabilities; stronger case management capacities; and workload measurement tools that enable bench officers to effectively manage cases, meaningfully track children’s progress through the system, fully implement federal and state foster care mandates, and implement best practices; (e) Communication and information-sharing barriers that preclude different data networks and the child welfare, judicial, mental health, criminal justice, education, and other systems from sharing information when necessary for the safety, permanency, and well being of abused and neglected children need to be identified and addressed through changes in laws or practice. For example, child welfare agencies and education systems should be able to share information to ensure appropriate care and education for a child while also protecting the privacy of the child and family; (f) Recruitment and long-term retention of committed, qualified, and trained bench officers who oversee the needs of abused and neglected children in dedicated dependency courts should be ensured; efforts should also be made to recognize and underscore the importance of the work done by dependency court judges throughout the country;
(g) The Judiciary should, working with bar leadership, facilitate meaningful reforms in, and provide needed support and oversight of, dependency courts, and serve as champions for abused and neglected children in the court system; (h) Effective collaboration between court and child welfare agency leaders should be established and formalized at a state level to create a vehicle for identifying existing barriers and crafting feasible solutions to meeting the needs of children in foster care;

BE IT FURTHER RESOLVED that the American Bar Association urges Congress, and the state and territorial legislatures, to maintain commitments for adequate resources, and enact laws and implement policies to increase resources and maintain flexibility in use of those resources, that support the needs of children and families at risk regardless of whether an abused or neglected child is removed from home, and without limiting the protections, support, and rights of children in foster care or their families;

BE IT FURTHER RESOLVED that state and local Bar Associations are urged to actively support the development and implementation of these laws and policies.
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 2005.

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 53 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 26 entities to which the policies were sent are listed in Appendix B.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received.

In adopting Recommendation 400 in 1996, the House realized that there might be old and outdated policies which would not be identified through this process. The House, therefore, included a provision to deal with this issue by providing that such policies would also be archived. See Appendix A, paragraph 6. The second Resolved clause in this Resolution implements that provision with respect to all policies 20 years old or older.

Policies that are archived pursuant to the Resolution are not considered to be rescinded. Rather, the Association will retain them for historical purposes, however, they cannot be expressed as ABA policy. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in Appendix C.

Respectfully submitted,

Mary T. Torres, Secretary
American Bar Association
August 2015

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Respectfully submitted,

Mary T. Torres, Secretary
American Bar Association
August 2015
RESOLVED. That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED. That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.

2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.

3. Prior to each Annual meeting, a list of affected policies will be compiled and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.

4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.

5. Those policies which are not archived will be subject to review every ten years thereafter.

6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.

7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.
APPENDIX B

The entities below reviewed and recommended disposition of the policies contained in the report:

Sections and Divisions
Administrative Law and Regulatory Practice
Criminal Justice
Environment, Energy, and Resources
Health Law
Individual Rights and Responsibilities
Intellectual Property Law
International Law
Judicial Division
Legal Education and Admission to the Bar
Litigation
Science and Technology Law
Tort Trial and Insurance Practice

Standing Committees
Election Law
Legal Aid and Indigent Defendants
Paralegals
Specialization

Special Committees and Commissions
American Jury Project
Domestic and Sexual Violence
Homelessness and Poverty
Immigration
Law and Aging

State, Local and Territorial Bar Associations
Bar Association of San Francisco
Los Angeles County Bar Association
Pennsylvania Bar Association
State Bar of Texas

Individuals
Robert L. Weinberg
<table>
<thead>
<tr>
<th></th>
<th>APPENDIX C Retained Policies</th>
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</thead>
</table>
| 1. | ABA Principles Relating to Juries and Jury Trials  
    Commission on American Jury Project  
    February, 2005 |
| 2. | Federal Affordable Housing Trust Fund  
    Commission on Homelessness and Poverty  
    February, 2005 |
| 3. | Permanent Residence  
    Commission on Immigration  
    February, 2005 |
| 4. | Statutes for the Innocent  
    Criminal Justice Section  
    February, 2005 |
| 5. | Convicting the Innocent  
    Criminal Justice Section  
    February, 2005 |
| 6. | Standards of Practice for Defense Counsel  
    Criminal Justice Section  
    February, 2005 |
| 7. | Federal Sentencing Practices  
    Criminal Justice Section  
    February, 2005 |
| 8. | Guidelines for the Evaluation of Judicial Performance  
    Judicial Division  
    February, 2005 |
| 9. | Provisional Approval  
    Section of Legal Education and Admission to the Bar  
    February, 2005 |
| 10. | Standards  
    Section of Legal Education and Admission to the Bar  
    February, 2005 |
11. Provisional Approval
   Section of Legal Education and Admission to the Bar
   February, 2005

13. Darfur & Sudan
    Robert L. Weinberg, District of Columbia
    February, 2005

14. Visa
    Section of Science and Technology Law
    February, 2005

15. Administrative Procedure Act
    Section of Administrative Law and Regulatory Practice
    February, 2005

16. Patients Access to Healthcare
    Section of Individual Rights and Responsibilities
    February, 2005

18. Paralegal Education Programs
    Standing Committee on Paralegals
    February, 2005

20. Study on Asbestos-Related Injuries
    Tort Trial and Insurance Practice Section
    February, 2005

21. Amend the Medicare Secondary Payer Act
    Tort Trial and Insurance Practice Section
    February, 2005

22. Judicial Rulemaking Process
    Tort Trial and Insurance Practice Section
    February, 2005

23. Screening Vans for Asbestos-Related Conditions
    Tort Trial and Insurance Practice Section
    February, 2005

24. Model Statute of Limitations for Asbestos
    Tort Trial and Insurance Practice Section
    February, 2005
25. Restricted Weapons
Bar Association of San Francisco
August, 2005

26. Domestic Violence
Commission on Domestic and Sexual Violence
August, 2005

27. U.S. Mail
Commission on Homelessness and Poverty
August, 2005

28. Social Insurance
Commission on Law and Aging
August, 2005

29. Medicaid
Commission on Law and Aging
August, 2005

30. Attorney Client Privilege
Criminal Justice Section
August, 2005

31. Convictions
Criminal Justice Section
August, 2005

32. Telephone Communication for Prisoners
Criminal Justice Section
August, 2005

33. Insurance Coverage
Health Law Section
August, 2005

34. United States Office of Personnel Management
Judicial Division
August, 2005

35. Black Letter Relating to Court Organization
Judicial Division
August, 2005
36. United States Marshalls Service
   Judicial Division
   August, 2005

37. United States Marshals Service Judicial Security Process
   Judicial Division
   August, 2005

38. Law School Approval
   Legal Education and Admission to the Bar
   August, 2005

39. Law School Approval
   Legal Education and Admission to the Bar
   August, 2005

40. Law School Standards
   Legal Education and Admission to the Bar
   August, 2005

42. United States Marine Ecosystems
   Section of Environment, Energy, and Resources
   August, 2005

43. Marine Regulations
   Section of Environment, Energy, and Resources
   August, 2005

44. World Marine Ecosystems
   Section of Environment, Energy, and Resources
   August, 2005

45. Voting Rights Act
   Section of Individual Rights and Responsibilities
   August, 2005

46. United Nations Convention Against Corruption
   Section of International Law
   August, 2005

47. Model Standards of Conduct for Mediators
   Section of Litigation
   August, 2005

36. United States Marshalls Service
   Judicial Division
   August, 2005

37. United States Marshals Service Judicial Security Process
   Judicial Division
   August, 2005

38. Law School Approval
   Legal Education and Admission to the Bar
   August, 2005

39. Law School Approval
   Legal Education and Admission to the Bar
   August, 2005

40. Law School Standards
   Legal Education and Admission to the Bar
   August, 2005

42. United States Marine Ecosystems
   Section of Environment, Energy, and Resources
   August, 2005

43. Marine Regulations
   Section of Environment, Energy, and Resources
   August, 2005

44. World Marine Ecosystems
   Section of Environment, Energy, and Resources
   August, 2005

45. Voting Rights Act
   Section of Individual Rights and Responsibilities
   August, 2005

46. United Nations Convention Against Corruption
   Section of International Law
   August, 2005

47. Model Standards of Conduct for Mediators
   Section of Litigation
   August, 2005
48. Federal Shield Law
Section of Litigation
August, 2005

49. Election Administration Guidelines and Commentary
Standing Committee on Election Law
August, 2005

50. Sixth Amendment
Division for Legal Services
August, 2005

51. Paralegal Education Programs
Standing Committee on Paralegal
August, 2005

52. Fundamental Liberties
State Bar of Texas
August, 2005

53. Model Case Management Order
Tort Trial and Insurance Practice Section
August, 2005
GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association
Submitted By: Mary T. Torres

1. Summary of Resolution:
In an ongoing effort to keep the Association's policies up to date, this resolution consists of policies 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as 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:**

N/A

10. **Referrals.**

The policies identified in the Resolution with Report have been circulated to 26 entities as noted in Appendix B and also will be sent to the Government Affairs Office.

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

Mary T. Torres
Law Offices of Mary T. Torres
201 Third Street NW Suite #500
Albuquerque, NM 87102
(505) 944-9030
mtt@marytorreslaw.com

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 that are 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. **Summary of the issue which the recommendation addresses**

   The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association's positions were adopted decades ago and are no longer relevant or effective.

3. **An explanation of how the proposed policy will address the issue**

   The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

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

   None at this time.
RESOLVED, That the Association policies adopted in 1995 which were previously considered
for archiving but retained as set forth in Attachment 1 to Report 400B dated August 2015, 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.
3. Cuban and Haitian Refugees  
   Dade County Bar Association  
   February, 1995

13. Litigation Reform  
    New York City Bar Association  
    February, 1995

    Standing Committee on Armed Forces Law  
    February, 1995

29. Elder Law Accredited Programs  
    Standing Committee on Specialization  
    February, 1995 Report

30. Certified Programs for Lawyers  
    Standing Committee on Specialization  
    February, 1995 Report

32. Alternative Dispute Resolution  
    Young Lawyers Division  
    February, 1995 Report

56. UNESCO  
    Section of International Law  
    August, 1995 Report

73. Resource Guidelines: Improving the Child Abuse and Neglect Court Process  
    Young Lawyers Division  
    August, 1995 Report

75. Universal Citation System  
    Section of Litigation  
    August, 1996 Report
3. Cuban and Haitian Refugees
Dade County Bar Association
February, 1995 Report 8F

Resolved, That the American Bar Association urges that the United States Government take special measures to protect the rights of Cuban and Haitian refugees being detained in camps under United States control, including due process, access to independent legal counsel, humanitarian living conditions and adequate medical care.

Further Resolved, That United States lawyers be permitted to visit with any such refugee requesting legal counsel for the purposes of counseling them.

13. Litigation Reform
New York City Bar Association
February, 1995 Report 8H

Resolved, That the American Bar Association supports litigation reform to deter meritless litigation, reform which should be implemented in the first instance, through the federal rule making process under the Judicial Conference and thereafter through federal legislation where it is apparent that rule amendments cannot reasonably address abusive practices; and it is further

Resolved, That the American Bar Association supports (a) the prohibition of referral fees to any person, except as may be permitted by applicable codes of legal ethics or statutes, (b) the prohibition of bonus payments to named plaintiffs beyond reasonable compensation for actual expenses, (c) a reasonable class organization procedure that discourages a race to the courthouse, (d) improved disclosure of settlement terms to class members, (e) limitations on the award of fees to private counsel to recover from SEC-implemented disgorgement funds, depending on the role private counsel played in the creation of such funds, (f) the court's authority to supervise class actions so as to ensure adherence by the parties to pleading requirements and the highest ethical standards, (g) early and fair settlement practices which provide settling defendants with a discharge from liability for contribution claims and the reduction of judgments for plaintiffs by amounts recovered through settlements and (h) the promotion of voluntary non-binding alternative dispute resolution procedures; and further

Resolved, That the American Bar Association supports private enforcement of the securities laws, and in particular the role that implied remedies under Rule 10b-5 of the Securities Exchange Act of 1934 play in protecting the rights of individual investors and the integrity of the American capital markets; and it is further

Resolved, That the American Bar Association opposes any legislation that would eliminate the concept of recklessness from that which is required to be pled or proved in private actions brought under Rule 10b-5; and it is further

Resolved, That the American Bar Association opposes any legislation that would require proof of actual reliance by individual investors in order to prove a violation under Rule 10b-5; and it is further

Resolved, That the American Bar Association opposes any legislation that would eliminate the concept of recklessness from that which is required to be pled or proved in private actions brought under Rule 10b-5; and it is further

Resolved, That the American Bar Association opposes any legislation that would require proof of actual reliance by individual investors in order to prove a violation under Rule 10b-5; and it is further
Resolved, That the American Bar Association opposes any requirement that would impose a responsibility on a non-prevailing party for the legal fees of the prevailing party in securities actions; and it is further

Resolved, That the American Bar Association opposes any change in the rules or legislation, such as the appointment of a guardian ad litem, that would undermine the role and obligation of counsel for the class to fulfill counsel's fiduciary duty to the members of the class; and it is further

Resolved, That the American Bar Association opposes any requirement that would bar access to the courthouse to shareholders with small holdings.

   Standing Committee on Armed Forces Law
   February, 1995 Report 115

Resolved, That the American Bar Association urges the Secretary of Defense to adopt rules requiring that all recommendations for changes to the Manual for Courts-Martial (MCM), the Presidentially promulgated regulation prescribing rules of procedure and evidence for actions governed by the Uniform Code of Military Justice (UCMJ), be promulgated with the same formality of public notice, opportunity for comment, and analysis of comments received as are changes to other important rules and regulations published pursuant to the Administrative Procedure Act and the Federal Register Act, and that no further changes to the MCM be implemented until such rules are adopted.

29. Elder Law Accredited Programs
    Standing Committee on Specialization
    February, 1995 Report 118A

Resolved, That the American Bar Association accredits the following designated specialty certification programs for lawyers:

Elder Law program of the National Academy of Elder Law Foundation of Tucson, Arizona.

30. Certified Programs for Lawyers
    Standing Committee on Specialization
    February, 1995 Report 118B

Resolved, That the American Bar Association accredits the following designated specialty certification programs for lawyers:

1. Medical Professional Liability program of the American Board of Professional Liability Attorneys, Great Neck, NY
2. Legal Professional Liability program of the American Board of Professional Liability Attorneys, Great Neck, NY

3. Accounting Professional Liability program of the American Board of Professional Liability Attorneys, Great Neck, NY

32. Alternative Dispute Resolution
Young Lawyers Division
February, 1995 Report 116

Resolved, That the American Bar Association encourages cooperation between the military services and state, territorial and local bar associations to prevent wrongful withholding of military members’ leasehold security deposits by assisting service members through educational programs and Alternative Dispute Resolution, and effective representation.

56. UNESCO
Section of International Law
August, 1995 Report 125C

Resolved, That the American Bar Association urges the United States Government to rejoin UNESCO at the earliest possible time, so that it may take part in UNESCO’s mandate to promote international cooperation through education, science, and culture.

73. Resource Guidelines: Improving the Child Abuse and Neglect Court Process
Young Lawyers Division
August, 1992 Report 116B

Resolved, That the American Bar Association encourages support for, and implementation of, Resource Guidelines: Improving the Child Abuse and Neglect Court Process, published by the National Council of Juvenile and Family Court Judges, dated August 1995.

75. Universal Citation System
Section of Litigation
August, 1996 Report 107

RESOLVED, that the American Bar Association recommends that:
1. All jurisdictions adopt a system for official citation to case reports that is equally effective for printed case reports and for case reports electronically published on computer disks or network services, that system consisting of the following key elements:

   The court should include the distinctive sequential decision number described in paragraph C below in each decision at the time it is made available to the public.

   B. The court should number the paragraphs in the decision.

   C. The court should require all case authorities to be cited by stating the year, a designator of the court, the sequential number of the decision, and where reference is to specific material within the decision, the paragraph number at which that material appears.

2. Legal Professional Liability program of the American Board of Professional Liability Attorneys, Great Neck, NY

3. Accounting Professional Liability program of the American Board of Professional Liability Attorneys, Great Neck, NY

32. Alternative Dispute Resolution
Young Lawyers Division
February, 1995 Report 116

Resolved, That the American Bar Association encourages cooperation between the military services and state, territorial and local bar associations to prevent wrongful withholding of military members’ leasehold security deposits by assisting service members through educational programs and Alternative Dispute Resolution, and effective representation.

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Section of International Law
August, 1995 Report 125C

Resolved, That the American Bar Association urges the United States Government to rejoin UNESCO at the earliest possible time, so that it may take part in UNESCO’s mandate to promote international cooperation through education, science, and culture.

73. Resource Guidelines: Improving the Child Abuse and Neglect Court Process
Young Lawyers Division
August, 1992 Report 116B

Resolved, That the American Bar Association encourages support for, and implementation of, Resource Guidelines: Improving the Child Abuse and Neglect Court Process, published by the National Council of Juvenile and Family Court Judges, dated August 1995.

75. Universal Citation System
Section of Litigation
August, 1996 Report 107

RESOLVED, that the American Bar Association recommends that:
1. All jurisdictions adopt a system for official citation to case reports that is equally effective for printed case reports and for case reports electronically published on computer disks or network services, that system consisting of the following key elements:

   The court should include the distinctive sequential decision number described in paragraph C below in each decision at the time it is made available to the public.

   B. The court should number the paragraphs in the decision.

   C. The court should require all case authorities to be cited by stating the year, a designator of the court, the sequential number of the decision, and where reference is to specific material within the decision, the paragraph number at which that material appears.
D. Until electronic publications of case reports become generally available to and commonly relied upon by courts and lawyers in the jurisdiction, the court should strongly encourage parallel citations, in addition to the primary citation described in paragraph C above, to commonly used printed case reports. When a cited authority is not available in those printed case reports, the court should require counsel to provide printed copies to opposing counsel and to the court. The parallel citation should only be to the first page of the report and parallel pinpoint citations should not be required.

E. The standard form of citation, shown for a decision in a federal court of appeals, should be:
   Smith v. Jones, 1996 5Cir 15, ¶18, 22 F.3d 955. 1996 is the year of the decision; 5Cir refers to the United States Court of Appeals for the 5th Circuit; 15 indicates that this citation is to the 15th decision released by the court in the year; ¶18 is the paragraph number where the material referred to is located, and the remainder is the parallel citation to the volume and page in the printed case report where the decision may also be found.
Pursuant to Report 400, adopted by the House of Delegates in 1996, the Association is annually required to review policies adopted by the House of Delegates that have been in existence ten years or more. See Report 400 attached as Appendix A. Those policies that are outdated, duplicative, inconsistent with current policy or no longer relevant are to be archived. The review process operates from the premise that any policy on the list will be archived unless there is a request to remove it from the archival list and retain it as current policy. Once archived, it may no longer be cited as current policy. An archived policy is not considered to be rescinded, but rather is retained by the Association for historical purposes only.

Several years ago, the Resolution and Impact Review Committee reviewed the current archiving procedure and determined that it was time to revisit policies that were originally considered for archiving but retained. To date, every policy that is at least ten years old has been considered for archiving once. In the first several years after the procedure was instituted, over 1000 policies were examined. Of those, about one-third were archived. In subsequent years, policies were examined when they became 10 years old. The vast majority of policies that were passed in the last twenty years have been retained at the request of the sponsoring entity, the Office of Governmental Affairs or a member of the House.

This year, the policies adopted in 1995 which were previously considered for archiving but retained were reviewed. The process of reviewing previously retained policies began in spring of 2012 and will continue annually. To accomplish this objective, the Division for Policy 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 79 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 38 entities to which the policies were sent are listed in Appendix B.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in Appendix C.

Respectfully submitted,

Mary T. Torres, Secretary
American Bar Association
August 2015
APPENDIX A
Approved by the House of Delegates, August, 1996

Report No. 400
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 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.
APPENDIX B

The entities below reviewed and recommended disposition of the policies contained in the report:

Sections and Divisions

Administrative Law and Regulatory Practice
Business Law
Criminal Justice
Environment, Energy, and Resources
Family Law
Government and Public Sector Lawyers
Health Law
Individual Rights and Responsibilities
International Law
Judicial Division
Law Practice
Legal Education and Admission to the Bar
Litigation
Solo, Small Firm and General Practice
Taxation
Young Lawyers

Standing Committees

American Judicial System
Armed Forces Law
Client Protection
Continuing Legal Education
Election Law
Ethics and Professional Responsibility
Legal Aid and Indigent Defendants
Legal Assistance for Military Personnel
Paralegals
Pro Bono and Public Service
Professionanism
Public Education
Specialization

Special Committees and Commissions

Domestic and Sexual Violence
Homelessness and Poverty
Law and Aging
Lawyer Assistance Programs
Women in the Profession
State, Local and Territorial Bar Associations

Northern Mariana Islands Bar Association
Dade County Bar Association
New York City Bar Association

Affiliated Organization
Hispanic National Bar Association
1. Discrimination
   Commission on Women in the Profession
   February, 1995

2. Federal Rules of Evidence
   Criminal Justice Section
   February, 1995

4. Enforcement of Environmental Laws
   Environment, Energy, and Resources
   February, 1995

5. Insurance Benefits
   Family Law Division
   February, 1995

6. Discrimination: Rights of Children
   Hispanic National Bar Association
   February, 1995

7. Minority Lawyers
   Hispanic National Bar Association
   February, 1995

8. Appointment Process
   Judicial Division
   February, 1995

9. Model Judicial Article
   Judicial Division
   February, 1995

10. U.S. District Courts
    Law Practice Division
    February, 1995

11. Amend 405 of Standards for Law School Approval
    Legal Education and Admission to the Bar
    February, 1995

12. Prayers in Schools
    New York City Bar Association
    February, 1995

1. Discrimination
   Commission on Women in the Profession
   February, 1995

2. Federal Rules of Evidence
   Criminal Justice Section
   February, 1995

4. Enforcement of Environmental Laws
   Environment, Energy, and Resources
   February, 1995

5. Insurance Benefits
   Family Law Division
   February, 1995

6. Discrimination: Rights of Children
   Hispanic National Bar Association
   February, 1995

7. Minority Lawyers
   Hispanic National Bar Association
   February, 1995

8. Appointment Process
   Judicial Division
   February, 1995

9. Model Judicial Article
   Judicial Division
   February, 1995

10. U.S. District Courts
    Law Practice Division
    February, 1995

11. Amend 405 of Standards for Law School Approval
    Legal Education and Admission to the Bar
    February, 1995

12. Prayers in Schools
    New York City Bar Association
    February, 1995
14. Article III Court
Northern Marianas Bar Association
February, 1995

15. Public Benefits
Section of Individual Rights and Responsibilities
February, 1995

16. International Business
Section of International Law
February, 1995

17. International Trade
Section of International Law
February, 1995

18. Environmental Cooperation
Section of International Law
February, 1995

19. Access to Justice
Section of Litigation
February, 1995

20. Rules Enabling Act
Section of Litigation
February, 1995

21. Seller Liability
Section of Litigation
February, 1995

22. Internal Revenue Code of 1986
Section of Taxation
February, 1995

24. Medicaid Estate Recovery Programs
Commission on Law and Aging
February, 1995

25. Model Rules for Fee Arbitration
Standing Committee on Client Protection
February, 1995
26. Federal Campaign Finances
   Standing Committee on Election Law
   February, 1995

27. Cameras in the Courtroom
   Standing Committee on American Judicial System
   February, 1995

28. National Education Goals
   Standing Committee on Public Education
   February, 1995

31. Dispute Resolution Programs
   Young Lawyers Division
   February, 1995

33. Mandatory Continuing Education
   Young Lawyers Division
   February, 1995

34. Model Lawyer Assistance Program
   Commission on Lawyer Assistance Programs
   August, 1995

35. Victim Service Programs
   Commission on Domestic and Sexual Violence
   August, 1995

36. Improving Legal Access to the Homeless
   Commission on Homelessness and Poverty
   August, 1995

37. Home Equity Conversion
   Commission on Law and Aging
   August, 1995

38. Juvenile Justice
   Criminal Justice Section
   August, 1995

39. Correctional Management
   Criminal Justice Section
   August, 1995
40. Funding for Legal Services Program  
   Division for Legal Services  
   August, 1995

41. Pregnancy  
   Family Law Division  
   August, 1995

42. Child Custody Registry  
   Family Law Division  
   August, 1995

43. Admission Rules  
   Government and Public Sector Lawyers Division  
   August, 1995

44. Social Security  
   Judicial Division  
   August, 1995

45. Standards  
   Legal Education and Admission to the Bar  
   August, 1995

46. Rulemaking Authority  
   Section of Administrative Law and Regulatory Practice  
   August, 1995

47. Internal Rules of Practice  
   Section of Administrative Law and Regulatory Practice  
   August, 1995

48. Regulation  
   Section of Environment, Energy, and Resources  
   August, 1995

49. Social Security Act  
   Section of Individual Rights and Responsibilities  
   August, 1995

50. HIV  
   Section of Individual Rights and Responsibilities  
   August, 1995

51. Child Custody  
   Section of Individual Rights and Responsibilities  
   August, 1995
52. Discrimination
Section of Individual Rights and Responsibilities
August, 1995

53. Federal Sentencing Guidelines
Section of Individual Rights and Responsibilities
August, 1995

54. International Banking
Section of International Law
August, 1995

55. Public Health
Section of International Law
August, 1995

57. International Atomic Energy Agency
Section of International Law
August, 1995

58. ILO
Section of International Law
August, 1995

59. Food and Agriculture Organization
Section of International Law
August, 1995

60. Bankruptcy
Section of Litigation
August, 1995

61. On-Line Access to Court
Solo, Small Firm and General Practice Division
August, 1995

62. House of Delegates Representation
Solo, Small Firm and General Practice Division
August, 1995

63. Office Management
Solo, Small Firm and General Practice Division
August, 1995

64. Model Rules 4.2
Standing Committee on Ethics and Professional Responsibility
August, 1995

52. Discrimination
Section of Individual Rights and Responsibilities
August, 1995

53. Federal Sentencing Guidelines
Section of Individual Rights and Responsibilities
August, 1995

54. International Banking
Section of International Law
August, 1995

55. Public Health
Section of International Law
August, 1995

57. International Atomic Energy Agency
Section of International Law
August, 1995

58. ILO
Section of International Law
August, 1995

59. Food and Agriculture Organization
Section of International Law
August, 1995

60. Bankruptcy
Section of Litigation
August, 1995

61. On-Line Access to Court
Solo, Small Firm and General Practice Division
August, 1995

62. House of Delegates Representation
Solo, Small Firm and General Practice Division
August, 1995

63. Office Management
Solo, Small Firm and General Practice Division
August, 1995

64. Model Rules 4.2
Standing Committee on Ethics and Professional Responsibility
August, 1995
65. Model Rule 3.8
Standing Committee on Ethics and Professional Responsibility
August, 1995

66. Interlocutory or Permanent Injunctions
Standing Committee on American Judicial System
August, 1995

67. Federal Courts
Standing Committee on American Judicial System
August, 1995

68. Professional Liability Protection
Standing Committee on Legal Assistance for Military Personnel
August, 1995

69. Pro Bono Legal Services
Standing Committee on Pro Bono and Public Service
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70. Conduct
Standing Committee on Professionalism
August, 1995

71. Inhalant Abuse
Health Law Section
August, 1995

72. Youth Courts
Young Lawyers Division
August, 1995

74. Discrimination by Lawyers
Young Lawyers Division
August, 1995

76. Legal Assistant Education Programs
Standing Committee on Paralegals
February, 2001

77. Continuing Legal Education
Standing Committee on Continuing Legal Education
February, 2002
78. Legal Assistants
Standing Committee on Paralegals
February, 2003

79. Domestic Violence
Commission on Domestic Violence
August, 2003
GENERAL INFORMATION FORM

Submitting Entity: Secretary of the Association
Submitted By: Mary T. Torres

1. Summary of Resolution:
   In an ongoing effort to bring the Association's policies up to date, this resolution consists of the review of policies adopted in 1995 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. Approval by Submitting Entity:
   The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors 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)

N/A

10. Referrals.

The policies identified in the Resolution with Report have been circulated to 38 entities as noted in Appendix B, and also will be sent to the Government Affairs Office.

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

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EXECUTIVE SUMMARY

1. **Summary of the resolution**
   This resolution archives Association Policies adopted in 1995 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. **Summary of the issue which the resolution addresses**
   The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association's positions were adopted decades ago and are no longer relevant or effective.

3. **An explanation of how the proposed policy will address the issue**
   The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

4. **A summary of any minority views or opposition which have been identified**
   None at this time
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