2016 ANNUAL MEETING • SAN FRANCISCO, CALIFORNIA • AUGUST 8-9, 2016

AMERICAN BAR ASSOCIATION

Resolutions with Reports to the House of Delegates

2016 ANNUAL MEETING

Resolutions with Reports
RESOLUTIONS WITH REPORTS
TO THE HOUSE OF DELEGATES

Moscone Convention Center West
3rd Floor Ballroom
San Francisco, California
August 8 - 9, 2016

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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 11-7 and also can be found in this book. Any additional Resolutions with Reports submitted by state or local bar associations will be numbered in the “10” series. Late Resolutions with Reports will be numbered in the “300” series. These reports will be distributed at the opening session of the House of Delegates meeting. Informational Reports can be found on the ABA’s website at http://www.americanbar.org/groups/leadership/house_of_delegates/2016-san-francisco-annual-meeting.html (click on Informational Reports).

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All sessions of the House of Delegates will be held on Monday, August 8 and Tuesday, August 9, 2016, in the Ballroom, 3rd Floor, at the Moscone Convention Center West, in San Francisco, California. 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 early 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 8. Sections, committees, delegates, affiliated organizations and bar associations, which have submitted Resolutions with Reports, oral information or late reports authorized by the Committee on Rules and Calendar, will be calendared.

The index, which appears at the end of this book, will assist House members in finding reports received by the May 10, 2016 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 11-7 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/2016-san-francisco-annual-meeting.html (click on Informational Reports).

Any late Resolutions with Reports, those received after May 10, 2016, will be considered by the House if the Committee on Rules and Calendar recommends a waiver of the time requirement and the recommendation is approved by a two-thirds vote of the delegates voting. Late Resolutions with Reports will be distributed at the opening session of the House, along with any additional Resolutions with Reports submitted by state or local bar associations.

The preliminary calendar of the House of Delegates meeting is as follows:
The Chair of the House of Delegates,
Patricia Lee Refo, Presiding

Presentation of Colors

Invocation

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

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

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

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

5. Statement by the President
   Paulette Brown, New Jersey

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

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

8. Presentation of Resolutions with Reports which any State or Local Bar
   Association Wishes to Bring Before the House of Delegates

9. Presentation of Proposals to Amend the Association’s Constitution and Bylaws
   11-1 through 11-7

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
# OFFICERS

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<tr>
<th>Position</th>
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<tr>
<td>President</td>
<td>Paulette Brown</td>
<td>Morristown, NJ</td>
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<tr>
<td>President-Elect</td>
<td>Linda A. Klein</td>
<td>Atlanta, GA</td>
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<td>Chair, House of Delegates</td>
<td>Patricia Lee Refo</td>
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<td>Mary T. Torres</td>
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<td>Treasurer</td>
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# BOARD OF GOVERNORS

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<tr>
<th>District</th>
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<tr>
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<td>Wendell G. Large</td>
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<td>Barry C. Hawkins</td>
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<td>Penina K. Lieber</td>
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<td>Alan Van Etten</td>
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<td>Pamela C. Enslen, Kalamazoo, MI</td>
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<td>Donald R. Dunner, Washington, DC</td>
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<td>Ilene K. Gotts, New York, NY</td>
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<td>Bernard T. King, Syracuse, NY</td>
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<td>Ruthe Catolico Ashley, Vallejo, CA</td>
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<td>Orlando Lucero, Albuquerque, NM</td>
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<td>Marcia Milby Ridings, London, KY</td>
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<td>Pamela A. Bresnahan, Washington, DC</td>
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<td>Min K. Cho, Orlando, FL</td>
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<td>Erica R. Grinde, Missoula, MT</td>
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<td>Law Student Member-at-Large</td>
<td>2016</td>
<td>Christopher S. Jennison, Silver Spring, MD</td>
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COMMITTEES OF THE HOUSE OF DELEGATES

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

TO THE

HOUSE OF DELEGATES

To permit the presentation of current financial data, the written report of the Treasurer will be distributed at the time of the Annual Meeting of the House of Delegates.
REPORT OF THE EXECUTIVE DIRECTOR
to the
HOUSE OF DELEGATES

(submitted May 25, 2016)

This report highlights American Bar Association activities from December 5, 2015 to May 25, 2016.

Introduction

The United States Constitution speaks to the pursuit of a “more perfect” union. To protect the rights contained in that seminal document, the American Bar Association has long sought a more perfect legal profession. Throughout our 138 year history, that’s included making changes within the Association itself -- tearing down gender and racial barriers to ABA membership and advancement; championing the pursuit of ethics; and developing a tremendous assortment of professional development opportunities and member services to help attorneys be effective advocates of justice.

Today is a period of great transition within the legal profession. Changing attitudes and a more competitive economy are factors that cause us to reexamine how we connect with current and potential members. We can look to many benchmarks to gauge our progress, including: keeping expenses down; increasing the number of members; and improving revenues from dues and non-dues sources.

We have been extraordinarily successful in recent years at holding down costs. The general operations budget in FY 2007 was $109.3 million; next year’s FY 2017 projected expenses, excluding the website development, will be $99.5 million. Accounting for inflation, next year we will spend some $30 million less we did ten years ago! And we ended FY 2015 with a record number of members, almost 417,000. Improving our revenues, both from dues and other sources, is proving to be much more difficult. During FY 2015, we implemented our first dues increase in eight years, and while that generated $3.0 million more in dues collections, last year’s numbers were $9.7 million less than in FY 2007. And while non-dues revenues have increased by $2.9 million since FY 2011, we need to do much better in that area.

My Midyear Meeting remarks to the House of Delegates focused on membership and enhancing the ABA’s value proposition. One recent initiative is our new affordable insurance program, that offers ABA members and their families very competitive pricing on a wide variety of policies. I’m excited by the potential of our insurance program, which can become a powerful “sticky benefit” of membership, helping us to recruit and retain dues-paying members.

Of course, improving our value proposition involves more than unveiling attractive new promotions and benefits. It requires an ABA staff focused on membership growth and organized to meet the demands of today’s changing profession.
On May 2, we took an important step with the restructure of our Membership and Marketing Division. Our Chief Marketing Officer position has been eliminated. The new Membership Group was established, and it reports to Deputy Executive Director Jim Dimos. The Group will work to improve the way the Association interacts with our members. Leading the Group, effective June 27, is our new Chief Membership Officer (CMO), Michael Kreisberg. The CMO has direct responsibility for our recruiting and retention efforts and for enhancing the member experience.

The CMO’s responsibilities will include recruitment and oversight of our Director of Member Outreach. This new position will be charged with informing members and the legal community on the value of the ABA. The Service Center will also fall under the CMO, and it will continue to improve its efforts as a primary point of contact between most members and the Association.

Beginning May 23, Lauren Ross serves as our new Email Communications Manager. Lauren will work with members and staff to help us establish best practices to better target our messages and reduce the voluminous number of emails sent by the Association. We need viable and effective protocols and business rules. Lauren has more than 10 years of experience in corporate email communications and comes to the Association from Epsilon, where she supported Fortune 500 companies such as United Airlines, Marriott, Home Depot, and Nissan/Infinity in their email communications.

Another aspect of our restructuring involves our reconstituted marketing programs, which now report to ABA’s Senior Associate Executive Director and Chief Financial Officer, Bill Phelan. This area includes ABA Advantage and digital engagement. Additionally, the dues billing and analytics functions were transferred to Financial Services. The new Marketing Department’s priorities include increasing our non-dues revenues, website development, and enhancing the ABA’s social media presence.

Projected Fiscal Year 2016 Membership Counts

Last year, the ABA reached a record number of members, 416,982, due in part to the rollout of free membership for law school students. For FY 2016, we project membership counts will decline to about 390,000, which is in line with gradual increases in membership counts from FY 2011 to FY 2014. We also project the Association will sustain a 1 percent drop in the number of dues-paying lawyer members and associates, from 205,000 to 202,500, continuing an unfortunate trend over the past decade.

While of course it would have been preferable to see increases in membership and dues-paying members, this year’s projected counts were influenced by many factors. As anticipated, the 13 percent dues increase in FY 2015 contributed to a decrease in dues paying members. Timing shifts for dropping members and a delayed billing cycle in FY 2015 also had the effect of inflating last year’s membership counts, while suppressing this year’s totals. For more information on the factors influencing our dues-paying membership count, please refer to the April 2016 memo I sent to the Board of Governors.
Membership Challenge -- Rooted in Changing Society and Profession

To overcome our membership challenges, we must understand the root causes. We’re in a period of significant change in our society and in our profession. Attitudes are changing. In the not-too-distant past, professionals were routinely “expected” to belong to organizations like the ABA.

Today, many millennials feel particularly time-challenged and prefer to establish their social and business connections online. A recent Pew Research Center study concluded only 13 percent of 19 to 29 year-olds participate in professional organizations. An Entrepreneur Magazine analysis of millennials who left professional organizations shows 37 percent simply did not find value in their group, 45 percent thought membership was too expensive, and 31 percent perceived a lack of proper technology [respondents could list more than one reason].

A depressed job market for attorneys compounds the trend of millennials’ increased reluctance to join professional organizations. Only 66.3 percent of 2014 law school graduates were able to find an entry-level job in the legal profession within one year of graduation. Greater competition within the profession, emerging nontraditional legal resources, and a shrinking demand for legal services have all contributed to a jobs crunch for attorneys. According to the U.S. Bureau of Economic of Analysis, the legal services sector -- which employs 70 percent of all lawyers -- has shrunk by 20 percent since 2004.

The economic challenges of the legal market have led to significantly decreased enrollment in law schools. The 1L class declined from a high of 52,488 in 2010 to 37,058 in the fall of 2015, a loss of 15,430 students (29.4 percent). And a smaller percentage of candidates are passing the bar; bar passage rates declined from 64 percent in 2014 to 59 percent in 2015.

Fewer young lawyers and an aging membership cause a continuing demographic squeeze for the ABA. To put it into perspective, in 2005 approximately 68,000 ABA members had been members of the bar at least 30 years; in 2015 that number had grown to nearly 86,000 -- a 26 percent increase.

ABAAction! -- Insurance

Since the Board of Governors approved the initiative at its June meeting three year ago, ABAAction! has helped staff focus its efforts to improve membership benefits and non-dues revenue collection. ABAAction! permeates everything we do. One example is the tremendous benefit launched this year -- our new affordable insurance program. We studied possibilities for this member value since the creation of the Insurance Opportunity Task Force more than four years ago. After much planning and research, the ABA rolled out the program with a soft-launch on April 4, 2016.

I’m pleased to report some promising signs at this early date. In the two weeks following a limited, targeted April 28 email to ABA members highlighting the program’s Rapid Decision Life Insurance component, the website had nearly 1,300 visits and more than 200 requests for quotes, as well as its first sales. Additional promotional emails detailing our other competitive
insurance offers will follow in coming months, as a prelude to the program’s major kickoff in August.

Throughout the year, we will enhance the variety of insurance programs we offer. Administered by our partners at USI Affinity, the new program provides highly competitive prices to ABA members on life, disability, dental, vision, and travel insurance, along with student loan consolidation assistance. Additional types of insurance, such as auto and home, will be available in coming months.

The insurance program’s website is: www.abainsurance.com. I encourage you to visit this dynamic site and spread the word to family, friends, and colleagues in the profession. Our program offers highly-rated insurance and great opportunities for savings. Attorneys who are starting their practices are a focus of our recruiting and retention efforts, and they can enjoy special savings. For example, a young lawyer who has been in practice five years may immediately save more than $3,000 on student loan costs and other insurance products -- almost 17 times the $177 rate for annual dues.

I’m excited by the potential of this new program to help us recruit and retain dues-paying members. It will be a valuable resource for our members and help cement the ABA’s long-time reputation as a reliable partner for lawyers throughout the profession, helping them achieve success in their lives and careers.

ABAAction! -- Law Student Outreach

This year’s membership count includes a very positive note: The success we’re having attracting law students to the ABA with our new “freemium” program. The program offers free membership to law students in FY 2016, and in the future, we’ll offer a premium version of membership, with many additional benefits, for a fee of $25. We currently have a record number of law student members, almost 72,000.

Over the past year, we have contacted all 204 ABA-approved law schools to promote our free student enrollment and the advantages of membership in the profession’s national professional association. To date, we have received or been promised complete student lists from 81 law schools to facilitate group enrollment.

Today’s law students and young attorneys expect value for their time and money, and the ABA is striving not only to meet but exceed those expectations. One way is through student loan consolidation available to participants of our new insurance program. Those who refinance through our SoFi program receive a sign-up bonus of $300, on top of the $25,000 an average attorney could expect to save at current rates over the lifetime of student loan repayments. The refinancing is available for both undergraduate and graduate student loans, involves no application or origination fees, and may be used by members and their families, including spouses and children.

We’re excited about the new premium student membership option. Among the valuable savings and benefits is a $250 discount on the popular BarBri bar examination preparatory
course. Also included in the upgrade is a $25 discount off West Academic Casebooks & Study Guides, access to law student leadership and competitions, and special mentoring programs. Through the premium model, the ABA hopes to build awareness, develop relationships, and deliver positive member experiences for law students that translate into higher retention of new bar admittee members.

Successfully engaging law students and young lawyers requires more than offering static benefits. The ABA must communicate value in contemporary ways that embrace online interaction and rapid responsiveness. Since initiation of our new law student website in November 2015, online traffic to the Law Student Division is up 25 percent over the prior year. The site has been viewed by some 75,000 users, and more than 33 percent of them accessed the site through smart phones and tablets. This underscores the increasing importance of maintaining sites that are readily accessible on mobile devices.

The site offers many informative resources, including the popular “Before the Bar” blog, which gives law students tips on professional development, building business relationships, and other topics. And the new Law Student Podcast features prominent guests such as former O.J. Simpson prosecutor Marcia Clark, who discussed her recent book on the case, and Senator Lindsey Graham, who gave advice on getting through law school and becoming a success in the profession.

To complement the ABA’s new student website and blogging outreach, we recently launched “10 Questions Live” -- a monthly series on Google Hangout that enables law students and young attorneys to interact with successful attorneys.

**ABAction! -- Membership Value and Experience**

For many years now, the Association has proven a capability to attract new members, recruiting 100,000 annually. But we have failed to demonstrate our value proposition effectively, as shown by unsatisfactory retention rates of new members. We must do a better job of engaging new members in our national professional association. This statistic stands out: We retain over 90 percent of members who have paid dues for at least three years.

We need to simplify the process of becoming and remaining a member. Our Group Membership campaign is a great tool for retaining members -- more than 94 percent of participating firms renew with the ABA. As of April 22, Group Membership participants totaled 70,673, an increase of 4.1 percent over last year. Dues revenues from the program rose 8.1 percent over the same period to $19,475,286. Since the beginning of FY 2015, the ABA has brought 650 new firms into the program.

Our Full Firm Membership Program continues to grow. We now have 100 Full Firm participants, including 49 of the National Law Journal’s largest U.S. firms. By April 2016, Full Firm membership reached 22,150 members -- an increase of 10.8 percent from the prior year, and associated dues revenue rose 18.5 percent to $4,990,650.
Our new Full Firm pilot program in Canada is also showing positive signs. Recently, Fasken Martineau DuMoulin LLP became the second firm to join the program; the ABA will gain more than 550 new members as a result.

Another important initiative, launched in early April, is the Powerful Career Woman campaign, which offers non-member lawyers and associates a six-month trial membership including a free section, division, or forum of choice. Our extensive outreach campaign uses direct mail, email, social media, online advertising, and telemarketing to demonstrate ways women leaders are breaking down barriers to opportunity and shaping today’s ABA. So far, the ABA has recruited more than 1,400 new members through this effort.

In the introduction, I noted that Michael Kreisberg is our new Chief Membership Officer. Since 2008, Michael has served as Director of Membership at the American Society of Mechanical Engineers in New York City. He led membership development, recruitment, and retention programs and affinity partnerships for that $100 million association with 141,000 members in more than 150 countries worldwide. He turned membership from a 10-year decline to sustained growth over a six-year period, going 119,000 to 141,000 members. He boosted retention rates from 75% to 85% by improving segmentation, targeting, and modeling of membership and leading multi-channel integrated direct marketing program that increased number and quality of touch points and outreaches to existing members. His previous experience includes Vice President, Customer Engagement and Inbound Customer Marketing at Citigroup, Inc., and Senior Director, Membership and Customer Service at the United States Tennis Association. Michael has a proven record of creating and launching membership programs, products, and services that provide significant value to members, fully engage membership in organization mission, and build member loyalty, and we’re delighted to welcome him to the Association.

ABA Advantage provides significant member value. Last year, members saved more than $18 million from discounts available through ABA Advantage partners representing more than 20 companies, including Hertz, Mercedes, Ricoh, and UPS. ABA Advantage brought the Association more than $6 million in marketing fees and royalties in calendar year 2015.

In recent months, ABA Advantage has added new savings opportunities for members through Bank of America automobile and mortgage loans, Thorne vitamins, and Adar IT. And through one of our newest partnerships, ABA members may also enjoy a new 20 percent discount at 1800flowers.com on flowers, gourmet gifts, Fannie May, The Popcorn Factory, and other products.

ABA Leverage enables client law firms, legal associations, and law schools to benefit from staff expertise and receive hotel discounts for meetings. Over the past year alone, the program has saved clients more than $1.2 million in reduced room rates, lower resort fees, and complimentary services. Leverage’s projected commissions through 2020 exceed $350,000.

The ABA also remains committed to our members’ professional success and development through Legal Career Central (LCC). In May, LCC launched a redesigned and mobile-friendly jobs board at jobs.americanbar.org for individuals looking for work in the legal profession, as well as employers interested in filling their vacant positions. The easy, state-of-
the-art interface allows job applicants to receive alerts when positions are posted that match their interests, and upload resumes anonymously so employers can contact them while maintaining control of their privacy. Given the competitive nature of employment in the legal sector, especially with entry-level positions, we hope this site will be a useful tool that helps many qualified applicants connect with new career opportunities.

**ABAAction! – Enhanced Website and Email**

The ABA has started work on a website redesign process to modernize online content, improve accessibility for mobile devices, and make navigation easier. The last substantial update to our website was completed in February 2011. Following the Board of Governors’ approval for the Strategy Phase of the project at this year’s Midyear Meeting, a Website Oversite Team comprised of members and staff reviewed proposals and in-person interviews from six finalist digital agencies eager to advise the ABA on how best to overhaul americanbar.org and shopaba.org. The search was narrowed to two finalists, and in March, Code and Theory was selected as our partner agency to help us achieve our online vision.

In April, work on the 12-week Strategy Phase began to examine the technology, staffing, and processes surrounding the ABA’s web presence. Contingent on additional Board of Governor funding, the plan is to then move work on designing, developing, and deploying an improved ABA website that meets our 21st century needs.

We’re also working to improve our email communications. Our new Email Communications Director, Lauren Ross, will monitor and manage the Association’s email systems, policies, and procedures for the ABA and work to ensure email communications between the Association and its members are consistent and valued. Working with members and staff, the goal is to formulate effective business practices and protocols for Association emails. In 2015, the ABA sent more than 300 million emails, double the number in 2010. Lauren will coordinate efforts to reduce the extreme volume of ABA emails and better target our messaging to match members’ interests.

**Access to Justice**

As the ABA focuses on member outreach and modernizing our communications channels, we of course remain committed to certain core values, such as the Association’s work to ensure every American has access to our justice system. One innovative new approach is the Standing Committee on Pro Bono and Public Service’s work on a website for the public to acquire pro bono legal information and assistance. So far, 42 jurisdictions have signed onto the project, which is expected to be launched later this year.

We appreciate the work of state and local bars to recruit volunteers for the project. Special recognition goes to George “Buck” Lewis of the Pro Bono Committee. Buck created the web portal for the State of Tennessee in 2011, and it was later utilized by the bars in South Carolina, Alabama, Minnesota, Indiana, and West Virginia. His law firm, Baker Donelson, donated the site to the Association for nationwide use.
Eliminating Bias, Enhancing Diversity

The ABA continues to pursue a more diverse Association and profession. On April 21, President Paulette Brown and I had the honor of speaking at the Section of Civil Rights and Social Justice’s 50th anniversary celebration. Formerly the Section of Individual Rights and Responsibilities, for five decades it has been unwavering in its support of people of color, women, the disabled, the LGBT community and others. The Section has a long and dedicated history of advancing justice for all of our citizens.

The Association will soon launch a new ABA Diversity Portal, which will provide information and links to a variety of diversity and inclusion activities, products, research, and initiatives across the Association.

Our work to increase accessibility across the Association continues to ensure ABA members with disabilities have appropriate access to Association programs and materials. More than a year ago, I appointed a staff task force to examine the ABA’s current accessibility practices and make recommendations for improvements. The task force has since made notable improvements. We’ve increased staff awareness and training on the importance of making the ABA experience as accessible as possible, including technology, meetings, transportation, webinars, and CLE. We’ve ensured accessibility language was in the contract for the redesign of the ABA website. And we’re identifying companies that transcribe and caption videos at a reasonable cost. These examples show our progress; we know the work must continue until every ABA member enjoys proper accessibility.

Promoting diversity and inclusion among the ABA’s staff is very important. We are currently updating our very successful “We Are the ABA” campaign to help facilitate dialogue and connections between staff members. The new program is called “My Story.” Our organization includes a large 900+ member staff and more than 3,500 entities. It’s understandable for people to focus on their own departments and assignments. And it’s not uncommon for people who’ve worked at the ABA for many years to have not met or interacted. “My Story” is designed to break down barriers, embrace our diversity, and generate interaction and conversations between staff members as never before. It will involve online resources and a series of posters for the Chicago and DC offices that feature a montage of staff photos involving people, places, and things that represent their life experiences.

Finances

As of April 30, the ABA’s consolidated operating revenue in FY 2016 was $5.5 million below budget at $138.9 million, primarily due to shortfalls in Sections ($3.9 million) and General Operations ($1.4 million), with the latter impacted by less advertising and publications revenue than expected. On a positive note, the Association’s revenue challenge has been offset with consolidated expenses that were $6.5 million below budget, due largely to the ABA’s recent efforts to control spending. Detailed financial information is provided in Treasurer Nick Casey’s report.
Sustainability

As we near the end of the FY 2017 budget process, the ABA continues to face a very challenging financial situation. The unfortunate reality remains: There is not enough money to fund everything that’s important to the Association. The Sustainability Working Group was established to follow on the work of a previous task force to help us find additional cost savings and position us for future viability. Led by ABA Treasurer Nick Casey, appointed members, and staff, the working group is now identifying actions (short-term and long-term) we can take to help assure a more sustainable financial path.

As part of our sustainability efforts, we continue to work on possibilities to maximize our use of floor space and reduce expenses at the ABA’s Chicago Headquarters. Working with a commercial real estate firm, we are considering all reasonable options and are now focused on the most viable, a possible renegotiation of our lease at 321 North Clark Street. While our lease extends until 2024, we may have a near-term opportunity to negotiate some very advantageous terms. We’re seeking a more effective and efficient facility for members staff -- at maximum cost savings.

In April, I appointed a Staff Task Force on Storage to ensure we use office space more efficiently. The task force is examining current storage practices across the Association, identifying best practices from inside and outside our organization, and developing recommendations to reduce our storage needs. Staff has opportunities -- through personal interviews, open hearings, and email -- to offer their suggestions.

Another sustainability effort began three years ago, when the Board of Governors approved additional resources for the Fund for Justice and Education (FJE) to more effectively target its fundraising efforts. Beginning in FY 2014, FJE launched the Resource Development Initiative (RDI) to refocus efforts, track progress, and maximize the use of new and existing resources to raise more funds. Charitable gifts to the ABA from individuals, Association leaders, and organizations such as foundations, corporations, and law firms have increased markedly. In the past two years, the RDI spent $567,889 more to drive new contributions, and that has resulted in an additional $1,390,597 in donations, a 244 percent return on investment.

Advocacy

Over 350 ABA and state and local bar leaders from 48 states, the District of Columbia, and the U.S. Virgin Islands participated in ABA Day from April 19 to 21 in the nation’s capital. As part of the grassroots lobbying program, participants urged their Members of Congress to provide adequate funding for the Legal Services Corporation and to support strong Juvenile Justice and Delinquency Prevention Act reauthorization and sentencing reform legislation. Highlights of the program included:

- Hundreds of meetings with members of the House and Senate or their staff, including Senate Majority Leader Mitch McConnell, Senate Minority Leader Harry Reid, and Speaker of the House Paul Ryan;
• Presentation of ABA Justice Awards to Senators Charles Grassley and Cory Booker and Representatives Jim Sensenbrenner and Joyce Beatty at the National Museum of the American Indian reception and dinner; and

• Presentation of a Special Presidential Recognition to Wade Henderson, president and CEO of The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, followed by a morning briefing by Valerie Jarrett, Senior Advisor to the President.

On April 19, the President signed into law S. 192, to reauthorize the Older Americans Act (OAA) of 1965. The ABA has sent many letters in support of the OAA, most recently to Senate Health, Education, Labor and Pensions Committee leaders in January 2015.

Also on April 19, the Senate Commerce-Justice-Science Appropriations Subcommittee proposed funding for the Legal Services Corporation (LSC) at $395 million for Fiscal Year 2017 -- a $10 million increase over the current fiscal year. On April 21, the full Senate Appropriations Committee passed the bill unanimously and without amendment -- it now goes to the Senate floor.

In February, the Governmental Affairs Office released a special edition of the ABA Washington Letter known as the annual “Major Legislation of Interest to Lawyers,” a 20-page chart highlighting legislative and executive branch action on ABA policy issues during the first session of the 114th Congress. Topics included association priority issues relating to criminal justice, federal agency regulation of lawyers, legal services, immigration, civil rights, national security, and the judiciary.

On February 18, Death Penalty Representation Project Director Emily Olson-Gault testified on behalf of the ABA before the Judicial Conference of the United States’ Ad Hoc Committee to Review the Criminal Justice Act on the subject of death penalty representation.

In the last quarter of 2015, the ABA reached some notable achievements in its Congressional advocacy efforts. Following a last-minute push by ABA advocates, the Legal Services Corporation received $385 million in the FY 2016 omnibus end-of-the-year appropriations package (Public Law 114-113). This was a $10 million increase over the previous year, and will help ensure civil legal assistance for many Americans unable to afford it.

The omnibus package also contained numerous other measures of interest to the ABA, including:

• Federal Judiciary -- an increase of $80.4 million, bringing the total in discretionary funding to $6.78 billion; and an extension of temporary judgeships for an additional year in nine district courts

• John R. Justice Prosecutors and Defenders Incentive Act -- level funding at $2 million for student loan repayment assistance for lawyers employed as federal and state prosecutors and public defenders
- **Immigration Courts** -- a $76 million increase to $427 million to provide for 55 additional immigration judge teams

- **Violence Against Women Act Grants** -- a $50 million increase to $480 million, including $45 million for civil legal assistance

- **Elder Justice and Adult Protective Services** -- a doubling of funding from $4 million to $8 million

- **Cybersecurity Act of 2015** -- creates a voluntary cybersecurity information sharing process that will encourage information sharing between private companies and the government and provide liability protection for companies that share cyber threat data with the government

In a 2015 *End of the Year Report* released December 31, US Supreme Court Chief Justice John Roberts urged the judiciary and lawyers to utilize training provided by the ABA, as well as the Federal Judicial Center and local bar organizations, so they may become more knowledgeable on the impact of new amendments to the Federal Rules of Civil Procedure on the justice system and legal culture.

**Communications**

National Health Care Decisions Day on April 16 provided the opportunity for placing an ABA op-ed on the importance of advance health care planning that was published by several news outlets including *Newsday*, *South Coast Today*, and *Richmond Times-Dispatch*. A second op-ed placed by Communications and Media Relations (CMR) in April recognized the 40th anniversary of the Supreme Court decision in *Gregg v. George*. Published by the *Houston Chronicle*, the op-ed notes the significant ongoing problems with the administration of capital punishment in the United States.

The ABA continues to remind cash-strapped states of the importance of maintaining adequate funds for indigent defense. In Louisiana, the ABA's advocacy was cited in coverage of a proposal to seek a 62 percent cut in funding to the state's public defender system, as reported by *Legal Reader* and *The Advocate* newspaper in Baton Rouge and New Orleans. In Pennsylvania, several news outlets, including the *Scranton Times-Tribune*, *WITF-TV*, and *Citizens Voice*, reported on an ABA amicus brief in a state Supreme Court case brought against a Pennsylvania county alleging inadequate monetary support for public defenders. And ABA guidelines on public defender caseloads were noted in recent stories on underfunded public defense, including those in the *Chicago Daily Law Bulletin*, *St. Louis Post-Dispatch*, *Times-Picayune*, and *The Atlantic*.

Several spring meetings of ABA member entities have generated significant media attention. With Attorney General Loretta Lynch as its headliner, the *Section of Antitrust Law spring meeting* attracted more than 50 reporters, including those from the *National Law Review*, *Thomson Reuters*, *Politico*, *Bloomberg*, *Fortune*, *New York Post*, and *USA Today*. Meanwhile,
the Section of Environment, Energy and Resources’ spring meeting brought in officials from the Environmental Protection Agency and the Department of Justice, drawing reporters from NPR, Bloomberg BNA, Law360, Inside Counsel, as well as trade publications such as E&E Publishing.

This spring, CMR prepared a FAQ and other background materials on the ABA-Rocket Lawyer relationship, available on its reporter resources webpage. Media coverage of the program included articles in the Philadelphia Bar Reporter, Bloomberg BNA, The Philadelphia Inquirer, and American Lawyer.

In late March, Senator Richard Blumenthal and ABA House of Delegates member Monte Frank published a Hill op-ed on Supreme Court nominee Merrick Garland that quoted from President Brown’s press statement on the nomination process. President Brown also praised the Justice Department for its efforts to eliminate unfair fees, fines, and bail practices of local courts in a March 18 letter to the editor published in the Washington Post in response to the newspaper’s article on the impact of the charges on low-income citizens.

Several resolutions under consideration by the House of Delegates during the Midyear Meeting were also of particular interest to reporters covering the February proceedings. Among them, one endorsing the Uniform Bar Exam was covered widely by the legal press, including the National Law Journal, Bloomberg BNA, Law360, and Above the Law. Another resolution that provides states with a framework to consider the regulation of nontraditional legal services generated several news stories, including those in The American Lawyer, New York Law Journal, Texas Lawyer, and the Connecticut Law Tribune. Following passage of the measure, Bloomberg BNA quoted from Brown’s media statement on the topic, saying that “Resolution 105 creates a framework to guide the courts ‘in the face of the burgeoning access to justice crisis’ and rapid change in the delivery of legal services.”

A study released on February 3 by the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation was covered widely by news outlets around the country, including The Washington Post, Albuquerque Journal, CNN, Bloomberg BNA, and Am Law Daily, among many others. As the first nationwide study of substance use and behavioral health problems among attorneys, “this new research demonstrates how the pressures felt by many lawyers manifest in health risks,” President Brown was quoted as saying in the New York Times, adding that the study is an “important guide” for the Association’s lawyer assistance programs.

Following a January 31 “60 Minutes” segment on money laundering that mentioned the ABA and its policies, President Brown issued a media statement. “The Association is committed to the elimination of money laundering and has worked diligently with federal and state governments, international law enforcement agencies, and state and local bars to find the best ways to achieve this goal,” she said, noting that the ABA was not informed in advance about the show and not given an opportunity to respond to any of the report’s statements.
ABA Rule of Law Initiative (ROLI)

On March 31, ABA ROLI honored US Supreme Court Justice Ruth Bader Ginsburg with its 2016 award for her dedication to the global advancement of the rule of law. The award was presented by ROLI Board Chair Margaret McKeown at a March 31 reception in her honor at the U.S. Supreme Court. Ginsburg thanked ROLI for the award, and acknowledged its difficult mission in a dangerous world.

On April 21, ROLI launched its project to increase accountability for sex and gender-based violence in the Democratic Republic of the Congo. The launch was co-hosted by ROLI, the Ministry of the Justice, and the Superior Council of the Judiciary, as well as the US Embassy in Kinshasa. The US Ambassador attended and spoke at the event.

In April, ABA ROLI’s Russia team discovered five articles published by bloggers about our work in Russia. Motivation for the articles is unclear; they substantially inaccurately and manipulatively review public documents such as our registration and ABA’s most recent audits in a manner that portrays ABA in Russia as having nefarious motives in excess of our claimed mission “to improve the professional qualifications of Russian lawyers.” A number of internal documents connected to ABA’s activities more than three years ago were somehow procured and used in the pieces. It does not appear any of these pieces have received bounce with the mainstream media in Russia, either online, in print, or on television. ROLI staff is coordinating closely in DC and Moscow, and updating a number of security plans in the event these pieces result in increased scrutiny from the authorities or the media.

In China, ROLI organized an LGBT rights training for lawyers on April 15 to 17 in the city of Tianjin. Participants included 13 lawyers and 11 LGBT community leaders. The two-day conference immersed lawyers in discussions on gender and sexual diversity, domestic and international LGBT movements, LGBT legal issues in China, and how to conduct legal advocacy.

In March, ROLI held a workshop in Tunisia for members of the Libyan media and the Constitutional Drafting Assembly (CDA) to enhance CDA’s outreach skills and the media’s knowledge of the constitutional development process and outcomes. In addition, there was also a workshop for human rights fellows on monitoring, documenting, and reporting human rights violations and a two-day meeting for professors from three Libyan law schools working on legal clinics.

On January 15 and 16, ROLI hosted its Balkans Regional Rule of Law Network (BRRLN) Steering Committee meeting in Skopje, Macedonia, for a total of 21 participants, including the presidents of the bar associations and several civil society representatives of BRRLN countries (Albania, Bosnia-Herzegovina, Kosovo, Macedonia, and Serbia). At the meeting, the participants discussed the future of BRRLN Network, establishing a Network Secretariat, and preparing a draft statute and bylaws that will govern the Network.

On January 12 in Lima, Peru ROLI’s “Program to Support the Criminal Justice Sector in Peru” conducted a launch event for a series of television programs about the new criminal justice
system. The U.S. Ambassador to Peru and high ranking government authorities attended the event, which was broadcasted live via the Judiciary’s television station and on the web.

ROLI held its first activity in Saudi Arabia earlier this year. It hosted a workshop on interactive teaching methods from January 11 to 12 in Riyadh at Prince Sultan University College of Law, which funded the event.

Center for Professional Development/Continuing Legal Education (CLE)

Gina Roers-Liemandt has been hired as the new Director of Professional Development and MCLE, and she will assume her new responsibilities on June 20. She is a highly respected expert in continuing legal education, with 16 years of experience in CLE at Thomson Reuters. She most recently served as the leader of West LegalEd Center and West Accreditation Services.

Gina will manage the resources devoted to program delivery and accreditation services provided by the Center for Professional Development. She will also work with the Standing Committee on CLE (SCOCLE) as they continue their work to update the ABA Model CLE Rules and evaluate the policies and processes governing educational programming and professional development across the association.

SCOCLE met in person on May 18 and voted to raise internal MCLE fees from $100 to $150 per credit hour to provide for better staffing of the MCLE Unit and to support ongoing costs related to the MCLE application system. This is the first increase in MCLE fees since FY 2011.

SCOCLE will submit a report to the Board of Governors at the Annual Meeting in San Francisco addressing six issues, with recommendations in each area. Those areas are: MCLE compliance; diversity in program faculty; service needs of content-producing entities; technology for program development and delivery; staff roles and division of duties in programming; and provision of accredited versus non-accredited programming.

ABA Retirement Plan Corrections

Staff has made significant progress on a number of retirement plan issues over the past year. Voluntary Compliance Program filings have been submitted to the Internal Revenue Service for both retirement plans. The IRS has accepted the ABA’s proposed corrections for the Thrift Plans, and the changes have been implemented. After years of deficiencies, the Thrift Plan is now set up effectively, both administratively and operationally. We’re awaiting the IRS response on our pension filing, and we expect to have positive news with that soon.

ABA Journal

Congratulations to ABA Journal’s Mark Hansen and Allen Pusey for winning a prestigious Peter Lisagor Journalism Award for Best Feature Story or Series. The Journal was also nominated for six other Lisagors for reporting, design, illustration, and overall excellence.
The competition for the awards is stiff, and includes the Chicago Tribune, Bloomberg News, Crain’s, and the Washington Post.

ABAJournal.com continues to draw more than 2 million page views each month, and from March 2015 to March 2016 has seen a 3.3 percent increase in its number of users, and a 17.7 percent jump in its page views per user. Mobile and tablet views of the site are increasing and now account for nearly half of its traffic.

The Journal offered two different covers for its May cover story “Did Litigation Kill the Beatles?” and it also offered readers an opportunity to vote for their favorite cover. Also, in cooperation with ABA Publishing, participants had an opportunity to pre-order a forthcoming book on the legal struggles of John Lennon.

Publishing

Due to the popularity of the Netflix documentary series, “Making a Murderer,” we have seen a huge resurgence of interest in The Innocent Killer, a book based on the same facts and originally published by the ABA in August 2014. Thus far it has sold 25,000 books and 8,000 ebooks in the United States and Canada. Its Global English trade paperback edition has also been licensed to Penguin Books and, as of this writing, has already sold 40,000 units at the rate of about 1,000 per week. It has also enjoyed eight weeks and counting on the London Times’ paperback bestseller list. The book has attracted press attention; e.g., author Michael Griesbach appeared on Roe Conn’s popular WGN Radio show on January 7 to speak about the Steven Avery case. He was also interviewed by Alison Bowen of the Chicago Tribune and appeared on Dateline NBC to discuss the case and his book.

In April, our Ankerwycke label made its debut at the LA Times Book Festival. The festival attracted more than 5,500 attendees with over 1,000 exhibitors selling books onsite. This is the West Coast’s largest book event where consumers are able to meet local and new publishers, attend book signings, and present manuscript proposals. Ankerwycke had four author signings: Paul Goldstein (Secret Justice), Jonathan Shapiro (Deadly Force and Lawyer’s Liars & the Art of Storytelling), Gerry Schwartzbach (Leaning on the Arc), and Jeff Cohen (Dealmaker’s Ten Commandments). Booth traffic included 100-150 visitors each day.

Cohen’s Dealmakers’ Ten Commandments is currently number one in entertainment law on Amazon, keeping up a trend that’s seen every Ankerwycke book hit the site’s top 10 in their respective areas.

Inside Counsel Revolution by former General Electric general counsel Ben Heineman launched in April to strong press coverage and early sales of more than 5,000. Business Ethics magazine ran an excerpt from the book in their latest issue, and Bloomberg BigLaw ran a piece summarizing the book’s themes.

The Standing Committee on Publishing Oversight’s (SCOPO) telephone town hall on March 31 was well attended, with several hundred member and staff representatives from content-producing entities dialing in. Updates were provided on areas of key concern raised in
the SCOPO survey of publishing entities. Follow-up actions from the meeting include establishing a better listserv to communicate news and announcements related to publishing, addressing key issues being experienced by several periodicals which sustained staff reductions in the reorganization, and holding two calls dealing with periodical issues and book production issues, respectively.

The ABA has reached an agreement with MEI Global which effectively outsources the business development side of content licensing. MEI will conduct an audit of Association content and negotiate with third parties that seek to license that content. The ABA will evaluate and give final approval for all negotiated deals.

Professional Services and Governance

The Section of Antitrust Law convened its 64th Spring Meeting April 6 to 8 in Washington, DC. Approximately 3,000 attendees from 62 countries participated in 60-plus CLE sessions that were covered by more than 50 reporters from national and international media outlets. A highlight of the meeting was a luncheon featuring US Attorney General Loretta Lynch as the guest speaker.

Daniel Marti, the White House Intellectual Property Enforcement Coordinator, was the guest speaker at the Section of International Property Law’s Spring Conference. Mr. Marti addressed issues of enforcement, counterfeiting, and border protection, and the efforts to coordinate various law enforcement agencies to protect intellectual property.

As part of its Spring Conference, on April 13, the Section of Litigation put on a half-day CLE program, “The Trial of Al Capone for Murder at the St. Valentine’s Day Massacre” at the Goodman Theatre in Chicago. The program starred Chicago personal injury attorney Robert Clifford as Al Capone, was seen by some 400 audience members, and received substantial favorable coverage in the media.

In late April, the Division for Public Education partnered with the ABA Criminal Justice Section to host a roundtable with 26 bar, court, law enforcement, and advocacy group leaders. The forum, held at the National Press Club, focused on the need for fairness and reform within the criminal justice system.

In March, the Section of Science and Technology and Center for Professional Development held the National Institute on the Internet of Things. The Institute examined issues raised by emerging smart technology, such as privacy concerns, security considerations, and the ethics associated with connecting billions of devices to the Internet and each other. The program featured a keynote address from Edith Ramirez, the Chairwoman of the Federal Trade Commission, and speakers included two federal judges, the Staff Director of the Senate Commerce Committee, representatives from the White House Office of Science and Technology, Microsoft, AT&T, and other corporations, law firms and government agencies. It also attracted reporters from Bloomberg BNA and Washington-based federal news, cybersecurity, and online technology publications.
FY 2016 also saw continued growth with the Military Pro Bono Project, which secures legal assistance for military members throughout the United States. Based on case-closing data provided by the Project’s volunteer attorneys, it’s estimated more than $1 million in billable hours were donated over the past year. In FY 2016, 129 civilian attorneys and 200 military attorneys were added to the pro bono volunteer roster. Additionally, 728 civilian lawyers now take part in the Project’s Operation Stand-By, whereby they assist military attorneys with legal questions related to their local jurisdictions and substantive areas of expertise.

Conclusion

Our membership challenges are formidable -- but they are not insurmountable. The ABA is putting programs in place to enhance our value proposition and make membership more appealing to the next generation of legal professionals. We’re restructuring the ABA so our staff can better focus on the needs of members. We’re modernizing our communications channels to promote benefits of membership in our very competitive 21st century world.

The great football coach Vince Lombardi once observed, “The achievements of an organization are the results of the combined effort of each individual.” The ABA is fortunate to have a staff with vast knowledge and great experience. All told, our 900+ staff members have nearly 8,800 years of combined experience working for the Association. Working together under the new staff reorganization, we can harness that experience to overcome the membership challenges we face today, and set the ABA on a path of growth and success for decades to come.

Respectfully submitted,

Jack L. Rives
Executive Director and
Chief Operating Officer
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 2016 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 Friday, May 20, 2016 in Denver, Colorado. Scope will meet again in conjunction with the ABA's Annual Meeting on Sunday, August 7, 2016, in San Francisco, California.

**Scope concluded that the following entities are active and not engaging in a function that unnecessarily overlaps with or duplicates the activities of other ABA entities; and commended them for their excellent work:**

**Commissions:**
- Disability Rights
- Domestic Violence
- Homelessness and Poverty
- Immigration
- Law and Aging
- Youth at Risk

Human Rights, Center for

**Scope concluded that the six (6) forums are active and not engaging in a function that unnecessarily overlaps with or duplicates the activities of other ABA entities. Scope also recommended the following:**

The Forums on Affordable Housing and Community Development, Air and Space Law, Construction Law, and Franchising should consider additional opportunities for collaboration with other ABA Sections and Divisions. Scope believe partnering with these entities on programs such as webinars, CLE and meetings would allow the Forums to develop synergies, while developing new membership, networking, speaking and publishing opportunities.
Scope also recommends that the Forums on Entertainment and Sports Industries, and Communications Law - consider additional opportunities for collaboration with other ABA Sections and Divisions. Scope believe partnering with these entities on programs such as webinars, CLE and meetings would allow the Forums to develop synergies and accessing of additional resources such as staff of the collaborating entity, while developing new membership, networking, speaking and publishing opportunities; develop and implement a plan for leadership succession and more active membership involvement; and continue to participate in the Section Officers Conference, to create strategies and collaborations that will increase the forum’s activities and revenues.

Scope will continue to monitor the progress of the Forums on Entertainment and Sports Industries, and Communications Law with a follow-up review December 2017.

Scope also reviewed proposed amendments from the following entities and had no objections to requests:

The Section of Public Utility, Communications and Transportation Law, to change the name to the Infrastructure and Regulated Industries Section;

The Standing Committee on Legal Assistance for Military Personnel, to change the jurisdiction of the Committee to expand the size of its members; and

The Task Force on International Trade in Legal Services, to create a Standing Committee

The following entities are scheduled to discontinue at the conclusion of the 2016 Annual meeting:

Commission on the Future of Legal Services
Commission on Diversity & Inclusion 360

Scope's 2016 Annual Agenda will include:

StC on Amicus Briefs; SpC on Bioethics and the Law; StC on Election Law; StC on Governmental Affairs; StC on Gun Violence; StC on Law Library of Congress; and StC on Medical Professional Liability; Follow-up: StC on Lawyer Referral and Information Services; and StC on Group and Prepaid Legal Services
Scope's 2016 Fall Agenda will include:

Diversity Entities: Commission on Sexual Orientation and Gender Identity, Commission on in the Profession, Council for Racial and Ethnic Diversity in the Educational Pipeline, Commit the Profession, Coalition on Racial and Ethnic Justice, Center for Racial and Ethnic Diversity Responsibilities

Respectfully Submitted,

[Signature]

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

/al

Date: June, 2016
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 2015-2016 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 2016 Annual Meeting.

The Scope Nominating Committee voted to nominate W. Andrew Gowder, Jr., of Charleston, SC for the full term and Jennifer “Ginger” M. Busby of Birmingham, AL for the partial 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.

Respectfully Submitted,

Patricia Lee Refo, Chair
Michael W. Drumke
Pamela C. Enslen
Leslie Miller
Richard A. Soden

Dated: June 2016
RESOLUTION

RESOLVED, That the American Bar Association reaffirms its support of lawyer referral services sponsored by state, local, territorial and tribal bar associations;

FURTHER RESOLVED, That the American Bar Association encourages lawyer referral services sponsored by state, local, territorial and tribal bar associations to adhere to the standards of the American Bar Association Model Supreme Court Rules Governing Lawyer Referral and Information Services;

FURTHER RESOLVED, That the American Bar Association shall consider and thoroughly discuss with its constituent members, who are represented by state and local bar associations, in advance of approving any program or legal service initiative that may result in an individual or business hiring an attorney for a fee.
REPORT

Background

With the rise of the Internet, we have seen a proliferation of legal startups providing direct legal services, advice, forms and/or lawyer referrals. Regulation has failed to keep up with the growth of this industry. Consequently, some of the information provided by these companies may be inadequate or incomplete, to the detriment of the consumer.

There is also risk to the consumer regarding the extent to which a lawyer participating in an online referral service has been vetted. Often, there is little or no information on the company website to let consumers know whether the lawyer to whom they are referred meets these basic standards:

1.) The lawyer is in good standing in practice
2.) The lawyer has current professional liability insurance
3.) The lawyer has experience in the area of law in which he or she is accepting referrals

While some Internet-based referral services have reasonable qualification standards for their lawyer participants, others do not and it is difficult for consumers to discern which services are better suited to meet their needs.

For more than seventy years, state and local bar associations have been providing community service focused lawyer referral services to the public. “Lawyer Referral and Information Services are designed to assist persons who are able to pay normal attorney fees but whose ability to locate appropriate legal representation is frustrated by a lack of experience with the legal system, a lack of information about the type of service needed, or a fear of the potential costs of seeing a lawyer. Lawyer referral programs offer two important services to the public. First, they help the client determine if the problem is truly of a legal nature by screening inquiries and referring the client to other service agencies when appropriate. The second, and perhaps more important, function of a lawyer referral service is to provide the client with an unbiased referral to an attorney who has experience in the area of law appropriate to the client's needs.”

The public service aspect of state and local bar association lawyer referral services cannot be underestimated. Not every contact to a state or local bar association sponsored lawyer referral service results in a referral. Local, knowledgeable intake staff will guide callers to appropriate legal aid organizations, government agencies or other resources. This personal service helps members of the public solve their problems quickly and enhances the image of the bar association in the community.

In addition to being a service to the public, state and local bar association lawyer referral services are a service to their lawyer members, providing them with contacts and potential business.

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1 See: ABA Model Supreme Court Rules Governing Lawyer Referral Services, Introduction http://www.americanbar.org/groups/lawyer_referral/policy.html
These services also provide a non-dues revenue source that supports pro bono programs and other public service efforts of the sponsoring bar association.

The Role of the American Bar Association in Supporting Lawyer Referral and Information Services

In August, 1993, the American Bar Association House of Delegates adopted the ABA Model Supreme Court Rules Governing Lawyer Referral Services (ABA Model Rules).\(^2\) To summarize the ABA Model Rules, they require: 1) that the service be operated as a public service; 2) that it allow participation by all licensed attorneys in the geographic area; 3) that fees for attorney participation be reasonable; 4) that malpractice insurance be maintained by all participants; 5) that attorneys who participate do not increase their fees to include their cost of participation; 6) that referrals not be made to those with an ownership interest in the service; 7) that clients be surveyed as to their satisfaction and that complaints against the panel member be investigated; 8) that procedures be established for admission to, suspension from, and removal from the service, including an appeal process; and, 9) finally, that the service have subject matter panels and establish minimum objective requirements for eligibility for those panels.

The ABA Standing Committee on Lawyer Referral and Information Service encourages and assists lawyer referral services to meet the standards of the ABA Model Rules.\(^3\) The Standing Committee operates a listserv, through which referral service program directors can exchange ideas on how to improve their operations and service to the public. The Standing Committee maintains a Clearinghouse, which provides sample operating rules, marketing tools, call center operation guides and other materials to help lawyer referral services.

The Standing Committee conducts an annual Workshop, where program directors can learn best practices, meet with technology experts and share latest developments in lawyer referral operations. The Standing Committee has a newsletter to keep lawyer referral program directors informed.

The Standing Committee also operates the Program of Assistance and Review – a peer advice program that matches volunteer consultants with lawyer referral services that would like to receive advice on improving their programs.

Recent American Bar Association Action

In 2015, the American Bar Association initiated a program called ABA Law Connect. According to an October 1, 2015 American Bar Association news release, “For $4.95, a small business owner or representative can ask a question online of an ABA-member lawyer as well as a follow-up question.”\(^4\) It was the next sentence, however, that drew the most attention: “Those

\(^2\) Id.
\(^3\) See: http://www.americanbar.org/groups/lawyer_referral.html
\(^4\) https://www.americanbar.org/news/abanews/aba-news-archives/2015/10/aba_rocket_lawyerl.html
interested in additional legal advice can discuss legal matters further in a lawyer-client relationship."\(^5\)

The news release quotes ABA President Paulette Brown, as follows: "By providing a low cost, highly accessible, online avenue for small business owners to get answers to basic legal questions, we hope to improve access to legal services while simultaneously offering our members potential new opportunities."\(^6\)

Connecting potential clients in need of legal representation with lawyers willing to provide that representation is the core function of a lawyer referral service.

The "competition" aspect of ABA Law Connect is of concern to state and local bar associations. However, it is of far greater concern that the program appears not to have adhered to the established policy of the American Bar Association as embodied in the ABA Model Rules.

For example, ABA Model Rule X provides, "A qualified service shall establish specific subject matter panels, and may establish moderate and no fee panels, foreign language panels, alternative dispute resolution panels and other special panels which respond to the referral needs of the consumer public, eligibility for which shall be determined on the basis of experience and other substantial objectively determinable criteria."\(^7\) The Commentary to ABA Model Rule X elaborates on experience requirements, as follows: "The importance of establishing meaningful experience requirements cannot be underestimated. It is inappropriate for a service to simply refer a caller to the next lawyer on the list without determining that the lawyer is qualified in the field of practice in which legal services are needed. Since the public relies on services to provide qualified legal representation which improves on what the consumer can obtain by lot, it is incumbent upon these services to ensure that their attorneys have substantially more qualifications than mere bar membership."\(^8\)

Attorneys participating in ABA Law Connect, despite its highly specialized nature, were not required to meet objective and verifiable experience requirements for the subject areas in which they were receiving referrals. Instead, participating "ABA lawyers," as the website identified them, were free to self-designate themselves in areas of law in which they may have absolutely no experience. While these potentially inexperienced lawyers receive the benefit of apparent American Bar Association approval, the ABA’s strong, trusted brand is diminished when the program does not comply with established policy, as provided in the ABA Model Rules.

\(^5\) Id.
\(^6\) Id.
\(^7\) See: ABA Model Supreme Court Rules Governing Lawyer Referral Services, Rule X http://www.americanbar.org/groups/lawyer_referral/policy.html
\(^8\) Id.
ABA Model Rule VII provides, “A qualified service shall periodically survey client satisfaction with its operations and shall investigate and take appropriate action with respect to client complaints against panelists, the service, and its employees.”\(^9\) The ABA Law Connect Terms of Service provided, in part: “(I)f ABA and Rocket Lawyer are not able to resolve a dispute with you after attempting to do so informally, then as a condition to your use of the Services you agree to resolve the dispute through binding arbitration under the auspices of JAMS Alternative Dispute Resolution (“JAMS”).”\(^10\) The “ABA lawyer” was not so bound.

For small business owners, the requirement that disputes be resolved through an expensive alternative dispute resolution service rendered the complaint process ineffective. In addition, if the client successfully challenged the arbitration clause, the ABA Law Connect Terms of Service further provided: “In the event that the agreement to arbitrate provided herein is found to be inapplicable or unenforceable for any reason, then as a condition to your use of the Services we agree that any resulting judicial proceedings will be brought in the federal or state courts of Chicago, Illinois, and by your use of the Services you expressly consent to venue and personal jurisdiction of the courts therein.”\(^11\) For the operator of a dry cleaning business in Bakersfield, California, this is not a realistic option. Again, the American Bar Association’s strong, trusted brand is diminished by such a procedure.

**The Purpose of this Resolution**

State and local bar association lawyer referral services face increasing competition from online providers and others. The lack of regulatory mechanisms for online lawyer referral services leads to wide variations in the quality of service provided by these companies, threatening an objective of ABA Goal IV: meaningful access to justice for all persons. Many of these competitors do not adhere to the quality standards inherent in the ABA Model Rules.

It is imperative for the American Bar Association, through the Standing Committee on Lawyer Referral and Information Service and other appropriate resources, to support state and local bar association sponsored public service lawyer referral services and encourage them to constantly improve their services to the community in compliance with the ABA Model Rules.

The American Bar Association should assist state and local bar association sponsored lawyer referral services hone their message and find mechanisms to inform the public of the advantages of using their public service referral programs.

Illinois statute provides that “[e]ach corporation shall have a board of directors and, except as provided in articles of incorporation, the affairs of the corporation shall be managed by or under the direction of the board of directors.” The American Bar Association’s Board of Governors is the Association’s board of directors. Consistent with Illinois law, the American Bar

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9 See: ABA Model Supreme Court Rules Governing Lawyer Referral Services, Rule VII [http://www.americanbar.org/groups/lawyer_referral/policy.html](http://www.americanbar.org/groups/lawyer_referral/policy.html)

10 See: [https://www.sfbar.org/forms/newsroom/letter-to-aba-re-rocket-lawyer-111015.pdf](https://www.sfbar.org/forms/newsroom/letter-to-aba-re-rocket-lawyer-111015.pdf)

11 Id.
Association’s Constitution creates a governance structure that vests management and decision-making authority in the Board of Governors which is charged to “oversee the management of the Association” and to “develop methods and specific plans for making the Association and its activities useful to the members in their professional work.”

The American Bar Association’s constituent members are represented by state and local bar associations. The American Bar Association should consult with state and local bar associations in advance of approving any program or legal service initiative that may result in an individual or business hiring an attorney for a fee. Consideration should be given to compliance with the ABA Model Rules, safeguarding the consumer, upholding the core values of the legal profession and adhering to the American Bar Association’s Mission and Goals.

Respectfully submitted,

Gaetan J. Alfano, Chancellor
Philadelphia Bar Association

August 2016

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1. Summary of Resolution.

The Philadelphia Bar Association and co-sponsoring state, metropolitan and local bar associations seek adoption of this Resolution.

This resolution calls on the American Bar Association to reaffirm its longstanding commitment to state and local bar association lawyer referral services that meet the standards of the Model Supreme Court Rules and to continue its efforts to encourage and assist state and local bar association lawyer referral services that do not yet meet the standards of the Model Supreme Court Rules to do so.

This resolution also calls on the American Bar Association, before approving any program that may result in an individual or business hiring an attorney for a fee, to consult with its constituent members, represented by state and local bar associations.

2. Approval by Submitting Entity.

The Philadelphia Bar Association approved the filing of this Resolution at the meeting of its Board of Governors on March 31, 2016.

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

No

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

This Resolution is consistent with existing and longstanding ABA policies supporting state and local bar association lawyer referral services and does not affect them.

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

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

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

The Standing Committee on Lawyer Referral and Information Service has in place the procedures and infrastructure to successfully implement any policies relating to the support of state and local bar association lawyer referral services that are adopted by the House of
Delegates. The Standing Committee on Lawyer Referral and Information Service has been responsible for the successful implementation of the ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services and for the successful administration of the Program of Assistance and Review to assist state and local bar association lawyer referral services in meeting the standards of the ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services.

The American Bar Association Board of Governors shall reach out to state and local bar associations in advance of approving any program or legal service initiative that may result in an individual or business hiring an attorney for a fee.

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

   None

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

10. **Referrals.**

    In April, 2016, the Philadelphia Bar Association sought input and co-sponsorships from state and local bar associations in states that were the subject of a pilot program known as ABA Law Connect. The Philadelphia Bar Association carefully considered the feedback from those entities and received co-sponsorship commitments from the following bar associations as of the date of this submission: Chicago Bar Association, Bar Association of San Francisco, Pennsylvania Bar Association, Allegheny County Bar Association and Montgomery County (PA) Bar Association. The following county bar associations in Pennsylvania that do not have representation in the House of Delegates have expressed support for this Resolution: Berks County Bar Association, Bucks County Bar Association, Chester County Bar Association, Dauphin County Bar Association, Delaware County Bar Association, Erie County Bar Association, Fayette County Bar Association, Franklin County Bar Association, Lebanon County Bar Association, Monroe County Bar Association, Schuylkill County Bar Association, Wilkes-Barre Law & Library Association and York County Bar Association.

    This Resolution has been referred to the National Conference of Bar Presidents, the Standing Committee on Lawyer Referral and Information Service and the Commission on the Future of Legal Services.

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

    Mark Tarasiewicz, Executive Director
    Philadelphia Bar Association
    1101 Market Street, 10th Floor
    Philadelphia, PA 19107
    215-236-6346
    mtarasiewicz@philabar.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.)

Albert S. Dandridge III, Member, ABA House of Delegates  
Schnader Harrison Segal & Lewis LLP  
1600 Market Street, Suite 3600  
Philadelphia, PA 19103  
(215) 751-2178  
adandridge@schnader.com

Butler Buchanan, III, Member, ABA House of Delegates  
Marshall Dennehey Warner Coleman & Goggin, P.C.  
2000 Market Street, Suite 2300  
Philadelphia, PA 19103  
(215) 575-2661  
bubuchanan@mdwgc.com
1. **Summary of the Resolution**

The American Bar Association has four articulated Goals, the fourth Goal being to advance the rule of law. Among the objectives of Goal IV is to "assure meaningful access to justice for all persons." For more than 70 years, state and local bar associations have been on the front lines of assuring meaningful access to justice through public service lawyer referral and information services. The Philadelphia Bar Association and the co-sponsors of this Resolution are proposing that the American Bar Association reaffirm its longstanding commitment to supporting state and local bar association lawyer referral and information services.

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

Rapid changes in technology have created both opportunities and risks for members of the public who access legal information or services in an unregulated environment over the Internet. If there are inadequate standards for the operation of the service or for attorney participation, then the objective to "assure meaningful access to justice for all persons" may not be met by these services.

The defining characteristic of a lawyer referral service is generally understood, if not explicitly described in statute or court rules, as the use of an intermediary to connect a potential client to a lawyer based on an exercise of discretion in accordance with sound standards. The ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services provide verifiable standards with a focus on consumer protection.

Where vendors operate in an unregulated environment in competition with state and local bar association lawyer referral services, it is critical that any program involving such vendors be thoroughly vetted to ensure that the consumer is being protected.

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

This Resolution calls on the American Bar Association to support state and local bar association lawyer referral services that adhere to high standards of consumer protection through compliance with the ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services. The American Bar Association’s support of these state and local bar association lawyer referral services will help them distinguish themselves from those services that do not maintain high standards.

This Resolution also calls on the American Bar Association to thoroughly discuss with its constituent members, represented by state and local bar associations, in advance of approving and program or legal service initiative that may result in an individual or business hiring an attorney for a fee. Through support of state and local bar association lawyer referral services and consultation with state and local bar associations regarding programs that may result in the hiring
of a lawyer for a fee, the American Bar Association furthers the objective to “assure meaningful access to justice for all persons.”

4. **Summary of Minority Views**

None of which we are aware.
SPONSOR: Edward Haskins Jacobs

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

Amends §1.2 of the Constitution to read as follows:

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

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

§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.
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 8 and 9, 2016 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 San Francisco in August 2016. I made the same motion before the House of Delegates the last fifteen 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. The first ten times, after the presentation of the proposal, the Standing Committee on Constitution and Bylaws reported to the House that the proposal is inconsistent with another purpose of the ABA – to uphold and defend the Constitution of the United States - and that therefore the proposal was “out of order.” Each time the Committee made that bold assertion without explaining why it is so (despite my explicit written request to the Committee in each of the last several years to explain in writing why this position is taken). And in each of those ten meetings, then a motion was made that the House postpone indefinitely action on my proposal. In 2010, Robert L. Weinberg from Washington, D.C., who disagrees with this proposal, nevertheless tried to get the House to vote directly on the proposal, but his motion was rejected. Bob made the same effort twice more, in 2013 and 2015.

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

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

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

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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 2015, three speakers raised the red herrings that the proposal asks the House to address not a legal issue, but rather a medical, theological, or a philosophical issue; or simply an issue of legal privacy, as reasons to postpone the issue indefinitely; or in Bob’s case, to reject it on its merits.

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

I want to see the House pass this proposal, but I realize passage now would take a miracle. This is driven home in each when new members of the House who have never been members before stand up in order to be introduced to the assemblage. Each year there are 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

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Although the ABA has an annual budget of over $200 million, the House of Delegates is not willing to commit the relatively minor sum it would take in order to bring transparency and accountability to the actions of the House by having every member’s vote electronically recorded when it deals with the most important matters, such as amendments to the ABA constitution or bylaws, and the adoption, amendment, or rescission of ABA policy positions. In 2001, I presented to the ABA House of Delegates a proposal to bring that transparency and accountability to the House and to have the results posted for a year on the ABA website. It failed miserably, with only about ten of the 500 or so in attendance voting in favor (based upon my guestimate at the time of the voice vote). Transparency in actions of the House of Delegates should be pressed for every year until it is reached, but for now at least I leave that to others. In 2005 the chairperson of the House mentioned in his remarks that he, too, thinks the House should have electronic voting. And it would not take much money to bring accountability to the House of Delegates. At a CLE program in the Virgin Islands several years ago, hand-held voting devices were given to the attendees to make part of the program interactive, so it cannot be very expensive, even if the individual votes, tied to specific members, are permanently recorded as part of the process. It is amazing in this day and age that the ABA House of Delegates is utterly opaque. The House intentionally refuses to put in place systems to reveal the votes of its members on the many important issues upon which it takes positions. No doubt the members of the House demand transparency of others in other contexts. The opaque nature of the House is indefensible. Amazing, really.
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
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 dealing with human rights and legislative
proposals every annual meeting. The current ABA policy manual includes these still-
current policies of the ABA, each of which proclaims that the ABA:

(1) Supports legislation on the federal and state level to finance abortion services for indigent women
(adopted August 1978); and
(2) Supports state and federal legislation which protects the right of a woman to choose to terminate a pregnancy before fetal viability, or thereafter,
if necessary to protect the life or health of the woman.; and

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

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

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

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

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

The stories one hears about mothers on their way to have a child in the womb poisoned to death or ripped apart by an abortionist, suddenly having a change of heart when they see 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 mere living cells that are not organized into an organism, and living organisms. Dr. Condie 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.4

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

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4 In her May 23, 2013 testimony before the Committee on the Judiciary of the U.S. House of Representatives on H.R. 1797, which would require a 20 week fetus to be protected from pain, Dr. Condic noted that “it is entirely uncontested that a fetus experiences pain in some capacity, from as early as 8 weeks of development.” She further noted, “Imposing pain on any pain-capable living creature is cruelty. And ignoring the pain experienced by another human individual for any reason is barbaric.” Dr. Condic went on to note, “Given that fetuses are members of the human species - human beings like us - they deserve the benefit of the doubt regarding their experience of pain and protection from cruelty under the law.” [Italics in original.]
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 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 people amongst us the rights to life, liberty, and the pursuit of happiness. The ABA fails in its mission if it fails to stand up for the rights of the powerless. If we deny the right to life for children in the womb because they are developmentally immature (and therefore, in the eyes of some, not "persons"), then we not only tragically deny these children their rights - we open the door to infanticide and the killing of other weak and infirm people. There is a crisis in the United States over the loss of our moral roots. The ABA, which claims to be the voice of the legal profession, and to be an advocate of the protection of fundamental rights, should become a strong voice for all the weak and vulnerable innocents who so desperately need champions now.

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

At the 2001 Annual Meeting, the Chair of the Standing Committee on Constitution and Bylaws reported that the Committee "voted to recommend to the House that the proposal be considered out of order, in that it is inconsistent with the first purpose clause of Association's Constitution, which is ... 'To uphold and defend the Constitution of the United States and maintain representative government.'" The same
claim was made in subsequent years, until 2011, when the Committee took no position “on the merits of the proposal,” but asserted the proposed language does not merit inclusion in the purposes section of the ABA constitution.\(^5\) 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 innocent human beings, including all those conceived but not yet born, is consistent with supporting and defending the Constitution of the United States. Later in this report I explain why the language I propose does belong in the purposes section of the ABA constitution, which positioning has also been opposed by the Standing Committee on Constitution and Bylaws.

So, the inconsistency contention has no merit. First the obvious: Nowhere does the actual language of the United States Constitution specify that the States may not defend the right to life of each and every innocent human being within their respective jurisdictions (including all those conceived but not yet born). So the claim that the defense of such life is inconsistent with defending and upholding the Constitution is on its face highly suspect. If the inconsistency argument does not rest on the actual language of the Constitution, let us go beyond the actual language of the Constitution and try to articulate the argument.\(^6\) The inconsistency argument could be so stated:

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

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

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

4. Therefore, advocating the defense of the right to life of all those conceived

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\(^5\) It is good that the Committee’s position in the first ten years and then each year after 2011, implicitly admitted that the children being killed in their mother’s wombs are in fact innocent human beings, not just blobs of tissue that are part of the mother’s body. That realization is step number one.

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

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

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

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

Based on the faulty contention that the child in the womb cannot properly be legislatively determined to be a human being, the Supreme Court denigrated 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 verses the
State's interest in protecting the "potential life" in the womb and the health of the mother.7 (Referring to a living being with its own DNA as "potential life" is doublespeak at its best.) The hand dealt the child in the womb by the Supreme Court was dealt from a stacked deck - based upon the lie that the child in the womb is not really a child. As a "potential life" rather than a real, live human being, the child's real rights get pushed aside by the Supreme Court. The rationale of Roe v. Wade is not 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 language of the United States Constitution (or in a Supreme Court interpretation of the Constitution). Would this mean the ABA had abandoned its purpose to uphold and defend the Constitution? Of course not. We have an obligation to address constitutional issues that need addressing. We honor the Constitution by doing so. So, even if I were advocating change in the language of the Constitution by lawful means, my proposal would not conflict with the ABA purpose to uphold and defend the Constitution.

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

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

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

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

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

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

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

The ABA Policy and Procedures Handbook lists hundreds of standing policies adopted by the ABA over the years, although action was taken at the 2001 meeting to "archive" some policies over ten years old, taking them off the list of current policy positions. Way back in 1978, the ABA adopted a policy, still in the 2013-2014 Handbook, supporting federal and state legislation to "finance abortion services for indigent women." In 1991, the ABA adopted a policy supporting legislation to promote "full counseling and referrals on all medical options" in federally funded family planning clinics. In 1992, the ABA adopted a policy, still in the 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 health or medical services. The ABA House of Delegates has also fairly recently adopted a policy implicitly approving government-funded killing of innocent human beings in their embryonic stage for stem cell and other research work.

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

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

Feel free to email me at edwardjacobs@yahoo.com.

PROPOSAL: Amends §2.1 of the Association’s Constitution to realign the districts.

(Legislative Draft – Additions underlined; deletions struck through)

Article 2. Definitions and General Provisions

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

... (g) "District" refers to the following areas with states listed in the rotational order of representation on the Board, which order within a district may be varied by unanimous agreement among the affected states:

At the conclusion of the 2004 2017 Annual Meeting:

District 1: Rhode Island, Maine, Vermont, New Hampshire
District 2: Connecticut, Michigan, Massachusetts
District 3: New Jersey, Pennsylvania
District 4: Virginia, District of Columbia
District 5: Kentucky, Alabama, North Carolina
District 6: Louisiana, Tennessee, Georgia, Maryland
District 7: Ohio, Illinois
District 8: Florida, Texas
District 9: Missouri, Minnesota, Wisconsin
District 10: Wyoming, Nebraska, South Dakota, North Dakota
District 11: Arizona, Colorado, Oklahoma
District 12: Arkansas, Iowa, New-Mexico, Tennessee, Kansas, Louisiana
District 13: Montana, Alaska, Oregon, New Mexico, Puerto Rico
District 14: California
District 15: New York
District 16: South-Carolina, Delaware, Mississippi, West Virginia, Arkansas
District 17: Utah, Hawaii, Nevada, Idaho
District 18: Maryland, Washington, Indiana, Connecticut
District 19: Iowa, Oregon, South Carolina
REPORT

REDISTRICTING PROPOSAL

I. OVERVIEW

One of the Governance Commission proposals before the House last August was Resolution 11-6B(3). This Resolution recommended revising the language of Article 16.1 of the Constitution, which provides that the Governance Commission’s decennial review of the Board of Governors shall include a review of the issue of districting “in terms of ABA membership.” The Governance Commission proposed to change the language in Article 16.1 to reflect the fact that, since the 1995 Governance Commission, the assignment of states to districts has been based on lawyer population, with a goal of grouping states with similar numbers of lawyers. However, the Governance Commission proposal to change the language in Article 16.1 to base districting on lawyer population failed in the House.

In June 2015, the Board of Governors approved the extension of the Governance Commission’s authority to continue its review and consideration of the issue of districting. In light of the action taken in the House with respect to Article 16.1, the Governance Commission has developed a new re-districting proposal based on ABA membership. (See Appendix A.)

II. PROPOSAL TO REDUCE LENGTH OF ROTATION

This proposal seeks to (i) avoid having a state with significant ABA membership move from its current three year rotation on the Board of Governors to a six year rotation, and (ii) reduce the number of years in which other states are not represented on the Board of Governors. At the same time the proposal seeks to maintain the ABA Board at a reasonable and workable size. In fact, if the proposal is adopted, the change in the size of the Board would not be significant, as it would increase by one, from 42 members to 43 members.

Significantly, no ABA group will be adversely affected in a meaningful way, and importantly, the proposal would be beneficial by reducing the number of years in the rotation for board seats.

Four states would move from a three-state to a two-state rotation (reducing their period of no Board representation from six years to three years). Four states would move from a four-state to a three-state rotation (reducing their period of no Board representation from nine years to six years).1 Michigan, Georgia, Massachusetts and Maryland would move from a three-state to a two-state rotation. Iowa, Oregon, Kansas and South Carolina would move from a four-state to a three-state rotation.

The other 44 states would not have any change in the number of states in their District. Three of those states would have a one-time gain in their next rotation (Arkansas would have a 3 year gain; Connecticut and New Mexico would have a 1 year gain).

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1 While the move for Oregon would result in a delay in its next term on the Board from 2019 to 2020, Oregon would move from a nine-year to six-year rotation on the Board.
<table>
<thead>
<tr>
<th>State</th>
<th>Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>No change.</td>
</tr>
<tr>
<td>Alaska</td>
<td>No change.</td>
</tr>
<tr>
<td>Arizona</td>
<td>No change.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>After its current rotation, moves from Dist. 12 to Dist. 16; 3 year gain in next rotation; remains in 4 state district.</td>
</tr>
<tr>
<td>California</td>
<td>No change.</td>
</tr>
<tr>
<td>Colorado</td>
<td>No change.</td>
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<tr>
<td>Connecticut</td>
<td>Moves from Dist. 2 to Dist. 18; 1 year gain in the next rotation; remains in 3 state district.</td>
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<tr>
<td>Delaware</td>
<td>No change.</td>
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<tr>
<td>District of Columbia</td>
<td>No change.</td>
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<tr>
<td>Florida</td>
<td>No change.</td>
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<tr>
<td>Georgia</td>
<td>Moves from 3 state to 2 state rotation; remains in Dist. 6.</td>
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<tr>
<td>Hawaii</td>
<td>No change.</td>
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<tr>
<td>Idaho</td>
<td>No change.</td>
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<tr>
<td>Illinois</td>
<td>No change.</td>
</tr>
<tr>
<td>Indiana</td>
<td>No change.</td>
</tr>
<tr>
<td>Iowa</td>
<td>Moves from Dist. 12 to new Dist. 19; moves from a 4 state to a 3 state rotation.</td>
</tr>
<tr>
<td>Kansas</td>
<td>Moves from a 4 state to a 3 state rotation; next rotation would accelerate 2 years; remains in Dist. 12.</td>
</tr>
<tr>
<td>Kentucky</td>
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</tr>
<tr>
<td>Louisiana</td>
<td>After its current term; moves from 4 state to 3 state rotation; moves from Dist. 6 to Dist. 12.</td>
</tr>
<tr>
<td>Maine</td>
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</tr>
<tr>
<td>Massachusetts</td>
<td>Moves from 3 state to 2 state rotation; remains in Dist. 2.</td>
</tr>
<tr>
<td>Michigan</td>
<td>Moves from 3 state to 2 state rotation; remains in Dist. 2.</td>
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<tr>
<td>Minnesota</td>
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<tr>
<td>Mississippi</td>
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<td>Missouri</td>
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<td>Montana</td>
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<td>New Hampshire</td>
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<tr>
<td>New Jersey</td>
<td>No change.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Moves from Dist. 12 to Dist. 13; 1 year gain in next rotation; remains in 4 state rotation.</td>
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<tr>
<td>New York</td>
<td>No change.</td>
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<tr>
<td>North Carolina</td>
<td>No change.</td>
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<tr>
<td>North Dakota</td>
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<tr>
<td>Ohio</td>
<td>No change.</td>
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<tr>
<td>Oklahoma</td>
<td>No change.</td>
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<tr>
<td>Oregon</td>
<td>Moves from 4 state to 3 state rotation; next rotation would be delayed 1 year; moves from Dist. 13 to new Dist. 19.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>No change.</td>
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<tr>
<td>Puerto Rico</td>
<td>No change.</td>
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<tr>
<td>Rhode Island</td>
<td>No change.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Moves from 4 state to 3 state rotation; moves from Dist. 16 to new Dist. 19.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>No change.</td>
</tr>
</tbody>
</table>
Maryland – Moves from 3 state to 2 state rotation; moves from Dist. 18 to Dist. 6.

Tennessee - Moves from Dist. 6 to Dist. 12; no change in rotation.

Texas - No change.

Utah - No change.

Vermont - No change

Virginia - No change.

Washington - No change.

West Virginia - No change.

Wisconsin - No change.

Wyoming - No change.
The Overall Impact

8 states move from 4 to 3 state or 3 to 2 state rotation:

<table>
<thead>
<tr>
<th>State</th>
<th>ABA Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan</td>
<td>8,120</td>
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<tr>
<td>Georgia</td>
<td>8,622</td>
</tr>
<tr>
<td>Massachusetts</td>
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<td>Kansas</td>
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The ABA membership of the 4 states moving to a 3 year rotation is as follows: Michigan (8,120); Georgia (8,622); Massachusetts (10,940) and Maryland (9,285). The next state with the highest level of membership is North Carolina (7,123). The ABA membership of the 4 states moving to a 6 year rotation is as follows: Iowa (2,454); Oregon (3,281); South Carolina (3,865); and Kansas (2,336). The next state with the highest level of membership is Utah (2,226).

Of the remaining jurisdictions, 40 have no change in rotation and 3 states have a one-time gain in rotation. Arkansas gets a 3 year gain in its next rotation, and Connecticut and New Mexico get a one year gain.

The overall impact would be: no change for 40 states, a substantial benefit for 8 states and a less significant benefit for 3 states. No states would lose any rotation.

---

2 The Commission also reviewed the proposal by: (i) using total lawyer population in each state as reported to the ABA using the ABA criteria of active and resident lawyers and (ii) giving 50% weight to the total lawyer population numbers and giving 50% weight to the ABA membership numbers. If ABA membership is not examined, and only the total lawyer population numbers are utilized, Missouri (25,337) and Washington (24,844) would replace Virginia (24,062) and Maryland (23,902) as states in 2-state districts. Puerto Rico (15,318) and Utah (8,413) would replace Kansas (8,266) and Iowa (7,526) as states in 3-state districts. (See Appendix B.)
Districts As Revised

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<th>District</th>
<th>States and Territories</th>
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<td>District 19</td>
<td>Iowa (2017-2020), Oregon (2020-2023), South Carolina (2023-2026)</td>
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Bold=Current Seat; Parenthesis=Term on Board
## States with Ranking

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<tr>
<th>State</th>
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<th>13-14 Rank</th>
<th>Total # of Lawyers as of 12/31/14</th>
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Appendix B

August 2015 Raw Lawyer Data
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SPONSORS: David S. Houghton (Principal Sponsor), Sidney Butcher, F. John Garza, Janet Green-Marbley, Sandra R. McCandless, Robert D. Oster, Ethan Tidmore, and Mary T. Torres

PROPOSAL: Amends §2.1 and §6.3 of the Association’s Constitution to define “accredited” and to clarify that the person elected as State Delegate must be accredited to the state for which elected.

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

Article 2. Definitions and General Provisions

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

(a) “Accredited” with respect to Association membership and for the purpose of a member being a candidate and/or voting in Association elections means the state in which the lawyer is licensed.

... 

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

In 2014, the Board of Elections recommended that the current language outlined in the Association’s Constitution and all related notices regarding State Delegate Elections be revised to better define “accredited.” The Board of Elections agreed that the accreditation of state should be the state in which the member is licensed to practice. A proposal was submitted for consideration by the House of Delegates at the 2014 Annual Meeting and subsequently withdrawn to address concerns raised by Association members.

The proposal has been redrafted and is being resubmitted to provide clarity to members voting in State Delegate Elections. The proposal amends §2.1 and §6.3 of the Constitution to define “accredited” and to clarify that the person elected as State Delegate must be accredited to the state to which elected. The amendment would conform the language in the Association’s Constitution to what is required by the State Delegate Election Guidelines in addition to defining “accredited.” The proposal is necessary to establish parameters and to clarify that accreditation for voting purposes should be determined by the state the member is licensed to practice. This proposal also is intended to encourage participation while preventing abuse.

The Committee considered whether to recognize all the state bars a member belongs to or whether members should select the state for counting and voting purposes. Being counted in more than one state would affect the number of delegates in the House. The Committee determined that a member could choose which state to be accredited to, but the member also must be a member of the bar of the state identified. It was the consensus of the Committee that members who are licensed to practice in more than one state should not be allowed to vote in multiple states. In such instances, members would be contacted and asked to select the state in which they wanted to vote. Only 18% of ABA members are licensed to practice in multiple states. The ABA membership system currently has a field for state bar admission which is a mandatory field and identifies the state where the member is admitted to practice. For election purposes, the ABA would have the ability to retrieve data for members as identified by this field. “Accredited” with respect to Association membership and for the purpose of a member being a candidate and/or voting in Association elections would mean the state in which the lawyer is licensed to practice.

Respectfully submitted,

David S. Houghton
Sidney Butcher
F. John Garza
Janet Green-Marbley
Sandra R. McCandless
Robert D. Oster
Ethan Tidmore
Mary T. Torres, ABA Secretary

August 2016
Amends § 6.4(a) of the ABA Constitution to provide the United States Virgin Islands with a young lawyer delegate.

§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 that if there is more than one state bar association in a state the House shall determine which associations may select delegates. A state bar association in a state that has more than 4,000 lawyers is entitled to an additional delegate for each additional 2,500 lawyers above 4,000 until it is entitled to four delegates. A state bar association in a state that has more than 14,000 lawyers and not more than 20,000 lawyers is entitled to five delegates. If it has more than 20,000 lawyers, it is entitled to six delegates. If the bar associations of a state are entitled to four or more delegates, at least one delegate representing the state bar or a local bar association in that state 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. Each state delegation, as well as the United States Virgin Islands, 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 or bar associations referred to in Articles 6.4(b) and 6.9 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. It is the responsibility of the state bar association to ensure that this requirement is satisfied. However, a state bar association is entitled to at least as many delegates as it was entitled to certify at the 1990 annual meeting.

(Legislative Draft – Additions underlined; deletions struck through)
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 Articles 6.4(b) and 6.9 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. It is the responsibility of the state bar association to ensure that this requirement is satisfied. However, a state bar association is entitled to at least as many delegates as it was entitled to certify at the 1990 annual meeting.
At the 2015 Annual Meeting in Chicago, the House of Delegates unanimously approved Resolution 11-6A(3), which amended § 6.4(a) of the ABA Constitution to provide every state delegation with a young lawyer delegate. In its report, the Commission on Governance stated that it “views this change as an opportunity to recognize the importance of having younger voices in our Association,” and that enlarging the House “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.”

As demonstrated by the Resolution’s unanimous passage, members of the House of Delegates agreed that young lawyers provide a valuable voice in ABA governance. Unfortunately, the amendment effectuated by Resolution 11-6A(3) did not provide the United States Virgin Islands with an additional young lawyer delegate, as it did with the 50 states, the District of Columbia, and Puerto Rico. This is because § 2.2 of the ABA Constitution does not define the United States Virgin Islands as a “state.”

It is understandable why the Commission on Governance may not have wished to provide every United States territory with an additional young lawyer delegate. Neither the Guam Bar Association, the CNMI Bar Association, nor the American Samoa Bar Association have established a young lawyers division, young lawyers section, young lawyers committee, or comparable entity. Thus, it is likely that any young lawyer seats designated for Guam, the Northern Mariana Islands, or American Samoa would remain perpetually vacant, since there is no organized young lawyer organization to fill them.

But this is not the case with the United States Virgin Islands. The United States Virgin Islands—a majority-minority jurisdiction and bar association—has been continuously represented in the House of Delegates since 1989 and on a per capita basis, is home to more lawyers than some states. In 1991, the Virgin Islands Bar Association established its Young Lawyers Committee, which immediately affiliated with the ABA Young Lawyers Division. The Young Lawyers Committee is one of the most active constituent parts of the Virgin Islands Bar Association, and it is represented in both the ABA Young Lawyers Division Assembly as well as on its Council (through a seat it shares with South Carolina). In fact, the United States Virgin Islands often sends more representatives to ABA Young Lawyers Division meetings than several states (not just on a per capita basis, but often in absolute terms as well!).

Goal III of the ABA Mission Statement, adopted by the House of Delegates in 2008, calls for “full and equal participation in the association, our profession, and the justice system by all persons.” The United States Virgin Islands is currently the only jurisdiction under the American flag with an active young lawyer organization that is not represented in the House of Delegates. It is our hope that, with the passage of this resolution, Virgin Islands young lawyers will have the same opportunity to have their voices heard in the House of Delegates as their counterparts in the 50 states, the District of Columbia, and Puerto Rico.
**SPONSORS:** Dynda A. Thomas (Principal Sponsor), John J. Beardsworth, Jr., Peter V. Lacouture, Mark C. Darrell, Michael A. McGrail, N. Beth Emery, Linda L. Randell, David R. Poe, Thomas P. Gadsden, Steven H. Brose, Robert B. Pringle, Patricia Dondanville, Robert L. Brubaker

**PROPOSAL:** Amends §10.1(a) of the ABA Constitution and Bylaws to reflect the name change of the Section of Public Utility, Communications and Transportation Law to the Infrastructure and Regulated Industries Section.

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

1. **§10.1(a) Sections and Divisions.** (a) There are within the Association the following sections and divisions for carrying on its work:
2. ...
3. ...
4. ...
5. Section of Public Utility, Communications and Transportation Infrastructure and Regulated Industries Section
6. ...
7. ...

...
REPORT

The Section of Public Utility, Communications and Transportation Law ("PUCAT") hereby provides notice of its intent to change its name to the "Infrastructure and Regulated Industries Section," seeking the recommendation of the Board of Governors and approval of the House of Delegates at the 2016 ABA Annual Meeting in accordance with the ABA Constitution and Bylaws §30.2.

PUCAT HISTORY

Our Section was created at the ABA’s Annual Meeting in 1917 as the Section of Public Utility Law. The Section focused on industries that made electricity, natural gas, water, telephone, telegraph, and railroad service available to the general public. In the early 20th century, economists referred to these industries as “natural monopolies,” because they required massive financial investment for the development of physical systems and were driven to serve the largest number of customers possible to benefit from economies of scale. Regulation was imposed on those industries to assure reasonable rates to the public, promote quality of service and safety, and guarantee a reasonable rate of return for the investors in the utilities. Often described as being “affected with the public interest,” these private infrastructure companies became known as “public utilities” because the services they provided were recognized as essential to day-to-day living in emerging industrial cities.

Then in 1991, the Section’s name was changed to the Section of Public Utility, Communications and Transportation Law (our current name) in recognition of the many technological and regulatory developments that had substantively transformed the industries we serve. The emergence of competitive technologies undermined the assumed natural monopolies, thereby changing not only how services were provided but the nature of governmental regulation of them. In particular, it became imperative to clarify that our section serves not only the classic telephone, electric and natural gas utilities of the late-20th century, but also fast-changing telecommunications and transportation industries, parts of which were subject to a regulatory structure that recognized competition as an essential factor in the establishment of reasonable rates for service.

The 25 years since that name change have seen an even more rapid and fundamental evolution of our industries, including the increasing role of competition in the traditional telephone, electric, and natural gas industries. Most importantly, the term, “public utility,” has become increasingly archaic and ultimately pejorative among growing numbers of practitioners who work in this dynamic area of the law, particularly younger lawyers. We see that the term “public utility” is unnecessarily limiting as many younger lawyers describe their focus as “energy companies” or “telecommunications companies,” for example, rather than “public utilities.”

As a result, we find that although our current Section name attempts to describe the large scope of our industries, it not only does not capture all that we do but actually impedes our ability to attract newer, younger members who do not self-identify with working with “public utilities.” We continue to serve the same industries that provide the infrastructure for essential public services, but changes in environmental concerns, technology, regulation and governmental
involvement have created new legal challenges – and legal specialties - in how these industries are structured, financed and ultimately regulated. The result has been a growing misunderstanding and confusion about the scope of the work of our Section, and a consequent negative effect on our ability to attract in-house and outside lawyers in our natural practice areas. It has become clear to us that even active ABA members and many of its leaders do not fully understand the industries that we serve.

After considerable reflection over a period of years, our Section’s leadership concluded that we should update our name to the “Infrastructure and Regulated Industries Section” (or “IRIS”) to reflect and clarify that our Section is a home for lawyers who work in industries that support key public service-related, constructed infrastructure that is the backbone of our economy. It would also recognize the importance of regulation and government involvement in the setting of rates, assuring of access, and safety of these critical infrastructure industries. The proposed new name will more accurately describe the modern configuration of our industries, and will enable us to draw more effectively from a significantly larger pool of lawyers who practice in the industries we serve. This in turn will enhance our ability to serve the interests of our membership. By broadening our visibility to those who will recognize their areas of practice in our Section’s name, we expect to be able to attract a greater share of the lawyers that practice in our core areas, to the overall net membership gain of the ABA. We also expect to benefit from the name change in our marketing of Section publications, webinars, and other events.

In seeking this section name change, we are not seeking a change in our jurisdiction and intend to continue with our current financial level of general revenue funding. Other than the change in the name, the internal structure and bylaws of the Section would remain the same. In summary, in addition to better describing what we really do and the industries we serve today, we hope to attract more new members to the Section from both existing ABA members and from non-ABA members.

**APPROVAL PROCESS**

After consideration by and a report of the Long-Range Planning Committee in March 2014, and following lengthy discussions at the 2014 Fall Council Meeting, the Section Council reached a consensus and the motion to change the Section name was approved by the Section Council on March 19, 2015. The motion to approve the new name will be put before the Section membership at the Annual Business Meeting of the Section on Saturday, August 6, 2016. All necessary steps to change the Section bylaws to reflect the new name are underway.

**POST-APPROVAL PROCESS**

During our 100th Anniversary year, our Section will promote our new name while we celebrate this anniversary milestone in the life of our Section, which is the ABA’s third oldest Section. And, going forward we hope to introduce new generations of lawyers to the work of the ABA and our Section. We believe that this name change will serve the policy interests and the membership of our Section and of the ABA.
Thank you for your consideration of this request. If you have any questions, please contact me at dynda.thomas@squirepb.com, or our Section Director, Susan Koz at susan.koz@americanbar.org.

Respectfully submitted,

[Signature]

Dynda A. Thomas, Section Chair
April 12, 2016
**SPONSORS:** Clyde J. "Butch" Tate II (Chair), Dwain Alexander II, William S. Aramony, Michelle Leatrice Raven, Danielle Reyes, Gregory L. Ulrich, Chloe Woods.

**PROPOSAL:** Amends Article 31, § 31.7 of the Constitution to expand the size of the Standing Committee to not more than ten members.

Amends §31.7 of the Constitution to read as follows (addition underlined):

1 §31.7 Legal Assistance for Military Personnel.

2

3 The Standing Committee on Legal Assistance for Military Personnel, which consists of not more than ten members, 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.

At the 2015 ABA Annual Meeting, the House of Delegates approved an amendment to the LAMP Committee’s charter in the ABA Bylaws to make clear that all civil legal issues affecting servicemembers and their dependents arising during a term of active-duty service fall within the jurisdiction of the Standing Committee. The amendment further recognized 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.

As a result of the approved amendment, the LAMP Committee’s charter now expressly encompasses all of those legal matters for which there is a direct relationship to military service irrespective of when they arise. Thus while the LAMP Committee’s membership had previously required expertise focused on legal assistance services for only those on active duty and their dependents, extension of the committee’s jurisdiction over legal matters arising during and after servicemembers’ transition to civilian status now requires the committee to have expertise in a wider range of legal areas, from VA benefits to employment law to the effects of post-traumatic stress, and many more. The committee has been, since its inception, constituted at the minimum number defined in the bylaws, currently at seven members. With the significantly higher level of activity undertaken by the committee and its growing staff over the past fifteen years, along with a more broadly defined mandate, there are growing demands upon the committee that can be effectively met only by more active and involved members.

In summary, expanding the LAMP Committee’s size from seven to ten will increase the depth and breadth of its expertise through its membership commensurate with the newly widened scope of its jurisdictional coverage, and it will also raise it to a membership size that is reflective of its stature within the Association. This bylaw change will thereby empower the ABA, though the LAMP Committee, to better carry out its mission to support the civil legal needs of military personnel and their families both during and after their time in service.

Respectfully submitted,

Clyde J "Butch" Tate II (Chair)
Dwain Alexander II
William S. Aramony
Michelle Leatrice Raven
Danielle Reyes
Gregory L. Ulrich
Chloe Woods

PROPOSAL: Amends § 31.7 of the Bylaws to create a Standing Committee on International Trade in Legal Services

Amends §31.7 of the Bylaws to read as follows:

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

1. Standing Committee on International Trade in Legal Services. The Standing Committee on International Trade in Legal Services, which consists of twelve members, shall: 1) monitor the negotiations of international trade agreements that involve the United States and the provision of legal services; 2) coordinate the Association’s positions on issues relating to the access by U.S. lawyers to the legal services markets of other countries and access by lawyers from foreign jurisdictions to the U.S. legal services market; 3) advise the U.S. Government of existing Association policies relating to these issues and of the Association’s position on relevant aspects of the negotiations; 4) develop policy recommendations for adoption by the House of Delegates; 5) assist other Association entities in the implementation of current Association policies relating to these issues; and 6) educate and engage in outreach to interested internal and external entities relating to the status of international trade agreement negotiations relevant to legal services and provide those entities with a mechanism to provide their input for consideration and study.

(Legislative Draft – Additions underlined; deletions struck through)

Standing Committee on International Trade in Legal Services. The Standing Committee on International Trade in Legal Services, which consists of twelve members, shall: 1) monitor the negotiations of international trade agreements that involve the United States and the provision of legal services; 2) coordinate the Association’s positions on issues relating to the access by U.S. lawyers to the legal services markets of other countries and access by lawyers from foreign jurisdictions to the U.S. legal services market; 3) advise the U.S. Government of existing Association policies relating to these issues and of the Association’s position on relevant aspects of the negotiations; 4) develop policy recommendations for adoption by the House of Delegates; 5) assist other Association entities in the implementation of current Association policies relating to these issues; and 6) educate and engage in outreach to interested internal and external entities relating to the status of international trade agreement
negotiations relevant to legal services and provide those entities with a mechanism to provide their input for consideration and study.
This purpose of this amendment is to establish a Standing Committee on International Trade in Legal Services. The effect of the amendment would be to transition the existing Task Force on International Trade in Legal Services ("Task Force"), created by the Board of Governors in 2003, into a permanent entity.

The Task Force has been reviewed by the ABA Standing Committee on Scope and Correlation of Work ("Scope") numerous times during its existence. The Scope Committee has consistently found that the Task Force "is active and not engaging in a function that unnecessarily overlaps with or duplicates the activities of other ABA entities" and has commended the Task Force for its "excellent work." The Scope Committee included the following in its response to the Task Force after its most recent review:

> Also during our review, Scope concluded the Task Force should consider changing its structure to a committee of the Association, such as, a standing or special committee. Scope believes such a change in structure should be considered, for the following reasons: the issues associated with globalization such as advising the U.S. Trade Representative, promoting American law and use of American lawyers abroad, and dealing with the issues that arise from foreign lawyers practicing in the United States are not going away in the foreseeable future; and a task force is created by the ABA Board of Governors to perform a short term assignment. (Letter dated January 12, 2015 from Scope Committee Chair Richard A. Soden to Task Force Chair David Tang).

For these reasons, and for the ongoing importance of these issues to the ABA and the U.S. legal profession, we urge adoption of this resolution to transition the Task Force to a Standing Committee.

**History of the Task Force**

The Task Force on GATT Negotiations Regarding Trade and Services Applicable to the Legal Profession (later referred to as the Task Force on GATS Legal Services Negotiations) was created by the Board of Governors in 2003, to be composed of six presidentially-appointed members, four of whom were to be designated representatives from the following ABA entities: Section of Administrative Law and Regulatory Practice; Section of Business Law; Section of International Law; and Section of Litigation. The other two positions were for at-large members. In August 2003, the Board increased the size of the Task Force from six members to eight members, in order to "to ensure that appropriate diversity is created and maintained among the current entity membership."

In February 2007, the Board approved changing the name to the Task Force on International Trade in Legal Services (ITILS), to more accurately reflect the range of issues and initiatives that the Task Force was being asked to address in relation to multilateral and bilateral trade
negotiations that impact the U.S. legal profession. In June 2009, the Board approved then President-Elect Carolyn Lamm’s request to revise the jurisdictional statement of the Task Force to increase its membership from eight members to twelve members. The additional seats were designated for the president of the National Conference of Bar Presidents, a liaison to the Commission on Ethics 20/20, and two state bar association presidents. This constitutes the current structure of the Task Force. In addition, because of the global professional ethics and regulatory issues inherent in the matters under study by the Task Force, the Center for Professional Responsibility has been and continues to be an essential partner in the work of the Task Force.

The primary purpose of the Task Force has been to: monitor international trade negotiations and other initiatives that impact trade in legal services; educate and engage in outreach to interested entities relating to the status of international trade agreement negotiations and provide those entities with a mechanism to provide their input to the Association for consideration and study; and to serve a coordinating function for ABA entities on issues and activities related to trade in legal services and inbound/outbound market access.

**International Trade in Legal Services**

Trade negotiations impacting legal services have been and continue to be engaged in both bilateral and multilateral context. For example, the General Agreement on Trade in Services (GATS) is the first multilateral, legally enforceable agreement covering trade and investment in services. All members of the WTO are signatories to the GATS framework agreement and many have scheduled GATS commitments in various service sectors, including legal services. These negotiations involve two important elements: outbound market access (what kind of access U.S. lawyers may have to overseas markets) and inbound privileges (what kind of access foreign lawyers will have to the U.S. market).

In addition, negotiations on trade in legal services are also being increasingly pursued through other means and mechanisms. The U.S. now routinely includes trade in services, including legal services, in the negotiation of bilateral and multilateral Free Trade Agreements. The recently concluded Trans Pacific Partnership Agreement contains a professional services annex with a specific section on legal services that obligates governments who are party to the agreement to encourage their relevant regulatory bodies to consider a number of issues if they regulate or seek to regulate foreign lawyers and transnational legal practice. In addition, discussions on legal services are currently taking place among U.S. negotiators and their foreign counterparts as a part of the Transatlantic Trade and Investment Partnership negotiations and the Trade in Services Agreement negotiations.

In addition, under some existing FTAs, there are provisions requiring governments to encourage and facilitate private industry dialogue on legal services market access and qualification issues. Lastly, independent of governmental trade negotiations, several foreign bars have expressed an interest in engaging in direct bar-to-bar discussions on these issues. For each of these
situations, the Task Force has specific examples in which it has undertaken initiatives or been asked to provide assistance by U.S. government trade negotiators.

Within the ABA there are several entities that have significant interests in the substance of these issues and the process involved in the U.S. making commitments on legal services. The Sections of International Law, Business Law and Litigation, for example, have strong interests in outbound access for U.S. lawyers and law firms seeking to provide services to clients in foreign jurisdictions. The Section of Legal Education and Admissions to the Bar and the Center for Professional Responsibility have strong interests in ensuring that the federal government does not undertake actions that improperly intrude on the primary authority of the state supreme courts to regulate the qualifications, admissions, and discipline of U.S. lawyers and foreign lawyers who are permitted to practice in the manner set forth in state court rules and regulations.

The multi-entity representation provided by the structure of the Task Force has made it uniquely qualified to evaluate issues, share information, and solicit input from all of the interested groups in one forum. Prior to its creation, no single ABA entity existed to coordinate internal activities related to these issues. In addition to facilitating internal coordination on these issues, the Task Force also maintains active relationships with the Conference of Chief Justices, National Conference of Bar Presidents, National Conference of Bar Examiners, National Association of Bar Executives, and National Organization of Bar Counsel. Representatives of these organizations regularly participate in meetings, conference calls and other activities. In several instances the Task Force has have collaborated with representatives of those entities to distribute information about pending services negotiation proposals and to facilitate a coordinated response to the relevant government agencies. The continuity in these relationships is important given the complexity and sensitivity of these issues.

**Importance of this Issue to U.S. Legal Profession and ABA Members**

The ongoing globalization of commercial activity makes it imperative for U.S. lawyers and law firms to be able to provide advice and assistance to their clients wherever the clients need that assistance. The U.S. is the largest legal services market and the largest exporter of legal services in the world, with more than $9 billion in exports annually. ABA members, both individuals and law firms, have substantial interest in assuring access to overseas markets. However, many countries have regulations or trade barriers in place that prevent or put onerous restrictions on U.S. firms operations within their borders.

Through the Task Force, the ABA is engaged in activities to promote the elimination of these legal services market access barriers around the world, including through implementation of ABA policy calling for the U.S. government to negotiate access for U.S. lawyers in foreign jurisdictions similar to what is offered under the ABA Model Foreign Legal Consultant Rule. This work demonstrates to U.S. lawyer and law firm members (and potential members) that the ABA is working on their behalf to improve their ability to establish offices and structure relationships
to most effectively serve their clients in foreign markets. In addition, the Task Force serves as a forum to develop and communicate views of ABA membership to governmental entities responsible for negotiating issues relevant to regulation of the legal profession and market access for U.S. firms. The Task Force also provides a valuable service through monitoring and informing members, ABA entities and affiliated entities of ongoing developments in international trade negotiations that impact legal services.

Many of the Task Force’s activities also serve an educational function, informing ABA members on rules of practice in foreign countries and educating foreign lawyers on rules of practice in U.S. jurisdictions. In addition, the Task Force has actively worked to promote implementation of ABA policies and has offered materials and assistance to states to consider adopting ABA model rules and policies on inbound foreign lawyers. Adoption of these policies will help state bars and lawyer regulatory systems deal more effectively with challenges presented by the increasing globalization of the legal profession.

The adoption of this amendment to transition the existing Task Force to a Standing Committee will serve to recognize the value that a permanent entity brings to this critical work and will ensure that the ABA is able to continue to effectively represent the interests of its members in both inbound and outbound legal services market access.

Respectfully Submitted,

David K.Y. Tang
Darrell Mottley
Rew R. Goodenow
Glenn Lau-Kee
Don DeAmicis
Hon. Delissa A. Ridgway
Kenneth B. Reisenfeld
Edward Mullins
Robert E. Lutz
Carole Silver
Timothy Brightbill
Glenn P. Hendrix
Stephen P. Younger
Thomas G. Wilkinson, Jr.
Laurel S. Terry
Erik Wulff
Erica Moeser
Eugene Theroux
Hon. Gerald W. VandeWalle
William P. Smith
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 2015 Annual Meeting, the Committee has received seven (7) proposals to amend the Association’s Constitution and Bylaws. The Committee met during the Midyear Meeting on February 6, 2016, in San Diego, California, and on March 23, 2016 and May 2, 2016, 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 §2.1 of the Association’s Constitution to realign the districts for representation on the Board of Governors, be approved.

 Proposal 3

The Committee voted to recommend that the proposal to amend §2.1 and §6.3 of the Association’s Constitution to define “accredited” and to clarify that the person elected as State Delegate must be accredited to the state for which elected, be approved.
Proposal 4

The Committee voted to recommend that the proposal to amend §6.4(a) of the Association’s Constitution to provide the United States Virgin Islands with a young lawyer delegate in the House of the Delegates, 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 §10.1(a) of the Association’s Constitution to change the name of the Section of Public Utility, Communications and Transportation Law to the Infrastructure and Regulated Industries Section, be approved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 6

The Committee voted to recommend that the proposal to amend §31.7 of the Association’s Bylaws to revise the jurisdictional statement of the Standing Committee on Legal Assistance for Military Personnel to expand the size of the Standing Committee to not more than ten members, be approved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 7

The Committee voted to recommend that the proposal to amend §31.7 of the Association’s Bylaws to create a Standing Committee on International Trade in Legal Services, be approved as to form. However, the Committee took no position on the substance of the proposal. However, the Committee took no position on the substance of the proposal.

Respectfully submitted,

David S. Houghton, Chair
Sidney Butcher
F. John Garza
Janet Green-Marbley
Sandra R. McCandless
Robert D. Oster
Ethan Tidmore
Mary T. Torres, Board Liaison
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 2016 to the following ABA Standards and Rules of Procedure for Approval of Law Schools:

- Standard 304: Simulations Courses, Law Clinics, and Field Placements
- Standard 305: Other Academic Study
- Standard 307(a): Studies, Activities, and Field Placements Outside the United States
- Interpretation 311-1: Academic Program and Academic Calendar
Standard 304. SIMULATION COURSES AND LAW CLINICS, AND FIELD PLACEMENTS

(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) direct supervision of the student’s performance by a faculty member;

(ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and

(iii) a classroom instructional component.

(c) A field placement course provides substantial lawyering experience that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a setting outside a law clinic under the supervision of a licensed attorney or an individual otherwise qualified to supervise, and (2) includes the following:

(i) direct supervision of the student’s performance by a faculty member or site supervisor;

(ii) opportunities for performance, feedback from either a faculty member or a site supervisor, and self-evaluation;

(iii) a written understanding among the student, faculty member, and a person in authority at the field placement that describes both (A) the substantial lawyering experience and opportunities for performance, feedback and self-evaluation; and (B) the respective roles of faculty and any site supervisor in supervising the student and in
assuring the educational quality of the experience for the student, including a clearly articulated method of evaluating the student’s academic performance;

(iv) a method for selecting, training, evaluating and communicating with site supervisors, including regular contact between the faculty and site supervisors through in-person visits or other methods of communication that will assure the quality of the student educational experience. When appropriate, a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program;

(v) a classroom instructional component, regularly scheduled tutorials, or other means of ongoing, contemporaneous, faculty-guided reflection; and

(vi) evaluation of each student’s educational achievement by a faculty member; and

(vii) sufficient control of the student experience to ensure that the requirements of the Standard are met. The law school must maintain records to document the steps taken to ensure compliance with the Standard, which shall include, but is not necessarily limited to, the written understandings described in Standard 304(c)(iii).

(d) Credit granted for such a simulation, law clinic, or field placement course shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.

(e) Each student in such a simulation, law clinic, or field placement course shall have successfully completed sufficient prerequisites or shall receive sufficient contemporaneous training to assure the quality of the student educational experience.

Interpretation 304-1

To qualify as an experiential course under Standard 303, a simulation, law clinic, or field placement must also comply with the requirements set out in Standard 303(a)(3).

Standard 305. FIELD PLACEMENTS AND OTHER ACADEMIC 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, but not limited to, 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

To qualify as a writing experience under Standard 303, other academic study must also comply with the requirement set out in Standard 303(a)(2). To qualify as an experiential course under Standard 303, other academic study must also comply with the requirements set out in Standard 303(a)(3).

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)(3).

Standard 307. STUDIES, ACTIVITIES, AND FIELD PLACEMENTS OUTSIDE THE UNITED STATES

(a) A law school may grant credit for (1) studies or activities outside the United States that are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council and (2) field placements outside the United States that meet the requirements of Standard 305-304 and are not held in conjunction with studies or activities that are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council.

Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

Interpretation 311-1

(a) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction for the purpose of Standard 311(a), 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(a), the credit hours shall not include any other coursework, including, but not limited to:

(1) Credit hours earned through field placements in compliance with Standard 304 and other study outside of the classroom in compliance with Standard 305;

(2) Credit hours earned in another department, school, or college of the university with which the law school is affiliated, or at another institution of higher learning;

(3) Credit hours earned for participation in co-curricular activities such as law review, 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.
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 amendments were approved by the Council at its meeting in December 2015 to be circulated for Notice and Comment. A public hearing was held on January 29, 2016. The Council approved the amendments at its meeting in March 2016.

In August 2014, the HOD considered Resolution 103A seeking concurrence in a comprehensive set of changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. With the exception of Interpretation 305-2, which prohibits granting credit for field placements for which a student receives compensation, the HOD concurred with the action of the Council.

In referring Interpretation 305-2 back to the Council for reconsideration, the HOD said:

> The House did not concur in the action of the Section and recommended that Interpretation 305-2 be eliminated from the Standards for the following reasons: 1) eliminating it will increase the number of experiential learning opportunities for law students; 2) law schools should be allowed to attach credit to paid externships; and 3) law students will graduate with less debt if they’re able to receive compensation.

The proposal moves the field placement experience from Standard 305 into Standard 304 with simulation courses and law clinics, the other categories of experiential learning identified in the Standards. The assumption is that the experiences from field placements are more in keeping with those programs than with offerings such as law review and moot court, which are covered in Standard 305. In moving field placements to Standard 304, requirements were added that are commensurate with those required for clinics and simulation courses—a means of guided reflection; opportunities for performance, feedback, and self-evaluation; and direct supervision. New Standard 304(c) defines a field placement course as one that provides substantial lawyering experience and calls for the creation of a written understanding for the experience. It also imports components from Standard 305 such as the requirement for appropriate prerequisites or sufficient training, and the need for credit granted to be commensurate with the time and effort required.

The revision removes any distinctions in the requirements for these programs based on credits offered, and mandates that records should be maintained for all placements. The revision also requires that law schools maintain sufficient control of the student experience at the field placement site to ensure that the requirements of the Standard are met.

Standard 305 remains to provide guidance for other academic study that does not involve attendance at a regularly scheduled class session, including, but not limited to, moot court, law review, and directed research. A new interpretation is added to Standard 305 similar to that recently adopted for Standard 304 that alerts schools that any program offered under the Standard that is intended to satisfy Standard 303 (as a writing experience or an experiential course) must comply with the requirements of that Standard.
The changes in Standard 304 and 305 require citation changes in Standard 307 (in which field placements outside of the United States are described), and in Interpretation 311-1 (in which calculation of credit hours is described).

The proposal eliminates the Interpretation that prohibits the granting of credit to a student for participation in a field placement for which the student receives compensation. The Council received a number of comments from law professors opposing the elimination of the Interpretation. Many who commented believed that the granting of credit for field placements would change the nature of the activity and that the supervising employer would be more likely to assign tasks that would benefit the employer and not benefit the student’s educational growth. On the other hand, comments received from law students and a few bar associations supported the elimination of the Interpretation to expand the number of placements available and to reduce the level of student debt. The Council believed that the protections that have been created in the revised Standard were adequate to ensure that students participating in field placements for which compensation is offered would be receiving a substantial lawyering experience deserving of academic credit.

Respectfully submitted,

The Honorable Rebecca White Berch
Chief Justice (Ret.), Supreme Court of Arizona
Chair, Council of the Section of Legal Education and Admissions to the Bar
August 2016
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association
Section of Legal Education and Admissions to the Bar

Submitted By: The Honorable Rebecca White Berch, Chair

1. Summary of Resolution(s).

The amendments move field placements from Standard 305, which covers study outside the classroom, into Standard 304, which now covers all types of experiential courses identified in the Standards. The Interpretation that prohibits the granting of credit to a student for participation in a field placement for which the student receives compensation has been eliminated.

2. Approval by Submitting Entity.

The amendments were approved by the Council at its meeting in December 2015 to be circulated for Notice and Comment. A public hearing was held on January 29, 2016. The Council approved the amendments at its meeting in March 2016.

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

Yes. 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.

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

The amendments modify the existing ABA Standards and Rules of Procedure for Approval of Law Schools.

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

Not applicable.

6. Status of Legislation. (If applicable)

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

The Council will notify ABA-approved law schools and other interested entities of the approved changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. The Council and the Managing Director’s Office will prepare guidance memoranda and training materials regarding the revised Standards.

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

Not applicable

9. Disclosure of Interest. (If applicable)

Not applicable

10. Referrals.

The amendments were posted on the Section’s website and circulated for Notice and Comment to the following interested persons and entities: ABA Standing and Special Committees, Task Forces, and Commission Chairs; ABA Section Directors and Delegates; Conference of Chief Justices; National Conference of Bar Presidents; National Association of Bar Executives; Law Student Division; SBA Presidents; National Conference of Bar Examiners; University Presidents; Deans and Associate Deans; Deans of Unapproved Law Schools; and Section Affiliated Organizations.

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

Barry A. Currier, Managing Director
American Bar Association
Section of Legal Education and Admissions to the Bar
321 N. Clark St., 21st floor
Chicago, IL 60654-7598
Ph: (312) 988-6744 / Cell: (310) 400-2702
Email: barry.currier@americanbar.org
12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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 Solomon Oliver, Jr.  
Chief Judge  
U.S. District Court for the Northern District of Ohio  
801 West Superior Avenue  
Cleveland, OH 44113  
Ph: (216) 357-7171 / Cell: (216) 973-6496  
Email: solomon_oliver@ohnd.uscourts.gov
EXECUTIVE SUMMARY

1. Summary of the Resolution

The amendments move field placements from Standard 305, which covers study outside the classroom, into Standard 304, which now covers all types of experiential courses identified in the Standards. The Interpretation that prohibits the granting of credit to a student for participation in a field placement for which the student receives compensation has been eliminated.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the oversight of field placement programs in the ABA Standards and Rules of Procedure for Approval of Law School.

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

Many who commented believed that the granting of credit for field placements would change the nature of the activity and that the supervising employer would be more likely to assign tasks that would benefit the employer and not benefit the student’s educational growth.
RESOLUTION

RESOLVED, That the American Bar Association approves the following program: Essex County College, Paralegal Studies Program, Newark, NJ.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal education programs: Auburn University Montgomery, Legal Studies Program, Montgomery, AL; NorthWest Arkansas Community College, Paralegal Program, Bentonville, AR; Santa Ana College, Paralegal Studies Program, Santa Ana, CA; University of California UCLA Ext., Paralegal Training Program, Los Angeles, CA; Quinnipiac University, Legal Studies Program, Hamden, CT; Delaware Technical and Community College, Paralegal Program, Georgetown, DE; Widener University Delaware Law School, Legal Education Institute, Wilmington, DE; College of Lake County, Paralegal Studies Program, Grayslake, IL; Roosevelt University, Paralegal Studies Program, Chicago, IL; William Rainey Harper College, Paralegal Studies Program, Palatine, IL; University of Louisville, Paralegal Studies Program, Louisville, KY; Community College of Baltimore County, Paralegal Studies Program, Baltimore, MD; Missouri Western State University, Legal Studies Program, St. Joseph, MO; Middlesex County College, Paralegal Studies Program, Edison, NJ; Suffolk County Community College, Paralegal Studies Program, Selden, NY; Sinclair Community College, Paralegal Program, Dayton, OH; University of Toledo, Paralegal Studies Program, Toledo, OH; Ursuline College, Legal Studies Program, Pepper Pike, OH; Central Carolina Technical College, Paralegal Program, Sumter, SC; Midlands Technical College, Paralegal Studies Program, Columbia, SC; J. Sargeant Reynolds Community College, Paralegal Studies Program, Richmond, VA; and Casper College, Paralegal Program, Casper, WY.

FURTHER RESOLVED, That the American Bar Association withdraws the approval of the following paralegal education programs: Baker College of Clinton Township, Paralegal Studies Program, Clinton Township, MI; Maryville University, Legal Studies Program, St. Louis, MO; and Marymount University, Paralegal Studies Program, Arlington, VA, at the request of the institutions.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the February 2017 Midyear Meeting of the House of Delegates for the following programs: University of Alaska Anchorage, Paralegal Certificate Program, Anchorage, AK; University of Arkansas Fort Smith, Paralegal Studies Program, Fort Smith, AR; Pima Community College, Paralegal Program, Tucson, AZ; Cerritos College, Paralegal Program, Norwalk, CA; Cuyamaca College, Paralegal Studies Program, El Cajon, CA; John F. Kennedy University, Legal Studies
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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.

**Essex County College, Paralegal Studies Program, Newark, NJ**

Essex County College is a two-year community college accredited by the Middle States Association of Colleges and Schools. The college offers an Associate of Science degree, a Certificate in Paralegal Studies, and a Nurse Paralegal Certificate.
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:

**Auburn University Montgomery, Legal Studies Program, Montgomery, AL**
Auburn University Montgomery is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers a Master of Science degree, a Bachelor of Science degree, a Minor, and a Certificate in Legal Studies.

**NorthWest Arkansas Community College, Paralegal Program, Bentonville, AR**
NorthWest Arkansas Community College is a two-year community college accredited by the Higher Learning Commission. The college offers an Associate of Applied Science degree in Paralegal Studies.

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

**UCLA Extension, Paralegal Training Program, Los Angeles, CA**
UCLA is a four-year university accredited by the Western Association of Schools and Colleges. The university offers a Certificate in Paralegal Studies.

**Quinnipiac University, Legal Studies Program, Hamden, CT**
Quinnipiac University is a four-year university accredited by the New England Association of Colleges and Schools. The university offers a Bachelor of Arts and a Minor/Certificate in Legal Studies.

**Delaware Technical and Community College, Legal Assisting/Paralegal Technology Program, Georgetown, DE**
Delaware Technical and 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.

**Widener University Delaware Law School, Legal Education Institute, Wilmington, DE**
The Legal Education Institute at Widener University Delaware Law School is in a law school and is accredited by the Middle States Association of Colleges and Schools. The institute offers an Associate of Science degree, a Bachelor of Science degree, a Legal Nurse Consulting Certificate, and a Certificate in several different concentrations in Paralegal Studies.

**College of Lake County, Paralegal Studies Program, Grayslake, IL**
College of Lake County is a two-year community college accredited by the Higher Learning Commission. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.
Roosevelt University, Paralegal Studies Program, Chicago, IL
Roosevelt University is a four-year university accredited by the Higher Learning Commission. The university offers a Certificate, a Bachelor of Professional Studies/Major in Paralegal Studies, a Bachelor of Arts with Paralegal Credential, and a Bachelor of Arts in Paralegal Studies.

William Rainey Harper College, Paralegal Studies Program, Palatine, IL
William Rainey Harper College is a two-year community college accredited by the Higher Learning Commission. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.

University of Louisville, Paralegal Studies Program, Louisville, KY
University of Louisville is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers an Associate of Arts degree in Paralegal Studies.

Community College of Baltimore County, Paralegal Studies Program, Baltimore, MD
Community College of Baltimore County 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 Legal Studies.

Missouri Western State University, Legal Studies Program, St. Joseph, MO
Missouri Western State University is a four-year university accredited by the Higher Learning Commission. The university offers an Associate of Science degree, a Bachelor of Science degree, a Minor, and a Certificate in Paralegal Studies.

Middlesex County College, Paralegal Studies Program, Edison, NJ
Middlesex County 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, a Certificate, and a Certificate of Achievement in Paralegal Studies.

Suffolk County Community College, Paralegal Studies Program, Selden, NY
Suffolk 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.

Sinclair Community College, Paralegal Program, Dayton, OH
Sinclair Community College is a two-year community college accredited by the Higher Learning Commission. The college offers an Associate of Applied Science degree in Paralegal Studies.

University of Toledo, Paralegal Studies Program, Toledo, OH
University of Toledo is a four-year university accredited by the Higher Learning Commission. The university offers an Associate of Applied Science degree, a Bachelor of Science degree, a Nurse/Paralegal Certificate, and a Certificate in Paralegal Studies.
Ursuline College, Legal Studies Program, Pepper Pike, OH
Ursuline College is a four-year college accredited by the Higher Learning Commission. The college offers a Bachelor of Arts degree, a Minor, and a Certificate in Legal Studies.

Central Carolina Technical College, Paralegal Program, Sumter, SC
Central Carolina Technical College is a two-year technical college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science in Paralegal Studies.

Midlands Technical College, Paralegal Studies Program, Columbia, SC
Midlands Technical College is a two-year technical college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science degree and a Certificate in Paralegal Studies.

J. Sargeant Reynolds Community College, Paralegal Studies Program, Richmond, VA
J. Sargeant Reynolds 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.

Casper College, Paralegal Program, Casper, WY
Casper College is a two-year college accredited by the Higher Learning Commission. The college offers an Associate of Arts 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 2017 Midyear Meeting of the American Bar Association House of Delegates.

University of Alaska Anchorage, Paralegal Certificate Program, Anchorage, AK; University of Arkansas Fort Smith, Paralegal Studies Program, Fort Smith, AR; Pima Community College, Paralegal Program, Tucson, AZ; Cerritos College, Paralegal Program, Norwalk, CA; Cuyamaca College, Paralegal Studies Program, El Cajon, CA; John F. Kennedy University, Legal Studies Program, Pleasant Hill, CA; Miramar College, Legal Assistant Program, San Diego, CA; Mt. San Antonio College, Paralegal/Legal Specialty Program, Walnut, CA; MTI College, Paralegal/Studies Program, Sacramento, CA; National University, Paralegal Studies Program, Los Angeles, CA; San Francisco State University, Paralegal Studies Program, San Francisco, CA; University of La Verne, Legal Studies Program, La Verne, CA; West Valley College, Paralegal Program, Saratoga, CA; Arapahoe Community College, Paralegal Program, Littleton, CO; Norwalk Community College, Legal Assistant Program, Norwalk, CT; Georgetown University, Paralegal Studies Program, Washington, DC; Wilmington University, Legal Studies Program, New Castle, DE; Broward College, Legal Assisting Program, Pembroke Pines, FL; Florida South Western State College, Paralegal Studies Program, Fort Myers, FL; Florida State College Jacksonville, Paralegal Studies Program, Jacksonville, FL; Seminole State College of Florida, fka Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL; South University, Legal Studies/Paralegal Studies Program, Royal Palm Beach, FL; Athens Technical College, Paralegal Studies Program, Athens, GE; South University, Legal Studies/Paralegal Studies Program, Savannah, GA; Kirkwood Community College, Legal
Assistant Program, Cedar Rapids, IA; Loyola University Chicago, Institute for Paralegal Studies, Chicago, IL; Southern Illinois University Carbondale, Paralegal Studies Program, Carbondale, IL; Northwestern College, Paralegal Studies Program, Chicago, IL; Bowling Green Community College of Western Kentucky University, Paralegal Studies Program, Bowling Green, KY; Morehead State University, Paralegal Studies Program, Morehead, KY; Sullivan University, Institute for Paralegal Studies, Lexington, KY; Herzing University, Legal Assisting and Paralegal Studies Program, Kenner, LA; Tulane University, Paralegal Studies Program, New Orleans, LA; Elms College, Legal Studies Program, Chicopee, MA; Oakland Community College, Paralegal Program, Farmington Hills, MI; Oakland University, Paralegal Program, Rochester, MI; Mississippi University for Women, Legal Studies Program, Columbus, MS; Central Piedmont Community College, Cato Campus, Paralegal Technology Program, Charlotte, NC; Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC; Montclair State University, Paralegal Studies Program, Montclair, NJ; Columbus State Community College, Paralegal Studies Program, Columbus, OH; Fortis College, Paralegal Program, Centerville, OH; Mt. St. Joseph University, fka College of Mt. St. Joseph, Paralegal Studies Program, Cincinnati, OH; University of Cincinnati—Clermont, Paralegal Technology Program, Batavia, OH; Rose State College, Paralegal Studies Program, Midwest City, OK; University of Oklahoma Law Center, Legal Assistant Education, Norman, OK; Bucks County Community College, Paralegal Studies Program, Newtown, PA; Community College of Philadelphia, Paralegal Studies Program, Philadelphia, PA; Greenville Technical College, Paralegal Program, Greenville, SC; South University, Legal Studies/Paralegal Studies Program, Columbia, SC; Brightwood College, fka Kaplan Career College, Paralegal Studies Program, Nashville, TN; Pellissippi State Community College, Paralegal Studies Program, Knoxville, TN; South College, Legal Studies and Paralegal Studies Programs, Knoxville, TN; Lee College, Paralegal Studies Program, Baytown, TX; Texas State University, Legal Studies Program, San Marcos, TX; Salt Lake Community College, Paralegal Studies Program, Richmond, VA; Edmonds Community College, Paralegal Program, Lynnwood, WA; Chippewa Valley Technical College, Paralegal Program, Eau Claire, WI; Madison College, Paralegal Program, Madison, WI; Western Technical College fka Western Wisconsin Technical College, Paralegal Program, La Crosse, WI; and Laramie County Community College, Paralegal Studies Program, Cheyenne, WY.

Respectfully submitted, Laura C. Barnard, Chair
Standing Committee on Paralegals August 2016
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Paralegals

Submitted By: Laura C. Barnard, Chair

1. Summary of Resolution(s).

This Resolution grants approval to one program, grants reapproval to twenty-two paralegal education programs, withdraws the approval of three programs at the request of the institutions, and extends the term of approval to several paralegal education programs.

2. Approval by Submitting Entity.

May 2016

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

This resolution has not been previously submitted.

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

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

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

N/A

6. Status of Legislation. (If applicable.)

N/A

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

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

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

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

N/A

10. Referrals.

None

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

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

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

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

1. Summary of the Resolution

The resolution grants approval to one program, grants reapproval to twenty-two programs, withdrawing the approval of three programs, and extends the term of approval of sixty-one programs.

2. Summary of the issue which the Resolution Addresses

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

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

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

4. Summary of Minority Views

No other positions on this resolution have been taken by other Association entities, affiliated organizations or other interested group.
RESOLVED, That the American Bar Association urges the President of the United States and
United States Senators to emphasize the importance of racial, ethnic, disability, sexual
orientation, gender identity and gender diversity in the selection process for United States Circuit
Judges and United States District Judges and to employ strategies to expand the diversity of the
pool of qualified applicants, nominees and appointees to the U.S. District Court and U.S. Circuit
Court of Appeals, including without limitation, the use of diverse merit selection panels.

FURTHER RESOLVED, That the American Bar Association urges the United States Circuit
Courts of Appeals and the Circuit Judicial Councils to emphasize the importance of racial,
ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process
for United States Bankruptcy Judges and to employ strategies to expand the diversity of the pool
of qualified applicants, nominees and appointees to the Bankruptcy Court, including without
limitation, the use of diverse merit selection panels.

FURTHER RESOLVED, That the American Bar Association urges the United States District
Courts to emphasize the importance of racial, ethnic, disability, sexual orientation, gender
identity and gender diversity in the selection process for United States Magistrate Judges and to
employ strategies to expand the diversity of the pool of qualified applicants, nominees and
appointees to United States Magistrate Judge positions, including without limitation, the use of
diverse merit selection panels.

FURTHER RESOLVED, That the American Bar Association urges the Judicial Conference of
the United States, federal courts, defender organizations, and the court support agencies to
recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and
gender diversity in the hiring process and to expand the diversity of the pool of qualified
employees in the Judicial Branch of the United States.

FURTHER RESOLVED, That the American Bar Association urges its members to facilitate the
selection of judges reflecting racial, ethnic, disability, sexual orientation, gender identity and
gender diversity by identifying, encouraging, assisting, and mentoring qualified diverse
candidates to seek selection as judges.
REPORT

Introduction

Diversity of both the profession and the bench is critical to ensuring public trust and confidence in our system of justice. In her recent opinion to The Washington Post, Stanford Professor Deborah L. Rhode writes, “From the outside, the legal profession seems to be growing ever more diverse. Three women are now on the Supreme Court. Loretta Lynch is the second African American to hold the position of attorney general. The president and first lady are lawyers of color. Yet according to Bureau of Labor statistics, law is one of the least racially diverse professions in the nation. Eighty-eight percent of lawyers are white…”1 Thus, the diversity, or lack thereof, of the legal profession is an issue that cannot be ignored. This Report will specifically focus on the diversity of the federal judiciary.

Federal judges fall into two basic groups: Article III judges who are appointed by the President upon confirmation by the Senate, and Article I judges, some of whom also come to the bench by way of Presidential appointment and Senate confirmation, and others who are appointed by other federal judges. The first category, Article III judges, includes federal district and circuit judges who are appointed for life terms. The second group, Article I judges, includes magistrate judges who are appointed by district judges for eight year renewable terms and bankruptcy judges who are appointed by circuit judges for fourteen year renewable terms.2 It is important to closely examine both groups’ diversity patterns. Some suggest that the diversity of the federal judiciary, indeed the diversity of the profession, should be measured against the diversity of the American people.3 While progress has been discernible, for these measurements to be on par, there is a long road ahead.

Definition of Diversity

The definition of diversity includes: “racial, ethnic, disability, sexual orientation, gender identity and gender diversity.” The ABA has a longstanding and unwavering commitment to increasing the appointment of diverse persons to the federal judiciary. Judicial diversity helps ensure that officials representing the judiciary reflect those whom the system serves, thus helping to promote public confidence in the decisions rendered. While the Administrative Office of the United States Courts (AO) collects data on racial, ethnic and gender diversity, it does not provide any information with regard to disability, sexual orientation, or gender identity of the bench. Reporting data on the demographics of the federal judiciary provides a very important tool in ensuring judicial diversity. There have been very few openly gay members of the District and Circuit courts. Recently, President Barack Obama has successfully nominated a number of members of the LGBT community; however, the number of judges is not confirmed by the AO,

3 Fair Employment Practices Officer, the Office of Fair Employment Practices of the Administrative Office of the U.S. Courts Briefing at ABA Roundtable on Diversity of Article I Federal Judges (July 29, 2015) [hereafter referred to as “ABA Roundtable”].
nor is there any information with regard to magistrate, bankruptcy judges or staff. Likewise, information with regard to disabilities is unavailable. Although the discussion below focuses on those areas for which there is data, the accompanying Resolution still encourages the appointing authority to consider all forms of diversity in the appointive process. It is the intention of the proponents of this Resolution to work with the AO and other entities to provide this diversity information in the future.

Background: Advances in the Diversity of the Federal Bench

Federal courts, both Article III and Article I, have become measurably more diverse in recent years. Indeed, the federal bench was over 80% male in 2000, but by 2014, that number had decreased to 68%. Gender diversity achievements in the magistrate and bankruptcy courts have been impressive: between 2000 and 2014 the magistrate judge and bankruptcy judge benches have increased female representation by over 10%. As to ethnicity, in 2000 only 12% of the federal bench was non-Caucasian whereas that percentage was over 16% in 2014. The data is clear that the Article III benches have diversified more quickly than their magistrate and bankruptcy court colleagues. Non-Caucasian Article III judges made up over 23% of the federal bench in 2014, while the equivalent number for magistrate judges was 14.6% and 5.6% for bankruptcy judges. Still, progress has been made on the Article I benches: nearly 90% of magistrate judges and 95% of bankruptcy judges were Caucasian in 2000. While reliable data is not readily available, anecdotal evidence suggests that these magistrate and bankruptcy benches have further diversified in the past eighteen to twenty-four months, but that data is not reflected in the most recent reports from the AO.

Plainly, overall ethnicity of the bar affects the pool of candidates from which appointments to any federal bench can be made. As noted above, 88% of lawyers nationwide identify themselves as Caucasian. Certain states have attempted to keep track of ethnicity. In 2011, consistent with national numbers, almost 87% of the members of the New York State Bar Association identified themselves as Caucasian. In Illinois, a similar survey in 2008 revealed that nearly 83% of the bar identified as Caucasian. In California, over 20% of the members of the bar identified themselves as ethnic minorities in 2014. Thus, while the “color of the bar” is slowly changing,

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5 Id.
6 Id.
7 Id.
8 Id.
the legal profession remains significantly non-diverse and is not yet reflective of the general population. Therefore, the pool of diverse candidates from which federal judges can be selected is small. Measured against the ethnicity of the bar, diversity in the overall federal judiciary has been impressive. But, more needs to be done if the federal benches are to reflect the population as a whole.

Encouraging Diversity in the Selection of United States Circuit and District Court Judges

This Resolution urges the President of the United States and United States senators to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States circuit judges and United States district judges and to expand the diversity of the pool of qualified applicants, nominees and appointees to these benches, as well as the diversity of merit selection panels where used.\(^\text{12}\)

2013 census data can be used to compare the racial and ethnic makeup of the general population with the makeup of the federal judiciary, presented by state and broken down by ethnicity.\(^\text{13}\) According to the U.S. Census Summary, as of 2013, the estimated general population was 73% Caucasian; 13% African-American; 16% Hispanic; 5% Asian American; .9% Native American/Alaskan; and .2% Pacific Islander/Hawaiian. 51% of the general population was estimated as female, and 49% male.\(^\text{14}\) The Article III Bench was 75.6% Caucasian; 12% African American; 9% Hispanic; 2.5% Asian American; 0.3% Native American; 0.4% Pacific Islander; and .3% unreported.\(^\text{15}\) Moreover, just about a third of appellate judges (31.5%) and district judges (31.2%) were female; and this percentage of disparity appears to be decreasing.\(^\text{16}\) To demonstrate some minor changes, in 2014, the Article III Bench was 72.3% Caucasian; 11.6% African American; 9% Hispanic; 2.4% Asian American; and .4% Pacific Islander; 0% Native American; and 4.3% were unreported. 32.3% of Article III judges were female.\(^\text{17}\)

By reallocating the population data out of state boundaries and into federal judicial districts and then accumulating the data into judicial circuits, the ethnic breakdown in each district and circuit can be identified.\(^\text{18}\) Further, ethnic breakdown of federal judges is available from the AOUSC.\(^\text{19}\) With this information, the ethnic makeup of the general populations in the judicial districts and circuits (rather than by state boundaries) can be compared to the ethnic makeup of the benches in those locations. Implications from this data are clear: overall, the judicial officer population does not yet appear to reflect the general population that those officers serve.\(^\text{20}\) Clearly one of the largest impediments to the diversity of the bench is the diversity of the bar. Although 73% of the population is Caucasian, 88% of the legal profession is.\(^\text{21}\) This restricts the pool of diverse candidates. Therefore, those selecting judges have to work harder to encourage qualified,

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12 This Resolution takes no position regarding the use of merit selection panels.
13 Frank J. Bailey, U.S. Bankruptcy Court for the District of Mass., ABA Roundtable; see also Bailey, supra note 2.
14 U.S. Census Summary, found at http://www.census.gov/2010census/.
15 Fair Employment Practices Officer, supra note 3.
16 Id.
18 For a further breakdown of the specific data referred to herein, please refer to Bailey, supra note 2.
19 Id.; see also http://www.fjc.gov/history/home.nsf/page/judges_diversity.html
20 Bailey, supra note 2.
21 Rhode, supra note 1.
dive candidates to apply. To a degree, those selecting judges have done so; in most circuits, the bench is more diverse than the profession. However, more can be done. Greater diversity on the bench may also encourage greater diversity within the profession.

A more diverse bench promotes the public’s confidence in the judiciary. As Judge Frank J. Bailey of the United States Bankruptcy Court for the District of Massachusetts explains, “when the entire bench in a district is Caucasian the litigant from an ethnic minority may feel an implied bias. When the entire bench in a certain court is Caucasian, an ethnic minority lawyer may not feel that it is possible to achieve an appointment to the bench on that court.” Moreover, “[w]hen judges do not look like the defendants or litigants in court, or if there is a perception that people of color are treated with bias, communities of color will have a more difficult time turning to the courts and trusting their decisions.... When entire communities lose faith in an essential component of our system of government, we all lose.” The data is clear: while discrepancy in diversity is not as broad as with the bankruptcy and magistrate courts, more effort must be made to ensure greater diversity of the Article III bench.

**Encouraging Diversity in the Selection of United States Bankruptcy and Magistrate Court Judges**

This Resolution further urges the U.S. Circuit Courts of Appeals and the Circuit Judicial Councils to continue to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for federal bankruptcy judges, and for the U.S. District Courts to continue to do the same in the selection process for magistrate judges, and to expand the diversity of the pool of qualified applicants, nominees and appointees to the magistrate and bankruptcy court benches, including the use of diverse merit selection panels.

By far, the largest number of cases filed in federal court are those filed in bankruptcy courts, and most American citizens have their federal court experience in front of a bankruptcy judge. Moreover, magistrate judges handle the day to day work of thousands of federal cases, civil and criminal, and often the first federal judge on the scene at an arraignment is a magistrate judge. Thus, it matters a great deal that those who appear before bankruptcy and magistrate judges perceive that they are being treated fairly.

For magistrate judges, Judicial Conference rules require that a merit selection panel be established by the district judges to select qualified candidates. Jud. Conf. Rules, 420.20.10. The merit selection panel must consist of at least seven members, including two non-lawyers, and no district court judge or retired Article III judge may serve on the panel. The rules now state as follows: “To further efforts to achieve diversity in all aspects of the magistrate judge

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22 Id.
24 Andre Davis, U.S. Court of Appeals for the Fourth Circuit, ABA Roundtable.
25 Id.
26 Bailey, supra note 2.
selection process, the court is encouraged to appoint a diverse selection panel.” Jud. Conf. Rules, 420.30.20. The merit selection panel has a duty to “make an affirmative effort to identify and give due consideration to all qualified applicants without regard to race, color, age (40 and over), gender, religion, national origin, or disability.” Jud. Conf. Rules 420.30.30. Even with the encouragement of the guidelines, the magistrate judge bench is less diverse than the overall Article III Bench. According to the statistics provided by the AO, as of 2013, the magistrate judge bench was 82% Caucasian; 6.4% African American; 4.4% Hispanic; 2.1% Asian American; .2% Native American; .2% Pacific Islander; and 4.7% unreported. Only about a third of magistrate judges were female, or 30.6%. In 2014, to show minor variation, the magistrate judge bench was 84.2% Caucasian; 6.2% African American, 3.8% Hispanic; 2.5% Asian American; .3% Native American; .2% Pacific Islander; and 2.8% were unreported. 34.8% of the magistrate judges were female.

The bankruptcy bench is even less diverse. As of 2013, the bankruptcy bench was 92.6% Caucasian; 2.6% African American; 1.6% Hispanic; .8% Asian American; 0% Native American; 0% Pacific Islander; and 2.4% unreported. While advances have been made on gender diversity, still only about a third of bankruptcy judges were female, or 30.6%. In 2014, the bankruptcy bench was 90.9% Caucasian; 2.9% African American; 1.6% Hispanic; 1.1% Asian American; 0% Native American; 0% Pacific Islander; and 3.5% unreported. 30.6% of the bankruptcy judges were female.

In 2013, the Institute for the Advancement of the American Legal System (the “IAALS”) at the University of Denver studied the selection, appointment and reappointment process for federal bankruptcy judges. The study involved interviews with circuit executives, circuit judges, bankruptcy judges, and merit selection panelists in all federal judicial circuits where there are regular vacancies for bankruptcy judges. Although the Judicial Conference of the United States has adopted guidance on the selection of bankruptcy judges, unlike with magistrate judges, the guidance is not mandatory. The judicial councils have adopted a wide range of approaches to the selection process. Most all circuits appoint a merit selection panel to coordinate the process, including advertising the vacancy, soliciting applicants, gathering the application materials, conducting interviews, checking references, and recommending a slate of qualified candidates to the circuit judges for appointment. Guidelines offer little detail relating to diversity, and though there is of course a requirement that the selection process be free of any discrimination, there is no affirmative guidance in the regulations. Thus, it is up to each circuit

27 Id.
28 Id.
29 Fair Employment Practices Officer, supra note 3.
31 Fair Employment Practices Officer, supra note 3.
34 Id.
35 Id.
36 Id.
37 Id.
court to adopt any requirements it might deem appropriate to ensure that diverse candidates apply and are given an opportunity for appointment.\textsuperscript{38}

One of the primary challenges surrounding the selection of bankruptcy judges is that, when making judicial appointments, the merit selection panel may, logically, look for candidates with the most extensive bankruptcy experience. By emphasizing bankruptcy expertise, the goal of increased diversity may suffer very early in the hiring process. If candidates are drawn from what is generally regarded as a non-diverse bar, the diversity of the applicant pool may not be substantial. By the time the finalists are presented to the circuit court, there is little the court can do to find diverse candidates. Should bankruptcy expertise be the deciding factor in the appointment process, or should a highly talented, diverse candidate that lacks subject matter expertise be given the edge? Can the law be learned through exposure in the same way that many district judges, with little prior experience in either civil or criminal matters, can still successfully preside over such matters? It should also be noted that in certain circuits, the notices of vacancy for bankruptcy judges now de-emphasize the level of bankruptcy practice experience in favor of more generalized legal expertise and personal skills. The First Circuit, for example, recently sought applicants for a vacancy with “outstanding legal ability and competence as evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and court processes.”\textsuperscript{39} They also encouraged applicants to “possess demeanor, character, and personality to indicate that they would exhibit judicial temperament . . . .” But, nowhere did the First Circuit’s application notice stress bankruptcy law experience, thus encouraging a broad range of applicants with high achievement in the legal profession.

Diversity on the bankruptcy bench is particularly important in relation to perceptions of justice.\textsuperscript{40} Studies have shown that when a merit selection panel is itself diverse, the likelihood of a diverse pool of applicants and a diverse appointee is increased, and when a merit selection panel consists only of bankruptcy practitioners (and judges), the applicants and appointees tend to be less diverse because they are regular participants in the practice, which is itself often non-diverse.\textsuperscript{41} One possible way to increase demographic diversity among bankruptcy judges without making diversity an explicit factor in the selection decision, could be demographic diversity of the merit selection panel itself. Research demonstrates that there is a link between the diversity of the panel’s membership and the diversity of applicants, nominees, and appointees.\textsuperscript{42} One solution may be to revise the Judicial Conference Rules for the appointment of bankruptcy judges so as to bring them in line with those for the appointment of magistrate judges.\textsuperscript{43}

“The pipeline method” is another important strategy, in which organizations reach out to youth directly, encouraging them to pursue a career in justice and present future career options in the federal judiciary.\textsuperscript{44} The diversity of the bench is not by any means the responsibility of the

\textsuperscript{38} Id.
\textsuperscript{39} United States Court of Appeals for the First Circuit website, http://www.ca1.uscourts.gov/news/vacancy-us-bankruptcy-judge
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Bailey, supra note 2.
\textsuperscript{44} Fair Employment Practices Officer, supra note 3.
President and the judges alone. The American Bar Association, along with state, local and specialty bar associations, has an obligation to both develop and encourage the diversity of the profession. The legal profession is the least diverse among other professions, such as medical doctors or accountants. The broader bar is in the best position to take steps on multiple fronts to garner the interest of more minorities and women to pursue a career in law. Bar associations should develop programs to encourage those who demonstrate the necessary legal skill and moral character to become judges. Likewise, specialty bars, such as the bankruptcy bar, must take steps to be more inclusive and to offer training and courses to allow lawyers to expand and improve their expertise within the field. These actions will allow the court a deeper pool of diverse candidates from which to choose the most qualified individuals to sit on the bench.

Sitting federal judges can assist the cause of diversity by ensuring that their interns and law clerks represent diverse backgrounds. Increasing the pipeline of qualified candidates, however, is a long-term solution and may have little impact short term. Nominating committees and merit selection panels should acknowledge and address forcefully the existence of implicit bias so that the issue may be faced head-on.

**Encouraging Diversity of Employees of the Judicial Branch of the United States**

Finally, this Resolution urges the Judicial Conference of the United States, federal courts, defender organizations, and the court support agencies to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the development of hiring goals and in the hiring process and to expand the diversity of the pool of qualified employees in the Judicial Branch of the United States. It is not only important for the judiciary to reflect the general population in which it serves, but also those employees who work with the judges and assist in their decision making.

**Conclusion**

With the acknowledgment that there exists a lack of diversity in the federal judiciary, this Resolution is intended to highlight potential effective ways to address the issue, and to encourage the development of new practices that enhance diversity. There is reason to believe that both the Article III and Article I (bankruptcy and magistrate courts) benches have become more diverse since 2013. Nevertheless, turnover is slow among those with lifetime appointment as well as among those with terms of either eight or fourteen years. The principal reason cited for a lack of diversity on the federal bench is that the pipeline of diverse applicants for judicial openings is not robust. Qualified diverse candidates must be encouraged to apply and must be mentored to understand the standards that are required to obtain appointments as a federal judge. Pipeline recruitment is an effective strategy in targeting minority students and encouraging them to consider a career in the federal judicial branch. This, however, is a long term approach that will take years to have an impact. It is also essential to have a diverse merit selection panel, as this can engender more diverse nominations and, in turn, a more diverse pool of applicants from...

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45 *Id.*
46 Fair Employment Practices Officer, supra note 3.
47 Bailey, supra note 2.
48 *Id.*
which the courts of appeals (for bankruptcy judges) and the district courts (for magistrate judges) select. Selection committees need to widen their outreach to the legal community to build a wider pool of candidates. There is no doubt that “[d]iversity on the bench means more perspectives are brought to bear on complicated issues, and this leads to better decisions.”\(^\text{49}\) The diversity of the third branch has been improving over time, however the employment of these strategies and the continuation of this critical discussion will most quickly and efficiently allow for a more representative federal judiciary which better reflects, and thus serves, the American population.

To ensure the advancement of these ideas, the Judicial Division of the American Bar Association intends to report back to the House of Delegates, through the appropriate committee, the diversity of the appointments to these benches every five years after the approval of this resolution.

Respectfully submitted,
Hon. Nannette Baker, Chair
National Conference of Federal Trial Judges

Mr. Michael Bergmann, Chair
Judicial Division
August 2016

\(^{49}\) Michele L. Jawando & Billy Corriher, supra note 23, at 6.
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Federal Trial Judges; Judicial Division

Submitted By: Judge Nannette Baker, Chair, National Conference of Federal Trial Judges
Mr. Michael Bergmann, Chair, Judicial Division

1. Summary of Resolution(s).

This Resolution urges the appropriate parties to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States Circuit Judges and United States District Judges, United States Bankruptcy and Magistrate judges, and for other qualified employees in the Judicial Branch of the United States, and to expand the diversity of the pool of qualified applicants, nominees and appointees, including without limitation, the use of diverse merit selection panels.

2. Approval by Submitting Entity.

The National Conference of Federal Trial Judges voted by email to approve this Resolution and Report on March 24, 2016. The Lawyers Conference, National Conference of Specialized Court Judges, National Conference of State Trial Judges, Appellate Judges Conference and National Conference of Administrative Law Judiciary all voted by email to cosponsor the Resolution and Report on March 25, 2016 and March 28, 2016. The Judicial Division voted to co-sponsor the Resolution and Report on April 5, 2016, during its monthly Judicial Division Council conference call. Finally, the Tort Trial and Insurance Practice Section voted to co-sponsor and notified the Judicial Division on May 5, 2016. After additional input from Judicial Division conferences and outside supporting entities, the decision was made to include the word “disability” within the definition of diversity; each named cosponsor approved and voted to remain a cosponsor by email during the week of May 9, 2016.

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

Yes. A related draft of the Resolution and Report was initially submitted for consideration of the House at the 2016 ABA Midyear Meeting, however, the item was withdrawn before the House agenda was even drafted. While the idea behind the policy has always had full support of all Judicial Division conferences, the Resolution and Report were revised after receiving additional input and commentary from each Judicial Division conference, in order to garner full support and cosponsorship of each Judicial Division conference.

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

At the 1995 ABA Midyear Meeting, the ABA House of Delegates adopted “Recommendation 111,” calling for the President of the United States to appoint minority lawyers of racial and ethnic diversity to all levels of the federal judiciary, including the United States Supreme Court.
This Resolution is also fully in sync with Goal III of the ABA, to Eliminate Bias and Enhance Diversity through (1) the promotion of full and equal participation in the association, our profession and the justice system by all persons; and (2) elimination of bias in the legal profession and the justice system. This Resolution, if adopted, only enhances and supports existing ABA policy and goals.

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

N/A

6. Status of Legislation. (If applicable)

N/A

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

The Judicial Division will work with judges and outside entities to increase the use, size, and diversity of merit selection panels. It will develop training materials on the issue of diversity. The Judicial Division will also reach out to various partners within the ABA and outside to work on long-term strategies to increase the diversity pool of qualified candidates.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

National Conference of State Trial Judges
National Conference of the Administrative Law Judiciary
National Conference of Specialized Court Judges
Lawyers Conference
Appellate Judges Conference
Commission on Racial and Ethnic Diversity in the Profession
Commission on Diversity and Inclusion 360
Coalition on Racial and Ethnic Justice
Council for Racial and Ethnic Diversity in the Educational Pipeline
Section of Administrative Law and Regulatory Practice
Section of Business Law
Criminal Justice Section
Government and Public Sector Lawyers Division
Section of Rights and Social Justice
Section of Labor and Employment Law
Section of Litigation
Tort Trial & Insurance Practice Section
Young Lawyers Division
Law Student Division
Section of State and Local Government Law
Standing Committee on the American Judicial System

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

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02109-3945

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Frank.Bailey@mab.uscourts.gov

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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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Frank.Bailey@mab.uscourts.gov
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

This Resolution urges the appropriate parties to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States Circuit Judges and United States District Judges, United States Bankruptcy and Magistrate Judges, and for other qualified employees in the Judicial Branch of the United States, and to expand the diversity of the pool of qualified applicants, nominees and appointees, including without limitation, the use of diverse merit selection panels.

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

Diversity of both the profession and the bench is critical to ensuring public trust and confidence in our system of justice, yet law is one of the least diverse professions in the nation. This resolution specifically focuses on increasing the diversity of the federal judiciary, so that the diversity of the federal judiciary can be equally measured against the diversity of the American people. For these measurements to be on par, there is a long road ahead.

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

The proposed policy position addresses the lack of diversity in the federal judiciary by drawing attention to the problem, using data as factual evidence, and by encouraging those responsible to take action by using appropriate tools and techniques to expand the diversity of the pool of qualified applicants, nominees and appointees to the bench, including without limitation, the use of diverse merit selection panels. The accompanying Report also calls for the Judicial Division of the ABA report back to the House of Delegates, through the appropriate committee, the diversity of the appointments to these benches every five years. By tracking the progress, invested parties will continue to be aware of the problem and work towards a solution.

4. **Summary of Minority Views**

There are no minority views known at this time.
RESOLUTION

1 RESOLVED, That the American Bar Association urges state and territorial election administrators and officials, to ensure the adoption and implementation, as soon as practicable, of statewide or territorial standards that provide clear criteria for determining what constitutes a valid vote when a hand count is required of paper and optical scan ballots.

5 FURTHER RESOLVED, That the ABA encourages election officials in those jurisdictions that use “voter intent” standards to determine the outcome of a ballot, ensure adoption of explanatory rules, regulations and/or policies that clarify such standards as soon as practicable.
REPORT

I. INTRODUCTION

This resolution urges adoption of counting standards for paper and optical scan ballots when it is necessary to hand count them consistent with the American Bar Association’s (ABA) mission and goal to “advance the rule of law at home and throughout the world.” A clear statement from the ABA on the issue of statewide ballot-counting standards is needed in order to ensure that 16 years after Bush v. Gore such standards are in place as soon as practicable.

The ABA recognizes that few states and territories, hereafter states, have clear statewide or territorial (statewide) standards in law or regulation, and that a few states have nothing in law. Only a hand-full of states have pre-determined standards governing how a ballot will be hand counted in the event of a recount or contest. A significant number of states have an unclear standard that may be interpreted differently across the state for ballots with the same marks. These states generally rely on the “voter’s intent” -- without more -- as the standard to be used to hand count ballots. This standard is not compatible with a clear, statewide standard for counting optical scan or other ballots in situations requiring a hand count. The ABA urges states with a general “voter intent” standard, as well as those states without any statewide standard in place, to adopt laws and regulations consistent with this resolution. The adoption and consistent enforcement of uniform standards will promote fair and transparent elections and avoid the arbitrary interpretation of ballots during a formal canvass, recount or contest of an election.

II. BRIEF HISTORY OF THE NEED FOR STATEWIDE BALLOT COUNTING STANDARDS

In Bush v. Gore, 531 US 98 (2000), decided December 11, 2000, the Supreme Court, by a 7-2 decision, held that standard-less manual recounts violate the Fourteenth Amendment’s Equal Protection Clause. As one commentator describes the case:

Noting that the Equal Protection clause guarantees individuals that their ballots cannot be devalued by "later arbitrary and disparate treatment," the per curiam opinion held 7-2 that the Florida Supreme Court’s scheme for recounting ballots was unconstitutional. Even if the recount was fair in theory, it was unfair in practice. The record suggested that different standards were applied from ballot to ballot, precinct to precinct, and county to county.

The Help America Vote Act of 2002 (HAVA) was passed in 2002 in response to the 2000 presidential elections. HAVA was to assist with improving voting systems and voter access. It

established minimum election administration standards for states and units of local government with responsibility for the administration of federal elections.

Among other state mandates, HAVA required that states develop uniform definitions of what constitutes a vote in Section 301(a)(6) of the Act:

Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.²

Despite the Supreme Court’s decision in Bush v. Gore, and the mandate in HAVA, many states have failed to address this constitutional equal protection concern. Pre-existing uniform statewide standards not only promote fair and transparent elections, and avoid arbitrary interpretation of ballots once an election is finished and decisions about counting can be influenced by knowing who will benefit given a certain interpretation, but they are mandated by federal law, and the US Constitution.

This resolution does not take a position on individual state “voter intent” laws, rather it urges them to implement rules, regulations and policies that clarify such standards prior to the general election. Voter intent is one common ballot-counting standard found in many state laws, but there are states with other standards for ballot counting, such as those that require all ballots to conform to the directions on the ballot and be read by voting machines, and other states that have statewide direct record electronic (DRE) equipment and, therefore, have not felt the need for statewide paper ballot counting standards. Any statewide standard that is clear and ensures that all voters who mark their ballot in the same manner are counted (or not) to ensure equal protection is the focus of this resolution.

States such as Oregon, Washington and Colorado have virtually all voters in the state vote-by-mail, which usually means a paper ballot. Additionally, voters may vote by paper when being assisted at “curb-side” stations. Other voters may vote by mail under the Uniform Overseas Assistance Voting Act (UOCAVA) which means that all states will have at least some hand-count ballots.

Some states suggest that a voter’s intent should be readily ascertainable from ballots that are marked and cast in compliance with the applicable balloting instructions. A non-conforming ballot, (i.e., one that is marked in a manner that disregards the balloting instructions and prevents the ballot from being tabulated by mechanical means) may not be counted. If the ballot is non-conforming due to a voter’s choice in how it is marked, this is clear policy. Even in such states, however, some consideration needs be given to ballots that cannot be machine-read due to situations not caused by the voter, such as ballots damaged in transit through the US mail, or ballots that are damaged once in custody of local election officials. Additionally, is the marking through a name by “X” or a line indicative of an intent to support, or an intent not to support the candidate whose name has been so marked under statewide standards? Or, are comments, whether positive or negative, that are written on a ballot on or near a slate of candidates, a

² HAVA, HR 3295, Section 301(a)(6).
specific candidate or text of a referendum to be regarded in determining the intent of the voter if such comments appear to clearly indicate intent? In such situations, guidance on how to handle ballots when they cannot be counted by voting equipment must be clear if the right to equal protection is to be given meaning. The confusion is evident by recalling the media events following the November 2000 Florida presidential vote.

There are states that have state law indicating that ballots are to be counted if the voter’s intent is clear and that have gone on to further set out statewide guidance as to what that policy means. Virginia, for example, developed such a document in 2001, and has subsequently amended it several times, to incorporate new examples. It is now entitled, “Ballot Examples - Hand Counting Printed Ballots for Virginia Elections or Recounts,” available at http://elections.virginia.gov/Files/ElectionAdministration/ElectionLaw/ExamplesforHandcounting.pdf. This guidance document uses pictorial examples of marked ballots based on actual examples election officials have seen, and indicates which kinds of markings should be counted, and which cannot be counted, in conformity with state law. Oklahoma’s current procedure for hand-counting ballots is located in Section 230:45-5-12 in the Oklahoma Administrative Code, online at www.sos.ok.gov/oar. The rules for counting, which contain descriptions of valid and invalid markings, are located in 230:45-5-19. Colorado addresses the issues through the Colorado Secretary of State Election Rules [8 CCR 1505-1], http://www.sos.state.co.us/pubs/rule_making/CurrentRules/8CCR1505-1Elections.html in Rule 18. Uniform Ballot Counting Standards. These examples demonstrate appropriate ways in which several states have addressed the issue. As stated above, however, the majority of states do not have clear pre-determined standards. Illustrating the importance and ease of understanding rules that are in place, the following select examples from Virginia and Colorado are provided below:
Virginia:

4) If a write-in candidate is a party to the recount, a vote shall be counted for the write-in candidate if its name is written on the ballot under that office, even if the write-in square, oval or arrow is not marked, and provided that no other candidate is marked for that office.

Votes to be counted:

(4 continued) A write-in vote for a candidate whose name appears on the ballot for the same office may not be counted.

Votes may not be counted:
A write-in vote in addition to a vote for a candidate for the office is an overvote and no vote shall be counted.

Voters may not be counted:

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**Colorado:**

Colorado Election Rules 18.6.4 Write-in votes
(a) If a voter designates a vote for a named candidate on the ballot and writes in the name of the same candidate in the write-in area, the vote must be counted.
(b) If a voter designates a named candidate on the ballot and writes in the name of a different candidate in the write-in area, it must be considered an overvote for that office if the number of chosen candidates exceeds the number permitted to be voted for in that office and no vote may be counted.
(c) During any recount of votes, if the number of undervotes in that race could change the outcome if attributed to a legally qualified write-in candidate, votes for that candidate must be counted whether or not the target area designating the selection of a write-in candidate has been marked, provided that the number of candidates chosen does not exceed the number permitted in that office.

**III. NUMEROUS AMERICAN BAR ASSOCIATION RESOLUTIONS AND POLICIES SUPPORT ELECTION ADMINISTRATION ISSUES**

The ABA has a long history in providing insight and advice on matters pertaining to the administration of elections. The promotion of statewide ballot counting standards is an extension of these efforts by the ABA.

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, ballot integrity, and guidelines for poll watchers. 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 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.

In August 2005, the American Bar 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.

In addition to the ABA’s support for election administration in general, the ABA has adopted a number of resolutions that pertain to voting rights for several specific groups of people, such as in 1992 for people living in U.S. territories to be able to vote in national elections, in 1993 to ensure the participation of homeless persons in elections, and in 2007 to improve the administration of elections to facilitate voting for people with disabilities.

Further, the ABA has addressed ballot integrity not just in both the Standards and the Current Guidelines, but also in resolutions regarding use of provisional ballots. Beginning in 1974, and subsequently, the ABA adopted resolutions regarding voter registration, improved opportunities to vote, and to support voter education.

IV. CONCLUSION

The statewide ballot counting laws or regulations urged by this Resolution for adoption by states and territories as soon as practicable will continue to advance the rule of law and ensure greater clarity in election results.

Respectfully Submitted,

John Hardin Young, Chair
Standing Committee on Election Law
August 2016
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Election Law

Submitted By: John Hardin Young, Chair, Standing Committee on Election Law

1. **Summary of Resolution(s).**

   The proposed resolution with report urges the American Bar Association to call on state and territorial election officials to ensure that state-wide and territorial-wide ballot counting guidance is in place as soon as practicable.

2. **Approval by Submitting Entity.**

   The Standing Committee on Election Law approved this recommendation and resolution at its Spring Business Meeting on April 22, 2016.

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 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. 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. In 2015, the ABA adopted a resolution which urged adoption and/or implementation of policies designed to achieve a thirty-minute maximum per voter wait time at the polls. Finally, in 2015, the ABA adopted a resolution which urged adoption of rules, regulations and policies that expressly permit the direct observation of the election process by OSCE observers; and encouraged election officials to welcome OSCE observation.

The proposed report and 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)

None applicable.

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

If the proposed report and resolution is approved by the House of Delegates, the Association will be able to: 1) in the immediate term encourage chief state election officials to adopt and implement policies, rules or regulations, as they have authority to do so, to clarify voter intent standards as soon as practicable, and 2) to encourage election administrators, officials, and legislators at the state and territorial levels to adopt and implement policies that work toward statutory recognition of voter intent standards. With the Association’s support, policy-makers can be reminded of the importance of uniform, statewide ballot counting law or other guidance to ensure equal protection for all voters.

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 following entities:

Section of Administrative Law and Regulatory Practice
Section of Civil Rights and Social Justice
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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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 proposed resolution would have the American Bar Association urge state and territorial election officials to ensure that uniform, state-wide or territorial-wide ballot counting guidance is in place as soon as practicable.

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

   The proposed resolution seeks to provide a remedy to the failure of many states to comply with U.S. Supreme Court directive and federal law regarding voter intent. Such non-compliance will mean that if election contests in the 2016 general election are close and fall within the margin of requiring a recount there will be a failure to comply with the Equal Protection provisions of the U.S. Constitution.

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

   The proposed policy position will encourage the adoption of uniform, statewide ballot counting standards as a measure of ensuring compliance with Equal Protection provisions in our nation’s electoral process.

4. **Summary of Minority Views**

   No minority views have been identified in opposition.
RESOLVED, That the American Bar Association urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty.

FURTHER RESOLVED, That before class action residual funds are awarded to charitable, non-profit or other organizations, all reasonable efforts should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible.
Introduction

The unmet need for civil legal services among those living in poverty is well documented: study after study has demonstrated that the majority of poor people who need civil legal services are turned away due to a severe shortage of legal aid resources. This not only has grave consequences for the people who are unable to get this critical legal help; everyone with matters before the courts and the justice system suffers as well as a result of the large increase in people left with no choice but to represent themselves in court on often complex legal matters.

Funding for legal aid services is woefully inadequate and the Association annually organizes bar leaders from around the country to lobby for more funding for the Legal Services Corporation to partially address this problem. The Association has adopted policy statements in support of adequate funding for LSC, as well as called upon bar associations and lawyers to “undertake vigorous leadership and aggressive advocacy to identify, pursue and implement creative initiatives that will result in new funding mechanisms for legal services providers.”

A creative initiative that has now been adopted in 19 U.S. jurisdictions helps provide critical funding for legal aid while at the same time providing a balanced resolution to what otherwise can often become a thorny issue in class action litigation. Specifically, these rules and statutes authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of awards of undistributed class action settlement residuals. This resolution seeks to have the Association go on record as supporting this approach for the reasons articulated below.

The Origins of the Cy Pres Doctrine

Cy pres awards are distributions of the residual funds from class action settlements or judgments (and occasionally from other proceedings, such as probate and bankruptcy matters) that, for various reasons, are unclaimed or cannot be distributed to the class members or other intended recipients. The term cy pres derives from the Norman-French phrase, cy pres comme possible, meaning “as near as possible.” Originating at least as early as sixth-century Rome, the cy pres doctrine has its roots in the laws of trusts and estates, operating to modify charitable trusts that specified a gift that had been granted to a charitable entity that no longer existed, had become infeasible, or was in contravention of public policy. In such instances, courts transferred the funds to the next best use that would satisfy “as nearly as possible” the trust settlor’s original intent.

When class actions are resolved through settlement or judgment, it is not uncommon for excess funds to remain after a distribution to class members. Residual funds are often a result of the inability to locate class members or class members failing or declining to file claims or cash

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1 House of Delegates policy resolution 95A124.
settlement checks. Such funds are also generated when it is “economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed.”

In these circumstances courts have used the cy pres doctrine to accomplish the distribution of residual funds to charities that benefit persons similarly-situated to the plaintiffs, or that advocate to improve access to justice more generally. This preserves the deterrent effect of the class action device, and allows courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions.

Cy Pres is a Well-Established Practice

The application of the cy pres doctrine in class actions, as with any other doctrine throughout legal history, has evolved as courts have been required to grapple with complex and unique facts and circumstances in each particular case. Because of such complexities, trial courts sometimes fashion unique cy pres distributions; some such awards have been reversed on appeal. The vast majority of such reversals are not for “abusing” the cy pres doctrine (i.e., using cy pres for personal gain for counsel or judges). Rather, most reversals are due to the misapplication of the doctrine within the particular circumstances of the case (e.g., failure to make every effort to fully compensate class members or misalignment between the interests of the class members and the interests of the cy pres recipients). While addressing these problems, federal courts have consistently found that the cy pres doctrine is valid in the class action context. The American Law Institute’s Principles of Law of Aggregate Litigation (“ALI Principles”) agrees and provides key guidance on the application of cy pres awards in class actions, which is respected and generally followed by the courts. The ALI Principles acknowledge that “many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members.”

With respect to funds left over after a first-round distribution to class members, the ALI Principles express a policy preference that residual funds should be redistributed to other class members until they recover their full losses, unless such further distributions are not practical:

If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

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2 In re Baby Prods. Antitrust Litig., 708 F.3d 163, 169 (3d Cir. 2013)
3 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 cmt. a (2010) [hereinafter ALI PRINCIPLES]
4 ALI PRINCIPLES, supra note 3, § 3.07(b)
As the ALI Principles recognize, when further distributions to class members are not feasible, the court has discretion to order a cy pres distribution, which puts the settlement funds to their next-best use by providing an indirect benefit to the class.

**Legal Aid and Access to Justice Organizations Are Appropriate Recipients of Cy Pres Distributions**

The fundamental purpose of every class action is to offer access to justice for a group of people who on their own would not realistically be able to obtain the protections of the justice system. This purpose is closely aligned with the mission of every civil legal aid and access to justice initiative across the nation.

In class action suits, when distributions to the class members are not feasible, it is necessary to determine other recipients who would be appropriate to receive the residual cy pres funds. The ALI Principles state that such recipients should be those “whose interests reasonably approximate those being pursued by the class,” and, if no such recipients exist, “a court may approve a recipient that does not reasonably approximate the interests” of the class.5

Courts evaluate whether distributions to proposed cy pres recipients “reasonably approximate” the interest of the class members by considering a number of factors, including: the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reason why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the cy pres recipient.

Organizations with objectives directly related to the underlying statutes or claims at issue in the relevant class action are clearly appropriate cy pres recipients. But narrowly limiting the scope of appropriate cy pres recipients to the precise claims in the class action may not always be possible or practical. Too narrow of a focus on the subject matter of the case can unnecessarily complicate the socially desirable settlement of large class action disputes. In a typical class action, counsel for plaintiffs and a defendant are resolving a complex dispute, and the disposal of residual funds is typically a detail in a larger resolution. While some court opinions speak of residual funds as “penalties” or “recoveries” for violations of the law, settling defendants usually see themselves as making a pragmatic business decision that specifically avoids any admission that they violated the law. Moreover, settling defendants have a practical interest in how residual funds are used, and may wish to avoid funding interest groups that campaign against the interests of the defendant.

There have been cases where parties improperly attempted to direct cy pres awards to causes that had no connection to the class or the case or to access to justice through the courts. Examples have included general awards to charities or educational institutions with no particular relationship to the class action. The concerns in the cy pres context are not about whether these

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5 ALI PRINCIPLES, supra note 3, § 3.07(c)
are good and effective charities and institutions; it is their relevance to the class action where there are residual funds to be awarded. In some instances, the reasons for including the organization have not been articulated, leaving the appeals court to guess about the connection of a particular organization to the issues of the case.

An appropriate recipient in most cases will be a legal services organization, so long as the underlying premise of expanding access to justice is properly articulated. Thus, federal and state courts throughout the country have long recognized organizations that provide access to justice for low-income, underserved, and disadvantaged people as appropriate beneficiaries of cy pres distributions from class action settlements or judgments. The access to justice nexus falls squarely within ALI Principles’ guidance that “there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests. 6"

An issue that sometimes arises in disposition of class action residuals is whether the scope of a suit (local or national) has been properly matched to the scope of a cy pres award. It is clearly disfavored under the case law for a cy pres award in a national class action case to be directed solely to a local charity. One advantage of an award to an organization with a broad access to justice mission is that such organizations exist throughout the country so any distribution can easily be structured to take into account the national nature of the case.

Because organizations with broad access to justice missions are widely recognized as appropriate recipients of cy pres awards, a growing number of states have adopted statutes or court rules codifying the principle that cy pres distributions to organizations promoting access to justice are an appropriate use of residual funds in class action cases. The state courts and legislatures in 19 states have adopted rules and statutes that specify, as appropriate cy pres recipients, charitable entities that promote access to legal services for low-income individuals. 7 Nine of these courts and legislatures have mandated a minimum baseline distribution (usually 25% to 50%) to the pre-approved category of recipients. 8 Because such statutes and court rules establish that it is permissible for any residual funds in class action settlements or judgments to be distributed to organizations that provide access to justice/civil legal aid, they make clear that such organizations are distinct from other charitable causes that have drawn legitimate concerns regarding a lack of nexus with the interests of the class members.

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6 ALI PRINCIPLES, supra note 3, § 3.07 cmt. b.
7 The states are: California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Washington. As of this writing, it has been reported that the Wisconsin Supreme Court adopted a petition for a cy pres rule, which is expected to become effective January 1, 2017 after final orders are drafted.
8 The states with rules requiring a percentage of cy pres awards to be devoted to access to justice organizations are: Colorado (50%), Illinois (50%), Indiana (25%), Kentucky (25%), Montana (50%), Oregon (50%), Pennsylvania (50%), South Dakota (50%) and Washington (50%). When effective, Wisconsin (50%) will become the 10th state.
Conclusion

Class action litigation has become an important device for resolving a wide range of disputes between individual plaintiffs and corporate defendants. Cy pres awards of undistributed class action settlement residue are an important part of the settlement process. Distributing funds to appropriate recipients is a practical variant of the cy pres device long recognized in trust law and is generally accepted as preferable to returning undistributed funds to the settling defendants or escheat of those funds to the state.

Awards of class action settlement funds should follow these principles: (1) compensation of class members should come first; (2) cy pres awards are appropriate where cash distributions to class members are not feasible; (3) cy pres recipients should reasonably approximate the interests of the class; (4) cy pres distributions should recognize the geographic make-up of the class, and where circumstances dictate should be made on the basis of such factors; (5) legal aid and access to justice organizations should be considered as appropriate cy pres recipients.

The American Bar Association therefore urges that state, local, territorial, and tribal jurisdictions adopt court rules or legislation that authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of class action residual funds.

Respectfully submitted,

Jacquelynne J. Bowman, Member
Standing Committee on Legal Aid & Indigent Defendants

August 2016
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants

Submitted By: Jacquelynne J. Bowman, Committee Member

1. **Summary of Resolution(s).**

   This resolution urges jurisdictions to adopt court rules or legislation that authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of class action residual funds. It states that before residual funds are awarded to such organizations, all reasonable efforts should be made to fully compensate members of the class, or it should be determined that such payments are not feasible.

2. **Approval by Submitting Entity.**

   April 2016

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 is consistent with prior policy that urges adequate funding for civil legal aid organizations.

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.)**

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

The resolution will be circulated to advocates for civil legal aid funding in the states.

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

None

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

N/A

10. **Referrals.**

    Section of Litigation  
    Section of Business Law  
    Section of Tort Trial and Insurance Practice  
    Section of Civil Rights and Social Justice  
    Section of Taxation  
    Judicial Division  
    Young Lawyers Division  
    Standing Committee on the Delivery of Legal Services  
    Standing Committee on Pro Bono and Public Service  
    Commission on Domestic and Sexual Violence  
    Commission on Homelessness and Poverty  
    Commission on Immigration  
    Commission on Disability Rights  
    Commission on Interest on Lawyers’ Trust Accounts  
    Commission on Law and Aging  
    Commission on Youth at Risk  
    Commission on Women in the Profession  
    Commission on Hispanic Legal Rights and Responsibilities  
    Center for Racial and Ethnic Diversity  
    Commission on Racial and Ethnic Diversity in the Profession  
    Coalition on Racial and Ethnic Justice  
    Commission on Sexual Orientation and Gender Identity  
    National Legal Aid and Defender Association  
    National Association of Women Judges
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Hon. Lora Livingston, Chair  
Standing Committee on Legal Aid and Indigent Defendants  
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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.)

Hon. Lora Livingston, Chair  
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261st Judicial District Court  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges jurisdictions to adopt court rules or legislation that authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of class action residual funds. It states that before residual funds are awarded to such organizations, all reasonable efforts should be made to fully compensate members of the class, or it should be determined that such payments are not feasible.

2. Summary of the issue which the Resolution Addresses

Access to justice organizations should always be considered to be appropriate recipients of class action residual awards. It is not always clear, absent specific authorizing rules or statutes, that such awards are permissible.

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

The resolution clarifies that access to justice organizations are appropriate recipients of class action residual awards.

4. Summary of Minority Views

No opposing views have been expressed by other ABA entities or organizations as of the preparation of this summary.
RESOLVED, That the American Bar Association supports the following principles that relate to electronic voting in elections to federal office:

National standards applied to all election software and firmware including open source code;

National standards applied to all election hardware, including open design, and including the capability to audit all events (votes, maintenance, etc.);

Creation of a secured voter-verified paper ballot at the time of voting, directly from the computer input device, i.e., DRE machine or optical scanner, with a copy provided to the voter before leaving the polling place. The paper ballot thus created is to be the official record of the vote cast;

Unimpeded access to polling places, voting machine hardware, firmware, and software by approved and certified observers;

Federal control and oversight of elections in the United States and its Territories;

Federal penalties for tampering with registration and voting systems; and

The capability of voting systems to undergo random audits, without having to meet criteria required to trigger a recount;

FURTHER RESOLVED, That the American Bar Association urges Congress and federal agencies to enact laws and adopt rules, regulations and policies that embody the aforementioned principles that relate to elections to federal office.
FURTHER RESOLVED, That the American Bar Association amend its ELECTION ADMINISTRATION GUIDELINES AND COMMENTARY (2009) as follows (insertions underlined, deletions struck-through):

7.2.b. Electronic voting machines should be required to have an immediately secured voter-verifiable paper record generated directly from the computer input device, i.e., DRE machine or optical scanner, of each vote or non-vote cast by the voter, with a copy provided to the voter before leaving the polling place, that will be used for audit purposes. The voter verified paper record should not contain any personally identifiable information, and is the official record of the vote cast.

7.6.d. A Periodic random sample manual recount audits of the computer count should be a part of the canvass of votes cast, not restricted by recount criteria as enunciated in 8.0.
REPORT

Introduction

The heart of democracy is a system of free, fair, and open elections, along with the public’s trust in the integrity of those elections. Voting is internationally recognized as a human right, and a most basic right in our democracy. Following the flawed 2000 presidential election in Florida, Congress enacted the Help America Vote Act (HAVA) in 2002, which was supposed to rectify or prevent the problems encountered in that state. While the title of the Act suggests that the goal would be achieved, the result has been quite different, and possibly made a bad situation worse. For whatever reasons, the reality is that the widespread use of electronic or computerized election processes in the United States has become more unreliable and insecure than ever.

Many of us are accustomed to the computerization of many aspects of our lives, such as automated teller machines and credit card accounts, which we have come to find convenient and highly reliable. While many Americans may assume similar reliability in electronic voting systems, others, and virtually all experts in the field, are less willing to take the integrity and reliability of those systems for granted – indeed there is growing skepticism and concern to the contrary.

This Report describes in detail the current state of affairs with regard to the electronic election process in the United States, explains the missteps that led to it, and offers solutions to the problems that exist.

While the Resolution deals only with elections to federal office, it is anticipated that state and local voting would, though not required to do so, adapt their own elections to the improved systems for the obvious reasons of economy and efficiency.

Background

Consider what is different about electronic election systems, or electronic voting technology (EVT), as opposed to information technology in other industries, such as banking, and various business entities. First, electronic voting systems are different from most computerized systems in that they are used at most twice a year, so that the individuals administering voting technology

1 For instance, see Article 21, Sec 3 of The Universal Declaration of Human Rights (1948), “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” Chief Justice Roberts wrote in McCutcheon v. FEC (572 U.S. ___, 134 S. Ct. 1434 at 1441 (2014)), “There is no right more basic in our democracy than the right to participate in electing our political leaders [including the right to vote].”.
2 In addition to the confusion surrounding the infamous “hanging chads” or “pregnant chads,” other irregularities were recorded, for instance, the discovery that voting machines in Volusia County recorded minus 16,022 votes for Al Gore (see Hacking Democracy, http://www.snagfilms.com/films/title/hacking_democracy, at 00:02:20 (access 6/2/16)).
4 The term electronic voting technology (hereafter EVT) has been selected for this Report, and is meant to include the registration process, as well as the voting process.
cannot easily maintain the needed skills in its use, whereas in most other areas, electronic systems are used on a daily basis — so that the individuals using them and those administering them are well-practiced. In the latter setting, security flaws are updated, and programming errors are fixed on a regular basis. Second, since the beginning of widespread use of electronic voting (see HAVA), digital technology has advanced geometrically, yet voting systems have not kept pace. Thirdly, the array of different proprietary systems has given us a patchwork that is difficult and expensive to inspect and certify, not the least because the source code is generally off-limits due to vendor claims of trade-secret protection.  

The electronic election process in the United States is vulnerable to malfunction, either intended (hacking), or unintended and due to either faulty equipment or operator misuse. Of particular concern is the possibility of election results being manipulated by partisan entities, including candidates, or third parties, including foreign governments.  

In their book, What Happened in Ohio, Robert Fitrakis, Steven Rosenfeld, and Harvey Wasserman describe events surrounding the Presidential election in Ohio in 2004. Much of these events is documented in a federal civil rights action filed on 8/31/06. The case was ultimately dismissed without prejudice on 2/7/2012 on procedural grounds, i.e., no subject matter jurisdiction under the Eleventh Amendment. There were a number of irregularities — long lines, misinformation given to voters, etc., that resulted in near chaos.

Notably, midway through the reporting of election results on election night, tabulation of the election results was transferred to a private server in Tennessee, run by a private company. This transfer coincided with a dramatic shift in the election results. Many of the details surrounding the operation of this private server became unknowable following the death of Michael Connell in a private plane crash shortly before he was to testify under subpoena in the Bronzville case. Connell was reported to have once said “There are things we will be doing on Election Day that haven't even been dreamt of yet.”

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5 See Hacking Democracy, http://www.snagfilms.com/films/title/hacking_democracy, at 00:03:50, where David Jefferson, Technical Adviser to California's Secretary of State could not obtain access to an electronic voting system he was charged with overseeing.
13 Ibid.
Andres Sepulvida is a hacker who claims to have rigged elections in Latin America for almost a decade. "On the issue of whether the [2016] U.S. Presidential election campaign is being tampered with, [Sepulvida] is unequivocal, 'I'm 100% sure it is.'"14

National standards should be applied to all election software and firmware, including open source code, and national standards should be applied to all election hardware, including open design, and including the capacity to audit all events (votes, maintenance, etc.).

What we have today is a late twentieth century technology grafted onto an eighteenth century tradition of voting methodology. We have partisan officials in control of the voting process, and a hodge-podge of election systems controlled by proprietary (virtually all secret) software. Whether corruption of electronic voting technology has affected previous or current elections may be unclear. What is clear is that the potential exists. The solution requires, among other things, standardized, open source voting software open to inspection at any time.

As has been well-publicized in the media, it was recently discovered that Volkswagen deliberately modified its computer software to deceive emissions inspection protocols. Volkswagen's software engineers developed a program that would control emissions so as to conform to emissions standards in the testing environment, but permit much more harmful emissions while the car was being driven on the highway. The car had more power and relatively less fuel consumption as a trade-off for unlawfully excessive emissions (up to 40 times more than when in "test" mode).15 The software was proprietary, so that inspection of the software was not possible by outsiders. The only reason the misconduct was detected was because some researchers16 happened to test emissions while the car was being driven on the highway, apparently doing the research for unrelated reasons – not because they were suspicious. When a manufacturer or vendor has this kind of restricted access to software code, the ability of others to detect malicious code is severely limited, and the potential for election-rigging without detection is enormous.

It was reported in 2004 that two brothers controlled 80% of the voting machines in the United States.17 In the words of Ion Sancho, Supervisor of Elections in Leon County, FL, "The vendors have entirely too much power in the elections arena today. Officials are really overly dependent upon the vendors. Vendors control what kind of technology may be offered in a state. We're essentially hostage to the financial desires of private interests to conduct the most public of our procedures – public elections."18 Also, "The vendors are driving the process of voting technology

17 Landes L, Two Voting [Machine] Companies and Two Brothers Will Count 80% of the U.S. Election – Using BOTH Scanners and Touchscreens, 4/27/04, http://www.rense.com/general52/bros.htm (access 6/2/16). This article points out that there is no federal agency that has regulatory authority or oversight of the voting machine industry.
in the United States. I would much rather we ... focus on allowing citizens to select technology.’’

In a July of 2001 report, the Caltech-MIT Voting Technology Project made a number of recommendations: (1) Move away from complex, monolithic machines; (2) Make source code for all vote recording and vote counting processes open source and source code for the user interface proprietary [Author’s Note: It is unclear why the term “proprietary” is included here, but it is important to point out that proprietary code need not be secret and known only to the maker]; (3) Adapt equipment so that voters can create a record of the vote that they can examine directly, and that can be used to audit equipment and elections; (4) Conduct audits of votes and equipment, even without a recount; and (5) Design equipment that logs all events (votes, maintenance, etc.) that occur on the machine.

In 2009, the German Constitutional Court ruled that “... the public nature of elections ... prescribes that all essential steps of an election are subject to the possibility of public scrutiny unless other constitutional interests justify an exception.” The ruling did not invalidate computerized voting systems in general, but did apply to the systems used in the 2005 election to the 16th Bundestag. The opinion contains numerous references to the need for open source code as a sine qua non for compliance with the requirement of constitutionality.

“A common refrain is the call for a single, nationwide voting machine to be used in all fifty states in every election. Uniformity might prevent voter and poll worker confusion and delay on Election Day. The idea is not outlandish; many if not most other countries have unified voting technology. However, those arguing against voting machine standardization note that uniformity would severely limit innovation and competition. Picking one company to administer the technology nationwide would stifle innovation and competition that could lead to improved voting technologies, potentially sticking administrators, poll workers, and voters with a suboptimal product.”

Nothing in this Report or Resolution would require “picking one company” to supply voting machines. What is important that strict standards should be required. Voting machines need not be uniform: but should be required to be able to run the standardized software, and to meet standards of usability. That report does not discuss software requirements and does not mention open source software.

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19 Ibid., at 01:17:49.
22 American Bar Association Committee on Election Law, Dialogues on Election Reform: A Continuing Conversation with the States (May 1, 2014), Section V. Voting Technology and Innovation (p. 48ff), http://www.americanbar.org/content/dam/aba/administrative/election_law/dialogues_on_election_reform.authcheckdam.pdf (access 6/2/16).
Opposition to open source voting software and firmware is to be expected, primarily for the reason that it supposedly harms the industry.\(^{23}\) "There are plenty of open-source projects that are centrally maintained by commercial companies with standard, commercial development processes."\(^{24}\) The issue does not seem to be so much about the economic interest of vendors vs. the public's interest in secure and reliable voting systems, but one of control of the technology by private interests — a position that is untenable in view of our experience since the enactment of HAVA.

*The paper ballot should be the official, but not the exclusive, record of the vote.*

Many have called for a return to the paper ballot, and abandoning electronic voting. Abandoning EVT is not necessary, and indeed may be unwise. The Open Source Election Technology Foundation notes, "We exist to reinvent how America votes where the sheer volume of ballots requires computers to complete the count in a verifiable, accurate, secure and transparent manner."\(^{25}\) Ballot-box stuffing and mysterious disappearances of boxes of ballots have long been well-known abuses of the voting process. On the other hand, electronic voting without a paper record is vulnerable to manipulation at the voting-booth level and at the tabulation level.

Making the paper ballot the official record along with a parallel electronic process of counting and tabulating votes, subject to random audits that do not need to be triggered by recount criteria, in conjunction with open source voting machines (including software) subject to unimpeded inspection by qualified personnel is perhaps the most reliable and secure system we can attain.

A system introduced at least six months prior to the 2004 Ohio election, designed to accomplish this goal, called TruVote, would provide two separate voting receipts. The first is shown under plexiglass, and displays the choices made by a vote on the touch screen. This copy falls into a lockbox after the voter approves it. The voter is provided with a copy of the ballot before leaving the polling place.\(^{26}\) Whether votes are recorded by DRE (direct-recording electronic [voting machine]) or filling in paper ballots to be optically scanned can be decided by Congress, but ultimately the official record should be the voter-verified paper ballot, with voter receipt, before the voter leaves the polling place. The Verified Voter Foundation adopted the following resolution:

Computerized voting equipment is inherently subject to programming error, equipment malfunction, and malicious tampering. It is therefore crucial that voting equipment provide a voter-verifiable audit trail, by which we mean a permanent record of each vote that can be checked for accuracy by the voter before the vote is submitted, and is difficult or impossible to alter after it has been checked. Many of the electronic voting machines being purchased do not satisfy


this requirement. Voting machines should not be purchased or used unless they provide a voter-verifiable audit trail; when such machines are already in use, they should be replaced or modified to provide a voter-verifiable audit trail. Providing a voter-verifiable audit trail should be one of the essential requirements for certification of new voting systems.\textsuperscript{27}

\textit{There should be unimpeded access to polling places, voting machine hardware, firmware, and software by approved and certified observers.}

Current ABA policy “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, and urges 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.” There may be other organizations that legislation could empower to be involved in the election process, including administration of voter registration.

\textit{There should be federal control and oversight of elections in the United States and its Territories, as well as federal penalties for tampering with registration and voting systems.}

Decentralization and reliance on volunteers ensure that the quality of administration varies by jurisdiction and even by polling place. The involvement of officials with partisan affiliations means that the rules or their interpretations will be subject to charges of partisanship depending on who stands to win from the officials’ decisions.\textsuperscript{28} Such an environment only weakens further a system already inherently insecure and questionably reliable.

OSCE Interim Report No. 1, 10/19/12, includes the observations (1) “Elections in the United States (US) are highly decentralized and federal legislation sets only minimum standards. The implementation and details of the electoral process are regulated by state laws, with some decisions taken at county level. Late changes to the electoral legal framework in some states have raised concerns among some OSCE/ODIHR LEOM interlocutors about voter information and the training of poll workers,” and (2) “There is no federal-level election management body in charge of administering and organizing election procedures. Administrative authority is generally vested in the state secretary or a state-level election commission or board. The Election Assistance Commission (EAC), which provides guidance on the implementation of the 2002 Help America Vote Act (HAVA), is without any commissioners and functions at an administrative level only.”\textsuperscript{29}

\begin{footnotesize}
\begin{enumerate}
\item Interim Report No. 1, OSCE Office for Democratic Institutions and Human Rights, 10/19/12, http://www.osce.org/odihr/96574?download=true (access 6/2/16). The Organization for Security and Cooperation in Europe (OSCE) was founded in 1973, and consists of 57 countries, of which the U.S. is a founding member. Its Office for Democratic Institutions and Human Rights (ODIHR) focuses on assuring the fairness of elections, http://www.osce.org/odihr/elections (access 6/2/16).
\end{enumerate}
\end{footnotesize}
In a report published in 2014, the Presidential Commission on Election Administration,\(^\text{30}\) made a number of recommendations to improve elections in the United States, including “Reforms of the standard-setting and certification process for new voting technology to address soon-to-be antiquated voting machines and to encourage innovation and the adoption widely available off-the-shelf technologies.”\(^\text{31}\) The report also notes “Well-known to election administrators, if not the public at large, this impending crisis arises from the widespread wearing out of voting machines purchased a decade ago, the lack of any voting machines on the market that meet the current needs of election administrators, a standard-setting process that has broken down, and a certification process for new machines that is costly and time-consuming. In short, jurisdictions do not have the money to purchase new machines, and legal and market constraints prevent the development of machines they would want even if they had the funds.”\(^\text{32}\)

More recently, the Brennan Center for Justice issued a report\(^\text{33}\) that focused on an “impending crisis” due to outdated voting machines, as well as the vulnerability of voting systems to malfunction and hacking. Limited resources available to procure and update voting systems (including disparities related to the economic well-being of different areas) were identified as a key area of concern.

In order to accomplish de-centralization and federal and non-partisan oversight and enforcement, we would need federal legislation that enables federal oversight of the administration of federal elections, i.e., for Congress and the President and Vice-President. Such legislation appears to be explicitly permitted under Article I, Sec. 4 of the Constitution for members of Congress, and the Constitution contains no prohibition of federal oversight of elections for President and Vice-President.\(^\text{34}\) The case for federal legislation is further advanced by a ruling that required alleged disenfranchised voters to bring an action in each county in New York state where the alleged misconduct occurred, creating an extremely burdensome barrier to justice.\(^\text{35}\)

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\(^\text{31}\) See https://www.supportthevoter.gov (access 6/2/16).


\(^\text{34}\) Article I, Section 4. “The Times, Places, and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations [italics added], except as to the Places of chusing Senators [this latter provision is probably rendered invalid, based upon a reading of the XVII Amendment].” Although the Constitution appears to be silent as to primary and general presidential elections, this Section is certainly consistent with such power of the Congress being implicit.

There should be capability of voting systems to undergo random audits, without having to meet criteria required to trigger a recount

In order to ensure maximal protections against vote tampering, in addition to making the voter verified paper ballot the official as described above, random sample comparisons of paper ballot count with computer-tabulated vote counts are necessary. Recount criteria should not be a part of this methodology, which is designed as a check, both on the accuracy of computer-tabulated results, as well as on integrity of paper ballot counts (i.e., a check against accidental or intentional destruction or counterfeiting of paper ballots.

The ABA ELECTION ADMINISTRATION GUIDELINES AND COMMENTARY (2009) should be amended as follows:

While the existence of a voter-verified paper record (7.2.b.) is important, it is also important that it be secured, and that the voter receives a receipt before leaving the polling place. It is also important that there is a clear statement that the voter-verified paper ballot is the official record of the vote cast.

A random sample manual recount of the computer count should be a part of the canvass of votes cast (7.6.d.). It is important to make clear that such a “recount” is not one that must be triggered by recount criteria, but is in fact a periodic random sample for reconciliation between the paper ballots cast and secured and the computer-tabulated vote totals.

Conclusion

Electronic voting in the United States today consists of a late twentieth century technology grafted onto an eighteenth century tradition of voting methodology. We have partisan officials in control of the voting process, and a decentralized hodge-podge of election systems controlled by proprietary (virtually all secret) software. In sum, in the present environment no amount of inspection and certification of existing systems can assure that the results of voting are reliable and secure.

Whether corruption of electronic voting technology has affected previous or current elections may be unclear, but what is clear is that the potential exists. The solution requires national standards (including federal oversight and enforcement power) for voting and registration technology, including open source voting machines and software open to inspection at any time; voter verified paper ballots as the official record of the vote, with periodic random audits; and the capability of auditing all events on each voting machine.

Respectfully submitted,
Bruce Wilder
August 2016

36 See Note 26.
37 See Note 20.
1. **Summary of Resolution(s).** The Resolution provides for modifying the present federal elections systems in the United States and its Territories, with regard to electronic or computerized election systems, including the voter registration process. It addresses multiple concerns that have been raised since the widespread use of electronic voting in the United States and its Territories.

2. **Approval by Submitting Entity.** N/A

3. **Has this or a similar resolution been submitted to the House or Board previously?** No. The ABA has previously adopted policy positions that are consistent with this proposal, but which do not fully encompass the proposal made here.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** *The ABA Election Guidelines and Commentary,* as amended August 2009; 10A114, Supports state and federal initiatives to modernize and improve voter registration practices, databases and networks and urges an independent technical and security assessment of statewide voter registration databases as well as supporting efforts to achieve ongoing improvements to such databases; *Dialogues on Election Reform: A Continuing Conversation with the States* (May 1, 2014); and 15A114, 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, and urges 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.

The Resolution does not appear to be in conflict with any of those policies, and the minor amendments proposed to *The ABA Election Guidelines and Commentary* are not expected to have any adverse impact.

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 known.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Adoption by the ABA would enable and validate proposals for reform and improvement of elections processes by interested organizations, as well as interested federal, state, and local entities.
8. **Cost to the Association.** (Both direct and indirect costs) None anticipated.

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

10. **Referrals.** This Resolution will be referred for support to the Standing Committee on Election Law, The Section of State and Local Government, the Section on Science and Technology, the Section on Civil Rights and Social Justice, and the Section on Intellectual Property.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address) Bruce L. Wilder, Wilder Mahood McKinley & Oglesby, 436 Seventh Avenue, Suite 1050, Pittsburgh, PA 15219, cell phone 412-636-3541, bwild@wildlaw.com and wilder.bruce@gmail.com.

12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.) Same as #11 above.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution is intended to achieve needed reform in elections to federal office in the United States and its Territories. Voting is a public function and a *sine qua non* of our democracy. Voting is internationally recognized as a human right, and a most basic right in our democracy. One purpose of the Resolution is to develop and standardize affordable open and scalable* computerized election systems, including the registration process and the voting process, so as to maximize the security and reliability of election systems, and thereby establish public trust in those systems. All electronic equipment, including software, used in the elections process must be open and available to the public for inspection and monitoring.

The official record of the vote must be a paper ballot, verified by the voter and secured at the time the vote is cast.

The resolution establishes ABA policy, and urges legislation, that federal elections are a public function of the federal government, with non-partisan federal oversight and federal penalties for tampering, as opposed to individualized, and very often partisan, state and local control. Federal control of the election process for federal elective office appears to be permissible under Article I, Section 4 of the Constitution (along with Amendment XVII) for Representatives and Senators. There does not appear to be any prohibition on federal determination of the time, place, and manner of popular elections for the presidency and vice-presidency.

2. Summary of the Issue that the Resolution Addresses

There is near-universal agreement among experts that our present system of electing individuals to federal public office is seriously flawed by outdated and often unreliable equipment, including software, that is difficult to monitor and evaluate, even by experts; subject to manipulation through hacking by candidates or domestic or foreign third parties; the absence of non-partisan federal oversight; and cost pressures on local authorities in charge of elections.

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

The proposed policy, if incorporated into legislation, will maximize the degree to which surveillance of elections and monitoring for intrusions, including the voter registration process, is effective. It will lower the overall costs of elections and minimize the possibility of tampering, through the employment of standardized open source equipment to enable effective oversight by the public. It will establish federal control and oversight of elections to federal office and provide for the capability of federal penalties for infractions.
4. Summary of Minority Views

None known.

* Here, the term scalable refers to the ability to upgrade systems to keep pace with advances in computer and information technology and security.
RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for lawyer referral services and their clients ("LRS clients") for confidential communications between an LRS client and a lawyer referral service, when an LRS client consults a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.
I. Introduction

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for lawyer referral services and their clients ("LRS clients") for confidential communications between an LRS client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It generally facilitates and implements the goal of existing ABA policy (93A 10D), when the ABA adopted the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Both Rule XIV of the Model Supreme Court Rules and Section 6 of the Model Act 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.”

Shielding communications between legal referral services and those seeking legal assistance from discovery remains important, but, despite the existing ABA policy, the protection of those communications remains uncertain, in part because the communications often do not involve a lawyer. This Resolution therefore urges a complementary approach: establishing a new lawyer referral service-LRS client privilege similar to the privilege that currently exists for confidential communications between attorneys and their clients. Such new privilege should provide that a person or entity who consults a lawyer referral service 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. The lawyer referral service-LRS client privilege would belong to the LRS client, and the LRS client would have the authority to waive the lawyer referral service-LRS client privilege. In addition, each jurisdiction may wish to apply to this new privilege certain of the recognized exceptions to the attorney-client privilege, including, for example: a) the crime/fraud exception (see, e.g., Cal. Evid. Code § 956 (crime/fraud exception to the attorney-client privilege; Cal. Evid. Code § 968(a) (crime/fraud exception to the lawyer referral service-client privilege)); b) the fiduciary exception (see, e.g., Restatement (Second) of Trusts § 173, cmt. b; Garner v. Wolfinbarger, 430, F.2d 1093 (5th Cir. 1970), but note that a number of states do not recognize this exception); and/or c) any overriding public policy exceptions.

II. Background on Lawyer Referral Services

Lawyer referral services help connect LRS clients (people, businesses, and other entities) seeking legal advice or representation with attorneys or organizations who are qualified to assist the LRS clients with their specific legal needs. In addition to providing an important service to the public, lawyer referral services provide an important service for attorneys by helping them to get new clients and grow their practices.
Lawyer referral services are usually non-profit organizations affiliated with a local, state or territorial bar association. There are hundreds of these organizations, and they assist hundreds of thousands of LRS clients every year connect with a lawyer. Some state governments and/or bar associations regulate and certify local lawyer referral services, such as in California. In addition, the ABA offers its own accreditation to lawyer referral services. While some lawyer referral services are directed by attorneys, most of the staff who do “intake” (answering phone calls from LRS clients, speaking with people who walk-in, or responding to electronically transmitted requests) are not attorneys and do not typically act under the direct supervision of attorneys. Lawyer referral services all invariably have adopted confidentiality rules requiring the intake staff to keep confidential the information provided consumers.

The lawyer referral process begins when the LRS client contacts the lawyer referral service; usually by phone or increasingly by email or over the Internet, to explain a problem, and ends when the lawyer referral service either provides the LRS client with contact information for one or more attorneys whose expertise is appropriate to the problem or directs the LRS client to a legal services program, government agency, or other potential solution. In the course of this interaction, confidential information regularly is provided by the LRS client to the lawyer referral service. Indeed, to be directed to the appropriate lawyer or government or non-profit office, LRS clients need to disclose the same or similar information to the lawyer referral service that they would typically provide in an initial meeting with a law firm or legal aid organization’s office personnel or a lawyer – the who, what, where, when, why and how of their legal situations.

Lawyer referral services are able to make appropriate referrals because they obtain detailed information needed to evaluate which is the appropriate resource for a given LRS client. Without detailed LRS client information, lawyer referral services cannot function properly. Inaccurate referrals are frustrating to LRS clients as they delay their ability to connect with a lawyer who is qualified to handle their matter if the LRS client so desired. What makes lawyer referral services valuable is their ability to triage LRS clients’ issues against the backdrop of knowledge of the government and nonprofit resources available, in addition to private lawyers in every area of law. Lawyer referral services are regularly questioned by LRS clients about the issue of confidentiality of the information being provided, and most, while they can assure the consumer that it is the lawyer referral service’s policy to keep the information provided confidential, are unable to reassure LRS clients that their communications are clearly privileged. This can hamper the kind of open communication required to make the right referral. More importantly, however, the lack of privilege may chill prospective LRS clients from seeking the assistance of a lawyer referral service and consequently deprive them of the ability to obtain competent and affordable counsel to assist with their legal problem. Moreover, in recent years in a number of instances, litigants have sought discovery of such communications. In particular, the Bar Association of San Francisco was subpoenaed by a District Attorney concerning LRS client communications. The issue was resolved without having to turn over any LRS client communications. In 2015, the Akron Bar Association Lawyer Referral Service was forced to comply with a subpoena of its lawyer referral records concerning a referral to a panel attorney. This resolution seeks to protect lawyer referral services and LRS clients from these types of subpoenas.
Until it is made clear that the communications are protected, LRS clients may be forced to endure the frustrating experience of making multiple cold calls to different legal aid organizations or private lawyers, asking each time if his/her issue matches the organization’s limited mission or the lawyer’s particular area of practice, and repeatedly being told no. Indeed, even uncertainty as to whether the communications are protected can and does have this affect. Ineffective referrals do and will result in LRS clients not connecting with the appropriate agency, legal aid society, or lawyer and decrease the use and utility of lawyer referral services. This is particularly unfortunate because two-thirds to three-quarters of referrals are not to private lawyers. Lawyer referral services provide a significant public service – not only to the LRS clients they serve, but to the multitude of government agencies and nonprofits that benefit from accurate referrals to them.

When speaking on the phone to lawyer referral service personnel, LRS clients are often anxious, angry, and upset about their legal issues; wish to explain their situation in great detail without being prompted to do so; and express concerns about deadlines and [a] desire for immediate legal assistance. In fact, referral counselors have no control over LRS clients’ outbursts and as a result, LRS clients often will provide potentially damaging or sensitive information immediately or soon after the referral counselor’s greeting. Similarly, LRS clients seeking legal assistance on lawyer referral services’ websites often ignore or resist the lawyer referral services’ attempts to restrict the information LRS clients provide. For example, while lawyer referral services’ websites typically ask specific questions and then limit the number of characters an LRS client can type in response, LRS clients often express a clear preference for providing a detailed, open narrative in a text box in response to a general instruction, such as: “Briefly explain your legal issue and what result you would like to see.”

Although LRS clients’ open narratives frequently include information that could harm the LRS client’s criminal or civil case if revealed to adverse parties, lawyer referral services’ cautions about not providing too much information are unlikely to be effective. LRS clients either ignore the caution altogether, and provide potentially damaging information without prompting, or they take the caution very seriously and provide little to no information, thereby frustrating any ability to make an accurate referral to a lawyer, government agency, or nonprofit organization. On the other hand, based on an informal survey of LRIS administrators throughout the country, the most common alternative utilized by many other lawyer referral services—forms with a series of specific questions—have a high abandonment rate with fewer completed submissions than a simple form with a general instruction that permits a more open-ended answer.

III. Background on the Attorney-Client Privilege

The concept of attorney-client privilege concerns information that the lawyer must keep private and facilitates the client’s ability to confide freely in his or her lawyer.¹ The attorney-

¹ The principle of confidentiality is a related but distinct concept set out in the legal ethics rules adopted by each state and other jurisdictions and in ABA Model Rule of Professional Conduct 1.6. These rules generally prohibit lawyers from revealing information relating to the representation of a client in the absence of the client’s informed
client privilege protects any information communicated in a confidential conversation between a client and an attorney for the purpose of seeking or obtaining legal representation or advice, 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 fully and candidly with lawyers, which, in turn, enables the clients to receive the most competent legal advice from fully-informed counsel. The attorney-client privilege contributes to the trust that is the hallmark of the confidential attorney-client relationship. The privilege belongs to the client, not to the lawyer, and so the client is always free to waive the privilege.

The attorney-client privilege is 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.

IV. The Problem and the Solution

If an LRS client reveals confidential information to a lawyer referral service 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 lawyer referral service 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 lawyer referral service itself. Thus, some courts may conclude that the attorney-client privilege does not apply to communications between LRS clients and lawyer referral services (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 LRS clients and lawyer referral services, making it difficult for the lawyer referral service to gather the information necessary to make a referral to the appropriate lawyer, government agency, not-for-profit program or other source of help. LRS clients sometimes ask lawyer referral services 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 LRS clients feel comfortable sharing as much information as possible with a lawyer referral service in order to facilitate a referral to the best possible attorney (or agency) for their particular legal issue. Second, with respect to the multitude of LRS clients who are overly comfortable sharing damaging or sensitive information with lawyer referral service personnel without being prompted to do so, these LRS clients are likely to be seriously harmed in the event of an
opposing party’s successful discovery request. In a number of instances, as cited above, litigants have sought discovery from a lawyer referral service with respect to confidential communications with an LRS client, and it is likely this will continue to occur.

The lack of a clear privilege threatens the open communication necessary for lawyer referral services to effectively triage the legal issues involved and match LRS clients with appropriate lawyers, government agencies, non-profit programs or organizations, or other resources. LRS clients’ trust and confidence in lawyer referral services might well quickly evaporate following publicized accounts of successful discovery requests to lawyer referral services. Discouraging or impeding the free and candid communications between lawyer referral services and LRS clients will materially harm the ability of lawyer referral services to help hundreds of thousands of people in need of legal assistance. Without open communication – including the exchange of information that might prompt lawyer referral service personnel to advise or warn an LRS client about fast-approaching deadlines and other crucial aspects of the case – LRS clients may prejudice their legal rights or suffer other serious harm.

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between an LRS client and a lawyer referral service in order to eliminate any uncertainty as to the privileged status of such communications from an LRS client seeking legal counsel. It would enable lawyer referral services to reassure LRS 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 lawyer referral service concerning its confidential communications with the other party.

The ABA previously expressed support for the goal of this proposal in August 1993 when it adopted the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Rule XIV of the Model Supreme Court Rules and Section 6 of the Model Act both state that:

“A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.”

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.”

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2 See Resolution (93A 10D),

3 In 1998, the ABA adopted a general policy against extending the attorney-client privilege to accountants and other non-lawyers: “RESOLVED, That the American Bar Association opposes legislation such as S. 1737 pending before the 105th Congress which would extend the attorney-client privilege to accountants and others not licensed to practice law.” The 1993 policy appears to control as it specifically addresses lawyer referral services, while the 1998
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 should not be provided to funding sources absent client consent. In particular, Resolution (01M 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 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.”

Despite the fact that the ABA Model Supreme Court Rules and the ABA Model Act urging that the attorney-client privilege be extended to cover lawyer referral service-LRS client communications were adopted in 1993, whether such protection is afforded remains uncertain. Only one state (California) has taken action on this issue at all, creating a new lawyer referral service-client privilege similar to the one urged in this Resolution, and one other state (New York) has proposed legislation taking a similar approach. Moreover, the communications at issue in this Resolution often do not involve a lawyer, and at the same time, lawyer referral services want to be careful to avoid any suggestion that they are “practicing law” or providing legal representation without a license to do so. Therefore, it is time for the ABA to revise and aggressively implement the goal of its existing policy by adopting the proposed resolution urging courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between an LRS client and a lawyer referral service.

Respectfully Submitted,

C. Elisia Frazier, Chair
Standing Committee on Lawyer Referral and Information Service
August 2016

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policy did not mention them at all. In any case, this Resolution is also consistent with the 1998 policy in seeking to establish a new privilege rather than extend the existing attorney-client privilege. As noted in the 1993 policy and in this Report, lawyer referral services are more like a lawyer’s clerk, receptionist, paralegal, colleague or other agent who may help facilitate legal representation, than they are like accountants or other professionals who provide non-legal services. (5/98B0GEC)

4 See Resolution (01M8A), Resolved Clause 3.
1. **Summary of Resolution(s).** This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for lawyer referral services and their clients ("LRS clients" or "LRS client") for confidential communications between an LRS client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new lawyer referral service-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.

2. **Approval by Submitting Entity.** Standing Committee on Lawyer Referral Services, by email on April 25, 2016

3. **Has this or a similar resolution been submitted to the House or Board previously?** Almost identical resolutions were submitted to the House prior to the 2015 Annual Meeting (Resolution 15A111) and the 2016 Mid-Year Meeting (Resolution 16M113), but the resolutions were voluntarily withdrawn to provide the sponsors an opportunity to further discuss the relevant issues with the ABA Standing Committees on Ethics and Professional Responsibility and Professional Discipline and add several minor clarifications and refinements to both the resolution and report. A similar principle was also incorporated into the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Quality Assurance Act, previously adopted by the ABA House of Delegates as policy in August 1993 (See Resolution 93A10D). However, while Resolution 93A10D urged state supreme courts and legislatures to apply the attorney-client privilege to confidential communications between LRS 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 LRS 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 the goal of Resolution (93A 10D), 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 (01M 8A), 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. Resolution (01M 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-LRS client privilege that is similar to the attorney-client privilege, the resolution is also generally consistent with Resolution (05A 111), which supports the preservation of the attorney-client privilege as essential to maintaining the confidential relationship between client and lawyer required to encourage clients to discuss their legal matters fully and candidly with their counsel.

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


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Lawyer referral services and their respective state and local bars around the country would hopefully urge their respective state supreme courts and legislatures to adopt rules or pass laws recognizing this evidentiary privilege. In addition, the ABA sponsoring entities, in coordination with the ABA Governmental Affairs Office and the ABA Center for Professional Responsibility, would urge the federal courts and Congress to approve similar rules and legislation at the federal level.

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

9. Disclosure of Interest. (If applicable) None
10. **Referrals.** Business Law, Center for Professional Responsibility, Criminal Justice, Judicial Division, Litigation, National Conference of Bar Presidents, National Association of Bar Executives, Standing Committee on Client Protection, Standing Committee for Ethics and Professional Responsibility, Standing Committee on Professional Discipline, Division for Legal Services, and the CPR/SOC Professional Responsibility Committee.

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 evidentiary privilege for lawyer referral services and their clients ("LRS clients" or "LRS client") for confidential communications between client and a lawyer referral service for the purpose of retaining a lawyer or obtaining an LRS legal advice from a lawyer. The new lawyer referral service-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.

2. Summary of the Issue that the Resolution Addresses

Lawyer referral services provide a public service in helping LRS clients to find legal representation (and attorneys find clients). In order to provide this service, lawyer referral services must first obtain information from each LRS client about their case or issue, to ensure that they are referred to the appropriate attorney or attorneys for their specific legal needs. In most states, it is unclear under existing statutory or case law whether any statutory or common law privilege would protect these confidential communications between an LRS client and a lawyer referral service, meaning that they are potentially subject to compelled discovery and disclosure. Lawyer referral services have been regularly questioned by LRS clients about this issue, and most are unable to reassure LRS clients that their communications are clearly privileged. This can hamper the kind of open communication required to make the right referral. Moreover, in recent years in a number of instances, litigants have sought discovery into such communications.

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

This resolution would urge federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between an LRS client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It would enable lawyer referral services to reassure their clients and thereby maintain the kind of open communications required to make a good referral. It would also eliminate, or at least minimize, the risk that an opposing lawyer might subpoena documents or seek testimony from a lawyer referral service concerning its confidential communications with the other party.

3. Summary of Minority Views

None as of this writing.
AMERICAN BAR ASSOCIATION
SECTION OF CRIMINAL JUSTICE
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association adopts the black letter of the *ABA Standards for Criminal Justice: Criminal Justice Mental Health Standards*, chapter seven of the ABA Standards for Criminal Justice, dated August 2016, to supplant the Third Edition (August 1984) of the *ABA Criminal Justice Mental Health Standards.*
AMERICAN BAR ASSOCIATION

Fourth Edition of the

CRIMINAL JUSTICE STANDARDS

ON

MENTAL HEALTH

(Encompassing proposed revisions to the
Third Edition approved in 1984)

Presented by the
CRIMINAL JUSTICE SECTION
for Adoption by the House of Delegates
Annual Meeting
August 2016

CRIMINAL JUSTICE STANDARDS

ON

MENTAL HEALTH
PART I: THE CRIMINAL JUSTICE SYSTEM AND THE MENTAL HEALTH SYSTEM

Standard 7-1.1. Terminology

(a) Unless otherwise specified, these Standards adopt the definition of "mental disorder" found in the current Diagnostic and Statistical Manual of the American Psychiatric Association. In the settings addressed by the Standards, mental disorder is most likely to encompass mental illnesses such as schizophrenia, bipolar disorder, and major depressive disorders; developmental disabilities that affect intellectual and adaptive functioning; and substance use disorders that develop from repeated and extensive abuse of drugs or alcohol or some combination thereof.

(b) "Mental health professional," as used in these Standards, includes psychiatrists, psychologists, social workers and psychiatric nurses and other clinicians with expertise in the evaluation and treatment of mental disorders.

(c) "Mental health evaluation," appearing throughout the Standards as "evaluation," means an evaluation by a mental health professional of an individual accused of, charged with, or convicted of a criminal offense or detained by the police for the purpose of assessing:

   i. mental competence, as defined in (f),

   ii. mental state at the time of the offense as it relates to the insanity defense and other criminal responsibility issues, including mitigation at sentencing,

   iii. risk for reoffending (referred to as "risk assessment" herein) or

   iv. treatment needs.

(d) "Mental health treatment," appearing throughout the Standards as "treatment," includes but is not limited to the appropriate use of psychotropic medications, habilitation services, assertive community treatment, supported employment, family psychoeducation, self-

The current edition of the Diagnostic and Statistical Manual, DSM-5, defines mental disorder as "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above."
management, and integrated treatment for co-occurring mental disorder and substance abuse.

(e) "Mental health facility" refers to a facility designated for treatment of individuals with mental disorder, such as public and private mental and medical hospitals, community mental health centers, and crisis intervention units, but not including jails or prisons. A "forensic" mental health facility is a secure government facility reserved for individuals who have been charged with or convicted of crime.

(f) "Mental competence," appearing throughout the Standards as "competence," is defined in detail in Parts IV and V of these Standards, but at a minimum requires present understanding of the likely consequences of a particular course of action. A valid "assent" requires only this minimal level of competence, accompanied by an affirmative indication of agreement with a particular course of action, after an explanation of the likely consequences of the action.

Standard 7-1.2. Responding to persons with mental disorders in the criminal justice system

(a) Officials throughout the criminal justice system should recognize that people with mental disorders have special needs that must be reconciled with the goals of ensuring accountability for conduct, respect for civil liberties, and public safety.

(b) Criminal justice officials should work with community mental health treatment providers and other experts to develop valid and reliable screening, assessment, diversion, and intervention strategies that identify and respond to the needs of individuals with mental disorder who come into contact with the justice system, whether the setting is traditional criminal court, problem-solving court, a diversion program, or post-adjudication supervision and monitoring.

(i) When appropriate, services should be configured to divert people with mental disorders from arrest and criminal prosecution into treatment, consistent with the [draft ABA Diversion Standards].

(ii) Court systems should consider establishing special dockets for defendants with mental disorders, consistent with the [draft ABA Specialized Courts Standards].

(iii) Criminal justice officials should consider consulting mental health professionals knowledgeable about the possible impact of culture, race, ethnicity, and language on mental health in designing
strategies to respond to persons with mental disabilities in the
criminal justice system.

(c) Services should be available within correctional and mental health
facilities to facilitate both evaluation and treatment during incarceration
and planning for treatment upon release.

Standard 7-1.3. Roles of mental health professionals in the criminal justice
process

(a) Mental health professionals serve the administration of criminal justice by:

(i) Evaluating and offering legally relevant expert opinions and
testimony about a particular person's past, present or future mental
or emotional condition, capacities, functioning or behavior, and
about the effects of interventions, treatments, services or supports
on the person's condition, capacities, functioning or behavior
(evaluative expert role);

(ii) Offering opinions and testimony, with or without an evaluation,
within their respective areas of expertise concerning present
scientific or clinical knowledge that is relevant to a criminal case
(scientific expert role);

(iii) Providing consultation about strategy to the prosecution or defense
(consultative role);

(iv) Providing treatment for individuals charged with or convicted of
crimes (treatment role).

(v) Providing consultation with the courts, the bar, correctional
agencies, legislatures and other stakeholders aimed at establishing
appropriate and effective responses to individuals with mental
disorder who are involved in the criminal justice system (policy
role).

Because these roles involve differing and sometimes conflicting
obligations and functions, the nature and limitations of each should be
clarified by mental health professionals, courts, attorneys, and criminal
justice agencies. The professional's performance within these roles should
be limited to the individual professional's area of expertise and, while
responsive to legal obligations, should be consistent with that
professional's ethical principles.

(b) Evaluative expert role. When evaluating the condition, capacities,
functioning or behavior of a person involved in the criminal justice
system, the professional, no matter by whom retained, has an obligation to make a thorough and impartial assessment based on sound evaluative methods and to reach an objective opinion on each specific matter referred for evaluation. The qualifications of a professional to serve as a court-appointed evaluator are set out in Standard 7-3.9(a). The qualifications of a professional to offer expert testimony about a person’s mental or emotional condition, capacities, functioning or behavior are set out in Standard 7-3.9(b). Disclosure of information obtained during the evaluation is governed by limitations set forth in Standards 7-3.2, 7-3.4(b) & (c), and 7-3.7 and presentation of expert testimony is governed by Standard 7-3.11.

(c) Scientific expert role. When offering expert opinions and testimony concerning scientific or clinical knowledge, the witness, no matter by whom retained, should function impartially within the professional’s area of expertise. The qualifications of a witness to offer expert testimony on present scientific or clinical knowledge are established in Standard 7-3.9(c).

(d) Consultative role. Mental health professionals serving as consultants to the prosecution or defense have the same obligations and immunities as any member of the prosecution or defense team, except as may be limited by law.

(e) Treatment role. When providing treatment for a person charged with or convicted of a crime, the obligations a mental health professional owes a patient and society derive primarily from those arising in the ordinary treatment relationship. Correctional and behavioral health agencies, facilities and programs should respect that professional relationship to the maximum extent consistent with public safety and sound institutional management. When establishing a therapeutic relationship, mental health professionals should advise the person of known limitations on the professional relationship arising from the person’s involvement in the criminal process or placement in an institutional setting.

(f) Policy role. Mental health professionals have at their disposal a wealth of empirical and practical information about the nature of mental disorders, the methods of assessing the treatability of and the risk presented by people with mental disorder, the effectiveness of treatment programs, and the operation of the mental health system. This knowledge can help policymakers make informed judgments in enacting statutes, regulations and guidelines that will improve the criminal justice system’s treatment of people with mental disorder. Mental health professionals should be encouraged to provide this information to the relevant stakeholders through testimony, contributions to the legal literature, formal and informal consultation, and other mechanisms.
The prosecutor and defense counsel should respect the mental health professional's professional obligations, whatever role the professional is serving, and as early as possible ascertain how such obligations might affect the legal process. Attorneys should not attempt to compromise either a mental health professional’s legal obligations (by, for instance, knowingly encouraging an expert to violate a statutory reporting requirement) or ethical obligations (by, for instance, knowingly providing misleading information to an evaluator, or refusing to pay an expert unless favorable conclusions are reached).

**Standard 7-1.4. Roles of the attorney representing a defendant with a mental disorder**

(a) Consistent with the ABA Resolution on Comprehensive Criminal Representation, attorneys who represent defendants with mental disorders should provide client-centered representation that is inter-disciplinary in nature. These attorneys should be familiar with local providers and programs that offer mental health and related services to which clients might be referred in lieu of incarceration, in the interest of reducing the likelihood of further involvement with the criminal justice system.

(b) Attorneys who represent defendants with mental disorders should work particularly closely with their clients to ensure that the clients understand their options. Attorneys should be prepared to deal with difficulties in communication that can result from the client’s mental disorder or from transfers to a different locale necessitated by treatment needs.

(c) Attorneys who represent defendants with mental disorders should explore all mental state questions that might be raised, including whether the client’s capacities at the time of police interrogation bear on the admissibility or reliability of any incriminating statements that were made, whether the client is competent to proceed at any stage of the adjudication, and whether the defendant’s mental state at the time of the offense might support a defense to the charge, a claim in mitigation of sentence, or a negotiated disposition.

(d) Attorneys who represent defendants with mental disorders should seek relevant information from family members and other knowledgeable collateral sources. Attorneys should share information about their clients with family members and knowledgeable collateral sources only with their clients’ assent, and in a way that does not compromise the attorney-client privilege.

(e) Attorneys who represent defendants in specialized courts should be familiar with and abide by the [draft ABA Specialized Court Standards]. Because a defendant may relinquish substantial rights in a specialized
court, the attorney’s role as counselor is particularly important in this setting.

Standard 7-1.5. Role of the judge and prosecutor in cases involving defendants with mental disorders

(a) Judges and prosecutors should consider treatment alternatives to incarceration for defendants with mental disorders that might reduce the likelihood of recidivism and enhance public safety.

(b) Courts and prosecutor offices should facilitate meetings among community organizations interested in assuring that services are provided to justice-involved persons with mental disorders, including local law enforcement agencies, correctional authorities, and the bench and bar, as well as treatment providers, representatives of the public mental health authority, professional organizations, and other community leaders and governmental officials.

(c) Courts and prosecutor offices that help create diversion programs or specialized courts should be guided by [the draft ABA Standards on Diversion and the Draft ABA Standards on Specialized Courts].

(d) When making charging or dispositional decisions about a defendant who has a mental disorder, judges and prosecutors should consider referring the defendant for treatment, either voluntarily or, if appropriate, pursuant to existing law relating to involuntary hospitalization or mandated outpatient treatment.

(e) In determining which defendants should be selected for participation in diversion programs or specialized courts and which forms of intervention to use, judges and prosecutors should, whenever possible, rely on evidence-based practices, including valid and reliable appraisals of relevant risk and treatment needs.

Standard 7-1.6. Joint professional obligations for improving the administration of justice in criminal cases involving individuals with mental disorders

(a) National, state, and local judicial, legal, and mental health agencies and professional organizations should work cooperatively to monitor the interdependent performance within the criminal process of their members and constituents, and to improve the overall quality of the administration of justice in criminal cases involving mental health issues, including the quality and availability of services for justice-involved individuals with treatment needs.
Appropriate professional organizations and governmental agencies, including licensing and accreditation bodies, should establish programs and evidence-based practices, including peer review, for monitoring the performance of mental health professionals participating in the criminal process. Existing professional ethics boards and committees should develop specific criteria and special review procedures designed to address the ethical questions that may arise when mental health professionals participate in the criminal process.

Appropriate professional, scientific, and governmental organizations should sponsor and disseminate the results of empirical research concerning:

(i) the validity and reliability of mental health evaluations employed in criminal cases;

(ii) the development of standardized protocols for conducting evaluations in criminal cases;

(iii) the application and practical effect of substantive rules and procedures in cases involving people with mental disorder;

(iv) the development of programs and services for individuals with mental health conditions, including diversion from arrest and prosecution to mental health treatment, treatment during periods of correctional confinement, and transition from correctional confinement to treatment post-release; and

(v) the quality and impact of participation by mental health professionals in the criminal process.

Standard 7-1.7. Education and training

(a) Interdisciplinary cooperation. Judicial, legal, and mental health professional associations, organizations, and institutions at national, state, and local levels should cooperate in promoting, designing, and offering basic and advanced education and training programs addressing the identification of and responses to individuals with mental disorders involved in or at risk of becoming involved in the criminal justice system. Such programs should include a focus on developing strategies to facilitate diversion from the criminal justice system to the community mental health treatment system before and after arrest, adjudication, and conviction. Such education and training programs should be offered to audiences working in both the criminal justice and mental health systems, including judges, attorneys, mental health professionals, and to students and trainees within these disciplines.
(b) Lawyers.  

(i) Law schools should provide the opportunity for students, as a part of their formal legal education, to become familiar with the issues raised in these Standards. In addition to the relevant law, these issues might include the nature and prevalence of mental disorder, methods of screening for and identification of individuals with mental disorders who are involved in the justice system, risk assessment, problem-solving strategies (including jail diversion programs and mental health courts), the role of mental health professionals in the justice system, and the essential elements of a comprehensive system of care.

(ii) Bar associations, law schools, and other organizations responsible for providing continuing legal education should develop and regularly conduct programs offering advanced instruction on the topics described in (b)(i), and should be tailored to local needs and resources. Prosecutors, public defenders, and other attorneys who specialize in, or regularly practice, criminal law should participate in these programs.

(c) Judges. Each jurisdiction's highest appellate tribunal or its judicial supervisory authority with responsibility for continuing judicial education should develop and regularly conduct education and training programs on the topics identified in (b)(i). Additionally, such programs should include strategies for presiding over judicial proceedings involving defendants or witnesses with mental disorders, methods of identifying and communicating with participants in the courtroom who have a mental disorder, and the role of judges in criminal justice/mental health collaborations. Judges who preside over criminal proceedings should participate in these programs.

(d) Mental health professionals.

(i) Professional and graduate schools that train mental health professionals should afford the opportunity for students and trainees to become familiar with the issues concerning the participation of mental health professionals in the criminal process and the potential involvement of individuals with mental disorders in the criminal justice system.

(ii) These professional and graduate schools should also provide advanced instruction for students and trainees who desire to meet the minimum criteria established by Standard 7-3.9(a) for qualifying as court-appointed evaluators and by Standard 7-3.9(b) for qualifying as expert witnesses testifying about a person's mental condition.
(iii) Professional and graduate schools and other appropriate organizations, including governmental agencies having responsibility for continuing education for and licensure or certification of mental health professionals, should develop and regularly conduct programs offering instruction on the participation of such professionals in the criminal process designed to:

(A) enable those professionals to meet the minimum criteria established by Standard 7-3.9(a) for qualifying as court appointed evaluators and by Standard 7-3.9(b) for qualifying as expert witnesses testifying about a person's mental condition; and,

(B) inform all participants of developments in law and criminal practice, including problem-solving strategies such as diversion programs and mental health courts, in order to improve the competence of those who play scientific, evaluative, consultative, treatment, or policy-making roles in the criminal process. Mental health professionals who participate in the criminal process should enroll in these programs.

(e) These Standards should be included among the instructional materials used in all of the training described in this Standard. Judges, lawyers, mental health professionals and their professional organizations should disseminate these Standards widely to policy makers and others responsible for improving services for individuals with mental disorders who are involved in the criminal justice system and to representatives of the media investigating matters concerning this population or the systems they populate.
PART II. LAW ENFORCEMENT AND CUSTODIAL ROLES

Standard 7-2.1. Specialized training and crisis intervention strategies

(a) All law enforcement agencies and detention facilities should provide specialized training to their personnel to assist them in identifying and responding to emergency incidents involving persons with mental disorders. Qualified mental health professionals and consumers of mental health treatment and their families should be involved in curriculum preparation and training.

(b) As an adjunct to training, all law enforcement agencies should promulgate written policies detailing department procedures for intervening in emergency situations involving persons with mental disorders.

(c) Where resources allow, law enforcement agencies should establish specialized police response teams, consisting of officers who have been trained in responding to emergency situations involving individuals with mental disorders. Police dispatchers should be trained to alert these teams whenever a crisis develops requiring police response.

(d) Law enforcement agencies should develop memoranda of understanding with local mental health authorities regarding the availability of specialized police response teams, crisis beds, and other treatment services available for individuals the police encounter who require prompt referral for evaluation or treatment. These memoranda should specify convenient locations where an officer may transport an individual needing attention.

(e) All custodial personnel, whether civilian or sworn, as well as dispatchers and other personnel who are involved in interventions should receive training in identifying and responding to the symptoms and behaviors, including self-injurious behavior, associated with mental disorders. Emphasis should be placed on those symptoms and behaviors that arise or are aggravated by incarceration, particularly as they relate to suicide prevention. Explicit guidelines for responding to emergency situations, providing first aid, and preventing individuals from harming themselves should be published and made available to all facility personnel.

Standard 7-2.2. Preference for voluntary law enforcement disposition
Department guidelines should authorize, but not require, law enforcement officers with appropriate training to provide assistance to any person with mental disorder who, in the officer’s discretion, requires care and assents to such care. The guidelines should stress that even where involuntary detention is permitted under Standard 7-2.3 officers should seek a voluntary disposition whenever feasible and appropriate.

Voluntary disposition may consist of referral to a mental health facility but may also involve alternatives to treatment, such as summoning the assistance of the person's friends or family.

**Standard 7-2.3. Law enforcement detention of people with mental disorders for purposes of evaluation and treatment**

Authority for law enforcement officers to take people with mental disorders into custody for purposes of referral for evaluation or treatment should be statutorily defined and limited to circumstances in which an officer has probable cause to believe that the person has committed a criminal offense or meets criteria for emergency evaluation under applicable state law. Law enforcement agencies should promulgate written procedures to guide the exercise of this authority.

Departmental guidelines should stipulate that when custodial disposition is appropriate under (a), police should:

(i) be appropriately trained in crisis intervention or utilize, whenever feasible, the services of mental health professionals to assist them in effecting custody of individuals with mental disorders in emergency situations, and

(ii) use only the physical control necessary to effect such custody, taking into consideration the obligation of law enforcement officers to protect the person, themselves, and others from bodily harm.

Law enforcement officials and administrators of treatment facilities in each locality should cooperate in developing joint guidelines and policies regarding the admission of persons in police custody to mental health facilities for appropriate evaluation or treatment. These guidelines should be widely disseminated to law enforcement, mental health professionals,
and mental health facility personnel. The guidelines should require law
enforcement officials to notify administrators and other appropriate
officials when facility officials decline to accept a person in police custody
for evaluation or treatment.

(d) Law enforcement officials and administrators of treatment facilities should
periodically conduct a joint review of such guidelines and policies to
evaluate performance and effect operational changes and improvements.

Standard 7-2.4. Custodial processing of persons with mental disorders by
law enforcement officers

(a) When arrest of an individual with a mental disorder is based exclusively
on minor non-violent criminal behavior, law enforcement officers should
follow one of the following options:

(i) in cases where the law enforcement officer reasonably believes that the
mental disorder did not contribute to the crime or is not serious,
processing the person in the same manner as any other criminal
suspect;

(ii) facilitating a voluntary disposition under Standard 7-2.2, or

(iii) immediately transporting the person to an appropriate facility for
evaluation and treatment under Standard 7-2.3.

Disposition under (ii) and (iii) does not preclude prosecution.

(b) When a person has been arrested for a crime not covered by Standard 7-
2.4(a), law enforcement officers should process the person in the same
manner as any other criminal suspect notwithstanding the fact that the
arresting officer has reasonable grounds for believing that the person's
behavior meets statutory and departmental guideline requirements for
emergency detention for mental evaluation. In such cases, however, law
enforcement officers should notify custodial personnel as required in 7-2.5
unless, in the officers’ judgment, the need for mental health intervention is
so urgent that the evaluation required in 7-2.5 would be insufficiently
timely and immediate transfer to a mental health facility under 7-2.3(a) is
necessary.
Upon initial presentation to the mental health facility, detention facility, the prosecutor or the court, the arresting officer should reveal fully those facts which suggest that the arrestee has a mental disorder and is in need of evaluation or treatment and should document the relevant information for reference in future proceedings.

Consistent with Standard 7-5.4, law enforcement officials who are considering interrogation of a detained person under this Standard should recognize that persons with mental disorders may be unusually susceptible to persuasion and should be alert to the possibility that official conduct may be more likely to constitute impermissible coercion or result in an invalid waiver of rights when an individual with mental disorder is questioned.

**Standard 7-2.5. Obligations of custodial personnel to detainees**

(a) Custodial personnel should ensure that treatment services are available to detainees. To this end, and pursuant to the provisions of Standard 7-2.1, training for all custodial personnel, and especially for personnel responsible for processing newly detained persons, should include instruction in the identifying persons with mental disorder.

(b) Custodial personnel should screen all detained individuals upon intake for symptoms or behaviors indicative of a mental disorder and, if such symptoms are observed, should promptly report those observations to the official in charge of detention at the holding facility. Such a report should also be made at any other time custodial personnel observe, or are told by the arresting officer about, a detainee whose conduct or demeanor is indicative of a mental disorder and whose behavior is self-injurious or is indicative of the possibility of suicide. Upon receiving such a report, the official in charge, after promptly confirming the need to do so, should summon a mental health professional to provide emergency evaluation and treatment, pursuant to Standard 7-2.6.

(i) Defense counsel should be notified of the evaluation results, whether the evaluation takes place before or after counsel’s appointment. The court and the prosecutor should be notified of the fact of the evaluation and treatment, without reference to any findings or opinions resulting from the evaluation or treatment.
When the mental health professional determines that a confined person requires immediate evaluation or treatment not available in the holding or detention facility, the detainee should be transferred to a facility capable of providing such services in accordance with Standard 7-2.6.

If treatment or transfer does not occur pursuant to Standard 7-2.6 and the person is subsequently discharged from custody, custodial personnel should arrange necessary referrals for mental health treatment and related services (including housing if necessary). If a detainee is believed to meet criteria for civil commitment, custodial officials should initiate proceedings for the detainee's commitment prior to discharge.

Standard 7-2.6. Treatment of detainees; voluntary and involuntary transfer; notice to counsel

(a) A detainee who in the opinion of a mental health professional who has evaluated the detainee assents, as defined in Standard 7-1.1(f) (i.e., understands the nature and purpose of a recommended treatment and agrees to such treatment), may be treated in the detention or holding facility or may be transferred to a treatment facility in conformity with the statutes or rules governing voluntary treatment and hospitalization. If treatment takes place in the detention or holding facility, custodial personnel should endeavor to maintain any treatment the detainee was receiving at the time of detention.

(b) If a detainee lacks the capacity to assent to recommended treatment or transfer to a treatment facility as defined in paragraph (a), treatment or transfer may be provided only if:

(i) a court has ordered treatment to restore the detainee's competence pursuant to Standard 7-4.10(b); or

(ii) a court or state law has authorized treatment or transfer; or

(iii) an administrative panel composed of the treating professional and another qualified treatment professional find that the detainee is experiencing extreme emotional distress or deterioration of functioning that requires immediate treatment in the detention or holding facility or in a treatment facility and that the proposed
treatment is likely to stabilize the detainee's condition, is the least intrusive method of doing so, and is medically appropriate. When treatment is provided pursuant to this provision, the continued need for treatment beyond [15 days] should be subject to judicial review under procedures prescribed by statute.

(c) If a detainee who has the capacity to consent to treatment or transfer as defined in paragraph (a) refuses treatment or transfer, treatment or transfer may be provided only if a court has:

(i) ordered treatment to restore the detainee's competence pursuant to Standard 7-4.11(b); or

(ii) authorized treatment or transfer pursuant to the jurisdiction's civil commitment law.

(d) The director of the detention or holding facility should notify the detainee's attorney and the prosecuting attorney whenever the detainee is transferred to a mental health or medical facility; when possible, this notice should precede the decision to transfer.

(e) Information obtained during the course of the evaluations or treatment described in this Standard is admissible in subsequent criminal proceedings only as provided in Standard 7-3.2(a).

Standard 7-2.7. Law enforcement and custodial records of contacts with persons with mental disorders

(a) Records of significant contacts with persons with mental disorders who are not charged with a crime should be filed separately from arrest records and should be subject to a high degree of confidentiality.

(b) Records of mental health treatment provided to the detainee should be maintained separately from other records pertaining to the detainee, and access to them should be limited to the professionals providing treatment, the detainee's attorney, and the detainee except as otherwise provided. Custodial personnel, including supervisory personnel, should not examine these records without prior authorization of the detainee or the detainee's attorney.
Detainees' access to treatment records maintained by a detention facility should be governed by rules similar to those applicable to patient access to treatment records maintained by other health institutions.
PART III. EVALUATIONS AND EXPERT TESTIMONY

Standard 7-3.1. Authority to obtain mental health evaluations

(a) Pre-trial evaluations; when permitted.

(i) Law enforcement and prosecution authorities may not seek or obtain a mental health evaluation, as defined in Standard 7-1.1(c), unless the subject of the evaluation has been taken into custody or arrested.

(ii) Law enforcement and prosecution authorities may seek and obtain a pretrial evaluation of an individual who has been taken into custody or arrested only under the circumstances referenced in (b), (c), (d) and (e)(i) & (ii) below, or if authorized by the individual's attorney.

(b) Evaluations to determine whether treatment is warranted for individuals who have been taken into custody or arrested are governed by Standards 7.2-3 through 7.2-7.

(c) Evaluations of a defendant's competence to proceed are governed by parts IV and V of this chapter.

(d) Evaluations of a defendant's mental condition at the time of the alleged crime:

(i) Defense-initiated evaluations are governed by Standard 7-6.4(a).

(ii) Prosecution-initiated evaluations are governed by Standard 7-6.4(b).

(e) Evaluations on dispositional issues:

(i) Evaluations of individuals found not guilty by reason of mental nonresponsibility [insanity] are governed by Standard 7-7.2.

(ii) Presentence evaluations of defendants convicted of non-capital crimes are governed by Standards 7-8.1 and 7-8.3.

(iii) Presentence evaluations of defendants charged with or convicted of capital crimes are governed by Standards 7-9.3.
(v) Evaluations of prisoners being considered for voluntary or involuntary transfer to treatment facilities are governed respectively by Standards 7-10.2 and 7-10.3.

Standard 7-3.2. Uses of disclosures or opinions derived from pretrial evaluations or treatment

(a) Admissibility of disclosure or opinions in criminal proceedings. No statement made by or information obtained from a person, or evidence derived from such statement or information during the course of any pretrial evaluation or treatment described in 7-3.1, and no opinion of a mental health professional based on such statement, information, or evidence is admissible in any criminal proceeding in which that person is a defendant unless it is otherwise admissible and:

(i) it relates solely to the defendant's present competency to proceed and the use of such disclosure or opinion conforms to the requirements of Standard 7-4.7; or,

(ii) it is relevant to an issue raised by the defendant concerning the defendant's mental condition and the defendant introduces or intends to introduce the testimony of a mental health professional to support the defense claim on this issue.

(b) Duty of evaluator to disclose information concerning defendant's present mental condition that was not the subject of the evaluation.

(i) If, in the course of any evaluation, the evaluator concludes that the defendant may be incompetent to proceed, the evaluator should notify the defendant’s attorney and, if the evaluation was initiated by the court or prosecution, should also notify the court and prosecution.

(ii) If in the course of any evaluation, the evaluator concludes that the defendant presents an imminent risk of serious danger to him or herself or to another person or otherwise needs emergency intervention, the evaluator should take appropriate precautionary measures in accordance with applicable professional Standards and statutory reporting requirements.

Standard 7-3.3. Defense, prosecution and court access to mental health professional assistance and evaluation
The right to defend oneself against criminal charges includes an adequate opportunity to explore, through a defense-initiated evaluation, the availability of any defense to the existence or grade of criminal liability relating to defendant's or mental condition. Accordingly, for defendants who cannot afford such an evaluation, each jurisdiction should make available funds in a reasonable amount to pay for an evaluation by a qualified mental health professional or professionals selected by the defendant.

In such cases a defense attorney who believes that an evaluation could support a defense claim based on mental disorder should move for the appointment of a professional or professionals in an ex parte hearing. The court should grant the defense motion if such services are reasonably necessary for an adequate defense.

The court should grant a defense motion for a consultative expert, as defined in Standard 7-1.3(d), when the defense attorney can establish good cause that such an expert is necessary for an adequate defense.

Prosecution and court access to the defendant for purposes of an evaluation by a mental health professional depends upon the nature of the evaluation and is governed by the Standards referenced in Standard 7-3.1.

**Standard 7-3.4. Procedures for initiating evaluations**

The party that initiates an evaluation of defendant's mental condition should inform the evaluator of each matter to be addressed in the evaluation.

The attorney initiating an evaluation should obtain and provide to the evaluator all records and other information that the attorney believes may be of assistance in facilitating a thorough evaluation on the matter(s) referred. The attorney should also take appropriate measures to obtain and provide to the evaluator information that the evaluator regards as necessary for conducting a thorough evaluation on the matter(s) referred. If the evaluation is initiated by the court, both the defense attorney and the prosecutor should obtain and provide the information. Such information may include relevant medical and psychological records, social history, police and other law enforcement reports, confessions or statements made by defendant, investigative reports, autopsy reports, toxicological studies, and transcripts of pretrial hearings. If a record provided to the evaluator
contains highly sensitive information, either attorney may request a protective order limiting its further disclosure.

(c) Consistent with discovery laws, the rules of evidence, and the treatment needs of the defendant, reports resulting from the evaluations described in this Standard, and the records and other information relied on by mental health professionals preparing such reports, should be kept confidential until such time as the record is admitted into evidence. On the motion of either attorney, these reports and records should be sealed.

(d) An evaluation of the defendant's present competence should not be combined with an evaluation of the defendant's mental condition at the time of the alleged crime, or with an evaluation for any other purpose, unless the defendant so requests or, for good cause shown, the court so orders. If an evaluation addresses such discrete issues, a separate report should be prepared on each issue.

(e) When an evaluation is conducted pursuant to court order, that order should:

(i) identify the initiating party;

(ii) identify the purpose(s) of the evaluation;

(iii) describe the circumstances under which statements or other information obtained during the course of the evaluation, and any opinions of the mental health professional based on the evaluation, may be disclosed or used for any purpose in any criminal proceeding;

(iv) explain all applicable evidentiary privileges;

(v) specify whether the evaluator is required to prepare a written report, and, if so, delineate the scope, content, and disposition of the written report; and

(vi) direct that the defendant’s relevant health care records be released, upon request, to the attorney for the defendant or the mental health professional conducting the evaluation, with or without the defendant’s consent.
(f) Each jurisdiction should promulgate standard court orders designed to inform mental health professionals who conduct evaluations of the laws and procedures within the jurisdiction applicable to such evaluations.

**Standard 7-3.5. Procedures for conducting evaluations**

(a) The party that initiates the evaluation should inform the mental health professional conducting the evaluation and ensure that the professional understands:

(i) specific legal and factual matters relevant to the evaluation;

(ii) rules governing disclosure of statements or information obtained during the evaluation and governing disclosure of opinions based on such statements or information; and,

(iii) applicable evidentiary privileges.

(b) In any evaluation, whether initiated by the court, prosecution, or defense, the defense and the mental health professional conducting the evaluation have independent obligations to explain to the defendant and to ensure that the defendant understands to the extent possible:

(i) the purpose and nature of the evaluation;

(ii) the potential uses of any disclosures made during the evaluation;

(iii) the conditions under which the prosecutor will have access to information obtained and reports prepared, as provided in Standards 7-3.2 and 7-3.7; and,

(iv) the consequences of defendant's refusal to cooperate in the evaluation as provided for in Standard 7-6.4(b).

(c) Presence of attorneys during evaluations that result in reports to the prosecution or court.

(i) When the scope of the evaluation is limited to the defendant's competence to proceed, the defense attorney is entitled, but not required unless mandated by law, to be present at the evaluation. If present, the attorney should actively participate only if requested to do so by the evaluator.
When the scope of the evaluation is not limited to defendant's competence to proceed, the defense attorney should be present at the evaluation only at the request of the evaluator for reasons relating to the effectiveness of the evaluation. If present the attorney may actively participate only if requested to do so by the evaluator.

Attorneys who are present during an evaluation when psychological testing is administered should be aware that test content is protected by law and that disclosure of that content can undermine the test's validity as a measure of a person's functioning.

The prosecutor may not be present at any evaluation of defendant.

The defense has no obligation to record a defense-initiated evaluation under Standard 7-3.3. However, if the defense records an evaluation of mental state at the time of the offense, copies should be provided promptly to the prosecution when the defendant gives notice, under Standard 7-6.3(b), of an intent to call the mental health professional who conducted the evaluation as an expert witness on the defendant's mental condition at the time of the alleged offense.

Whenever feasible, recordings should be made of all court-ordered evaluations of defendants initiated by the prosecution or the court. Copies of such recordings should be provided promptly to the defense attorney and the prosecution.

Jails and other correctional facilities should maintain equipment that evaluators may use to make audio and video recordings of evaluations they conduct in such facilities. The equipment should be available, on request of the evaluator, for use in a private room when feasible and consistent with security requirements. Alternatively, facilities should allow evaluators to use their own equipment.

If an evaluation is recorded, video recording should be considered preferable to audio recording.
Joint evaluations should be encouraged. They should be permitted when agreed upon by the prosecutor and the defense attorney. A joint evaluation involves either an evaluation conducted by two or more behavioral health professionals or an evaluation by a mental health professional agreed on by both parties.

Standard 7-3.6. Preparation and contents of written reports of mental evaluations

Promptly upon concluding the evaluation, the mental health professional should prepare a complete, written report, unless the professional is retained by the defendant and the defense attorney decides that the professional will not be called as an expert witness.

Contents of written report.

The written evaluation report should:

(i) identify the specific matters referred for evaluation;

(A) describe the procedures, tests, and techniques used by the evaluator;

(C) consistent with Standards 7-3.8 and 7-6.6, state the evaluator's clinical findings and opinions on each matter referred for evaluation and indicate specifically those questions, if any, that could not be addressed;

(D) identify the sources of information and present the factual basis for the evaluator's clinical findings and opinions; and,

(E) present the reasoning by which the evaluator utilized the information to reach the clinical findings and opinions.

(ii) Except as limited by Standard 7-3.7(a), the evaluator should include in the written report any statements or information that serve as necessary factual predicates for the clinical findings or opinions, even if the statements or information are of a personal or potentially incriminating nature.

The attorney who requested the evaluation should not edit, modify, or otherwise revise the report in any way that would compromise the report's integrity. However, after the report has been completed and submitted to
the attorney, the attorney may correspond in writing or converse with the mental health professional in order to clarify the meaning or implications of the evaluator's findings or opinions.

(d) Each jurisdiction should promulgate written guidelines regarding the law and procedures within that jurisdiction governing the preparation of written reports in order to inform mental health professionals serving as evaluators.

Standard 7-3.7. Discovery of written reports

(a) When the court has ordered a pretrial evaluation on any past or present competency issue, the evaluator should prepare a separate report on that issue even if other issues have also been referred for evaluation. The report should not contain information or opinions concerning either the defendant's mental condition at the time of the alleged offense or any statements made by the defendant regarding the alleged offense or any other offense. Upon satisfying itself that the report does not contain information or opinions that should have been excluded, the court should promptly provide copies to the prosecutor and to the defense attorney.

(b) When the defendant gives notice of an intent to rely on an expert,

(i) the defense should promptly provide to the prosecution all written reports on the issue in question prepared by any mental health professional whom the defendant intends to call as an expert witness. If the defendant intends to call an expert witness who has not previously prepared a written report, a written report conforming to Standard 7-3.6 (b) should be prepared and promptly provided to the prosecution.

(ii) the prosecution should promptly provide to the defense all information, including written reports prepared by mental health professionals, bearing on the issues addressed by the defense expert that have not already been provided through the discovery process.

(c) Upon a showing of good cause by the defendant, the court may order that the delivery of a report or reports be denied, restricted, or deferred until a time certain before trial. The court may order the defendant to promptly
disclose to the prosecutor a list of the sources of information relied upon in any report whose delivery has been denied, restricted, or deferred.

(d) Each jurisdiction should establish, by statute or court rule, detailed guidelines governing discovery of written reports prepared by mental health professionals.

Standard 7-3.8. Admissibility of expert testimony concerning a person's mental condition or behavior

(a) Expert testimony, in the form of an opinion or otherwise, concerning a person's past or present mental condition should be admissible whenever the testimony is based on and is within the specialized knowledge of the witness and will assist the trier of fact on an issue relevant to the adjudication.

(b) Expert testimony relating to the person's future mental condition or behavior, including risk of reoffending, should be admissible when relevant to any criminal proceeding or special commitment hearing if the testimony is within the specialized knowledge of the witness and is based on reliable techniques and practices, which may include consideration of:

(i) the clinical significance of the individual's history and current behavior;

(ii) scientific studies involving the relationship between specific behaviors and variables that are objectively measurable and verifiable;

(iii) the possible psychological or behavioral effects of proposed therapeutic or other interventions;

(iv) the factors that tend to enhance or diminish the likelihood that specific types of behavior could occur in the future, or

(v) the defendant's performance on validated instruments for assessing risk and need only when administered, scored, interpreted and presented in accordance with scientific and professional standards.

(c) If the jurisdiction requires the evaluator to present his or her opinion on a question requiring a conclusion of law or a moral or social value judgment, the evaluator should use cautionary language to explain the
Standard 7-3.9. Qualifications for evaluating and testifying mental health professionals

(a) Court-appointed evaluators. No professional should be appointed by the court to evaluate a person's mental condition unless the court determines that the professional's qualifications include:

(i) sufficient professional education and clinical training as set out in Standard 7-3.10, as well as sufficient experience, to establish the clinical knowledge required for the specific type(s) of evaluation(s) being conducted; and,

(ii) sufficient forensic knowledge, gained through specialized training or an acceptable substitute therefor, necessary for understanding the relevant legal matter(s) and for satisfying the specific purpose(s) for which the evaluation is being ordered.

(b) Evaluators who testify. No witness should be qualified by the court to present expert opinion testimony on a person's mental condition unless the court determines that the witness:

(i) has sufficient professional education and clinical training as set out in Standard 7-3.10, as well as sufficient experience, to establish the clinical knowledge required to formulate an expert opinion; and,

(ii) has either:

(A) acquired sufficient knowledge, through forensic training or an acceptable substitute therefor, relevant to conducting the specific type(s) of mental evaluation actually conducted in the case, and relevant to the substantive law concerning the specific matter(s) on which expert opinion is to be proffered; or,

(B) has had a professional therapeutic relationship with the person whose mental condition is in question and will limit the testimony to matters concerning the defendant's general mental condition as presented during the therapeutic relationship; and
(iii) has performed an adequate evaluation, including a personal interview with the individual whose mental condition is in question, relevant to the legal and clinical matter(s) upon which the witness is called to testify.

(c) Scientific experts. As indicated in Standard 7-1.3(b), expert testimony may involve issues of present scientific or clinical knowledge and may be presented by an expert who has not evaluated the defendant. No witness should be qualified by the court to present expert testimony on issues of present scientific or clinical knowledge unless the court determines that the witness:

(i) has a degree in an appropriate medical or scientific discipline; and,

(ii) has relevant clinical or research experience and demonstrated familiarity with current scientific or clinical information on the specific issue on which the witness is called to testify.

(iii) Professional credentials and general practical experience should not, in and of themselves, constitute a demonstration of expertise sufficient to warrant qualification as an expert witness on issues of present scientific or clinical knowledge.

Standard 7-3.10. Establishing minimum professional education and clinical training requirements for evaluators and expert witnesses; recommended requirements

(a) Every jurisdiction should establish, by statute, regulation, or court rule, minimum professional education and training requirements necessary to qualify persons for the performance of roles identified in Standard 7-3.9.

(b) In developing such minimum requirements, jurisdictions should take the following general factors into consideration:

(i) Necessary and desirable education and training requirements should differ according to the specific subject matter of the evaluation(s) being performed and the specific legal purpose(s) for which expert opinion is being solicited; and,

(ii) Sufficient flexibility should be provided to permit the courts to utilize persons who clearly demonstrate the requisite knowledge notwithstanding their lack of the formal education or training that may be specified in the requirements. However, experience in
performing evaluations or in testifying as an expert should not, by itself, constitute a sufficient demonstration of the requisite clinical knowledge.

In establishing minimum professional and education and clinical training requirements, each jurisdiction should strive for the highest possible qualifications and should adopt the following recommended minimum requirements, their foreign equivalent, or such higher requirements as may be feasible and appropriate:

(i) When an evaluation concerns a person's competence to proceed and other mental conditions at the time of the evaluation or a person's need for treatment, evaluators and expert witnesses should be either:

(A) a licensed physician who has successfully completed at least two years of postdoctoral specialty training in a psychiatric residency program approved by the American Board of Psychiatry and Neurology (or one year of internship and one year of such residency training) or its foreign equivalent; or,

(B) a psychologist who has received a doctoral degree in psychology from an educational institution accredited by an organization recognized by the Council on Postsecondary Accreditation or its foreign equivalent, and who is licensed as a psychologist if the jurisdiction requires licensure; or,

(C) a clinical social worker who has received a master's degree in social work with an emphasis on clinical practice from an educational institution accredited by the Council on Social Work Education or its foreign equivalent, and who has completed a minimum of two years or three thousand hours of postgraduate supervised clinical experience in the diagnosis, assessment, and treatment of mental disorders in an appropriate clinical setting, and who is licensed or certified as a social worker if the jurisdiction requires licensure or certification; or,

(D) a clinical specialist in psychiatric nursing or a psychiatric nurse, who has received a master's degree in psychiatric nursing from an educational institution accredited by an
organization recognized by the National League of Nursing or its foreign equivalent, and who is licensed or certified if the jurisdiction requires licensure or certification for the respective discipline.

(ii) When an evaluation concerns a person's mental condition at the time of an alleged crime, or a person's future mental condition or behavior when these issues arise within a sentencing proceeding or a special commitment proceeding held pursuant to Standard 7-4.14 or Standard 7-7.4, the evaluator or expert witness should be either:

(A) a licensed physician who has completed the postdoctoral specialty training in a psychiatric residency program approved by the American Board of Psychiatry and Neurology or its foreign equivalent; or,

(B) a psychologist who has received a doctoral degree in psychology from an educational institution accredited by an organization recognized by the Council on Postsecondary Accreditation or its foreign equivalent, and who is licensed as a psychologist if the jurisdiction requires licensure.

(iii) A licensed physician who does not meet the requirements of specialty training in psychiatry established in this Standard but who has completed the postdoctoral training requirements of another medical specialty, may, upon performing an adequate evaluation, qualify to testify as an expert witness regarding any physical condition or any organically based mental disability within the scope of the professional's specialized knowledge.

(iv) A certified special education teacher, speech or language pathologist, or an audiologist, who is licensed or certified if the jurisdiction requires licensure or certification for the respective discipline, may, upon performing an adequate evaluation, qualify to testify as an expert witness regarding a disability within the scope of the professional's specialized knowledge.

Standard 7-3.11. Presentation of expert testimony

(a) An attorney intending to call an expert witness should assist the expert in preparing for trial consistent with Standard 7-3.6(c).
The expert’s opinion should be presented in a form consistent with Standard 7-3.8.

The expert should identify and explain the theoretical and factual basis for the opinion and the reasoning process through which the opinion was formulated. In doing so, the expert should be permitted to describe facts upon which the opinion is based, regardless of their independent admissibility under the rules of evidence, if the court finds that the Sixth Amendment to the U.S. Constitution and similar relevant state provisions permit admission of these facts and that:

- (i) they are of a type that is customarily relied upon by mental health professionals in formulating their opinions; and
- (ii) they are relevant to serve as the factual basis for the expert's opinion; and
- (iii) their probative value outweighs their tendency to prejudice or confuse the trier of fact.

Every jurisdiction should promulgate written guidelines designed to inform and advise mental health professionals called to testify as expert witnesses about all aspects of the law and procedure within that jurisdiction applicable to the effective presentation of expert opinions.

**Standard 7-3.12. Jury instructions**

The court should instruct the jury concerning the functions and limitations of mental health professional expert testimony. As provided for in Standard 15-4.4(d), preliminary instructions should be given prior to the introduction of the expert testimony. The jury should be informed that the purpose of such testimony is to identify for the trier of fact the clinical factors relevant to the issues of past, present, and future mental condition or behavior that are under consideration.

Jurors also should be informed that they are not asked or expected to become experts in medicine, psychology, or other behavioral sciences and that their task is to decide whether the explanation offered by a mental health professional is persuasive. In evaluating the weight to be given a mental health professional's opinion, the jury should consider the qualifications of the witness, the theoretical and factual basis for the mental health professional's opinion, and the reasoning process by which
the information available to the expert was utilized to formulate the
opinion. In reaching its decisions on the ultimate questions in the trial, the
jury is not bound by the opinions of expert witnesses. The testimony of
each witness should be considered in connection with the other evidence
in the case and given such weight as the jury believes it is fairly entitled to
receive.
PART IV. COMPETENCE TO PROCEED: GENERAL PROVISIONS

Standard 7-4.1. Competence to proceed; rules and definitions

(a) In any criminal proceeding that takes place prior to or during adjudication of guilt and that requires the presence of the defendant, other than a proceeding pertaining to the defendant’s competence to proceed and proceedings (such as bail hearings) where a competence requirement would seriously prejudice the defendant, the defendant must be competent to proceed.

(b) The test for determining the defendant’s competence to proceed when the defendant is represented by counsel should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings.

(c) The tests for determining whether the defendant is competent to waive representation by counsel and to proceed pro se are specified in Standard 7-5.3.

(d) The terms competence and incompetence as used with Part IV of this chapter refer to mental competence or mental incompetence. A finding of incompetence to proceed may arise from any mental disorder or condition as long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings.

Standard 7-4.2 Competence to Plead

(a) No plea of guilty or nolo contendere should be accepted from a defendant who is incompetent to proceed.

(i) Absent additional information bearing on the defendant's competence, a finding that the defendant is competent to proceed should be sufficient to establish the defendant's competence to enter a plea of guilty or nolo contendere.

(ii) The test for determining mental competence to proceed with pleading should be whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and whether, given the nature and complexity of the charges and the potential consequences of a
conviction, the defendant has a rational as well as factual understanding of the proceedings relating to entry of a plea of guilty or nolo contendere.

(b) Evaluations of persons believed to be incompetent to proceed with pleading and treatment of persons found incompetent to proceed with pleading should take place in accordance with this part.

Standard 7-4.3. Responsibility for raising the issue of competence to proceed

(a) The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of incompetence to proceed at any time the court has a good faith doubt as to the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.

(b) The prosecutor should move for evaluation of the defendant's competence to proceed whenever the prosecutor has a good faith doubt as to the defendant's competence. The prosecutor should further advise defense counsel and the court of any information that has come to the prosecution's attention relative to defendant's incompetence to proceed.

(c) Defense counsel may seek an ex parte evaluation or move for evaluation of the defendant's competence to proceed whenever counsel has a good faith doubt about the defendant’s competence, even if the motion is over the defendant’s objection.

(d) A motion for evaluation should be in writing and contain a certificate of counsel indicating that the motion is based on a good faith doubt about the defendant’s competence to proceed consistent with (f). Defense counsel should make known to the evaluator the specific facts that have formed the basis for the motion.

(e) Neither party should move for an evaluation of competence in the absence of a good faith doubt that the defendant is competent to proceed. Nor should either party use the incompetence process for purposes unrelated to assessing and adjudicating the defendant’s competence to proceed, such as to obtain information for mitigation of sentence, obtain a favorable plea negotiation, or delay the proceedings against the defendant. Nor should the process be used to obtain treatment unrelated to the defendant’s competence to proceed; rather such treatment should be sought pursuant to
Part II of these Standards, whether the defendant is in jail, the community, or an inpatient facility.

In making any motion for evaluation, or, in the absence of a motion, in making known to the court information raising a good faith doubt of defendant's competence, the defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege.

Standard 7-4.4. Judicial order for competence evaluation

Whenever, at any stage of the proceedings, a good faith doubt is raised as to the defendant's competence to proceed and the requirements below are met, the court should order an evaluation and conduct a hearing into the competence of the defendant to proceed. The court should follow this procedure whether the doubt arises from a motion of counsel, from information supplied by counsel, from the court's own observation of the defendant, or from any information otherwise known to the court.

The court should not order an evaluation of a defendant's competence to proceed before there has been a determination of probable cause by a judge, grand jury or prosecutor unless an earlier evaluation is requested by defense counsel. If it is determined that probable cause for criminal prosecution does not exist, there should be no further inquiry into the defendant's competence to proceed.

An evaluation to determine competence to proceed should not be ordered before the defendant is represented by counsel who has had an opportunity to consult with the defendant and to be heard by the court.

The evaluator(s) appointed to perform the evaluation of the defendant's competence to proceed should be qualified by training and experience to offer testimony to the court on matters affecting competence. A mental health professional who is appointed as an evaluator should have the qualifications set forth in Standard 7-3.9.

The order for evaluation should specify the nature of the evaluation to be conducted and should specify the legal criteria to be addressed by the evaluator in accordance with the requirements set forth in Standard 7-3.4(e). Unless requested by the defendant, or for good cause shown in
accordance with Standard 7-3.4(d), the evaluation should not include an
evaluation into the defendant's mental condition at the time of the offense
or other matters collateral to the issues of competence to proceed.

(d) Each jurisdiction should establish time periods by which the evaluation
should be concluded and a report returned to the court. Such periods
normally should not exceed [fourteen] days unless good cause is shown
that an extension is necessary for an adequate evaluation. Such extensions
should last no longer than [fourteen] days.

Standard 7-4.5. Location of competence examination

(a) Whenever feasible, evaluation of a defendant’s competence to proceed
should be conducted in the locality in which the defendant is charged. A
defendant should be evaluated in jail only when the defendant is ineligible
for release to the community. A defendant may be evaluated in an
inpatient facility only when

(i) an outpatient evaluation of the defendant determines that the
defendant must be admitted to the facility for a professionally
adequate evaluation to be completed

(ii) the defendant is admitted to the facility for treatment unrelated to
the evaluation, or

(iii) the defendant will not submit to outpatient examination as a
condition of pretrial release.

(b) Confinement authorized under (a) may continue for such time as is
necessary for the evaluation to determine competence, consistent with
Standard 7-4.4(c).

(c) Pendency of proceedings to determine competence to proceed should not
postpone judicial determination of eligibility for pretrial release.

Standard 7-4.6. Report of evaluator

(a) The first matter to be addressed in the report should be the defendant's
competence to proceed. If the opinion of the evaluator is that the
defendant is competent to proceed, issues relating to treatment should not
be addressed. If the opinion of the evaluator is that the defendant is not
competent to proceed, or that the defendant is competent to proceed but
that continued competence is dependent upon maintenance of treatment,
the evaluator should then report on the treatment necessary for the
defendant to attain or maintain competence, with a presumption that such
treatment should take place in the community.

(b) If the evaluator determines that treatment is necessary for the defendant to
attain or maintain competence, the report should address the following
issues:

(i) the condition causing the incompetence;

(ii) the treatment required for the defendant to attain or maintain
competence and an explanation of appropriate treatment
alternatives in order of choice;

(iii) the availability of the various types of acceptable treatment in the
local geographical area. The evaluator should indicate the
agencies or settings in which such treatment might be obtained,
including the jail. Whenever the treatment would be available on
an outpatient basis in the community, the evaluating expert should
make such fact clear in the report;

(iv) the likelihood of the defendant's attaining competence under the
treatment and the probable duration of the treatment.

(c) If the evaluator determines that the only appropriate treatment requires
that the defendant be taken into custody or involuntarily hospitalized, then
the report should include the following:

(i) an analysis of the defendant’s treatment needs that require
attention in a custodial or inpatient setting;

(ii) whether the defendant, because of the condition causing
incompetence, meets the criteria for placement in an inpatient
setting, as set forth by law;

(iii) whether there is a substantial probability that the defendant will
attain competence to proceed within the reasonably foreseeable
future;

(iv) the nature and probable duration of the treatment required for the
defendant to attain competence;
alternatives to involuntary confinement the evaluator considered
and the reasons for the rejection of such alternatives.

Standard 7-4.7. Use of reports

(a) Any information or testimony elicited from the defendant at any hearing
or examination on competence or contained in any motion filed by the
defendant or any information furnished by the defendant to the court or to
any person evaluating or providing mental health services, and any
information derived therefrom, and any testimony of experts or others
based on information elicited from the defendant, should be considered
privileged information and should be used only in a proceeding to
determine the defendant's competence to proceed and related treatment
issues unless the privilege is waived.

(b) The defendant waives the privilege established in (a) by using or
indicating an intent to use the report or parts thereof for any other purpose.
Upon such waiver, the prosecutor should be permitted to use the report or
any part of the report to address the mental condition issue for which the
defendant uses the report, subject only to the applicable rules of evidence.

(c) If the privilege is not waived pursuant to (b), the report should be put
under seal after its use to determine competence and may only be unsealed
if subsequent proceedings relitigate that issue.

Standard 7-4.8. Necessity for hearing on competence to proceed

(a) In every case in which a good faith doubt of the defendant's competence to
proceed has been raised and as soon as practical after receipt of the reports
of the evaluators, the court should conduct a hearing on the issue of
competence to proceed unless all parties stipulate that no hearing is
necessary and the court concurs. If the defendant has been confined for
examination, the hearing should be held within [seven] days of the receipt
of the report of the evaluators; if the defendant is at liberty it should be
held within [thirty] days.

(b) If, after the competence evaluation, defense counsel and the defendant
disagree about whether a plea of incompetence should be asserted, special
counsel should be appointed to represent the defendant’s position during
the competency hearing.
If the parties agree on the issue of competence to proceed or issues related to treatment, a stipulation containing the factual basis for the agreement may be accepted by the court. The court, after review of the factual basis for the stipulation, should enter the appropriate order on the basis of the stipulation. In the absence of stipulation by the parties and concurrence by the court, a hearing on the issues should occur.

Trial by jury should not be required for the hearing on competence to proceed, provided that in those jurisdictions which authorize trial by jury for determination of issues of involuntary civil commitment, jury trial should be available to a defendant to determine issues of competence to proceed and of involuntary confinement for treatment to restore competence.

In lieu of or after a hearing, the parties may request that the court dispose of the case by either dismissing the charges without prejudice or placing the charges in abeyance, pending the defendant’s successful participation in treatment, if

(i) based on the reports of the evaluators, it appears that the defendant is incompetent to proceed but would be a suitable candidate for mental health treatment,

(ii) the prosecutor and the defense attorney agree that such diversion would be preferable to an order for restoration of competence to proceed, and

(iii) the defendant assents to such diversion.

Standard 7-4.9. Hearing on competence; defendant's rights, evidence, and priority of issues

In all hearings regarding competence, a defendant should have:

(i) the right to be present at the hearing, to fully cross-examine witnesses, to call independent expert witnesses, to have compulsory process for the attendance of witnesses, and to have a transcript of the proceedings. Either party should have the authority to call and examine any person identified by the evaluators as a source of information for the evaluative report other than the defendant or the defense attorney.
(ii) the right to adequate notice and time to prepare for the hearing, including timely disclosure of the report of appointed evaluators and, if necessary, opportunity to interview or, in those jurisdictions that so provide, to depose the evaluators before the hearing.

(b) Evidence presented at the hearing should conform to rules of evidence applicable to criminal cases within that jurisdiction. The evaluators, whether called by the court or by either party, should be subject to examination.

(i) Defense counsel may elect to relate to the court personal observations of and conversations with the defendant to the extent that counsel does not disclose the substance of confidential communications or violate the attorney-client privilege; counsel so electing may be cross-examined to that extent. Such testimony does not disqualify the attorney from representing the defendant.

(ii) The court may properly inquire of defense counsel about the attorney-client relationship and the client's ability to communicate effectively with counsel. The defense counsel, however, should not be required to divulge the substance of confidential communications or those that are protected by the attorney-client privilege. Defense counsel responding to inquiry by the court on its own motion should not be subject to cross-examination by the prosecutor.

(c) At the hearing, the court should consider separately each discrete issue raised and should first consider the issue of the defendant's competence to proceed.

(i) The party raising the issue of incompetence should have the burden of going forward with the evidence to show incompetence.

(ii) If the court, after hearing the evidence, finds by a preponderance of the evidence that the defendant is competent to proceed the matter should proceed to trial; if the defendant is found not competent, the court should proceed to issues of treatment to restore competence.

Standard 7-4.10. Hearing on competence; dispositional issues
Once the court has found that the defendant is not competent to proceed or that competence depends on continuation of treatment, the court should consider issues relating to treatment to restore competence.

(i) A defendant may be ordered to undergo treatment if the court finds that there is a substantial probability the treatment will restore the defendant to competence in the foreseeable future.

(ii) The court may order treatment be administered on an outpatient basis (including as a condition of pretrial release), at a custodial facility, or at an inpatient mental health facility.

(iii) A defendant should not be involuntarily hospitalized to restore or sustain competence unless the court determines by clear and convincing evidence that:

(A) treatment appropriate for the defendant to attain or maintain competence is available in the facility; and

(B) no appropriate treatment alternative is available that is less restrictive than placement in the facility.

At the conclusion of the hearing the court should enter its written order for treatment to restore competence. The order should contain the following:

(i) written findings of fact setting forth separately and distinctly the findings of the court on the issues of competence, treatment, and involuntary hospitalization, if applicable;

(ii) information sufficient for a professional involved in providing treatment to ascertain the charge against the defendant and the nature of the condition causing the incompetence;

(iii) a finding that the institution, program, or provider to which the defendant is to be committed or referred is sufficiently staffed and equipped to meet that defendant's treatment needs, or a finding that the ordered disposition is the best available option; and

(iv) when reports will be required under 7-4.12 from the professionals providing treatment.

An order adjudicating the defendant incompetent to proceed should be an appealable order.
Standard 7-4.11. Right to treatment and to refuse

(a) A defendant determined to be incompetent to proceed has a right to prompt and adequate treatment to restore competence and a right to have such services administered by competent and qualified professionals.

(b) Within [fourteen] days after entry of an order detaining or committing a defendant for treatment or directing that a defendant report for treatment on an outpatient basis, and assuming the person is not already restored to competence, the professional providing such services should develop and file with the court, copies being made available to both parties, an individualized plan of treatment. Each treatment plan should contain the following:

(i) a statement of the specific causes of defendant's incompetence including, where appropriate, diagnosis and description of any mental disorder, and reference to any other factors causing the incompetence to proceed;

(ii) a statement of the planned treatment, whether medical, psychological, educational, or social, appropriate to restore competence;

(iii) a statement setting forth any restrictions to be placed on the defendant and the reasons for imposing such restrictions;

(iv) a statement of the expected duration of treatment required to restore the defendant's competence.

(v) provision for periodic review of the plan’s efficacy.

(c) A defendant has a right to treatment in the least restrictive setting appropriate to restore competence to proceed.

(i) If the criteria for commitment to an inpatient facility in Standard 7-4.10(a) (iii) are met, a defendant may be treated in a forensic facility or a general treatment facility whose staff have training and experience in the treatment of persons under criminal charges.

(ii) Whenever a defendant who is incompetent to proceed has been denied pretrial release or is unable to meet the release conditions imposed, that defendant may be detained in jail only if adequate
treatment to restore competence is provided in that setting.
Otherwise treatment must be in a mental health facility.

(d) A defendant determined to be incompetent to proceed and committed for

treatment should have the right to refuse any treatment that has an
unreasonable risk of serious, hazardous or irreversible side effects.
Otherwise, such a defendant may be subject to psychoactive medication
over objection if:

(i) the government’s interests in prosecuting the defendant are
important;

(ii) the medication proposed is substantially likely to restore the
defendant to competence and substantially unlikely to have side
effects that will interfere significantly with the defendant’s ability
to assist counsel;

(iii) the medication is necessary to restore competence, and any less
intrusive treatments are unlikely to achieve the same result; and

(iv) the medication is in the defendant’s best medical interests in light
of the defendant’s medical condition.

(e) If a defendant found incompetent to proceed is treated with medication in
an inpatient facility, becomes competent, and is returned to jail or to the
community to await further legal proceedings, the court should order as a
condition of the defendant’s return that the receiving facility or local
treatment facility continue such treatment as the inpatient facility may
recommend to maintain the defendant’s competence. Only if such
treatment in the local facility is clearly not feasible should the court
consider ordering the defendant returned to the inpatient facility pursuant
to Standard 7-4.10 (a) (iii) until proceedings against the defendant are
ready to commence.

Standard 7-4.12. Periodic redetermination of incompetence

(a) Defendant’s continuing incompetence to proceed should be periodically
redetermined by the court without the necessity of motion by either party.
The facility or person responsible for treatment should therefore be
required periodically to file with the court a report on the defendant's
current status, with copies to the prosecutor and defense counsel and with
notice to the defendant. The report should be filed:
any time the treating facility or person responsible for treatment concludes that the defendant has attained competence to proceed;

(ii) any time the treating facility or person responsible for treatment concludes that there is not a substantial probability that the defendant will attain competence within the foreseeable future; or

(iii) at the following intervals: 30 days, 90 days, 180 days, and every 180 days thereafter.

(b) The report should contain the following:

(i) a reevaluation of those issues required by Standard 7-4.6 to be contained in the initial report to the court;

(ii) a description of the treatment administered to the defendant;

(iii) an evaluation of the defendant's continued progress toward attaining competence within the reasonably foreseeable future, if the report concludes that the defendant remains incompetent to proceed.

(c) Either party should have the right to contest the report or any issues addressed in the report within such time as is established in that jurisdiction and the right to demand a hearing on the issues contested, pursuant to Standard 7-4.10.

(i) Before the hearing, upon motion of either party and upon cause shown, the court should order that the defendant be evaluated by independent mental health professionals and that reports be submitted;

(ii) Each party should have the right to present evidence at the hearing. At the conclusion of the hearing the court should enter its written order setting forth separately and distinctly the findings of the court on the issues of competence, treatment, and involuntary confinement.

(d) If neither party contests the report within the time set, the court should independently review the report and:
if the court concurs in the report's conclusions the court should
enter an order accepting the report and continuing the defendant's
treatment or setting the case for trial, as appropriate;

(i) if the court does not concur in the report's conclusions the court, if
appropriate, should order an independent reevaluation of the
defendant and should hold a hearing on the issues addressed in the
report.

(e) Notwithstanding the availability of periodic redeterminations by the court,
either party should, upon good cause to believe that a defendant has
attained competence to proceed, be able to initiate a redetermination of the
defendant's competence under Standard 7-4.10.

(i) The prosecutor or defense counsel, upon a showing of good cause,
should be able to make a motion for reevaluation of a defendant by
independent evaluators or for rehearing by the court of the issue of
the defendant's continuing incompetence. For good cause shown,
the court should be empowered to order such reevaluation or
rehearing at any time.

(ii) Defense counsel should be permitted to have the defendant
reevaluated at defense expense at any time, and the treating
institution should be mandated to make the defendant available to
the evaluator for reexamination. All records necessary for
independent evaluation should be available to the prosecutor or
defense counsel at any time.

Standard 7-4.13. Defense motions; proceedings while defendant remains
incompetent

The fact that the defendant has been determined to be incompetent to
proceed-should not preclude further judicial action, defense motions, or
discovery proceedings which may fairly be conducted without the
personal participation of the defendant.

Standard 7-4.14. Disposition of unrestorably incompetent defendants

(a) A defendant may be adjudged unrestorably incompetent to proceed
(unrestorable) if the defendant has previously been adjudged incompetent
and the court finds by a preponderance of evidence that there is no
substantial probability that the defendant will become competent to
proceed within the foreseeable future.
The court should hold a hearing to determine whether the defendant is unrestorable whenever the issue has been raised by the report of the professional providing treatment, at the expiration of the maximum time of sentence for the crime charged or [twelve/eighteen] months from the date of adjudication of incompetence to proceed, whichever first occurs.

If the defendant has been found unrestorable then the defendant should be released from any detention or commitment for treatment to attain or restore competence. If the defendant meets the criteria for involuntary civil commitment, the court may order such commitment and may direct that initial commitment take place in a forensic facility.

**Standard 7-4.15. Conducting proceedings when the defendant is taking medication**

A defendant should not be considered incompetent to proceed because the defendant's competence is dependent upon continuation of treatment which includes medication, nor should a defendant be prohibited from standing trial or entering a plea solely because that defendant is being provided such services under professional supervision.

If the defendant proceeds to trial with the aid of treatment that may affect demeanor, either party should have the right to introduce evidence regarding the treatment and its effects, and the jury should be instructed accordingly.

**Standard 7-4.16. Credit for time served**

A defendant who has been detained or committed for examination of competence to proceed or treatment to restore competence to proceed should receive credit against any sentence ultimately imposed for the time of such pretrial confinement.
PART V. COMPETENCE IN SPECIFIC CONTEXTS

Standard 7-5.1 Competence to proceed in specific contexts and related issues

(a) Legislatures and courts should recognize that special competence issues arise when defense counsel has good faith doubts about the defendant’s ability to make significant decisions, when the defendant wants to proceed pro se, when the defendant is subject to police interrogations, and when the proceeding at issue occurs after conviction.

(b) Standard 7-5.2 applies when defense counsel has doubts about the defendant’s competence to make decisions about matters within the defendant’s sphere of control.

(c) Standard 7-5.3 applies when the defendant elects to proceed without counsel and when, after such election, the defendant proceeds pro se.

(d) Standard 7-5.5 governs the admissibility of statements made by people with mental disorder during interrogation and related issues.

(e) Standards 7-8.7 and 7-8.8 govern competence to proceed of defendants represented by counsel in noncapital sentencing and post-conviction proceedings and Standards 7-9.8 and 9.9 govern competence issues relating to capital sentencing and post-conviction proceedings.

Standard 7-5.2 Competence to proceed with specific decisions: control and direction of case

(a) Matters that are under the defendant’s sphere of control include the decisions to plead guilty, assert a defense of nonresponsibility [insanity defense], and waive the rights to jury trial, testify, and appeal.

(b) The test for determining whether the defendant is competent to make a decision regarding control and direction of the case should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the nature and consequences of the decision or decisions under consideration.

(c) If the defense attorney has a good faith doubt concerning the defendant’s competence to make decisions within the defendant’s sphere of control under (a), the defense attorney may make a motion to determine the defendant’s competence to proceed under Standard 7-4.3 even if the defendant has previously been found competent to proceed in the case. Upon such motion, the court should order a mental health evaluation, if
necessary, according to the procedures set forth in Standard 7-4.4, and indicate the specific decisional issue in question. If, after a hearing, the court finds the defendant competent to proceed, defense counsel should follow the defendant’s direction on matters within the defendant’s sphere of control. If the defendant is found incompetent, the court should order treatment according to Part IV.

**Standard 7-5.3. Competence to elect to proceed without representation by counsel; competence to proceed pro se**

(a) A defendant who is incompetent to elect to proceed without representation by counsel should not be permitted to proceed to trial or enter a plea of guilt or nolo contendere while unrepresented by counsel.

(b) The test for determining competence to elect to proceed without representation by counsel should be whether the defendant

(i) is competent to proceed under Standard 7-4.1(b),

(ii) has a rational and factual understanding of the possible consequences of proceeding without legal representation, including difficulties the defendant may experience due to his or her mental or emotional condition or lack of knowledge about the legal process, and

(iii) the ability to make a voluntary, knowing, and rational decision to waive representation by counsel.

(c) A defendant who is competent to elect to proceed without representation by counsel may plead guilty if competent to do so under Standard 7-4.2.

(d) A defendant who is competent to elect to proceed without representation by counsel may represent him or herself at trial unless the court finds that, as a result of mental disorder,

(i) the defendant lacks the capacity to carry out the minimum tasks required for self-representation at trial to such a substantial extent as to compromise the dignity or fairness of the proceeding, or

(ii) the defendant will significantly disrupt the decorum of the proceeding.

(e) If, after explaining the availability of a lawyer and making sufficient inquiry of a defendant professing a desire to waive representation by
counsel and proceed pro se, the trial judge has a good faith doubt about the
defendant’s competence with respect to either waiver or pro se
representation, the judge should order a pretrial evaluation of the
defendant according to the procedures set forth in part IV of this chapter.

After obtaining the report of the evaluators, the court should hold a
hearing at which the defendant is represented on the issues raised
according to the procedures set forth in part IV of this chapter.

If the court determines that the defendant is both competent to
 elect to proceed without representation by counsel and competent
to proceed pro se, the court should proceed with the case. The
court in any such case should consider the appointment of standby
counsel in accordance with Standard 6-3.7 to assist the defendant
or, if it should prove necessary, to assume representation of the
defendant.

If the court determines that the defendant is incompetent to elect to
proceed without representation by counsel, the court should
proceed to consider treatment in accordance with part IV of this
chapter.

If the court determines that the defendant is competent to elect to
proceed pro se but is not competent to proceed to trial without
representation of counsel, the court should appoint counsel to
represent the defendant and should proceed to trial of the case.

Standard 7-5.4. Use of statements by people with mental disorder at trial

This Standard addresses competence and admissibility issues that arise
when people with mental disorder make incriminating statements to the
police that are potentially:

unreliable, as described in (b).

involuntary, as described in (c),

obtained in violation of *Miranda v. Arizona*, as described in (d).

Where the court finds that the reliability of a statement has been
significantly impaired by a person's mental disorder, it should exclude the
statement from evidence even in the absence of official misconduct.
Where the statement has not been excluded, the court should permit
evidence to be presented to the trier of fact regarding the effect of the
defendant's mental disorder on the reliability of the statement.

(c) Courts should recognize that official conduct that does not constitute
impermissible coercion when persons without mental disorder are
interrogated may impair the voluntariness of the statements of persons
with mental disorder. Where such impairment of voluntariness is
significant, the court should exclude the statement from evidence.
However, in the absence of any such impermissibly coercive official
conduct, such statement should not be excluded from evidence solely
because it was the product of the person's mental disorder, unless it is
found unreliable pursuant to Standard 7-5.4(b).

(d) Statements made by persons with mental disorder in response to custodial
interrogation should be admissible only if the person has a factual and
rational understanding of his or her rights and makes a knowing and
voluntary waiver of them. A person's mental disability can affect and
impair each element of an otherwise valid waiver.

(d) The court should admit into evidence at both pretrial hearings and trial
otherwise admissible expert testimony by qualified mental health
professionals bearing on the effect of a person's disorder on the reliability
and voluntariness of a statement and the validity of any waiver of rights
that preceded such a statement.
PART VI. NONRESPONSIBILITY FOR CRIME

Standard 7-6.1. The defense of mental nonresponsibility [insanity]

(a) A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disorder, that person was unable to appreciate the wrongfulness of such conduct.

(b) When used as a legal term in this Standard, mental disorder refers to any disorder that substantially affected the mental or emotional processes of the defendant at the time of the alleged offense, unless it was a disorder manifested primarily by repeated criminal conduct or was attributable solely to the acute effects of voluntary use of alcohol or other drugs.

Standard 7-6.2. Admissibility of other evidence of mental condition

Evidence, including expert testimony, concerning the defendant’s mental condition at the time of alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be admissible, consistent with Standard 7-3.8(a) restricting experts to testimony based on their specialized knowledge.

Standard 7-6.3. Control and notice of defense based on mental condition

(a) The decision whether to raise a defense of mental nonresponsibility under Standard 7-6.1 is the defendant’s. The decision whether to introduce evidence of mental condition under Standard 7-6.2 is the defense attorney’s.

(b) If the defense intends to rely upon the defense of mental nonresponsibility [insanity] or introduce expert testimony relating to mental condition at the time of the offense charged, it should, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the prosecuting attorney in writing of such intention and file a copy of such notice with the clerk. The court may, for cause shown, allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate. If notice is not given in compliance with the requirements of this Standard, the court may impose sanctions appropriate to the degree of prejudice to the prosecution.

Standard 7-6.4. Evaluation procedures to determine mental condition at the time of the offense

(a) Prior to the notice required in Standard 7-6.3(b) the defense may seek evaluation of the defendant’s mental condition at the time of the offense. Standard 7-3.3(a) governs when the defendant is entitled to funding for this evaluation.
After the defendant’s notice as provided in Standard 7-6.3(b) and a finding that the defendant intends to rely upon expert testimony, the court may, on motion of the prosecuting attorney, order the defendant to be examined by an expert designated in the order for the purpose of determining the mental condition that is being put in issue by the defendant. If the court determines that an adequate evaluation of defendant’s mental health condition at the time of the alleged crime has been precluded because the defendant has refused to cooperate with the mental health professional, it should adopt remedial measures proportionate to the degree of prejudice to the prosecution and the extent to which the non-cooperation was influenced by the defendant’s mental disorder.

The court should not on its own motion order an evaluation of the defendant to determine mental condition at the time of the offense and should not grant such a motion from the prosecution except as provided in (b) of this Standard.

Procedures for conducting evaluations of mental condition at the time of the offense, including the attorneys’ duty to provide information, the terms of the court order, the presence of counsel during the evaluation, recording of the evaluation, and the conduct of joint evaluations are governed by Standards 7-3.4 and 7-3.5.

Procedures for preparing reports on the mental condition at the time of the offense are governed by Standards 7-3.6.

**Standard 7-6.5. Discovery and disclosures**

Upon giving notice under Standard 7-6.3(b), the defense should provide the prosecution with the results of its evaluation(s), as provided in Standard 7-3.7(b)(i).

Pursuant to Standard 11-2.1 in the Discovery Standards, the prosecution should timely provide the defense with information bearing on the defendant’s mental condition at issue, including expert reports or statements, the results of mental evaluations and tests, and any written or recorded statements and the substance of any oral statements made by the defendant. Additionally, upon receiving notice under Standard 7-6.3(b), the prosecutor should, as soon as reasonably practicable, disclose to defense counsel:

- any information that tends to rebut the factual data upon which the experts called by the defendant are relying, including documents, names and addresses of witnesses and their relevant written or recorded statements, and substance of any oral statements;
the names, addresses, and statements of any experts whom the
prosecutor intends to call for the purpose of discrediting the mental
nonresponsibility [insanity] defense or evidence of mental
condition.

(c) Admissibility and disclosure of evaluation results are governed by
Standard 7-3.2(a) (on the admissibility of defendant’s evaluation
statements), Standard 7-3.2(b) (on the use of information relevant to
competence to proceed or imminent risk), and Standard 7-3.4(c) (on
disclosure of evaluation results to the public).

Standard 7-6.6. Limitation on opinion testimony concerning mental
classification

Expert testimony as to how the development, adaptation, and functioning
of the defendant’s mental processes may have influenced the defendant’s
conduct at the time of the offense charged should be admissible.
Consistent with Standard 7-3.8(a), expert reports and testimony should be
based on specialized knowledge of the expert and the insanity test
language should be used only if the expert can explain its clinical
relevance. Testimony that a defendant is “sane” or “insane” should not be
used unless required by the jurisdiction.

Standard 7-6.7. A unitary trial

The defense of mental nonresponsibility [insanity] and all other evidence
pertaining to the defendant’s responsibility for the acts charged should be
heard in a unitary trial unless, upon the defendant’s request, the court
determines that trying the issue of guilt separately from the issue of
responsibility is necessary to prevent substantial prejudice to the
defendant.

Standard 7-6.8. Instruction to the jury

Upon motion of either party, the court may instruct the jury as to the
dispositional consequences of a verdict of not guilty by reason of mental
nonresponsibility [insanity].

Standard 7-6.9. Burden of production and burden of persuasion

The defense should have the burden of ensuring that evidence of mental
nonresponsibility [insanity] is introduced.

Once evidence of mental nonresponsibility [insanity] has been introduced
at trial, the party with the burden of persuasion should prevail if it meets
the preponderance of the evidence standard of proof.
Nothing contained in paragraph (b) above relieves the prosecution of its burden of proving beyond a reasonable doubt all elements of the offense charged including the mental state required for the offense charged.

**Standard 7-6.10. Forms of verdict**

(a) When the defense of mental nonresponsibility [insanity] has been properly raised, the verdict returned should be in the form of either guilty, not guilty, or not guilty by reason of mental nonresponsibility [insanity]. The jury should be instructed that it may consider the verdict of not guilty by reason of mental nonresponsibility [insanity] only after finding, beyond a reasonable doubt, that the defendant committed the conduct charged.

(b) Legislatures should not enact statutes that supplant or supplement the verdict of not guilty by reason of mental nonresponsibility [insanity] with a verdict of guilty but mentally ill.
PART VII. COMMITMENT OF NONRESPONSIBILITY ACQUITTEES

Standard 7-7.1. Commitment following mental nonresponsibility [insanity] acquittal

(a) Mental nonresponsibility acquittees may be involuntarily confined pursuant to special commitment criteria that:

(i) are less demanding in certain respects than the criteria typically required for general involuntary civil commitment of individuals with mental disorder who have not been charged with a crime, and

(ii) if proven, may result in confinement in forensic mental health facilities that are more secure than the civil hospitals relied upon in the general involuntary commitment setting.

(c) If the commitment of a mental nonresponsibility acquittee is not sought, or if the commitment is sought but the court declines to order such commitment, the acquittee should be released.

(d) In jurisdictions that confer authority on an administrative board or a statewide forensic director to make commitment and release decisions about individuals acquitted by reason of mental nonresponsibility, the provisions of this part referring to the director of the mental health facility should be modified accordingly.

Standard 7-7.2. Commitment procedures; special and general

(a) Each state should adopt a separate set of special procedures ("special commitment") for seeking the civil commitment of those acquittees who were acquitted by reason of mental nonresponsibility of offenses involving acts causing, threatening, or creating a substantial risk of death or serious bodily harm. These procedures should include the dispositional option of conditional release, consistent with Standard 7-7.12.

(b) States may seek the civil commitment of mental nonresponsibility [insanity] acquittees who were acquitted of offenses that did not involve acts causing, threatening, or creating a substantial risk of death or serious bodily harm only by using those procedures used for the general civil commitment (commitment of persons outside the criminal justice system).

Standard 7-7.3. Evaluation

(a) After issuance of a verdict of not guilty by reason of mental nonresponsibility in cases governed by 7-7.2(a), the trial court, upon motion by the prosecution, should order an evaluation of whether the
acquittee meets the commitment criteria set out in Standard 7-7.4(b). The
time allotted for evaluation should not exceed [thirty] calendar days
except, when for good cause shown, the court extends the period for up to
an additional [thirty] calendar days. This evaluation is for the sole purpose
of assisting the court in determining whether the acquittee should be
committed.

(b) The court may order that the evaluation be conducted while the mental
nonresponsibility acquittee is in the community, in a correctional facility,
or in a mental health facility. In choosing the location of the evaluation,
the court should be guided by the least restrictive alternative principle and
concern for public safety. The evaluation should be conducted by mental
health professionals possessing the qualifications required by Standard 7-3.9.

(c) During the evaluation process, mental nonresponsibility acquittees should
have the same rights regarding treatment as do persons subject to general
civil commitment stem, consistent with the requirements of institutional
and public safety.

(d) The evaluation should be completed and an evaluation report should be
submitted to the court and to all parties within the time allotted for the
evaluation under (a). Upon submission of the evaluation report the
prosecuting attorney may move for a commitment hearing. If the
prosecuting attorney decides to seek commitment, a motion for a hearing
must be filed within [five] days. That hearing must be held within [fifteen]
days from the court’s receipt of the evaluation report.

(e) If the prosecuting attorney does not file a timely motion seeking
commitment, an acquittee in custody should be released.

Standard 7-7.4. Special procedures; commitment criteria

(a) Special commitment procedures for mental nonresponsibility acquittees
acquitted of offenses involving acts causing or creating a substantial risk
of death or threatening serious bodily harm should afford acquittees the
right to a commitment hearing which meets the requirements set forth in
Standard 7-7.5

(b) At the conclusion of the commitment hearing, the court may order the
acquittee committed if it finds:

(i) beyond a reasonable doubt that the acquittee committed the
criminal act for which he or she was acquitted by reason of mental
nonresponsibility [insanity], unless the trier of fact made such a
finding at the acquittee’s criminal trial, as provided in Standard 7-6.10(a), and

(ii) by a preponderance of the evidence that, due to mental disorder of the type described in Standard 7-6-1(b), the acquittee is at risk for causing a substantial risk of bodily harm to others in the foreseeable future if not committed, or

(iii) by a preponderance of the evidence that the acquittee does not meet the criteria in (b)(ii) due to the effect of treatment currently being received, in which case the acquittee may be committed unless the acquittee proves by a preponderance of the evidence that the acquittee will continue to receive such treatment following release for as long as the treatment is required.

(c) Commitment should result in confinement in a forensic mental health facility unless the acquittee proves by a preponderance of the evidence that conditions imposed pursuant to Standard 7-7.12 will provide adequate protection of the community.

Standard 7-7.5. Special commitment hearings

(a) A special commitment system for mental nonresponsibility acquittees should provide the procedural protections described in this Standard.

(b) The acquittee should be represented by counsel at the commitment hearing and is entitled to assistance of counsel during this period. If the acquittee is without counsel, the court should appoint counsel. If the acquittee is unable to afford counsel, the cost should be borne by the state. Representation by counsel cannot be waived except as provided in Standard 7-5.3.

(c) At the hearing, the acquittee is entitled to confront and cross-examine adverse witnesses. The acquittee is also entitled to present witnesses, including an independent expert witness or expert witnesses. For financially eligible acquittees, the reasonable cost of expert witnesses should be borne by the state.

(d) At the hearing, the rules of evidence should apply.

(e) An acquittee’s refusal to participate in an evaluation under Standard 7-7.3 may be taken into account by the court in determining whether commitment criteria are met.

(f) The acquittee should have the right to appeal on the record an adverse ruling on the issue of commitment. The appeal should be heard on an expedited basis.
Standard 7-7.6. Special commitment; conditions of confinement

Consistent with the requirements of institutional and public safety, persons committed to a mental health facility pursuant to special commitment statutes should be confined under comparable conditions and with the same rights of persons committed under general commitment statutes. Placement should be in the least restrictive treatment environment, which can include a civil hospital.

Standard 7-7.7. Special commitment; maximum duration of commitment order

(a) When, pursuant to Standard 7-7.4, a court hospitalizes or conditionally releases a mental nonresponsibility acquittee, it should also issue an order setting the maximum duration of the acquittee’s special commitment. The maximum duration set by the court should not exceed the maximum term of incarceration provided by law for the most serious count in the indictment or information had the acquittee been found responsible for the crime charged. Upon the expiration of the maximum duration of special commitment, the criminal court’s jurisdiction over the acquittee should cease, and any confinement or conditional release of the acquittee ordered by such court should terminate.

(b) In setting the maximum duration for special commitment, as in other commitment proceedings under this chapter, the court should consider the acquittee’s need for treatment and its concerns for the public’s safety, but it may not consider retribution or punitive factors.

Standard 7-7.8. Special commitment; periodic review

(a) A specially committed acquittee may petition for a judicial hearing to determine whether the acquittee continues to meet the criteria for special commitment set forth in Standard 7-7.4. The acquittee may petition the court for such a hearing [six months] after the acquittee’s original special commitment, and every [year] thereafter. At the original commitment hearing, or at subsequent periodic review hearings under this Standard, the court may issue an order allowing the acquittee to petition for a rehearing sooner than the mandatory period stated herein. The court should issue such an order when it appears that the acquittee’s mental condition and other relevant factors warrant a shorter interval between periodic review hearings.

(b) Upon filing of a petition for a review hearing the court should convene a hearing within [thirty] days, which should be conducted in accordance with the procedures set forth in Standard 7-7.5.
At any hearing held within one year of the acquittee’s original special commitment, commitment may continue if the criteria in Standard 7-7.4(b)(ii) or (iii) are met.

At any hearing held a year or more after the original special commitment, commitment may continue if the state proves by clear and convincing evidence that the acquittee meets the criteria in Standard 7-7.4(b)(ii) or (iii).

If commitment is continued under either (b)(i) or (b)(ii), but the criteria in Standard 7-7.4(c) governing conditional release are met, the acquittee should be placed on conditional release.

Legal assistance should be regularly available to all specially committed acquittees at the location of their confinement. To ensure that each acquittee’s right to periodic review as set forth in paragraph (a) of this Standard is effective, each acquittee should have ready access to counsel, including appointed counsel. When the acquittee is entitled to periodic review, counsel should request a hearing on the acquittee’s continuing need for commitment or should notify the court in writing that counsel has conferred with the acquittee and that a hearing is not requested at that time. By declining to request a hearing when the acquittee is entitled to review, the acquittee does not waive the right to any subsequent hearing.

Nothing in this Standard should be interpreted as limiting the right of a specially committed acquittee to petition for a writ of habeas corpus at any time.

**Standard 7-7.9. Special commitment; petition for acquittee’s release**

When the director of the facility in which a specially committed acquittee is confined determines that substantial clinical evidence indicates that the acquittee meets the criteria for release without conditions or, pursuant to Standard 7-7.12, with conditions, the director should petition the court for the acquittee’s release.

The petitioner should have access to counsel for preparing and presenting the petition to the court.

The petition should set forth the clinical findings supporting the conclusion in favor of release and should contain a summary of all pertinent clinical data.

A hearing should be held no later than [fifteen] days after filing the petition and the acquittee should remain confined pending the hearing.
Following the hearing the court should determine the matter pursuant to Standard 7-7.8(b).

The acquittedee should receive a copy of the petition and should have the right to be present at the hearing, to be represented by counsel, and to present evidence.

The prosecuting attorney should receive a copy of the petition and should have the right to be present at the hearing and to present evidence.

**Standard 7-7.10. Special commitment; notification of release**

When the release or conditional release of a specially committed acquittedee is imminent, the prosecuting attorney should have the authority to notify relevant individuals and agencies.

**Standard 7-7.11. Special commitment; authorized leave**

(a) Authorized leave means a temporary, finite absence from the facility without staff supervision that is part of a treatment program. Authorized leave for specially committed acquittedees should be permitted only by an order from court.

(b) When the director of the facility concludes that a specially committed acquittedee can be granted authorized leave without posing a danger to the community and that such leave would benefit the acquittedee’s treatment regimen, the director should provide notice of an intent to authorize the leave to the prosecutor and, if the acquittedee is represented, to defense counsel. The notice should indicate the leave’s specific conditions and include a summary of all pertinent clinical data. The prosecutor should have the right to challenge the leave authorization in court, which should determine whether the leave is consistent with public safety and whether any additional conditions should be imposed.

(c) If a specially committed acquittedee violates any condition of an authorized leave order, or if the leave is no longer appropriate to the acquittedee’s treatment regimen or is no longer consistent with public safety, the leave may be terminated by the director or by the court.

**Standard 7-7.12 Special commitment; conditional release**

(a) Every state should establish procedures for the conditional release of acquittedees who can be served in the community without undue risk to public safety. To facilitate conditional release, states should establish conditional release programs (CRP) with sufficient staffing and resources to discharge the following responsibilities:
(i) Reviewing any proposed plan for conditional release and contacting all service providers named in the plan to determine their capacity and willingness to (a) provide the services specified in the plan, (b) submit periodic reports to the CRP regarding the acquittee's participation in services, and (c) immediately notify the CRP if an acquittee is non-compliant with or otherwise no longer appropriate for services from the provider;

(ii) Monitoring an acquittee's compliance with the conditional release order by reviewing reports provided by service providers named in the order and maintaining accessibility to providers 24 hours per day, 7 days per week, to receive reports of non-compliance;

(iii) Immediately notifying the prosecutor of any allegation or other indication that the acquittee has failed to comply with the conditions of a conditional release order or no longer is appropriate for conditional release;

(iv) Before an acquittee's term of conditional release expires, arranging for providers serving the acquittee to assess the acquittee's likelihood of continuing to receive necessary services without a conditional release order in place and reporting the same to the court and the attorneys for the acquittee and the state; and

(v) Organizing periodic training for service providers in the jurisdiction regarding the special service needs of individuals on conditional release and the procedures for reporting to the CRP.

(b) Prior to the first periodic review provided for in (a), for any person who is committed to a mental health facility, the facility, the CRP or both together should, in cooperation with local mental health providers, prepare a conditional release plan or explain in writing why release planning is not appropriate. The acquittee may also proffer a conditional release plan during any special commitment or review hearing. Every conditional release plan should specify, at a minimum:

(i) Where the acquittee will reside;

(ii) The names and contact information for all providers who will serve the acquittee, the frequency of services, and the non-confidential nature of services;

(iii) The acquittee's daytime activities; and

(iv) The requirements for drug testing, if applicable.
Conditional release plans should take effect only if approved by the court. Every conditional release order issued by the court should specify, at a minimum:

(i) A plan for services and other conditions of the acquittee’s release;

(ii) The responsibilities of the CRP staff, consistent with section (a)(ii­iv) of this Standard; and

(iii) The duration of the order.

If the CRP receives a report alleging that, or otherwise has reason to believe that, an acquittee has failed to comply with the conditions of release or otherwise no longer meets eligibility criteria for conditional release, it should immediately notify the prosecutor. In addition, if the CRP believes that the acquittee requires placement in an inpatient facility without delay, it should initiate proceedings for the acquittee’s civil commitment under the jurisdiction’s general civil commitment law.

If a prosecutor receives a report under section (d) of this Standard, he or she may petition the court for revocation of the acquittee’s conditional release and an order for placement of the acquittee in a facility pending a revocation hearing.

If a court finds probable cause to believe that an acquittee on conditional release has failed to comply with the conditions of release or otherwise no longer meets eligibility criteria for conditional release, it should order the acquittee taken into custody, which can include removing the acquittee from a civil hospital to which he or she was committed under (d), and transported to the originating mental health facility or such other facility as the state mental health authority designates pending a revocation hearing.

If an acquittee on conditional release is placed in a facility under section (f) of this Standard, a court should conduct a hearing within 10 days of the acquittee’s placement. The acquittee should be entitled to the procedural protections described in Standard 7-7.5.

If, at the hearing, the prosecutor proves by clear and convincing evidence that the acquittee no longer meets eligibility requirements for conditional release, the court should revoke the conditional release. Non-compliance with conditions of release may serve as evidence that the acquittee is ineligible for conditional release, but non-compliance alone is not necessarily sufficient.
If the court finds that the acquittee, although ineligible for conditional release under the existing plan for services, would be eligible with modifications to the plan, it may order such modifications and impose such other conditions as it determines appropriate.

An acquittee whose conditional release is revoked shall not be precluded from petitioning for release under Standard 7-7.8 or from being released pursuant to Standard 7-7.9.

Before the expiration of an acquittee’s term of conditional release, the CRP should provide the court and the attorneys for the acquittee and the state with reports from providers serving the acquittee assessing the likelihood that the acquittee would continue to receive and comply with necessary services without a conditional release order. Upon the request of either attorney, or sua sponte, the court may order additional evaluations of the acquittee. If the prosecutor petitions for extension of the acquittee’s conditional release term, the court should hold a hearing with the procedural protections described in Standard 7-7.5.

If, at the hearing, the prosecutor proves, by clear and convincing evidence, that the acquittee is not likely to receive or comply with necessary services without a conditional release order, the court may extend the acquittee’s conditional release, consistent with durational limits specified in Standard 7-7.7.

If the court finds that the acquittee is likely to continue to receive necessary services without a conditional release order in place, it should deny the prosecutor’s petition for extension.
PART VIII. SENTENCING AND POST-CONVICTION IN NON-CAPITAL CASES

Standard 7-8.1. Emergency Treatment

If after conviction but prior to sentencing an offender requires emergency treatment, the criteria and procedures of Standard 7-10.3(c) should be followed.

Standard 7-8.2 Contents of Presentence Report

Consistent with Standard 18-5.4 in the Sentencing Standards, in cases involving an offender with a mental disorder, a presentence report should be prepared. The report should include:

(a) A summary of the offender’s current mental health condition and current and past treatment;

(b) A description of programs or resources, such as treatment centers, residential facilities, vocational training services, educational and rehabilitative programs, and, in particular, community-based mental health services, that would be appropriate for the offender’s condition;

(c) A description of any condition relating to the offender’s likelihood of adhering to treatment;

(d) An indication of whether assignment of a specialized probation officer or a case manager trained in monitoring offenders with mental disorder would be appropriate in the offender’s case.

(e) When considered necessary to inform the judge about any of the foregoing factors, a recommendation for a comprehensive mental health evaluation.

Standard 7-8.3 Expert Assistance in Sentencing

In discharging the duties specified in Standard 18-5.8(a) (requiring notice of an intent to controvert or supplement a presentence report) and Standard 18-5.17(a)(i) (allowing a party to present evidence at sentencing hearings) defense counsel may require the assistance of mental health professionals. Accordingly, each jurisdiction should ensure that this form of assistance is available to indigent defendants who can demonstrate that their mental condition is likely to be a significant factor at sentencing and that expert assistance is needed to evaluate that condition. This provision does not preclude the court or the prosecutor from seeking a mental health evaluation prior to sentencing.
Standard 7-8.4 Use of Pretrial Evaluation Results

Testimony of a mental health professional that is based on a competency evaluation conducted prior to trial is admissible at a sentencing hearing only in accordance with Standard 7-4.7. Testimony based on other pretrial evaluations of mental condition are admissible only if the offender puts mental condition in issue at the hearing.

Standard 7-8.5 Diminished Culpability

Consistent with Standards 18-3.2 and 18-6.3 of the Sentencing Standards, in all non-capital cases evidence of mental disorder at the time of the offense may be a mitigating factor in sentencing a convicted offender. In particular, conditions that should be considered mitigating if they existed at the time of the offense include:

(a) Significant limitations in both cognitive functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from intellectual disability, dementia, or a traumatic brain injury.

(b) Severe mental disorder, not manifested primarily simply by repeated criminal conduct or attributable solely to the acute effects of voluntary alcohol or drug use, that significantly impaired the offender’s capacity to appreciate the nature, consequences or wrongfulness of conduct, exercise rational judgment in relation to conduct, or conform conduct to the requirements of the law.

Standard 7-8.6 Sentence of Probation

(a) An offender should not be denied probation solely because the offender requires mental health treatment.

(b) If a court imposes a sentence of probation the court should, to the extent authorized by applicable law, consider the offender’s current mental condition, including the presence of mental disorder and the offender’s amenability to treatment in the community for the disorder, and the conditions that could ensure the offender’s adherence to recommended treatment.

(c) Treatment of an offender with mental disorder who is sentenced to probation should be a condition of probation if necessary to protect the safety of the offender or the public or to assure the offender’s successful integration in the community.

(d) If probation is imposed with mental health treatment as a condition of probation, the court and the department of corrections should ensure that
specialized probation officers trained in working with people with mental disorder are assigned to the offender.

**Standard 7-8.7. Competence to proceed: noncapital sentencing**

(a) A court may not sentence a defendant who is incompetent to proceed at time of sentence.

(i) The test for determining competence to proceed at time of sentence should be whether the defendant has the sufficient present ability to consult with the defendant's attorney with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the sentence proceedings.

(ii) If, at the time of sentencing, a good faith doubt is raised as to the defendant's competence to proceed and the defendant's participation is necessary to ensure a fair sentencing proceeding, the court has an obligation to determine the defendant's competence and, before imposing sentence, should order a presentence evaluation of the defendant and determine whether he or she is competent to proceed at the time of sentence according to the procedures set forth in part IV of these Standards.

(b) If the defendant is found incompetent to proceed at the time of sentence, the court should order treatment to restore competence pursuant to Standards 7-4.10 through 7-4.12 in part IV of these Standards.

(i) If the defendant is restored to competency, sentencing should proceed.

(ii) If the defendant is found to be non-restorable, and the defendant was convicted of an offense causing, threatening, or creating a substantial risk of death or serious bodily harm, the court should initiate special commitment under part VII of these Standards. Defendants convicted of other offenses may be subject to general involuntary civil commitment.

**Standard 7-8.8. Competence to proceed: appealing from conviction in a noncapital case**

(a) Consistent with Standard 7-5.2, the test for determining whether the defendant is competent to make a decision regarding whether to appeal conviction in a noncapital case should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree
of rational understanding and whether the defendant has a rational as well as factual understanding of the nature and consequences of the decision.

(i) If the defense attorney believes the defendant is competent under this Standard, then the defense attorney should abide by the defendant’s decision about whether to appeal.

(ii) If the defense attorney believes the defendant is incompetent under this Standard then the attorney may petition the court to permit a next friend acting on the defendant’s behalf to initiate or pursue the appeal.

(b) The decision about which issues to raise on appeal is the defense attorney’s. However, incompetence of the defendant during the time of appeal should be considered adequate cause, upon a showing of prejudice, to permit the defendant to raise, in a later appeal or action for postconviction relief, any matter not raised on the initial appeal because of the defendant's incompetence.
PART IX: SENTENCING AND POST-CONVICTION IN CAPITAL CASES
[NEW]

7-9.1 Mental disorder and capital cases

(a) As stated in Standard 18-1.1 and except as provided in this Part, the American Bar Association Standards for Criminal Justice do not take a position on whether the death penalty should be an available sentencing alternative. The sole purpose of Standards 7-9.1 through 7-9.9 is to address unique issues that arise in connection with mental disorder in those jurisdictions that retain the death penalty. These issues include:

(i) When mental disorder is an exemption from imposition of the death penalty.

(ii) When mental disorder renders an offender incompetent to be executed.

(iii) The effect of mental disorder on post-conviction proceedings in capital cases.

(iv) Evaluation and judicial procedures that should be followed when mental disorder is an issue in a capital trial, at capital sentencing, or during the post-conviction process.

(b) Except as otherwise provided in this Part, procedures governing evaluations, disclosure of evaluation results, and notice of intent to present mental health experts should be consistent with Standards 7-3.2 to 7-3.14 and 7-6.4 and 7-6.5. The provisions in this Part that address those issues are designed to protect against the prosecution’s pretrial access to mental condition evidence that is relevant only after conviction.

7-9.2 Prohibition on execution of people with certain mental conditions

(a) Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and

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1 Sections (a), (b) and (c) of this provision are taken verbatim from paragraphs 1 and 2 of American Bar Association Resolution 122A, which passed the House of Delegates on August 8, 2006. The resolution was also adopted by the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill.
practical adaptive skills, resulting from intellectual disability, dementia, or a traumatic brain injury.

(b) Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity:

(i) to appreciate the nature, consequences or wrongfulness of their conduct,

(ii) to exercise rational judgment in relation to conduct, or

(iii) to conform their conduct to the requirements of the law.

(c) A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

(d) Eligibility for exemption from the death penalty under (a) should be determined at a hearing prior to trial. Eligibility for exemption from the death penalty under (b) should be determined by the judge at the capital sentencing proceeding after the presentation of evidence but before deliberation on a verdict, unless the defense requests a pretrial hearing on the issue. The defendant should bear the burden of proving both exemptions by a preponderance of the evidence.

(e) A finding of criminal responsibility at trial should not bar a finding of eligibility for the exemption in (a) or (b), and a finding of eligibility for the death sentence under (a) or (b) should not preclude finding a mitigating circumstance at sentencing, even if the language defining the relevant criteria is identical.

7-9.3 Evaluation of mental condition relevant to capital trials

(a) The court should provide funding for one or more qualified mental health professionals to evaluate a defendant charged with capital murder if, upon motion of the defense attorney, the court finds that (i) the defendant’s mental condition is likely to be a significant factor at the guilt or penalty phase of the trial or on issues that would exempt the defendant from the death penalty, and (ii) the defendant is financially unable to pay for expert assistance. Consultative mental health professionals may be appointed consistent with Standard 7-1.3(d) upon similar findings by the court.
Mental health professionals appointed under (a) should satisfy the education, training and experience requirements specified in Standard 7-3.9 and 7-3.11(c)(ii through iv). If the attorney for the defendant establishes that there is reason to believe that the defendant may have significant limitations in both intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from intellectual disability, dementia, or a traumatic brain injury, at least one of the evaluators should be skilled in the administration, scoring and interpretation of intelligence tests and measures of adaptive behavior.

Evaluators should prepare separate written reports on each of the issues addressed, including, as applicable, a mental condition defense, exemption from the death penalty based on Standard 7-9.2(a), exemption from the death penalty based on Standard 7-9.2(b), and mitigation.

7-9.4 Notice of intent to present mental health evidence

If the attorney for the defendant intends to present expert evidence in support of a mental condition defense or an exemption described in Standard 7-9.2, or if the defense anticipates it will present expert mental health evidence in mitigation at the penalty phase of the trial, the attorney should so notify the prosecutor at the time of filing pretrial motions. The notice should also provide:

(i) the names of the mental health professionals who will testify;
(ii) their qualifications;
(iii) the specific nature of any testing the experts have performed or will perform; and
(iv) a brief, general summary of the topics to be addressed that is sufficient to permit the government to identify an appropriate rebuttal expert witness.

If, in the event that the defendant is convicted of capital murder and the issue has not been resolved prior to trial, the attorney for the defendant decides to proceed with presentation of expert mental health evidence in support of an exemption from the death penalty under Standard 9.2(b), or
the attorney decides to present such evidence in mitigation, the attorney should confirm his or her intent within 24 hours of the defendant’s conviction.

(c) If the defense attorney fails to give the notice required by this Standard, the court may impose sanctions appropriate to the degree of prejudice to the prosecution and the willfulness of the violation.

(d) Evidence of notice given under this Standard, later withdrawn, is not admissible in any civil or criminal proceeding against the defendant who gave notice.

7-9.5 Discovery of defense experts’ reports and basis of evaluation

(a) Reports of experts identified under Standard 7-9.4(a) that concern a mental condition defense or an exemption under 7-9.2(a) should be subject to discovery by the prosecutor responsible for the guilt phase of the trial prior to trial, consistent with Standard 7-3.7(b).

(b) Reports of experts identified under Standard 7-9.4(a) that concern an exemption from the death penalty under Standard 7-9.2(b) or addressing mitigation should, at the prosecutor’s discretion, be provided to either

(i) a separate prosecutor (a “firewalled” prosecutor), who may not share the reports or otherwise communicate about the evaluation with the prosecutor responsible for the guilt phase of the trial unless the defendant is found guilty of a capital offense and the defendant confirms an intent to claim an exemption or offer mitigation during sentencing under Standard 7-9.4(a), or

(ii) the prosecutor responsible for the sentencing phase of the trial once the defendant is convicted of a capital offense and confirms an intent to present mental health evidence at sentencing.

(c) As used in this Standard “reports” include not only the expert’s written report but also educational, health care, vocational, social service, military, and mental health records; medical and psychological test data; notes and reports summarizing the experts’ work and evaluations; and other materials the experts consulted or relied upon.
(d) The court may impose sanctions appropriate to the degree of prejudice to the prosecution for failure to comply with the discovery requirements of this Standard.

7-9.6 Prosecution-initiated evaluation of the defendant and defense discovery

(a) If the defendant provides notice under Standard 7-9.4(a), the court should, upon the prosecutor's motion, order the defendant to be evaluated by one or more mental health professionals satisfying qualifications specified in Standard 7-9.3(b). The scope of the evaluation should be limited to issues that are subject of the notice.

(b) If the notice provided by the defendant under Standard 7-9.4(a) indicates that expert evidence will be used to support a mental condition defense at trial or an exemption under Standard 7-9.2(a), the evaluators should submit written reports on that issue to the prosecution and the defense. If the notice provided by the defendant under Standard 7-9.4(a) indicates that expert evidence will or might be used in support of an exemption under 7-9.2(b) or mitigation at sentencing, the evaluators should submit written reports on that issue to the defense. If the evaluation takes place prior to trial, the reports should also be submitted, at the prosecutor's discretion, either to

(i) the "firewalled" prosecutor described in Standard 7-9.5(b)(i), who should not share the reports or otherwise communicate about the evaluation with the prosecutor responsible for the guilt phase of the trial unless the defendant is found guilty of a capital offense and the defendant confirms an intent to offer mental health evidence during sentencing, or

(ii) the prosecutor responsible for the sentencing phase of the trial once the defendant is found guilty of a capital offense and confirms an intent to offer mental health evidence during sentencing.

(c) If the defendant fails to submit to an evaluation ordered under this Standard or fails to cooperate with the evaluation for reasons unrelated to mental disorder the court may impose sanctions proportionate to the degree of prejudice to the prosecution and the extent to which the failure was influenced by the defendant's mental disorder.

7-9.7 Inadmissibility of information obtained during an evaluation.
(a) No statement made by or information obtained from a defendant, or evidence derived from such statement or information during the course of any mental health evaluation, or during treatment that occurs after arrest for the capital offense, and no opinion of a mental health professional based on such statement, information, or evidence is admissible in the prosecution’s case-in-chief at the sentencing phase of a capital trial for the purpose of proving the aggravating circumstances provided by law.

(b) Such statements, information, or opinion shall be admissible for rebuttal purposes in a capital sentencing proceeding, but only if relevant to (i) an exemption from the death penalty, (ii) mitigation during sentencing, or (iii) statements made by the defendant under oath where the law permits the use of evaluation statements.

7-9.8 Competence to proceed at capital sentencing

(a) The defendant must be competent to proceed with the capital sentencing proceeding.

(i) Absent additional information bearing on defendant's competence at the time of capital sentencing, a finding that the defendant was competent to proceed at trial should be sufficient to establish the defendant's competence to proceed with sentencing.

(ii) A defendant is competent to proceed at capital sentencing if he or she has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and, given the nature and complexity of the sentencing issues, has a rational as well as factual understanding of the proceedings, including the consequences of failing to present mitigation evidence and the possibility that a defendant’s attitude toward the death penalty and its alternatives will change over time.

(b) The decisions about whether to challenge the death penalty, present mitigating evidence and present any particular mitigating evidence are defense counsel’s, after consultation with the defendant.

7-9.9 Mental Disorder or Disability after Sentencing

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2 This provision, through subsection (d), is taken verbatim from paragraph 3 of American Bar Association Resolution 122A, which passed the House of Delegates on August 8, 2006. The resolution was also adopted by the American Psychiatric Association, the American Psychological Association, and the
Grounds for precluding execution. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity:

(i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of conviction or sentence;

(ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or

(iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case.

Procedures to be followed in each of these categories are specified in (b) through (d) below, and procedures to be followed in all three categories are specified in (e) below.

Procedure in cases involving prisoners seeking to forgo or terminate post-conviction proceedings. If a court finds that a prisoner under sentence of death who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision, the court should permit a next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.

Procedure in cases involving prisoners unable to assist counsel in post-conviction proceedings. If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to [rationally] understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings and order an evaluation of the prisoner. If the court finds, after evaluation or after treatment as provided in Part IV, that there is no significant

National Alliance for the Mentally Ill. The language replaces original standard 7-5.6. Subsection (e) revises original standard 7-5.7.
likelihood of restoring the prisoner's capacity to participate in post-
conviction proceedings in the foreseeable future, it should reduce the
prisoner's sentence to the sentence imposed in capital cases when
execution is not an option.

(d) Procedure in cases involving prisoners unable to understand the
punishment or its purpose. If, after challenges to the validity of the
conviction and death sentence have been exhausted and execution has
been scheduled, a court finds that a prisoner has a mental disorder or
disability that significantly impairs his or her capacity to [rationally]
understand the nature and purpose of the punishment, or to appreciate the
reason for its imposition in the prisoner's own case, the sentence of death
should be reduced to the sentence imposed in capital cases when execution
is not an option.

(e) Evaluation and adjudication procedure. The evaluation procedure for
making the determinations required by this Standard should be as follows:

(i) Any individual, including a correctional official, other state
official, the prosecution, counsel for the prisoner, or the court on
its own motion, may raise the issue of whether a prisoner is
incompetent on the grounds described in Standard 7-9.9(a). If the
court finds that there is reason to believe the prisoner may be
incompetent, it should appoint counsel for the prisoner if the
prisoner is not represented, and, if the prisoner is indigent, provide
counsel with adequate resources to retain a mental health
professional to evaluate the prisoner. The state should be permitted
to have its own qualified professional or professionals conduct an
evaluation as well.

(ii) All evaluations of a prisoner's current mental condition for purpose
of determining the issue of competence should be conducted by
mental health professionals whose qualifications meet the
requirements of Standard 7-3.9 through 7-3.12.

(iii) If, after receiving the reports of the evaluation or evaluations,
counsel for the prisoner believes that the prisoner is currently
incompetent, counsel should move for a hearing on the issue of
competence. Upon receiving such a motion, the court should order
a hearing unless it finds, under Standard 7-9.9 (e) (vi), that the
attorney's motion is improper.
(iv) Following the hearing, if the court finds, by a preponderance of the evidence, that the prisoner is currently incompetent, it should order the appropriate disposition, consistent with Standards 7-9.9(b) through (d).

(v) If evaluations or proceedings under this Standard cannot be accomplished before the scheduled date of the prisoner's execution, the court should order a stay of execution until the proceedings on the issue of competence are completed.

(vi) In the absence of good faith doubt about the prisoner's current competence, it is improper for an attorney to request resources to retain a mental health professional to evaluate the prisoner or move for a hearing to determine the prisoner's competence. It is improper to use proceedings on the issue of current mental condition solely for the purpose of delay.
PART X. SENTENCED PRISONERS WITH MENTAL DISORDER

Standard 7-10.1 Services for people with mental disorder

(a) Pursuant to Standards 23-6.11 and 23-8.2 in the Standards on Treatment of Prisoners, a correctional facility should provide appropriate and individualized mental health treatment to prisoners with mental disorder.

(b) Correctional officers should receive appropriate training on how to deal with prisoners who have a mental disorder.

(c) Segregated housing of persons with mental disorder should only occur under the circumstances defined in Standard 23-2.8.

(d) Prisoners who require mental health treatment not available in the correctional facility should be transferred to a forensic mental health facility, pursuant to procedures set forth in the following Standards.

Standard 7-10.2. Voluntary transfer to mental health facility

(a) A prisoner desiring treatment in a mental health facility may make an application for voluntary admission to such a facility.

(b) If the application is endorsed by the chief executive officer of the correctional institution and accompanied by the report of an evaluation conducted by a mental health professional that explains why the prisoner should be transferred to a mental health facility, and the mental health facility accepts the endorsed application, the prisoner should be admitted to the facility.

(c) If the mental health facility does not accept the application, then the correctional facility may petition a court to order the transfer. The petition should be accompanied by the prisoner’s application and the evaluation report, all of which should also be sent to the mental health facility. The court should set the matter for a prompt hearing. If the court finds, by clear and convincing evidence, that the prisoner has a mental disorder and is in need of treatment for the disorder in a mental health facility, the prisoner should be transferred.

Standard 7-10.3. Involuntary transfer

(a) If the prisoner disagrees with the correctional facility’s determination that transfer is needed, the facility may petition a court for involuntary transfer. The decision-maker must find by clear and convincing evidence that the prisoner has a mental disorder and is in need of treatment for the disorder in a mental health facility rather than in the correctional facility. Expert
testimony as to whether a prisoner has a mental disorder and requires treatment in a mental health facility should be admissible.

(b) Prior to involuntary transfer of a prisoner with a mental disorder to a mental health facility, the prisoner should be afforded, at a minimum, the following procedural protections:

(i) at least [3 days] in advance of the hearing, written and effective notice of the fact that involuntary transfer is being proposed, the basis for the transfer, and the prisoner’s rights under this Standard;

(ii) decision-making by a judicial or administrative hearing officer independent of the correctional facility, or by an independent committee that does not include any correctional staff but that does include at least one qualified mental health professional, who cannot be responsible for treating or referring the prisoner for transfer;

(iii) a hearing at which the prisoner may be heard in person and, absent an individualized determination of good cause, present testimony of available witnesses, including the prisoner’s treating mental health professional, and documentary and physical evidence;

(iv) absent an individualized determination of good cause, opportunity for the prisoner to confront and cross-examine witnesses or, if good cause to limit such confrontation is found, to propound questions to be relayed to the witnesses;

(v) an interpreter, if necessary for the prisoner to understand or participate in the proceedings;

(vi) counsel, or some other advocate with appropriate mental health care training;

(vii) a written statement setting forth in detail the evidence relied on and the reasons for a decision to transfer;

(viii) an opportunity for the prisoner to appeal to a mental health care review panel or to a judicial officer; and

(ix) a de novo hearing held every [6 months], with the same procedural protections as here provided, to decide if involuntary placement in the mental health facility remains necessary.

(c) If a mental health professional at the correctional facility concludes that a prisoner with mental disorder requires immediate transfer to a dedicated mental health facility because of a serious and imminent risk to the safety of the prisoner or others, the chief executive of a correctional facility
should be authorized to order such a transfer. However, with 48 hours of admission an involuntary transfer hearing should be conducted pursuant to this Standard.

**Standard 7-10.4. Right of prisoner to refuse treatment**

(a) Involuntary medication of a prisoner should be permitted only if the prisoner is suffering from a serious mental disorder, non-treatment poses a significant risk of serious harm to the prisoner or others, the treatment is medically appropriate, and no less intrusive alternative is reasonably available.

(b) Prior to involuntary mental health treatment of a prisoner with a mental disorder, the prisoner should be afforded, at a minimum, the procedural protections specified in Standard 10.3(b) for involuntary mental health transfers, except that:

(i) the decision-making body in the first instance and on appeal may include appropriate correctional agency staff;

(ii) the notice should set forth the mental health staff’s diagnosis and basis for the proposed treatment, a description of the proposed treatment, including, where relevant, the medication name and dosage, and the less-intrusive alternatives considered and rejected; and

(iii) the de novo hearing should determine whether to continue or modify any involuntary treatment, and in reaching that decision should consider, in addition to other relevant evidence, evidence of side effects.

(c) In an emergency situation requiring the immediate involuntary medication of a prisoner with mental disorder, an exception to the procedural requirements described in subdivision (b) of this Standard should be permitted, provided that the medication is administered by a qualified health care professional and that it is discontinued within 72 hours unless the requirements in subdivision (b) of this Standard are met.

(d) Notwithstanding a finding pursuant to subdivision (b) of this Standard that involuntary treatment is appropriate, mental health staff should continue attempting to elicit the prisoner’s consent to treatment.

**Standard 7-10.5. Good time credits and parole**

(a) A prisoner transferred to a mental health facility should earn good time credits on the same terms as prisoners in adult correctional facilities.
A prisoner transferred to a mental health facility should be eligible for parole release consideration on the same terms as prisoners in correctional facilities.

If otherwise qualified for parole, a prisoner should not be denied parole solely because the prisoner had or is receiving treatment in a mental health facility.

Parole may be conditioned outpatient treatment if the prisoner would benefit from such treatment and it treatment is necessary to protect the safety of the offender or the public or to assure the offender’s successful integration in the community parole may be conditioned on such treatment.

**Standard 7-1.0.6. Return to correctional facility**

(a) When a transferred prisoner seeks return to a correctional facility and the prisoner was transferred voluntarily under Standard 7-1.0.2, the prisoner should be returned to the correctional facility unless the mental health facility believes that the prisoner still meets transfer criteria and it is determined, pursuant to a hearing conducted under Standard 7-1.0.3(b), that continued treatment in the mental health facility is necessary. If the prisoner seeking return to the correctional facility was transferred involuntarily, the prisoner is entitled to a hearing within [six months], consistent with Standard 7-1.0.3(b)(ix).

(b) When the mental health facility determines that the prisoner no longer meets the transfer criteria and decides to return the prisoner, the prisoner, the correctional facility, and the court should receive written notice of this decision at least [fifteen] days prior to the return. The notice should include the factual basis for the return decision and confirmation that the prisoner has been advised of the right to object.

(i) When the prisoner, the mental health facility, and the correctional facility agree that the prisoner no longer meets the transfer criteria in Standard 7-1.0.3(a), the prisoner should be returned promptly to the correctional facility.

(ii) If the prisoner objects to being returned, that objection must be included in the notice sent to the court. The court should determine, at a hearing if necessary, whether the return decision reflects deliberate indifference to the offender’s reasonable mental health needs. If the court so finds, the prisoner should remain in the mental health treatment facility.
Standard 7-10.7. Civil commitment at expiration of sentence

(a) A prisoner who has been hospitalized pursuant to Standard 7-10.3 must either be released or civilly committed pursuant to the state's general civil commitment statute when the sentence expires.

(b) Statutes that provide for post-sentence commitment of offenders using criteria that differ from the general civil commitment criteria should be repealed.

Standard 7-10.8 Re-entry

Provisions for ensuring a smooth transition to the community for prisoners with mental disorder are found in Standard 23-8.9 of the Standards on Treatment of Prisoners, which govern re-entry of prisoners.
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 third 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 Criminal Justice Mental Health Standards will be included in the fourth edition of the Standards.

Background

The proposed black letter standards in these chapters emerge from an effort of more than three years, begun with the work of an updating task force in October 2012. The Task Force\(^3\) was appointed by the Criminal Justice Standards Committee, a Standing

\(^3\) TASK FORCE FOR THE REVISION OF THE CRIMINAL JUSTICE MENTAL HEALTH STANDARDS

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Committee of the Criminal Justice Section. The Task Force, which focused on the standards relating to mental health first met in February 2013 to chart direction. After eight meetings the Task Force submitted a draft to the Criminal Justice Section Standards Committee in 2014. After two Standards Committee meetings, the draft was submitted to the Criminal Justice Section Council for review at the Fall 2015 Meeting. The Criminal Justice Section Council approved these revised Standards at its Spring 2016 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.

Overview of the Recommended Changes

Much has changed in mental health law and practice since the last edition. Court decisions, legislative developments, and advances in research have addressed nearly every issue covered in the Standards. The Task Force examined the Standards in light of these changes, and also incorporated language from newer ABA standards on sentencing, diversion, and other issues. Because of the diverse make-up of the task force, a variety of perspectives was heard. Yet the Task Force reached agreement on nearly every issue it considered.

The Task Force recommended significant revisions to all ten parts of the Criminal Justice Mental Health Standards. The key changes in Part I were a formal recognition of the roles defense attorneys, prosecutors and judges play in cases involving people with mental disorder, and the addition of material on specialized courts, diversion possibilities, and the need for service networks for criminal defendants with mental problems. Changes to Part II, on the police, injected material on crisis intervention units and on the legal process and treatment that is due people with mental disorder who are detained pretrial. Part III was rewritten to recognize constitutional and evidentiary developments that affect forensic evaluation and testimony. Parts IV and V were subject to significant reorganization, given the Supreme Court's decisions in Godinez v. Moran (1993) regarding competency to plead guilty and waive counsel, Edwards v. Indiana (2008),

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regarding competency to represent oneself, and Sell v. United States (2003), dealing with the right of defendants found incompetent to refuse psychoactive medication.

The key issues addressed in the revisions to Part VI were whether the defendant should control the decision about raising the insanity defense and which party should bear the burden of proof in insanity cases. The commitment criteria for insanity acquitees found in Part VII were completely revamped, and a new section on conditional release added. The original Part VIII, which anticipated Kansas v. Hendricks (1997) by banning the post-sentence commitment process upheld in that case, is now integrated into Part X (on prison settings). That Part was also revised to incorporate new ABA policy (Chapter 23) on treatment in prison. The new Part VIII now deals with sentencing and post-conviction in non-capital cases, with much greater focus on pre-sentence reports and probation as a sentencing option and on the extent to which mental competence should be required during sentencing and appeal. And finally, the revised standards contain a completely new part, Part IX, which deals with sentencing and post-conviction in capital cases. This part incorporates a 2006 resolution passed by the ABA's House of Delegates, the American Psychological Association and the American Psychiatric Association concerning exemptions from the death penalty, and also includes innovative procedural mechanisms for dealing with these exemptions and with the presentation of mitigating evidence in capital cases.

Some of the more significant issues addressed in the standards include: the need for a coherent system of community treatment for people with mental disorder; the scope of, and process for obtaining, treatment in jails; the presence of attorneys during evaluations; the extent to which expert witnesses should address the “ultimate issue”; expert reliance on hearsay; the extent to which the defendant should control decisions about the case; the standard governing competency to represent oneself; disposition of unremittably incompetent defendants; the scope of the insanity defense; the standard governing commitment of insanity acquittees; the scope of mitigation afforded mental disorder in non-capital and capital cases; the notion of “firewalled” prosecutors to handle evaluation results in capital cases; the commutation of death sentences in cases of permanent incompetency or incompetency to be executed; and the process required to hospitalize prisoners and to return hospitalized prisoners to prison.

Conclusion

The Criminal Justice Section urges that the House of Delegates adopt the proposed amendments to the Criminal Justice Mental Health Standards, which will be published as the Fourth Edition of Chapter Seven of the ABA Standards for Criminal Justice.

Respectfully submitted,

Judge Bernice Donald, Chair
Criminal Justice Section
August, 2016
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section
Submitted By: Judge Bernice Donald, Chair

1. **Summary of Resolution(s).** The Criminal Justice Section recommends that the ABA adopt the black letter of the *ABA Standards for Criminal Justice: Criminal Justice Mental Health Standards*, Chapter Seven of the ABA Standards for Criminal Justice, dated August 2016, to supplant the Third Edition (August 1984) of the *ABA Criminal Justice Mental Health Standards*.

2. **Approval by Submitting Entity.** This resolution was approved by the Criminal Justice Section Council at its Spring Meeting on April 30, 2016.

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?** Approval of this resolution would supplant Third Edition (August 1984, Resolution 400) of the *ABA Criminal Justice Mental Health Standards*.

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

6. **Status of Legislation.** (If applicable) Not applicable.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The policy will be distributed to various criminal justice stakeholders as a tool to offer guidance on the mental health system. 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 2016 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
Special Committees and Commissions

Coalition on Racial and Ethnic Justice
Commission on Domestic and Sexual Violence
Commission on Immigration
Commission on Youth at Risk
Death Penalty Representation Project
Commission on Disability Rights

Sections, Divisions
Government and Public Sector Lawyers Division
Civil Rights and Social Justice (including Death Penalty Due Process Project)
Judicial Division
Law Student Division
Litigation
Solo, Small Firm and General Practice Division
State and Local Government Law
Young Lawyers Division

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

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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 adopt the black letter standards, dated August 2016, to chapter seven “Mental Health” of the *American Bar Association Standards for Criminal Justice*.

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

   Since these chapters were last amended, there have been dramatic developments in the area of legal ethics, criminal justice and mental health. Thousands of new judicial decisions have been handed down. Hundreds of new books and articles touching upon the ethics of our profession have been published. Indeed, the proper role and function of lawyers, criminal justice and mental health has been a particularly topical focus of discussion, debate and controversy in recent years.

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

   It has been over 30 years since the third edition of the Criminal Justice Mental Health Standards was passed by the ABA House of Delegates. In that time there have been many changes in the intersection of the criminal justice system and the mental health system. These updated Standards reflect these changes and create best practices in consideration of those changes. In addition to several new Standards, every Standard has been revised since the previous edition.

   The Fourth Edition of the Standards substantively revises all of the Standards in the previous edition. While there are too many changes to list here, you can find a copy of the Third Edition Standards at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_complete.authcheckdam.pdf.

   The Criminal Justice Section urges prompt consideration of the proposed Standards by the House due to the ABA’s continuing obligation to see to it that the ABA Standards for Criminal Justice reflect current developments in the law.

4. **Summary of Minority Views**

   None are known.
RESOLUTION

1 RESOLVED, That the American Bar Association supports the treatment of the likelihood-of-confusion standard in federal trademark law as a question of fact.
REPORT

This Resolution and Report concerns the trademark law “likelihood-of-confusion” test for infringement and, in particular, whether the test should be treated as a question of fact or law or a mixed question of fact and law. This Resolution favors treatment of the test as a question of fact. If the issue arises on appeal or in Congress, approval of this Resolution by the House of Delegates would support an Association amicus curiae brief encouraging the treatment of the likelihood-of-confusion test as a question of fact or legislation that would codify treatment as a question of fact by amending the federal trademark statute, the Lanham Act, 15 U.S.C. § 1051 et seq.

Trademarks allow consumers to identify the source of a product. As consumers become familiar with certain products and the companies that sell them, they come to expect consistent quality in all products sold by particular companies. Trademark laws allow companies to protect their brand, and the expectation of quality or other goodwill they have established with customers. It accomplishes that by preventing competitors from using a mark that is the same as or so similar that it is likely to confuse consumers as to whether the product was made by or is being sold by the company that first used the trademark. The legal test for challenging the use of a mark that might mislead consumers is the “likelihood of confusion test.” The ultimate question, based on the weighing of several factors—such as the similarity of the two trademarks, the notoriety of the first trademark, the similarity of the products—is whether consumers are likely to be confused as to the source of the goods.

Given the fact-intensive nature of this inquiry, most circuit courts consider likelihood of confusion a question of fact to be decided by a jury. Consistent with that, the U.S. Supreme Court recently held that a similar trademark issue that also requires a fact-intensive assessment made from the perspective of a reasonable person or community should be left to a jury and not a district court to decide. Hana Fin., Inc. v. Hana Bank, 135 S. Ct. 907 (2015) (“Hana Financial”). “Tacking” in trademark law is a doctrine under which a trademark owner may make certain modifications to its mark over time while preserving its claim to prior use, the test being whether the two marks create the same continuing impression on consumers so that they consider them the same. In “Hana Financial,” the Supreme Court held that the jury, rather than a court, determines whether the use of an older trademark may be tacked to a newer one. The Supreme Court explained that when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decision maker that ought to provide the fact-intensive answer. Like tacking, the likelihood of confusion test employs factors that require an inquiry into consumers’ perception. Because the likelihood of confusion test is a similar fact-intensive assessment made from the perspective of an ordinary person or community, that question also should be left to a jury and not a district court.

A few circuits, however, consider likelihood of confusion a mixed question of fact and law, reviewing a district court’s determination on each factor for clear error, while the court’s ultimate balancing of those factors is treated as a matter of law subject to de novo review. That treatment of this fact-intensive inquiry flies in the face of long-standing principles of jurisprudence that delicate assessments of the inferences to be drawn by a reasonable person or
community should be left to a jury. Therefore, the Section of Intellectual Property Law proposes this Resolution to establish Association policy that favors treatment of the likelihood of confusion test is a question of fact.

A. Likelihood of Confusion Test Is a Fact Intensive Inquiry

A mark infringes upon the rights of another when the second mark is likely to cause confusion with a first mark. 15 U.S.C. §§ 1114, 1143(a); Rosco, Inc. v. Mirror Lite Co., 304 F.3d 1373, 1384 (Fed. Cir. 2002). Actual confusion need not be proven, the mark owner need only show the likelihood that a reasonable consumer of the goods or services could mistake the origin of the goods or services identified by the mark. To determine whether likelihood of confusion exists between two marks, all jurisdictions have established very similar multi-factor tests.

The factors currently used by the regional circuit courts to determine whether a mark is likely to confuse consumers are based on factors first stated in Polaroid Corp. v. Polarad Elect. Corp., 287 F.2d 492 (2d Cir. 1961). These factors, sometimes known as the “Polaroid factors,” the specifics of which may vary slightly as applied throughout the country, generally include:

- Strength of the senior user’s mark. The stronger or more distinctive the senior user’s mark, the more likely the confusion.
- Similarity of the marks. The more similarity between the two marks, the more likely the confusion.
- Similarity of the products or services. The more that the senior and junior user’s goods or services are related, the more likely the confusion.
- Likelihood that the senior user will bridge the gap. If it is probable that the senior user will expand into the junior user’s product area, the more likely there will be confusion.
- The junior user’s intent in adopting the mark. If the junior user adopted the mark in bad faith, confusion is more likely.
- Evidence of actual confusion. Proof of consumer confusion is not required, but when the trademark owner can show that the average reasonably prudent consumer is confused, it is powerful evidence of infringement.
- Sophistication of the buyers. The less sophisticated the purchaser, the more likely the confusion.
- Quality of the junior user’s products or services. In some cases, the lesser the quality of the junior user’s goods, the more harm is likely from consumer confusion.

When applying these multi-factor tests, typically no single factor determines whether confusion is likely, and not all factors carry the same weight. See Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co., 550 F.3d 465, 478 (5th Cir. 2008). The Trademark Trial and Appeal Board (“TTAB”) uses a variation of the above factors, called the DuPont factors, in making the same assessment regarding the registrability of a mark. Palm Bay Imps. v. Veuve Clicquot Ponsardin, 396 F.3d 1369, 1371 (Fed. Cir. 2005); In re E.I. du Pont de Nemours & Co., 476 F.2d 1357 (CCPA 1973). Clearly, the issue of likelihood of confusion is a fact-intensive inquiry.
B. Most Circuit Courts Treat Likelihood of Confusion as a Question of Fact for a Jury

Most circuits, including the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth Eleventh, and District of Columbia, treat likelihood of confusion as a question of fact. That is because the fact-intensive nature of the inquiry is better suited for a jury to decide than a district court. See Wendt v. Host Int'l, Inc. 125 F.3d 806, 812 (9th Cir. 1997) (“The Lanham Act’s ‘likelihood of confusion’ standard is predominantly factual in nature . . .”); Paletteria La Michoacana, Inc., 69 F. Supp. 3d at 196 (“[I]t is less than ideal for a court, sitting in relative isolation, to speculate about what consumers may think regarding the similarity of two marks as a question of law.”); MDT Corp. v. N.Y. Exch., Inc., 858 F. Supp. 1028, 1032 (C.D. Cal. 1994) (“Summary judgment disfavored in trademark cases because the ultimate issue of likelihood of confusion is so inherently factual.”).

C. There is a Circuit Split as to Whether Likelihood of Confusion is a Question of Fact, a Mixed Question, or One of Law

Not all circuits treat likelihood of confusion as a question of fact. A few circuits, including the Second and the Sixth, consider likelihood of confusion a mixed question of fact and law. In such mixed question circuits, the courts “review the district court’s determinations as to each separate factor . . . for clear error, while the court’s ultimate balancing of those factors is a matter of law subject to de novo review.” Starbucks, 588 F.3d at 105 (citation omitted). Similarly, the Federal Circuit treats likelihood of confusion as a question of law subject to de novo review, but reviews underlying findings of fact by the U.S. Patent and Trademark Office (“PTO”) under the substantial evidence standard. In re Majestic Distilling Co., 315 F.3d 1311, 1314 (Fed. Cir. 2003); see also Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. v. New Millennium Sports, S.L.U., 797 F.3d 1363, 1369 (Fed. Cir. 2015). As a result, there is a circuit split on whether likelihood of confusion is a question of fact for the jury to determine, or to be ultimately decided by the court.

D. In a Recent Trademark Case Involving a Similar Issue, the Supreme Court Recently Held That the Jury Should Decide Fact-Intensive Determinations of How a Community Would Make an Assessment

In Hana Financial, the Supreme Court held that the fact-intensive issue of tacking, a doctrine under which a trademark user may make certain modifications to its mark over time while maintaining priority, was a question of fact for the jury and not the district court. The issue to be determined when a trademark owner relies on previous use of a similar mark is whether the two marks for which continuing priority is sought are similar enough that they “create the same,
continuing commercial impression” so that consumers “consider both as the same mark.” Van Dyne-Crotty, Inc. v. Wear-Guard Corp., 926 F. 2d 1156, 1159 (Fed. Cir. 1991). The question is very similar to that of likelihood of confusion and is also very fact-intensive.

The Supreme Court held that when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decision maker that ought to provide the fact-intensive answer. The Court went on to explain that a jury is better positioned than a judge to decide such questions:

Application of a test that relies upon an ordinary consumer’s understanding of the impression that a mark conveys falls comfortably within the ken of a jury. Indeed, we have long recognized across a variety of doctrinal contexts that, when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer. See, e.g., United States v. Gaudin, 515 U.S. 506, 512 (1995), 115 S.Ct. 2310, 132 L.Ed. 2d 444 (1995) (recognizing that “delicate assessments of the inferences a “reasonable [decisionmaker]” would draw . . . [are] peculiarly one[s] for the trier of fact” (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450; 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976); first alteration in original)); id., at 450, n. 12, 96 S.Ct. 2126 (observing that the jury has a “unique competence in applying the ‘reasonable man’ standard”); Hamling v. United States, 418 U.S. 87, 104-105, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (emphasizing “the ability of the juror to ascertain the sense of the ‘average person’” by drawing upon “his own knowledge of the views of the average person in the community or vicinage from which he comes” and his “knowledge of the propensities of a ‘reasonable’ person”); Railroad Co. v. Stout, 17 Wall. 657, 664, 21 L.Ed. 745 (1874) (“It is assumed that twelve men know more of the common affairs of life than does one man, [and] that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge”).

Id. at 911. The Supreme Court also distinguished between construing patent claim terms, like the terms of a contract, which “is one of those things that judges often do and are likely to do better than jurors,” and the “tacking inquiry, [which] by contrast, involves a factual judgment about whether two marks give the same impression to consumers. Making that kind of judgment is not, as discussed above, ‘one of those things that judges often do’ better than jurors.” Id. at 911 n.2. Therefore, the Supreme Court’s holding in Hana Financial—that tacking is a question of fact—is highly instructive as to how the Supreme Court would have decided, had it been before the Court, on the issue of likelihood of confusion.

E. As in Hana Financial, a Jury Should Decide Fact-Intensive Determinations of How a Community Would Make an Assessment

Should the Supreme Court be given an opportunity to rectify the inconsistent treatment of the question by a few circuits as a mixed question or a question of law, the Supreme Court would likely find that the likelihood-of-confusion inquiry is a question of fact, based upon language from Hana Financial. Although tacking and likelihood of confusion are distinct factual
questions, both require the evaluation of consumer perception and commercial impression. Like
tacking, the likelihood of confusion test employs factors that require an inquiry into consumers' perception. Indeed, as noted by at least one circuit, tacking "stems from the same 'bloodlines' as the issue of likelihood of confusion because whether two marks impart the same commercial impression is a heightened scrutiny of the likelihood of confusion analysis." *Adventis, Inc. v. Consol. Prop. Holdings, Inc.*, No. 7:02-CV-00611, 2006 WL 1134129, at *5 (W.D. Va. Apr. 24, 2006).

Consumer perception permeates the likelihood of confusion inquiry, further evidencing that the inquiry is a question of fact best suited for juries. *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 318 (4th Cir. 1992). "Likelihood of confusion is determined on the basis of a "reasonably prudent consumer."" *Survivior Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 630 (9th Cir. 2005); see also *Star Indus. v. Bacardi & Co.*, 412 F.3d 373, 383 (2d Cir. 2005); *Heartland Bank v. Heartland Home Fin.*, 335 F.3d 810, 822 (8th Cir. 2003). This requires consideration of "[w]ho is the reasonably prudent consumer?" *Brookfield Commc’ns*, 174 F.3d at 1048. "The purchaser contemplated is the ordinary one who uses ordinary caution 'buying under the usual conditions prevailing in the trade, and giving such attention as such purchasers usually give in buying that class of goods.'" *David Sherman Corp. v. Heublein, Inc.*, 340 F.2d 377, 379 (8th Cir. 1965). Consumer surveys are often used to prove likelihood of confusion and are considered by courts to be the most persuasive evidence of the same. *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 615 (9th Cir. 1989) ("An expert survey of purchasers can provide the most persuasive evidence of secondary meaning."); *Tone Bros. v. Sysco Corp.*, 28 F.3d 1192, 1204 (Fed. Cir. 1994) ("Consumer surveys are recognized by several circuits as the most direct and persuasive evidence of secondary meaning." (internal quotation marks omitted)). Indeed, it may be folly not to offer such a survey. *Gimix, Inc. v. JS&A Grp., Inc.*, 213 U.S.P.Q. 1005, 1006 (N.D. Ill. 1982) ("Neither side in this case has produced any consumer surveys or other similar evidence. Both sides are at fault for such laxness."). *aff’d*, 699 F.2d 901 (7th Cir. 1983). The likelihood of confusion factors require an assessment of consumer perception.

For example, sophistication of consumers in the relevant market by its very nature requires understanding what level of care consumers use when making choices in the marketplace. Restatement (Third) of Unfair Competition § 20 (1995) ("The reasonably prudent purchaser often invoked in determining likelihood of confusion is the ordinary purchaser of the goods or services buying with ordinary care. As with the standard of the reasonable person in negligence cases, the discernment exercised by a reasonably prudent purchaser varies with the circumstances."). By way of another example, "the strength of a mark depends ultimately on its distinctiveness, or its 'origin-indicating' quality, in the eyes of the purchasing public." *Savin Corp. v. Savin Grp.*, 391 F.3d 439, 457 (2d Cir. 2004). Yet another example is that, "[c]losely related products are those that would reasonably be thought by the buying public to come from the same source, or thought to be affiliated with, connected with, or sponsored by, the trademark owner." *CAE, Inc. v. Clean Air Eng’g, Inc.*, 267 F.3d 660, 679 (7th Cir. 2001). "[B]ecause the rights of an owner of a registered trademark extend to any goods that might be, in the minds of consumers, 'related,' i.e., put out by a single producer, the more accurate inquiry is whether the public is likely to attribute the products and services to a single source." *Id*. The likelihood of confusion test is a similarly fact-intensive issue and just such a community assessment; like tacking, it therefore also should be left to a jury and not a district court.
**Conclusion**

The central focus in evaluating trademark infringement is the fact-intensive determination of how a community would assess whether the use of an accused mark is likely to cause confusion, to cause mistake or to deceive. As the U.S. Supreme Court has recently held as to a similar fact-intensive trademark issue and assessment on the inferences to be drawn by reasonable people, the determination of whether a mark is likely to cause confusion should be left for the jury to decide. Consistent with that, the resolution calls for the Association to adopt policy the American Bar Association supports the treatment of the likelihood-of-confusion standard as a question of fact.

Respectfully submitted,

Theodore H. Davis Jr., Chair  
Section of Intellectual Property Law  
August 2016
1. **Summary of Resolution**

The resolution calls for the Association to adopt policy supporting the treatment of the likelihood-of-confusion standard as a question of fact. Given the fact-intensive nature of the inquiry, most circuit courts consider likelihood of confusion a question of fact to be decided by a jury. And in *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907 (2015) ("Hana Financial,"”) the Supreme Court held that the jury, rather than a court, determines how an ordinary person or community would make an assessment to resolve such fact-intensive questions.

A few circuits, however, consider likelihood of confusion a mixed question of fact and law. Those rulings are inconsistent with *Hana Financial* and countless other cases holding that inferences to be drawn by a reasonable person should be left to a jury.

2. **Approval by Submitting Entity**

The Section Council approved the resolution on April 5, 2016.

3. **Has This or a Similar Recommendation Been Submitted to the House or Board Previously?**

No.

4. **What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?**

None.

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

N/A

6. **Status of Legislation**

None.
7. **Plans for Implementation of the Policy if Adopted by the House of Delegates**

The policy will provide authority for the preparation and filing of an Association *amicus* brief in the Supreme Court or other appropriate judicial forum in a case presenting the issues that are addressed in the policy and, if unsuccessful, to request that Congress amend the applicable statutes.

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

Adoption of the recommendations would not result in additional direct or indirect costs to the Association.

9. **Disclosure of Interest**

There are no known conflicts of interest with regard to this recommendation.

10. **Referrals**

This recommendation is being distributed to each of the Sections, Divisions, and the Standing Committees of the Association.

11. **Contact Person (prior to meeting)**

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution calls for the Association to adopt policy supporting the treatment of the likelihood-of-confusion standard as a question of fact.

2. Summary of the Issue that the Resolution Addresses

Although likelihood of confusion is a fact-intensive inquiry and determined from the perspective of an ordinary person or community would make an assessment to resolve such fact-intensive questions, a few circuits consider likelihood of confusion a mixed question of fact and law. Those rulings are inconsistent with the principle that inferences to be drawn by a reasonable person should be left to a jury.

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

The resolution will enable the American Bar Association to file a brief with the Supreme Court to encourage it to hold that the likelihood of confusion test is a question of fact and to bring consistency to the standard applied to this issue in all of the regional circuits.

4. Summary of Minority Views

None known at this time.
RESOLVED, That the American Bar Association supports an interpretation of the federal Lanham Act, 15 U.S.C. § 1051 et seq., recognizing that the ineligibility of an otherwise valid mark for registration with the U.S. Patent and Trademark Office ("USPTO"), through the cancellation of an existing federal registration or the denial of an application for a federal registration, does not in and of itself disqualify that mark for protection under all provisions of the Lanham Act, the common law, or from registration on state registers; and

FURTHER RESOLVED, That the American Bar Association supports an interpretation of the Lanham Act recognizing that the ineligibility of a mark for registration with the USPTO does not in and of itself restrict the mark owner’s right to use the mark in commerce; and

FURTHER RESOLVED, That the American Bar Association supports an interpretation of the Lanham Act recognizing that the owners of marks registered on the Principal Register, the primary register of trademarks maintained by the USPTO, enjoy procedural and substantive advantages in litigation to protect their marks otherwise not available to owners of common-law marks not registered on the Principal Register.
REPORT

This report addresses the significance of the cancellation of an existing registration of an otherwise valid trademark or service mark on the Principal Register of the United States Patent and Trademark Office ("USPTO"),

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or the USPTO’s denial of an application for such a registration. The Section of Intellectual Property Law requests the House of Delegates to approve this Resolution, which would support an Association amicus curiae brief in support of neither party in two cases that are the subjects of pending petitions for writs of certiorari before the Supreme Court, namely, In re Tam, 808 F.3d 1321 (Fed. Cir. 2015) (en banc), petition for cert. filed sub nom. Lee v. Tam (U.S. April 20, 2016) (No. 15-1293), and Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439 (E.D. Va. 2015), petition for cert. filed (U.S. April 5, 2016) (No. 15-1311).

This Resolution does not address, and does not propose the ABA address, the issues of: (1) whether the USPTO properly determined the marks at issue in those cases were unregisterable; or (2) whether those determinations by the USPTO violated the Free Speech Clause of the First Amendment or any other provision of the Constitution. The Resolution instead will establish policy in support of advising the Supreme Court and lower courts of three basic propositions of trademark law, namely, that: (1) a determination that a mark is ineligible for registration on the USPTO’s Principal Register does not necessarily render that mark invalid and unprotectable (although it may); (2) such a determination does not restrict the mark owner’s right to use the mark in commerce; and (3) the owner of a mark registered on the Principal Register enjoys certain substantive and procedural advantages in litigation to protect its mark that are not available to the owners of unregistered marks. Action by the House of Delegates at the 2016 Annual Meeting is necessary to insure that, should the Supreme Court grant either of the pending petitions for certiorari described above, any Association brief on the merits could be timely filed.

Summary

Under Section 45 of the federal Lanham Act, 15 U.S.C. § 1127 (2012), “[t]he term ‘trademark’ includes any word, name, symbol, or device, or any combination thereof ... used by a person ... to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” The same statute contains a substantively identical definition of “service mark”; courts and practitioners typically use “marks” as shorthand references to both trademarks and service marks. Pursuant to the federal Lanham Act, the owner of either type of mark may apply to register its mark on one of two “registers” maintained by the USPTO, namely the Principal

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1 Federally registered trademarks are those marks that are approved by the USPTO for inclusion on the agency’s Principal Register, the primary register of trademarks maintained by the USPTO. Although federal registration of a mark is not mandatory, it has several advantages including, but not limited to, providing notice to the public of the registrant’s claim of ownership of the mark, establishing a legal presumption of ownership nationwide, and creating an exclusive right to use the mark on or in connection with the goods/services listed in the registration. 15 U.S.C. §§ 1057(b)-(c), 1072, 1115.

2 The trademark owner in Pro-Football has noticed an appeal to the Fourth Circuit and, additionally, petitioned for a writ of certiorari before judgment pursuant to Supreme Court Rule 11. Briefing before the Court of Appeals closed on March 18, 2016, but the Fourth Circuit has not yet scheduled oral argument.
Register and the Supplemental Register. The proposed resolution addresses only registrations on the Principal Register.

Section 2 of the Lanham Act, 15 U.S.C. § 1052 (2012), prohibits the registration on the Principal Register of certain marks. That section provides that:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of title 19) enters into force with respect to the United States.

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

(d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive . . . .

(e) Consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable under section 1054 of this title, (3) when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them, (4) is primarily merely a surname, or (5) comprises any matter that, as a whole, is functional.

(f) Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. . . .

A mark which would be likely to cause dilution by blurring or dilution by tarnishment under [15 U.S.C. §] 1125(c) . . . ., may be refused registration only pursuant to a proceeding brought under [15 U.S.C. §] 1063 . . . . A registration for a mark which would be likely to cause dilution by blurring or dilution by tarnishment under [15 U.S.C. §] 1125(c) of this title, may be canceled pursuant to
a proceeding brought under either section 1064 of this title or section 1092 of this title.

A claimed mark may be found unregistrable under Section 2 in three contexts: (1) an examiner assigned to an application to register the mark can reject the application, in which case the applicant can appeal to the Trademark Trial and Appeal Board (the “Board”), an administrative tribunal within the USPTO;3 (2) another party can challenge the application in an “opposition proceeding” before the Board; and (3) even if the application matures into a registration, the registration can be cancelled by a court or the Board for any reason that would have prevented its issuance in the first place; after that, it can be cancelled “[a]t any time if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered, or is functional, or has been abandoned, or its registration was obtained fraudulently or contrary to . . . [Section 2(a)-(c)] . . . .” 15 U.S.C. § 1064(3).4

Although the proposed resolution is not linked to a particular ground for unregistrability, the two cases creating the urgency for the House to act both arise from one of the several prohibitions in registration found in Section 2(a) of the Lanham Act, namely, that barring the registration of “matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” Id. § 1052(a). In Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439 (E.D. Va. 2015), the court rejected a claim by the parent corporation of the Washington Redskins NFL team (PFI) that the cancellation of its registrations abridged PFI’s right to free speech. It based this conclusion in part on the ground that, because Section 2(a) is relevant only to the registration process, the ineligibility of the marks in question for registration did not affect PFI’s ability to use them. Id. at 455 (“Nothing about Section 2(a) impedes the ability of members of society to discuss a trademark that was not registered by the PTO. Simply put, the Court holds that cancelling the registrations of the Redskins Marks under Section 2(a) of the Lanham Act does not implicate the First Amendment as the cancellations do not burden, restrict, or prohibit PFI’s ability to use the marks.”).

In contrast, the en banc Federal Circuit struck down Section 2(a)’s prohibition on the registration of potentially disparaging mark as a violation of the Free Speech Clause. The appeal to the Federal Circuit in In re Tam, 808 F.3d 1321 (Fed. Cir. 2015) (en banc), arose from the USPTO’s rejection of an application to register the mark THE SLANTS for entertainment services on the ground the mark was potentially disparaging to Asian-Americans. Although it might be true the ineligibility of a mark for registration under Section 2(a)’s content-based prohibitions on registration does not restrict the mark’s use, the Tam court identified a number of disadvantages visited on the owners of unregistered marks. Tam, 808 F.3d at 1328-29. Those

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3 As a non-Article III tribunal, the Board’s jurisdiction extends only to determinations of the registrability of the mark or marks before it; in particular, it cannot entertain constitutional issues.

4 A dissatisfied litigant before the Board can avail itself of two types of appeals: (1) it can appeal on the existing record to the U.S. Court of Appeals for the Federal Circuit; or (2) if it wishes to supplement the record and “there are adverse parties residing in a plurality of districts not embraced within the same State,” 15 U.S.C. § 1071(b)(4), it can pursue a de novo review of the Board’s decision by appealing to the U.S. District Court for the Eastern District of Virginia; otherwise, a de novo appeal may be initiated in the district in which the prevailing party before the Board is domiciled. Tam arises from the former type of appeal, while Blackhorse arises from the latter.

Referring to the cause of action available to protect unregistered marks provided by Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (2012), the Tam court also held “it is not at all clear that [an applicant denied registration under Section 2(a)] could bring a § 43(a) unfair competition claim. Section 43(a) allows for a federal suit to protect an unregistered trademark, much like state common law. But there is no authority extending § 43(a) to marks denied under § 2(a)’s disparagement provision.” 808 F.3d at 1344 n.8. Indeed, the court went even further by suggesting an applicant denied registration under Section 2(a)’s content-based prohibitions on registration has no common-law rights to its mark. Id. at 1344 (“The government has not pointed to a single case where the common-law holder of a disparaging mark was able to enforce that mark, nor could we find one. The government’s suggestion that [the applicant] has common-law rights to his mark appears illusionary.”). The Federal Circuit therefore required the government to demonstrate a compelling state interest in the continued maintenance of Section 2(a)’s content-based prohibitions on registration, id., a demonstration the government ultimately could not meet. Id. at 1354-57.

The Resolution does not take a position on the constitutionality of any portion of the Lanham Act, including that of the language in Section 2(a) at issue in Pro-Football and Tam. It also does not purport to opine on whether particular marks are eligible or ineligible for federal registration under the Act. Rather, the Resolution seeks to dispel any misbelief that otherwise valid marks become unprotectable because they are not eligible to be covered by federal registrations. Unregistrability in and of itself does not preclude reliance on certain protections available under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), state law, and the common law. Accordingly, the Resolution asks the ABA House of Delegates to approve policy supporting an interpretation of the Lanham Act recognizing that the ineligibility of an otherwise valid mark for registration with the USPTO does not in and of itself disqualify that mark for protection under the Lanham Act, the common law, or based on state registration. The policy sought here would support a brief filed with the U.S. Supreme Court on behalf of neither party, should the Court grant certiorari in either Tam or Pro-Football.

A. Otherwise Valid Marks Ineligible for Federal Registration May Be Eligible for Protection Under § 43(a) of the Lanham Act, the Common Law, or State Trademark Acts

Some grounds for the denial or cancellation of a federal registration of a trademark also render the mark ineligible for protection under any form of trademark law. For example, if the registration of a mark is cancelled because the underlying mark has become generic, has been abandoned, or is merely functional the owner is left with no rights in the trademark under any body of law. See, e.g., T. Marzetti Co. v. Roskam Baking Co., 680 F.3d 629, 634 (6th Cir. 2012)
(affirming finding that claimed “Texas Toast” mark was generic for oversized bread and
croutons); Specht v. Google Inc., 747 F.3d 929, 934-35 (7th Cir. 2014) (affirming finding of
abandonment as a matter of law for mark not used for over a decade); Groeneveld Transp.
Efficiency, Inc. v. Lubecore Int’l, Inc., 730 F.3d 494, 507-08 (6th Cir. 2013) (affirming finding as
a matter of law that claimed product configuration was functional).

Nevertheless, the denial of the application for a federal registration or the cancellation of
the federal registration of an otherwise valid mark does not in and of itself disqualify that mark
for protection under the Lanham Act, the common law, or state law causes of action such as that
found in the Uniform Deceptive Trade Practices Act. For example, Section 43(a) of the Lanham
Act, 15 U.S.C. § 1125(a) (2012), recognizes a federal cause of action against the infringement of
unregistered marks, and courts have routinely recognized the eligibility for protection under
Section 43(a) of designations not qualifying for federal registration, including the titles of
individual creative works,\(^5\) trade names,\(^6\) and even reproductions of the United States
flag that would be ineligible for registration under Section 2(b) of the Act, 15 U.S.C. § 1052(b).\(^7\)

Moreover, it is well-established that the cancellation of an existing registration does not
in and of itself invalidate all rights in the underlying mark. 3 J. Thomas McCarthy, *McCarthy on

works are not registrable, they may be protected under section 43(a) of the Lanham Act upon a showing of
secondary meaning.”); *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 269 (5th Cir. 1999) (“The Trademark Trial and
Appeal Board has consistently interpreted [prior authority of the Court of Customs and Patent Appeals] as
prohibiting the registration of single book titles as trademarks. The descriptive nature of a literary title does not
mean, however, that such a title cannot receive protection under § 43(a).”); *Re v. Smith*, Civ. No. 04-11385-RGS,
they may fall within the protections of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), if the title has acquired a
of individual works are given common-law trademark protection, at least if they have acquired a secondary
meaning, i.e., if they are commonly identified with their source. However, under a rule criticized by commentators,
the title of an individual work may not be registered as a trademark.” (citations omitted)).

\(^6\) See, e.g., *Accuride Int’l, Inc. v. Accuride Corp.*, 871 F.2d 1531, 1534 (9th Cir. 1989) (“The major legal distinction
between trademarks and trade names is that trade names cannot be registered and are therefore not protected under
15 U.S.C. § 1114. However, analogous actions for trade name infringement can be brought under section 43(a).”
(citation omitted)); *Walt-W. Enters. v. Gannett Co.*, 695 F.2d 1050, 1054 n.6 (7th Cir. 1982) (“Although trade names
... are not registrable under the Lanham Act, an action for trade name infringement is nonetheless proper under
[Section 43(a)].” (citation omitted)); *Chronicle Publ’g Co. v. Chronicle Publ’ns, Inc.*, 733 F. Supp. 1371, 1376
(N.D. Cal. 1989) (“The main difference between trade names and trademarks ... is that trade names cannot
be registered and are not protected under [Section 32 of the Lanham Act]. However, actions for
infringement of either a trade name or trademark, whether or not it has been registered, may be
maintained under section 43(a).” (citation omitted)); *R.R. Salvage of Conn., Inc. v. R.R. Salvage, Inc.*, 561 F.
Supp. 1014, 1019 (D.R.I. 1983) (“Although trade names are not registrable under the Lanham Act, they are
nonetheless protected under the Act.” (citation omitted)); *Great W. Fin. Corp. v. Great W. Sav. & Loan Ass’n of
Oklahoma City*, 406 F. Supp. 1286, 1291 (W.D. Okla. 1975) (“The Lanham Act grants the same remedial
treatment to trade names, whether registrable or not, as though they were registered, especially in matters of unfair
competition.”).

availability of protection under Section 43(a) for flag design even if design unregistrable).
Trademarks and Unfair Competition § 19:3 (4th ed.) As the Tenth Circuit has explained in a case presenting a fraud-based challenge to a registration:

Unlike the registration of a patent, a trademark registration of itself does not create the underlying right to exclude. Nor is a trademark created by registration. While federal registration triggers certain substantive and procedural rights, the absence of federal registration does not unleash the mark to public use. The Lanham Act protects unregistered marks as does the common law.


The theory that otherwise valid marks become unprotectable because they are not covered by registrations also cannot be reconciled with Section 43(c) of Act, 15 U.S.C. § 1125(c) (2012), which protects the distinctiveness of famous marks against likely dilution. That statute expressly identifies whether or not a mark is registered as one of four nonexclusive factors for consideration in the threshold inquiry into mark fame. See 15 U.S.C. § 1125(c)(2). The existence

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8 See also Specialized Seating, Inc. v. Greenwich Indus., 616 F.3d 722, 728 (7th Cir. 2010) (“All a finding of fraud does is knock out the mark’s ‘incontestable’ status, and its registration . . . . It does not affect the mark’s validity, because a trademark need not be registered to be enforceable.”); Crash Dummy Movie, LLC v. Mattel, Inc., 601 F.3d 1387, 1391 (Fed. Cir. 2010) (“[C]ancellation of a trademark registration does not necessarily translate into abandonment of common law trademark rights.”); Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 996 (9th Cir. 2001) (“[E]ven if [the appellants] knowingly submitted a false declaration such that the appellants’ federal registration should be canceled, the appellants could (and did) still bring suit alleging common law trademark infringement.”); Santana Prods., Inc. v. Compression Polymers, Inc., 8 F.3d 152, 155 (3d Cir. 1993) (“[T]he cancellation of a trademark registration does not extinguish common law rights the registration did not create.”) (quoting Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812, 819 (1st Cir. 1987)); Orient Exp. Trading Co. v. Federated Dept Stores, Inc., 842 F.2d 650, 654 (2d Cir. 1988) (“Even if appellants’ registered marks are cancelled, however, the use of the [disputed] name . . . could still be protected from unfair competition under section 43(a) of the Lanham Act.”); Cal. Cooler, Inc. v. Loretto Winery, Ltd., 774 F.2d 1451, 1454 (9th Cir. 1985) (“[D]eficiencies in registration, such as failure to renew, or even cancellation, do not affect common law trademark rights.”); Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366, 376 (1st Cir. 1980) (“[I]n some cases of cancellation of federal registration the registrant may still be able to establish his common law right to exclusive use . . . .”); eCash Techs., Inc. v. Guagliardo, 210 F. Supp. 2d 1138, 1155 (C.D. Cal. 2001) (“Defendants seemed to assume that if the registration were canceled, they could not be liable for infringement. As has been stated, such an assumption neglects the continuing common law trademark rights that Plaintiff may have enjoyed even if its registration were canceled.”); Aveda Corp. v. Evita Mktg., Inc., 706 F. Supp. 1419, 1425 (D. Minn. 1989) (“[E]ven if a plaintiff's registration is shown to be fraudulently obtained, the plaintiff's common law rights in the mark may still support an injunction against an infringing defendant.”); Nat'l Railways Bus Sys. v. Trailway Van Lines, Inc., 269 F. Supp. 352, 357 (E.D.N.Y. 1965) (“Plaintiff's failure to establish a statutory right [to registration] . . . does not affect its common law claim of unfair competition.”); Bakers Eng'g & Equip. Co. v. Reed, 103 F. Supp. 856, 856 (W.D. Mo. 1952) (“The personal defendant . . . now seeks to have canceled the trade-mark registered by the plaintiff on the ground that it was registered without his consent. Registration of trademarks is not necessary for their validity. And the plaintiff would have a common law action for an alleged infringement and for unfair competition [even in the event of cancellation].”).
or nonexistence of a registration therefore clearly does not serve a gatekeeping function in actions brought under that statute. See, e.g., New York City Triathlon, LLC v. NYC Triathlon Club, Inc., 704 F. Supp. 2d 305, 321-22 (S.D.N.Y. 2010) (finding unregistered marks famous and likely to be diluted in violation of Section 43(c)).

B. The Ineligibility of a Mark for Registration Does Not Affect the Ability of its Owner to Use the Mark

It is well-established that the denial of a registration to a particular mark does not in of itself restrict the mark’s use in commerce. As the Court of Customs and Patent Appeals explained in affirming a refusal to register a mark, “it is clear that the PTO’s refusal to register appellants’ mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed.” In re McGinley, 660 F.2d 481, 484 (C.C.P.A. 1981); see also In re Fox, 702 F.3d 633, 635 (Fed. Cir. 2012) (“[A] refusal to register a mark has no bearing on the applicant’s ability to use the mark . . . .”); In re Boulevard Entm’t, Inc., 334 F.3d 1336, 1343 (Fed. Cir. 2003) (“[T]he refusal to register a mark . . . does not affect the applicant’s right to use the mark in question.”). There is no readily apparent authority to the contrary.

C. The Owner of a Mark on the Principal Register Enjoys Procedural Advantages in Litigation to Protect its Mark Compared to the Owners of Unregistered Marks

The Supreme Court has observed that “[t]he benefits of registration are substantial,” B & B Hardware, Inc. v. Hargis Indus., 135 S. Ct. 1293, 1309 (2015), and a mark owner denied registration can suffer numerous disadvantages in litigation to protect its mark. Some of those disadvantages are purely procedural in nature. For example, Sections 7(b) and 33(a) of the Lanham Act, 15 U.S.C. §§ 1057(b), 1115(a) (2012), provide that a certificate of registration on the Principal Register constitutes “prima facie” evidence of the validity of the registered mark; if

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9 There is a minority position on the enforceability of rights to otherwise valid marks that are, for whatever reason, ineligible for registration but the Section believes that position is less firmly grounded in the Lanham Act and opinions interpreting the Act. Some scholars and others have argued that the enforceability of a mark for which registration has been cancelled on disparagement grounds is an open question, and disagree as to how courts are likely to resolve it. See, e.g., Stephen R. Baird, Moral Intervention In The Trademark Arena: Banning the Registration of Scandalous And Immoral Trademarks, 83 Trademark Rep. 661, 789-91 (1993); see also Jordan Weissmann, Why Washington’s NFL Team Might Not Need to Worry About Losing Its Trademarks, Slate, Jun. 18, 2014, http://www.slate.com/blogs/moneybox/2014/06/18/washington_football_team_loses_trademark_case_why_it_might_not_matter.html (last visited Oct 16, 2014); Joseph Stromberg, The Redskins just lost some legal protection of their name. Here’s what it means, Vox, http://www.vox.com/2014/6/18/5820770/the-redskins-just-lost-legal-protection-of-their-name-heres-what-it (last visited Oct 16, 2014). At least one court has held that another of the Section 2 statutory bars—the bar against registration of government insignia—renders such marks unenforceable under Section 43(a) as well. See Renna v. County of Union, N.J., 88 F. Supp. 3d 310, 320 (D.N.J. 2014).

Most recently, in an additional views section of a now-vacated Federal Circuit opinion, Judge Moore commented that “it is the use of a trademark in commerce, not its registration, which gives rise to a protectable right. Equally clear, however, is that § 43(a) protection is only available for unregistered trademarks that could have qualified for federal registration. Thus, no federal cause of action is available to protect a trademark deemed disparaging, regardless of its use in commerce.” In re Tam, 785 F.3d 567, 576 (Fed. Cir. 2015) (additional views of Moore, J.) (citations omitted), reh’g en banc granted, opinion vacated, 600 F. App’x 775 (Fed. Cir. 2015); see also In re Tam, 808 F.3d 1321, 1345 (Fed. Cir. Dec. 22, 2015) (en banc), as corrected (Feb. 11, 2016).
such a registration becomes incontestable under Section 15 of the Act, id. § 1065, that evidence becomes “conclusive,” subject to certain exceptions identified in Section 33(b) of the Act. Id. § 1115(b). In contrast, “[u]nregistered marks have no presumption of validity . . . . Thus, a plaintiff must prove that an unregistered mark is valid and protectable.” MNI Mgmt., Inc. v. Wine King, LLC, 542 F. Supp. 2d 389, 404 (D.N.J. 2008) (citation omitted).

Other advantages are more substantive in nature. 10 These include the availability of particular causes of action to registrants on the Principal Register, but not to nonregistrants. Thus, for example, nonregistrants are ineligible for the cause of action against counterfeiting 11 created by the intersection of Section 32 of the Lanham Act, 15 U.S.C. § 1114, which is available only to federal registrants, 12 with Section 34, 15 U.S.C. § 1116, and Section 35, id. § 1117. As noted above, nonregistrants can rely on the unfair competition cause of action under Section 43(a) of the Act, but liability under that section does not trigger the heightened remedies set forth in Section 34(d), id. § 1117, or the availability of statutory damages under Section 35(c), id. § 1117(c). Nonregistrants are similarly ineligible for the private cause of action provided for Section 526(a) of the Tariff Act of 1930, 19 U.S.C. 1526(a) (2012), which is similarly restricted to the owners of registered marks. Finally, nonregistrants cannot avail themselves of the opportunity to record their registrations with U.S. Customs and Border Patrol, which is a prerequisite for the import-exclusion remedy authorized by Section 526 and Section 42 of the Lanham Act, 15 U.S.C. § 1124.

Respectfully submitted,

Theodore H. Davis Jr., Chair
Section of Intellectual Property Law
August 2016

10 See, e.g., 15 U.S.C. § 1057(c) (providing that registration on Principal Register constitutes nationwide constructive priority as of filing date of application maturing into registration); id. § 1125(c)(2) (identifying the existence or nonexistence of a registration as relevant to the inquiry into whether a mark is sufficiently famous to qualify for protection against likely dilution under federal law).

11 A defendant’s mark is “counterfeit” only if it is “identical [to], or substantially indistinguishable from, a registered mark.” 15 U.S.C. § 1127 (emphasis added); see also id. § 1116(d)(1)(b) (“[C]ounterfeit mark’ means . . . a counterfeit of a mark that is registered . . . .” (emphasis added)).

12 See, e.g., Fin. Inv. Co. (Bermuda) Ltd. v. Geberit AG, 165 F.3d 526, 531 (7th Cir. 1998) (“Authorities uniformly agree that only the trademark’s registrant (or her assignee) may sue under § 32(1).”); Gaia Techs., Inc. v. Reconversion Techs., Inc., 93 F.3d 774, 779-80 (Fed. Cir. 1996) (vacating finding of liability under Section 32 in light of plaintiff’s failure to demonstrate ownership of registration).
GENERAL INFORMATION FORM

Submitting Entity:  Section of Intellectual Property Law

Submitted by:  Theodore H. Davis Jr., Section Chair

1. Summary of Resolution

The Resolution will establish policy in support of advising the Supreme Court and lower courts of three basic propositions of trademark law, namely, that: (1) a determination that a mark is ineligible for registration on the USPTO’s Principal Register does not necessarily render that mark invalid and unprotectable (although it may); (2) such a determination does not restrict the mark owner’s right to use the mark in commerce; and (3) the owner of a mark registered on the Principal Register enjoys certain substantive and procedural advantages in litigation to protect its mark that are not available to the owners of unregistered marks.

2. Approval by Submitting Entity

The Section of Intellectual Property Law Council approved the resolution on May 5, 2016.

3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

No.

4. What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?

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

While there is a bill pending in the House to cancel all federal registrations and requiring the denial of all applications for the registration of marks using the term “redskins,” H.R. 684, the “Non-Disparagement of Native American Persons or Peoples in Trademark Registration Act of 2015,” there is no legislation addressing the issue discussed in the Resolution.
7. Plans for Implementation of the Policy if Adopted by the House of Delegates

The policy will provide authority for the preparation and filing of an Association *amicus* brief in the U.S. Supreme Court or other appropriate judicial forum in a case presenting the issues that are addressed in the policy.

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

Adoption of the recommendations will not result in additional direct or indirect costs to the Association.

9. Disclosure of Interest

There are no known conflicts of interest with regard to this recommendation.

10. Referrals

This recommendation is being distributed to each of the Sections, Divisions, and the Standing Committees of the Association.

11. Contact Person (prior to meeting)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution will establish policy on three basic propositions of federal trademark law.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses the significance of the cancellation of an existing registration of an otherwise valid trademark or service mark on the Principal Register of the United States Patent and Trademark Office ("USPTO"), or the USPTO’s denial of an application for such a registration.

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

The Resolution will establish policy in support of advising the Supreme Court and lower courts of three basic propositions of trademark law, namely, that: (1) a determination that a mark is ineligible for registration on the USPTO’s Principal Register does not necessarily render that mark invalid and unprotectable (although it may); (2) such a determination does not restrict the mark owner’s right to use the mark in commerce; and (3) the owner of a mark registered on the Principal Register enjoys certain substantive and procedural advantages in litigation to protect its mark that are not available to the owners of unregistered marks.

4. Summary of Minority Views

The Resolution has three parts. To the best of the Section of Intellectual Property Law’s knowledge, there are no judicial opinions or scholarship inconsistent with the positions advanced by the second and third portions of the Resolution.

The Section of Intellectual Property Law has considered the following minority views expressed by some scholars and commentators and concluded they are inconsistent with the weight of authority set forth above.

As to the first portion of the Resolution, there is a minority position on the enforceability of rights to otherwise valid marks that are, for whatever reason, ineligible for registration. Some scholars and others have argued that the enforceability of a mark for which registration has been cancelled on disparagement grounds is an open question, and disagree as to how courts are likely to resolve it. See, e.g., Stephen R. Baird, “Moral Intervention In The Trademark Arena: Banning The Registration Of Scandalous And Immoral Trademarks,” 83 Trademark Rep. 661, 789-91 (1993); see also Jordan Weissmann, “Why Washington’s NFL Team Might Not Need to Worry About Losing Its Trademarks,” Slate, Jun. 18, 2014, http://www.slate.com/blogs/moneybox/2014/06/18/washington_football_team_loses_trademark_case_why_it_might_not_matter.html (last visited Oct 16, 2014); Joseph Stromberg, “The Redskins just lost some legal protection of
RESOLVED, That the American Bar Association supports an interpretation of the special patent
venue statute, 28 U.S.C. § 1400(b), that does not adopt the definition of “resides” in the separate,
general venue statute, 28 U.S.C. § 1391(c), to ascertain the meaning of “resides” in §1400(b); and

FURTHER RESOLVED, That the American Bar Association supports an interpretation of 28
U.S.C. § 1400(b) such that venue in a patent infringement case involving a business entity
defendant is proper only in a judicial district (1) located in the state under whose laws the
business entity was formed or (2) where the business entity has committed acts of infringement
and has a regular and established place of business.
REPORT

This Resolution and Report concern venue in patent infringement actions—determining where a corporate defendant resides for purposes of venue. Specifically, it concerns whether the proper interpretation of the term “resides” as used in the venue provisions of the Patent Act, 28 U.S.C. § 1400(b)1 is where the business is incorporated, or whether resort must be had to the general venue statute, 28 U.S.C. § 1391(c), to interpret the meaning of “resides” in the venue provisions of the Patent Act, with the result that venue is proper wherever the defendant is subject to personal jurisdiction for that case.

The Section of Intellectual Property Law requests that the House of Delegates approve this Resolution, which would support an Association amicus curiae brief in the U.S. Supreme Court in the case of In re TC Heartland, LLC, No. 2016–105, 2016 WL 1709433 (Fed. Cir. April 29, 2016) (“TC Heartland”), should a petition for certiorari be filed and granted. If such a petition is timely filed and granted, the deadline for filing an amicus brief on the merits in the Supreme Court will likely be reached before the next meeting of the House of Delegates.

Summary

On April 29, 2016, a unanimous panel of the Federal Circuit2 held that in light of amendments made by Congress to 28 U.S.C. § 1391 in 2011, the meaning of “resides” as used in special patent venue statute 28 U.S.C. § 1400, which is not defined in § 1400, can only be resolved by resort to the general venue statute, which defines where companies reside for purposes of venue. TC Heartland, 2016 WL 1709433, at *5. The court explained that § 1400(b) of the patent venue statute provides that venue is proper “where the defendant resides” but “itself does not define corporate residence.” Id. It further noted that the outcome of the dispute over the proper reading of the statutes was determined by the court’s prior consistent ruling in VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir. 1990) (“VE Holding”).3 TC Heartland, LLC, 2016 WL 1709433, at *4.

In addition to defining venue as proper where the defendant resides, 28 U.S.C. § 1400(b) also deems venue as proper “where the defendant has committed acts of infringement and has a regular and established place of business.” Because there is no dispute over this alternative ground on which to establish venue, the report will focus on the portion of the statute that provides for venue based on a defendant’s residence.

The case was before the Federal Circuit on a petition for a writ of mandamus filed by TC Heartland to direct the United States District Court for the District of Delaware either to dismiss or to transfer the patent infringement suit filed against it.

The statutes and views on their interpretation have changed over time. For example, the VE Holdings decision recalls a position once held by the Section of Intellectual Property Law with respect to a past version, stating:

As far back as 1974, the A.B.A. Section of Patent, Trademark and Copyright Law supported a resolution that the term “resides” in § 1400(b) be defined by § 1391(c). Gess, Desirability of Initiating Patent Litigation Wherever the Defendant is Found, 1974 A.B.A. Sec. Pat. Trademark and Copyright L. 114, 115 (“[T]he patent venue provision, 28 U.S.C. § 1400(b) and the interpretation given it by the Supreme Court in Fourco ... is the result of historical accident. The consequence of this accident has been to create confusion in the courts and to unduly shield a corporate infringer.’”).

Although not mentioned by the court, at the Section’s urging, in 1977 the ABA House of Delegates adopted a resolution that took a similar view on the outcome in Fourco and favored amending the predecessor to Section 1400(b) to define corporate residence to include any judicial district in which the corporation “is
The *TC Heartland* court further held that an earlier amendment to § 1391 in 1988 rendered inapplicable the Supreme Court’s contrary reading of an earlier version of these statutes in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957) (“*Fourco*”). Id. at *6. However, subsequent to the amendments of § 1391 in 1988 and 2011, the Supreme Court has not addressed whether the Court’s *Fourco* decision applies to the patent venue statute in its current form.

The Resolution disfavors the Federal Circuit precedent and favors applying Supreme Court precedent for reading the special patent venue statute as it stands alone and not supplemented by the definition of corporate residence found in §1391(c). In 2011, when Congress amended § 1391 to add to subparagraph (a) the language “Applicability of Section.—Except as otherwise provided by law—,” Congress made clear that resort to § 1391 was improper where a special statute existed. Thus, Congress did not intend for courts to look beyond § 1400(b) to § 1391 to determine where venue is proper in a patent case. As properly read, § 1400(b) provides that patent cases against companies may be brought only: (1) where the entity “resides,” meaning where they were incorporated; or (2) where the entity “has committed acts of infringement” and “has a regular and established place of business.” The Federal Circuit’s prior decision in *VE Holding*, and its recent decision in *TC Heartland*, both conflict with the U.S. Supreme Court’s reasoning in *Fourco*, 353 U.S. at 228, which held that § 1400(b) stands alone.

These Federal Circuit decisions misinterpret the venue statutes and do not follow Supreme Court precedent. The Federal Circuit’s current reading of the statute produces the result that corporate defendants may be sued anywhere they are subject to a district court’s personal jurisdiction, which has led to improper forum shopping, with a disproportionately high number of plaintiffs favoring the Eastern District of Texas. Accordingly, this Resolution asks the ABA House of Delegates to approve policy supporting a statutory construction of the special patent venue statute § 1400(b) such that one should not look to § 1391(c) to ascertain the scope of “resides,” but rather venue for a corporate defendant should be limited either to where it resides or where it has committed acts of infringement and has a regular and established place of business. If implemented, this proposed policy would reduce the perceived unfettered forum shopping for which the patent system has been criticized for many years, and would put in the hands of Congress any decision whether venue should be enlarged beyond that provided by § 1400(b).

**A. The Venue Statutes At Issue**

28 U.S.C. § 1400(b) is the patent venue statute and provides:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

*Id.* (emphasis added). The statute establishes that venue is proper “where the defendant resides.” It does not define the term.

doing business.” Those positions from the 1970’s have long since ceased to represent ABA or section policy. The ABA resolution was archived in 1998.
28 U.S.C. § 1391 is the general venue statute and, among other things, defines where a corporation resides for venue purposes. That statute provides, in relevant part:

(a) **Applicability of Section.**—*Except as otherwise provided by law—*
   (1) this section shall govern the venue of all civil actions brought in district courts of the United States; and
   (2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) **Venue in General.**—A civil action may be brought in—
   (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
   (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
   (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) **Residency.**—*For all venue purposes—*
   (1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;
   (2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and
   (3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) **Residency of Corporations in States With Multiple Districts.**—
For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

*Id.* (emphasis added). § 1391(a)(1) provides that § 1391 can only be relied on to determine where venue is proper in cases for which there is not already a provision for venue elsewhere ("**Applicability of Section.**—*Except as otherwise provided by law—*(1) this section shall govern the venue of all civil actions brought in district courts of the United States."). § 1391(c) defines
"Residency.—For all venue purposes," and § 1391(c)(2) provides that venue is proper if the defendant corporation would be subject to the court’s personal jurisdiction in that case. Both of these subsections are framed by § 1391(a)(1)'s prohibition against reference to § 1391 where there is already a specific statute providing for venue in a particular type of case.

B. Congress Amended § 1391(a)(1) and Thereby Overturned VE Holding

Before the Supreme Court decided Fourco, § 1391(c) had long defined venue for corporations as including judicial districts where the corporation “is doing business.” In Fourco, the Supreme Court rejected that interpretation, holding instead that “§ 1391(c) is a general venue statute, whereas § 1400(b) is a special venue statute applicable, specifically, to all defendants in a particular type of actions, i.e., patent infringement actions.” Fourco, 353 U.S. at 228. The Fourco Court reaffirmed the holding in Stonite Prods. Co. v. Melvin Lloyd Co., 315 U.S. 561 (1942), “that Section 48 [which is now § 1400(b)] is the exclusive provision controlling patent infringement proceedings” and “that Congress did not intend the Act of 1897 (which had become § 48 of the Judicial Code []) to dovetail with the general relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings.” Fourco, 353 U.S. at 225 (quoting Stonite, 315 U.S. at 563, 566). The Federal Circuit’s decision in VE Holding resulted from a 1988 amendment amending § 1391(c) to include the prefatory phrase “for purposes of venue under this chapter.” The VE Holding court relied on that new language to conclude “that ‘[s]ection 1391(c) applies to all of chapter 87 of title 28, and thus to § 1400(b) ....’” VE Holding, 917 F.2d at 1580.

VE Holding was premised on language in § 1391 deleted by the 2011 amendments. In 2011, Congress again amended § 1391 to, among other things, remove “for purposes of venue under this chapter” from subparagraph (c) and to add to subparagraph (a) the prefatory language “Applicability of Section.—Except as otherwise provided by law—.” The 2011 changes also added to subparagraph (c) the prefatory language “Residency.—For all venue purposes—.” The change to § 1391(a), “[e]xcept as otherwise provided by law,” means that if a specific statute defines venue for a particular type of case, such as § 1400(b), then that first statute shall govern without consulting the second, in this case § 1391. A plain reading of § 1391(a) therefore mandates that § 1400(b) be read without resort to § 1391. When read in light of such precedent as Fourco, a defendant corporation resides only where it is incorporated. Fourco, 353 U.S. at 226 (citing Shaw v. Quincy Mining Co., 145 U.S. 444 (1892)).

The primacy of the special patent venue statute, § 1400(b), over the general venue statute, §1391, is reinforced by the statutory construction canon that “[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.” Fourco, 353 U.S. at 228 (citations omitted) (internal quotation marks omitted). It is erroneous to begin the statutory construction analysis by deciding first the reach of the general statute, then evaluating the effect of the special statute. Id. at 228-29 (“Specific terms prevail over the general in the same or another statute which otherwise might be controlling.”). The Federal Circuit took such an erroneous approach to statutory construction in VE Holding, and it wrongly repeated that error in construing these same statutes again in TC Heartland.
C. In Fourco, the Supreme Court Has Already Rejected The Federal Circuit's Interpretation of These Patent Venue Statutes By Holding that § 1400(b) Is the Only Statute Governing Venue in Patent Cases

In 1957, the Supreme Court granted certiorari in Fourco to decide whether "28 U.S.C. § 1400(b) [is] the sole and exclusive provision governing venue in patent infringement actions, or whether that section is supplemented by 28 U.S.C. § 1391(c)." Id. at 223. The Court concluded that 1400(b) is the sole and exclusive provision governing patent venue. Id. at 228-29.

When Fourco was on appeal to the Second Circuit, that court had held that "proper construction 'requires ... the insertion in' § 1400(b) 'of the definition of corporate residence from § 1391(c), and that the two sections, when thus 'read together,' mean 'that this defendant may be sued in New York, where it 'is doing business.'" Id. at 223-24. Because the Second Circuit's opinion conflicted with the Supreme Court's decision in Stonite Prods. Co. v. Melvin Lloyd Co., 315 U.S. 561 (1942), the Court granted certiorari. Id. at 224.

The Stonite Court had also reviewed whether the special patent infringement venue statute was the exclusive provision governing venue for patent infringement cases, or whether a later venue provision supplemented the patent infringement venue statute. Fourco, 353 U.S. at 224. The later venue provision allowed for actions where the "defendants residing in different judicial districts within the same state, [could] be brought in either district." Id. After reviewing the history of the patent infringement venue provision, the Stonite Court held that the patent infringement venue statute "alone should control venue in patent infringement proceedings." Id. at 225.

The Court in Fourco similarly addressed whether a substantive change had occurred in the exclusive venue statute for patent infringement. Id. In relevant part, the statute was amended to have "where the defendant resides” replace “of which the defendant is an inhabitant,” essentially substituting the term “inhabitant” with the term “resident.” Id. at 226. The Court noted that the intent to make a substantive change in the law by way of the amendment must be "clearly expressed." Id. at 227. Because the "Revisers’ Notes" associated with the updating of the code did not clearly express any intent to change the exclusive venue provision, the Supreme Court held "that 28 U.S.C. § 1400(b) made no substantive change from [its predecessor] 28 U.S.C. (140 ed.) § 109 as it stood and was dealt with in the Stonite case.” Id.

Accordingly, the Fourco Court rejected the respondent’s argument and the lower court’s holding that § 1391(c) supplemented § 1400(b). Id. at 228. It noted that under well-settled law "[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment ... Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'” Id. at 228-29 (citations omitted). Thus, as it had in Stonite, the Court held that, “§ 1391(c) is a general corporation venue statute, whereas § 1400(b) is a special venue statute applicable, specifically, to ... patent infringement actions.” Id. at 228.
D. The Federal Circuit’s Recent TC Heartland Decision Is In Conflict with the Supreme Court’s Holding in Fourco

In TC Heartland, the Federal Circuit has again held that the undefined term “resides” as used in special patent venue statute § 1400 can only be resolved by resort to the general venue statute. It noted that the patent venue statute, § 1400(b), provides that venue is proper “where the defendant resides” but “itself does not define corporate residence.” It further held that an earlier amendment to § 1391 rendered inapplicable the Supreme Court’s inconsistent reading of these statutes in Fourco, stating that as a result of that amendment the Supreme Court’s decision “is no longer the law because in the 1988 amendments Congress had made the definition of corporate residence applicable to patent cases.”

Contrary to the Federal Circuit’s interpretation of the 1988 and 2011 amendments, they in fact fail to suggest in any way a congressional intent to overturn Fourco. TC Heartland, 2016 WL 1709433, at *7-8. Instead both VE Holding and TC Heartland conflict with the U.S. Supreme Court’s reasoning in Fourco, in which, when faced with essentially the same statutory interpretation, it held that § 1400(b) controls and that resort to the general statute was improper. Thus, the Federal Circuit’s new inconsistent opinion cannot stand.

Conclusion

In TC Heartland, the Federal Circuit incorrectly held that in light of amendments made by Congress to § 1391 in 2011, the undefined term “resides,” as used in special patent venue statute § 1400, can only be resolved by resort to the general venue statute. The special patent venue statute, however, stands alone and is not supplemented by § 1391(c)’s definition of corporate residence. When Congress last amended § 1391, it rendered inapplicable the analysis found in the Federal Circuit’s prior inconsistent decision in VE Holding. Both that case and the Federal Circuit’s recent holding in TC Heartland are in conflict with the U.S. Supreme Court’s reasoning in Fourco, 353 U.S. at 228, which when faced with essentially the same question, holds that § 1400(b) stands alone.

If the issue arises at the Supreme Court, this resolution would provide the basis for the American Bar Association submitting an amicus curiae brief encouraging the Court to hold that the proper interpretation of the term “resides” as used in 28 U.S.C. § 1400(b) is where the business is incorporated, which interpretation should be made without resort to § 1391(c).

Respectfully submitted,

Theodore H. Davis Jr., Chair
Section of Intellectual Property Law
August 2016
1. **Summary of Resolution**

The resolution calls for the Association to adopt policy supporting a statutory construction of the special patent venue statute, 28 U.S.C. § 1400(b), that does not adopt the definition of "resides" in the separate, general revenue statute U.S.C. § 1391(c) to ascertain the meaning of "resides" in §1400, and to put an end to improper forum shopping in patent cases. In *In re TC Heartland, LLC*, No. 2016–105, 2016 WL 1709433 (Fed. Cir. April 29, 2016) ("TC Heartland"), a unanimous panel of the Federal Circuit recently held that following amendments made by Congress to § 1391 in 2011, the term "resides," as used in special patent venue statute § 1400, can only be resolved by resort to the general venue statute. As a result of that interpretation, the Federal Circuit held that venue is proper anywhere a court has personal jurisdiction over the corporate defendant.

The special patent venue statute, however, stands alone and should not be supplemented by § 1391(c)'s definition of corporate residence. Both its prior precedent and the Federal Circuit's recent holding in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) ("Fourco"), which held that § 1400(b) stands alone. Should the issue arise, this resolution would support an American Bar Association amicus curiae brief encouraging the Supreme Court to again hold that the proper interpretation of the term "resides" as used in 28 U.S.C. § 1400(b) is where the business is incorporated, which interpretation is made without resort to §1391.

2. **Approval by Submitting Entity**

The Section Council approved the resolution on April 5, 2016.

3. **Has This or a Similar Recommendation Been Submitted to the House or Board Previously?**

This resolution has not been submitted previously. At its 1977 midyear meeting, the ABA adopted a resolution regarding the then-current versions of the venue statutes. That 1977 resolution supported reversing the Supreme Court’s decision in *Fourco* by amending Section 1400(b) of Title 28 of the United States Code to read as follows:

Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.
The judicial district in which a corporation is incorporated or licensed to do business or is doing business shall be regarded as the residence of such corporation for the purposes of this section.

This ABA policy was archived in 1998.

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**

The resolution does not call for legislation. At this time, the Section is aware of two bills addressing patent venue: S. 2733, the “Venue Equity and Non-Uniformity Elimination Act of 2016,” was introduced into the Senate Judiciary Committee on March 17, 2016, and H.R. 9, the “Innovation Act,” reported out of the House Judiciary Committee on February 25, 2016. Both would limit venue for corporate defendants.

7. **Plans for Implementation of the Policy if Adopted by the House of Delegates**

The policy will provide authority for the preparation and filing of an Association amicus brief in the U.S. Supreme Court or other appropriate judicial forum in a case presenting the issues that are addressed in the policy.

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

Adoption of the recommendations would not result in additional direct or indirect costs to the Association.

9. **Disclosure of Interest**

There are no known conflicts of interest with regard to this recommendation.

10. **Referrals**

This recommendation is being distributed to each of the Sections, Divisions, and the Standing Committees of the Association.
11. **Contact Person (prior to meeting)**

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12. **Contact Persons (who will present the report to the House)**

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This Resolution asks the ABA House of Delegates to approve policy supporting a statutory construction of the special patent venue statute, 28 U.S.C. § 1400(b), that does not look to the separate general venue statute, 28 U.S.C. § 1391(c), to ascertain the meaning of the term “resides,” and limits venue for a corporate defendant to either where it resides or where it has committed acts of infringement and has a regular and established place of business, putting an end to improper forum shopping in patent cases.

2. **Summary of the Issue that the ResolutionAddresses**

   In an April 2016 decision, the Court of Appeals for Federal Circuit did not followed Supreme Court precedent. The Federal Circuit’s current reading of the patent venue statute produces the result that corporate defendants may be sued anywhere they are subject to a district court’s personal jurisdiction, which has led to forum shopping, with a high number of plaintiffs favoring venue in the Eastern District of Texas.

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

   The resolution will support an American Bar Association amicus brief encouraging the Supreme Court to again hold that §1400 stands alone, and consequently the term “resides” as used in § 1400(b) means where the business is incorporated, and overturn the Federal Circuit precedent that venue is proper wherever the defendant is subject to personal jurisdiction for that case.

4. **Summary of Minority Views**

   Some argue that the Federal Circuit’s interpretation of the current version of the two statutes is correct. They agree the patent venue statute, § 1400(b), provides that venue is proper where the defendant resides and does not define corporate residence. They favor an interpretation of §1400(b) that incorporates the general venue statute definition of corporate residency as necessary to fill a gap in § 1400(b). They see the title of § 1391(c) “Residency.—For all venue purposes, as dictating residency for corporations under § 1400(b). Some also argue that the Supreme Court’s *Fourco* decision goes too far by shielding corporate infringers from venue in jurisdictions in which they are infringing patents. And they agree with the Federal Circuit that subsequent amendments to § 1391 render *Fourco* inapplicable.
RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.
Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity.

[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice
to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.
REPORT

"Lawyers have a unique position in society as professionals responsible for making our society better. Our rules of professional conduct require more than mere compliance with the law. Because of our unique position as licensed professionals and the power that it brings, we are the standard by which all should aspire. Discrimination and harassment . . . is, and unfortunately continues to be, a problem in our profession and in society. Existing steps have not been enough to end such discrimination and harassment."

ABA President Paulette Brown, February 7, 2016 public hearing on amendments to ABA Model Rule 8.4, San Diego, California.

I. Introduction and Background

The American Bar Association has long recognized its responsibility to represent the legal profession and promote the public’s interest in equal justice for all. Since 1983, when the Model Rules of Professional Conduct ("Model Rules") were first adopted by the Association, they have been an invaluable tool through which the Association has met these dual responsibilities and led the way toward a more just, diverse and fair legal system. Lawyers, judges, law students and the public across the country and around the world look to the ABA for this leadership.

Since 1983, the Association has also spearheaded other efforts to promote diversity and fairness. In 2008 ABA President Bill Neukum led the Association to reformulate its objectives into four major "Goals" that were adopted by the House of Delegates.1 Goal III is entitled, "Eliminate Bias and Enhance Diversity." It includes the following two objectives:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system.

A year before the adoption of Goal III the Association had already taken steps to address the second Goal III objective. In 2007 the House of Delegates adopted revisions to the Model Code of Judicial Conduct to include Rule 2.3, entitled, "Bias, Prejudice and Harassment." This rule prohibits judges from speaking or behaving in a way that manifests, "bias or prejudice," and from engaging in harassment, "based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." It also calls upon judges to require lawyers to refrain from these activities in proceedings before the court.2 This current proposal now before the House will further implement the Association’s Goal III objectives by placing a similar provision into the Model Rules for lawyers.

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2 Rule 2.3(C) of the ABA Model Code of Judicial Conduct reads: "A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others."
When the Model Rules were first adopted in 1983 they did not include any mention of or reference to bias, prejudice, harassment or discrimination. An effort was made in 1994 to correct this omission; the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility (SCEPR”) each proposed language to add a new paragraph (g) to Rule 8.4, “Professional Misconduct,” to specifically identify bias and prejudice as professional misconduct. However, in the face of opposition these proposals were withdrawn before being voted on in the House. But many members of the Association realized that something needed to be done to address this omission from the Model Rules. Thus, four years later, in February 1998, the Criminal Justice Section and SCEPR developed separate proposals to add a new anti-discrimination provision into the Model Rules. These proposals were then combined into Comment [3] to Model Rule 8.4, which was adopted by the House at the Association’s Annual Meeting in August 1998. This Comment [3] is discussed in more detail below. Hereinafter this Report refers to current Comment [3] to 8.4 as “the current provision.”

It is important to acknowledge that the current provision was a necessary and significant first step to address the issues of bias, prejudice, discrimination and harassment in the Model Rules. But it should not be the last step for the following reasons. It was adopted before the Association adopted Goal III as Association policy and does not fully implement the Association’s Goal III objectives. It was also adopted before the establishment of the Commission on Sexual Orientation and Gender Identity, one of the co-sponsors of this Resolution, and the record does not disclose the participation of any of the other Goal III Commissions—the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, and the Commission on Disability Rights—that are the catalysts for these current amendments to the Model Rules.

Second, Comments are not Rules; they have no authority as such. Authority is found only in the language of the Rules. “The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”

Third, even if the text of the current provision were in a Rule it would be severely limited in scope: It applies (i) only to conduct by a lawyer that occurs in the course of representing a client, and (ii) only if such conduct is also determined to be “prejudicial to the administration of justice.” As the Association’s Goal III Commissions noted in their May 2014 letter to SCEPR:

It [the current provision] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also does not address harassment at all, even though the judicial rules do so.

In addition, despite the fact that Comments are not Rules, a false perception has developed over the years that the current provision is equivalent to a Rule. In fact, this is the only example in the Model Rules where a Comment is purported to “solve” an ethical issue that otherwise would

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require resolution through a Rule. Now—thirty-three years after the Model Rules were first adopted and eighteen years after the first step was taken to address this issue—it is time to address this concern in the black letter of the Rules themselves. In the words of ABA President Paulette Brown: "The fact is that skin color, gender, age, sexual orientation, various forms of ability and religion still have a huge effect on how people are treated." As the Recommendation and Report of the Oregon New Lawyers to the Assembly of the Young Lawyers Division at the Annual Meeting 2015 stated: "The current Model Rules of Professional Conduct (the "Model Rules"), however, do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation." The Association should now correct this omission. It is in the public’s interest. It is in the profession’s interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.

II. Process

Over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998. The emphasis has been on open discussion and publishing drafts of proposals to solicit feedback, suggestions and comments. SCEPR painstakingly took that feedback into account in subsequent drafts, until a final proposal was prepared.

This process began on May 13, 2014 when SCEPR received a joint letter from the Association’s four Goal III Commissions: the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identify. The Chairs of these Commissions wrote to the SCEPR asking it to develop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III. These Commissions explained that the current provision is insufficient because it “does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system.”

In the fall of 2014 a Working Group was formed under the auspices of SCEPR and chaired by immediate past SCEPR chair Paula Frederick, chief disciplinary counsel for the State Bar of Georgia. The Working Group members consisted of one representative each from SCEPR, the Association of Professional Responsibility Lawyers (“APRL”), the National Organization of Bar

1 Paulette Brown, Inclusion Not Exclusion: Understanding Implicit Bias is Key to Ensuring An Inclusive Profession, ABA J. (Jan. 1, 2016, 4:00 AM), http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring.

2 In August 2015, unaware that the Standing Committee on Ethics and Professional Responsibility was researching this issue at the request of the Goal III Commissions, the Oregon State Bar New Lawyers Division drafted a proposal to amend the Model Rules of Professional Conduct to include an anti-harassment provision in the black letter. They submitted their proposal to the Young Lawyers Division Assembly for consideration. The Young Lawyers Division deferred on the Oregon proposal after learning of the work of the Standing Committee on Ethics and Professional Responsibility and the Goal III Commissions.

3 Letter to Paula J. Frederick, Chair, ABA Standing Committee on Ethics and Professional Responsibility 2011-2014.
Counsel ("NOBC") and each of the Goal III Commissions. The Working Group held many teleconference meetings and two in-person meetings. After a year of work Chair Frederick presented a memorandum of the Working Group’s deliberations and conclusions to SCEPR in May 2015. In it, the Working Group concluded that there was a need to amend Model Rule 8.4 to provide a comprehensive anti-discrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment.

On July 8, 2015, after receipt and consideration of this memorandum, SCEPR prepared, released for comment and posted on its website a Working Discussion Draft of a proposal to amend Model Rule of Professional Conduct 8.4. SCEPR also announced and hosted an open invitation Roundtable discussion on this Draft at the Annual Meeting in Chicago on July 31, 2015.

At the Roundtable and in subsequent written communications SCEPR received numerous comments about the Working Discussion Draft. After studying the comments and input from the Roundtable, SCEPR published in December 2015 a revised draft of a proposal to amend Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association, including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016. Written comments were also invited. President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an anti-discrimination provision to the black letter Rule 8.4.

After further study and consideration SCEPR made substantial and significant changes to its proposal, taking into account the many comments it received on its earlier drafts.

III. Need for this Amendment to the Model Rules

As noted above, in August 1998 the American Bar Association House of Delegates adopted the current provision: Comment [3] to Model Rule of Professional Conduct 8.4, Misconduct which explains that certain conduct may be considered “conduct prejudicial to the administration of justice,” in violation of paragraph (d) to Rule 8.4, including when a lawyer knowingly manifests, by words or conduct, bias or prejudice against certain groups of persons, while in the course of representing a client but only when those words or conduct are also “prejudicial to the administration of justice.”

Yet as the Preamble and Scope of the Model Rules makes clear, “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.” Thus, the ABA did not squarely and forthrightly address prejudice, bias, discrimination and harassment as would have been the case if this conduct were addressed in the text of a Model Rule. Changing the Comment to a black letter rule makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and

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harassment. It also clearly puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice. It is a specific requirement.

Therefore, SCEPR, along with our co-sponsors, propose amending ABA Model Rule of Professional Conduct 8.4 to further implement Goal III by bringing into the black letter of the Rules an anti-discrimination and anti-harassment provision. This action is consistent with other actions taken by the Association to implement Goal III and to eliminate bias in the legal profession and the justice system.

For example, in February 2015, the ABA House of Delegates adopted revised ABA Standards for Criminal Justice: Prosecution Function and Defense Function which now include anti-bias provisions. These provisions appear in Standards 3-1.6 of the Prosecution Function Standards, and Standard 4.16 of the Defense Function Standards.10 The Standards explain that prosecutors and defense counsel should not, “manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status.” This statement appears in the black letter of the Standards, not in a comment. And, as noted above, one year before the adoption of Goal III, the Association directly addressed prejudice, bias and harassment in the black letter of Model Rule 2.3 in the 2007 Model Code of Judicial Conduct.

Some opponents to bringing an anti-discrimination and anti-harassment provision into the black letter of the Model Rules have suggested that the amendment is not necessary—that the current provision provides the proper level of guidance to lawyers. Evidence from the ABA and around the country suggests otherwise. For example:

- Twenty-two states and the District of Columbia have not waited for the Association to act. They already concluded that the current Comment to an ABA Model Rule does not adequately address discriminatory or harassing behavior by lawyers. As a result, they have adopted anti-discrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct.11 By contrast, only thirteen jurisdictions have decided to address this issue in a Comment similar to the current Comment in the Model

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11 See California Rule of Prof’l Conduct 2-400; Colorado Rule of Professional Conduct 8.4(g); Florida Rule of Professional Conduct 4-8.4(d); Illinois Rule of Prof’l Conduct 8.4(j); Indiana Rule of Prof’l Conduct 8.4(g); Iowa Rule of Prof’l Conduct 8.4(g); Maryland Lawyers’ Rules of Prof’l Conduct 8.4(e); Massachusetts Rule of Prof’l Conduct 3.4(i); Minnesota Rule of Prof’l Conduct 8.4(h); Missouri Rule of Prof’l Conduct 4-8.4(g); Nebraska Rule of Prof’l Conduct 8.4(d); New Jersey Rule of Prof’l Conduct 8.4(g); New Mexico Rule of Prof’l Conduct 16-300; New York Rule of Prof’l Conduct 8.4(g); North Dakota Rule of Prof’l Conduct 8.4(f); Ohio Rule of Prof’l Conduct 8.4(g); Oregon Rule of Prof’l Conduct 8.4(a)(7); Rhode Island Rule of Prof’l Conduct 8.4(d); Texas Rule of Prof’l Conduct 5.08; Vermont Rule of Prof’l Conduct 8.4(g); Washington Rule of Prof’l Conduct 8.4(g); Wisconsin Rule of Prof’l Conduct 8.4(i); D.C. Rule of Prof’l Conduct 9.1.
Rules. Fourteen states do not address this issue at all in their Rules of Professional Conduct.

- As noted above, the ABA has already brought anti-discrimination and anti-harassment provisions into the black letter of other conduct codes like the ABA Standards for Criminal Justice: Prosecution Function and Defense Function and the 2007 ABA Model Code of Judicial Conduct, Rule 2.3.
- The Florida Bar’s Young Lawyer’s Division reported this year that in a survey of its female members, 43% of respondents reported they had experienced gender bias in their career.
- The supreme courts of the jurisdictions that have black letter rules with anti-discrimination and anti-harassment provisions have not seen a surge in complaints based on these provisions. Where appropriate, they are disciplining lawyers for discriminatory and harassing conduct.

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12 See Arizona Rule of Prof’l Conduct 8.4, cmt.; Arkansas Rule of Prof’l Conduct 8.4, cmt. [3]; Connecticut Rule of Prof’l Conduct 8.4, Commentary; Delaware Lawyers’ Rule of Prof’l Conduct 8.4, cmt. [3]; Idaho Rule of Prof’l Conduct 8.4, cmt. [3]; Maine Rule of Prof’l Conduct 8.4, cmt. [3]; North Carolina Rule of Prof’l Conduct 8.4, cmt. [5]; South Carolina Rule of Prof’l Conduct 8.4, cmt. [3]; South Dakota Rule of Prof’l Conduct 8.4, cmt. [3]; Tennessee Rule of Prof’l Conduct 8.4, cmt. [3]; Utah Rule of Prof’l Conduct 8.4, cmt. [3]; Wyoming Rule of Prof’l Conduct 8.4, cmt. [3]; West Virginia Rule of Prof’l Conduct 8.4, cmt. [3].

13 The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.


15 In 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four female clients and one female employee. In re Moothart, 860 N.W.2d 598 (2015). The Wisconsin Supreme Court in 2014 disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a $350,000 home. In re Kratz, 851 N.W.2d 219 (2014). The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him. In re Griffith, 838 N.W.2d 792 (2013). The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? In re McGrath, 280 P.3d 1091 (2012). The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. In re Campiti, 937 N.E.2d 340 (2009). The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.” In re Thomsen, 837 N.E.2d 1011 (2005).
IV. Summary of Proposed Amendments

A. Prohibited Activity

SCEPR’s proposal adds a new paragraph (g) to Rule 8.4, to prohibit conduct by a lawyer related to the practice of law that harasses or discriminates against members of specified groups. New Comment [3] defines the prohibited behavior.

Proposed new black letter Rule 8.4(g) does not use the terms “manifests ... bias or prejudice” which appear in the current provision. Instead, the new rule adopts the terms “harass or discriminate” which are based on the words “harassment” and “discrimination” that already appear in a large body of substantive law, antidiscrimination and anti-harassment statutes, and case law nationwide and in the Model Judicial Code. For example, in new Comment [3], “harass” is defined as including “sexual harassment and derogatory or demeaning language towards a person who is, or is perceived to be, a member of one of the groups. ... unwelcome sexual advances, requests for sexual favors, and or other unwelcome verbal or physical conduct of a sexual nature.” This definition is based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings before a court.17

Discrimination is defined in new Comment [3] as “harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g).” This is based in part on ABA Model Code of Judicial Conduct, Rule 2.3, Comment [3], which notes that harassment, one form of discrimination, includes “verbal or physical conduct,” and on the current rule, which prohibits lawyers from manifesting bias or prejudice while representing clients.

Proposed new Comment [3] also explains, “The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).” This provision makes clear that the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under New Rule 8.4(g). But, substantive law regarding discrimination and harassment can also guide a lawyer’s conduct. As the Preamble to the Model Rules explains, “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”18

B. Mens Rea Requirement

Proposed new Rule 8.4(g) does not use the term “knowingly.” SCEPR received many comments about whether new paragraph (g) should include a specifically stated requirement that the

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16 The phrase, “manifestations of bias or prejudice” is utilized in proposed new Comment [3].
17 ABA Model Code of Judicial Conduct Rule 2.3, Comment [4] reads: “Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.”
misconduct be “knowing” discrimination or harassment. SCEPR concluded that a “knowing” or “knowingly” requirement in new paragraph (g) is neither necessary nor appropriate.

Rule 8.4(d), which current Comment [3] illuminates, prohibits “conduct that is prejudicial to the administration of justice.” It does not include an additional requirement that such conduct be “knowing.” Current Rule 8.4(d) does not require one to “knowingly” engage in conduct that is prejudicial to the administration of justice.

Some commentators suggested that the term “knowingly” should be preserved from the current Comment, which explains that “a lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice … violates paragraph (d) when such actions are prejudicial to the administration of justice.” As noted above, Comments provide interpretive guidance but are not elements of the Rule.

“Knowingly” as used in the Model Rules denotes “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Rule 1.0(f). And the use of the term “knowingly” in the current provision makes sense in the context of that comment, which deals with bias and prejudice. Bias and prejudice are states of mind that can only be observed when they are made manifest by knowing acts (words or conduct). So it was appropriate to require a “knowing” manifestation as the basis for discipline.

By contrast, “harassment” and “discrimination” are terms that denote actual conduct. As explained in proposed new Comment [3], both “harassment” and “discrimination” are defined to include verbal and physical conduct against others. The proposed rule would not expand on what would be considered harassment and discrimination under federal and state law. Thus, the terms used in the rule—“harass and discriminate”—by their nature incorporate a measure of intentionality while also setting a minimum standard of acceptable conduct. This does not mean that complainants should have to establish their claims in civil courts before bringing disciplinary claims. Rather, it means that the rule intends that these words have the meaning established at law. The well-developed meaning and well-delineated boundaries of these terms in legal doctrine rebuts any notion that the standard imposes strict liability based on a vague and subjective proscription.

Also, the mens rea of the respondent, as well as the harm caused by the conduct, are factors that could be taken into account under the Standards for Imposing Lawyer Sanctions, for example, when determining what sanctions, if any, would be appropriate for the conduct.

C. Scope of the Rule

Proposed Rule 8.4(g) makes it professional misconduct for a lawyer to harass or discriminate while engaged in “conduct related to the practice of law.” The rule is constitutionally limited; it does not seek to regulate harassment or discrimination by a lawyer that occurs outside the scope of the lawyer’s practice of law, nor does it limit a lawyer’s representational role in our legal system. It does not limit the scope of the legal advice a lawyer may render to clients, which is

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This, for example, where the word “knowingly” is used elsewhere in the Model Rules—in paragraphs (a) and (f) to Rule 8.4 and in Rule 3.3(a) for example—the lawyer’s state of mind and knowledge or lack thereof can readily be inferred from the conduct involved and the circumstances surrounding that conduct.
addressed in Model Rule 1.2. It permits legitimate advocacy. It does not change the circumstances under which a lawyer may accept, decline or withdraw from a representation. To the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct. The proposal also does not limit a lawyer’s ability to charge and collect a reasonable fee for legal services, which remains governed by Rule 1.5. And, as new Comment [4] makes clear, the proposed Rule does not impose limits or requirements on the scope of a lawyer’s professional expertise.

Note also that while the provision in current Comment [3] limits the scope of Rule 8.4(d) to situations where the lawyer is representing clients, Rule 8.4(d) itself is not so limited. In fact, lawyers have been disciplined under Rule 8.4(d) for conduct that does not involve the representation of clients.20 Some commenters expressed concern that the phrase, “conduct related to the practice of law,” is vague. “The definition of the practice of law is established by law and varies from one jurisdiction to another.”21 The phrase “conduct related to” is elucidated in the proposed new Comments and is consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges.22 The proposed scope of Rule 8.4(g) is similar to the scope of existing anti-discrimination provisions in many states.23

Proposed new Comment [4] explains that conduct related to the practice of law includes, “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.” (Emphasis added.) The nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.

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22 See Florida Rule of Professional Conduct 4-8.4(d) which addresses conduct “in connection with the practice of law”; Indiana Rule of Prof’l Conduct 8.4(g) which addresses conduct a lawyer undertakes in the lawyer’s “professional capacity”; Iowa Rule of Prof’l Conduct 8.4(g) which addresses conduct “in the practice of law”; Maryland Lawyers’ Rules of Prof’l Conduct 8.4(e) with the scope of “when acting in a professional capacity”; Minnesota Rule of Prof’l Conduct 8.4(h) addressing conduct “in connection with a lawyer’s professional activities”; New Jersey Rule of Prof’l Conduct 8.4(g) addressing when a lawyer’s conduct is performed “in a professional capacity”; New York Rule of Prof’l Conduct 8.4(g) covering conduct “in the practice of law”; Ohio Rule of Prof’l Conduct 8.4(g) addressing when lawyer “engage, in a professional capacity, in conduct”; Washington Rule of Prof’l Conduct 8.4(g) covering “connection with the lawyer’s professional activities”; and Wisconsin Rule of Prof’l Conduct 8.4(i) with a scope of conduct “in connection with the lawyer’s professional activities.”
The scope of proposed 8.4(g) is actually narrower and more limited than is the scope of other Model Rules. “[T]here are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity.” For example, paragraph (c) to Rule 8.4 declares that it is professional misconduct for a lawyer to engage in conduct “involving dishonesty, fraud, deceit or misrepresentation.” Such conduct need not be related to the lawyer’s practice of law, but may reflect adversely on the lawyer’s fitness to practice law or involve moral turpitude.

However, insofar as proposed Rule 8.4(g) applies to “conduct related to the practice of law,” it is broader than the current provision. This change is necessary. The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration of justice. Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction’s highest court with the privilege of practicing law. The ethics rules should make clear that the profession will not tolerate harassment and discrimination in all conduct related to the practice of law.

Therefore, proposed Comment [4] explains that operating or managing a law firm is conduct related to the practice of law. This includes the terms and conditions of employment. Some commentators objected to the inclusion of workplace harassment and discrimination within the scope of the Rule on the ground that it would bring employment law into the Model Rules. This objection is misplaced. First, in at least two jurisdictions which have adopted an anti-discrimination Rule, the provision is focused entirely on employment and the workplace. Other jurisdictions have also included workplace harassment and discrimination among the conduct prohibited in their Rules. Second, professional misconduct under the Model Rules already applies to substantive areas of the law such as fraud and misrepresentation. Third, that part of the management of a law practice which includes the solicitation of clients and advertising of legal services are already subjects of regulation under the Model Rules. And fourth, this would not be the first time the House of Delegates adopted policy on the terms and

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24 MODEL RULES OF PROF’L CONDUCT, Preamble [3].
25 MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. [2].
26 MODEL RULES OF PROF’L CONDUCT, Preamble [1] & [6].
27 See D.C. Rule of Prof’l Conduct 9.1 & Vermont Rule of Prof’l Conduct 8.4(g). The lawyer population for Washington DC is 52,711 and Vermont is 2,326. Additional lawyer demographic information is available on the American Bar Association website: http://www.americanbar.org/resources_for_lawyers/profession_statistics.html.
28 Other jurisdictions have specifically included workplace harassment and discrimination among the conduct prohibited in their Rules. Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require a prior finding of employment discrimination by another tribunal. See California Rule of Prof’l Conduct 2-400 (lawyer population 167,690); Illinois Rule of Prof’l conduct 8.4(j) (lawyer population 63,060); New Jersey Rule of Prof’l Conduct 8.4(g) (lawyer population 41,569); and New York Rule of Prof’l Conduct 8.4(g) (lawyer population 175,195). Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require that the conduct be unlawful. See, e.g., Iowa Rule of Prof’l Conduct 8.4(g) (lawyer population of 7,560); Ohio Rule of Prof’l Conduct 8.4(g) (lawyer population 38,237); and Minnesota Rule of Prof’l Conduct 8.4(h) (lawyer population 24,952). Maryland has included workplace harassment and discrimination as professional misconduct when the conduct is prejudicial to the administration of justice. Maryland Lawyers’ Rules of Prof’l Conduct 8.4(e), cmt. [3] (lawyer population 24,142).
conditions of lawyer employment. In 2007, the House of Delegates adopted as ABA policy a recommendation that law firms should discontinue mandatory age-based retirement policies.\textsuperscript{30} and earlier, in 1992, the House recognized that “sexual harassment is a serious problem in all types of workplace settings, including the legal profession, and constitutes a discriminatory and unprofessional practice that must not be tolerated in any work environment.”\textsuperscript{31} When such conduct is engaged in by lawyers it is appropriate and necessary to identify it for what it is; professional misconduct.

This Rule, however, is not intended to replace employment discrimination law. The many jurisdictions which already have adopted similar rules have not experienced a mass influx of complaints based on employment discrimination or harassment. There is also no evidence from these jurisdictions that disciplinary counsel became the tribunal of first resort for workplace harassment or discrimination claims against lawyers. This Rule would not prohibit disciplinary counsel from deferring action on complaints, pending other investigations or actions.

Equally important, the ABA should not adopt a rule that would apply only to lawyers acting outside of their own law firms or law practices but not to lawyers acting within their offices, toward each other and subordinates. Such a dichotomy is unreasonable and unsupportable.

As also explained in proposed new Comment [4], conduct related to the practice of law includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law. SCEPR was presented with substantial anecdotal information that sexual harassment takes place at such events. “Conduct related to the practice of law” includes these activities.

Finally with respect to the scope of the rule, some commentators suggested that because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination.

SCEPR has considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules. There is no such limitation in the current provision. Legal ethics rules are not dependent upon or limited by statutory or common law claims. The ABA takes pride in the fact that “the legal profession is largely self-governing.”\textsuperscript{32} As such, “a lawyer’s failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process,” not the civil legal system.\textsuperscript{33} The two systems run on separate tracks.

The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system. In fact, as a self-governing profession we have made it clear that “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been

\textsuperscript{30} ABA HOUSE OF DELEGATES RESOLUTION 10A (Aug. 2007).
\textsuperscript{31} ABA HOUSE OF DELEGATES RESOLUTION 117 (Feb. 1992).
\textsuperscript{32} MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [10].
\textsuperscript{33} MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [19].
breached." Thus, legal remedies are available for conduct, such as fraud, deceit or misrepresentation, which also are prohibited by paragraph (c) to Rule 8.4, but a claimant is not required as a condition of filing a grievance based on fraud, deceit or misrepresentation to have brought and won a civil action against the respondent lawyer, or for the lawyer to have been charged with and convicted of a crime. To now impose such a requirement, only for claims based on harassment and discrimination, would set a terrible precedent and send the wrong message to the public.

In addition, the Model Rules of Professional Conduct reflect ABA policy. Since 1989, the ABA House of Delegates has adopted policies promoting the equal treatment of all persons regardless of sexual orientation or gender identity. Many states, however, have not extended protection in areas like employment to lesbian, gay, or transgender persons. A Model Rule should not be limited by such restrictions that do not reflect ABA policy. Of course, states and other jurisdictions may adapt ABA policy to meet their individual and particular circumstances.

D. Protected Groups

New Rule 8.4(g) would retain the groups protected by the current provision. In addition, new 8.4(g) would also include “ethnicity,” “gender identity,” and “marital status.” The anti-discrimination provision in the ABA Model Code of Judicial Conduct, revised and adopted by the House of Delegates in 2007, already requires judges to ensure that lawyers in proceedings before the court refrain from manifesting bias or prejudice and from harassing another based on that person’s marital status and ethnicity. The drafters believe that this same prohibition also should be applicable to lawyers in conduct related to the practice of law not merely to lawyers in proceedings before the court.

“Gender identity” is added as a protected group at the request of the ABA’s Goal III Commissions. As used in the Rule this term includes “gender expression” which is as a form of gender identify. These terms encompass persons whose current gender identity and expression are different from their designations at birth. The Equal Employment Opportunities

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34 MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [20].
35 E.g., People v. Odom, 941 P.2d 919 (Colo. 1997) (lawyer disciplined for committing a crime for which he was never charged).
36 A list of ABA policies supporting the expansion of civil rights to and protection of persons based on their sexual orientation and gender identity can be found here: http://www.americanbar.org/groups/sexual_orientation/policy.html.
37 For a list of states that have not extended protection in areas like employment to LGBT individuals see: https://www.aclu.org/map/non-discrimination-laws-state-state-information-map.
38 Some commenters advised eliminating references to any specific groups from the Rule. SCEPR concluded that this would risk including within the scope of the Rule appropriate distinctions that are properly made in professional life. For example, a law firm or lawyer may display “geographic bias” by interviewing for employment only persons who have expressed a willingness to relocate to a particular state or city. It was thought preferable to specifically identify the groups to be covered under the Rule.
39 The U.S. Office of Personnel Management Diversity & Inclusion Reference Materials defines gender identity as “the individual’s internal sense of being male or female. The way an individual expresses his or her gender identity is frequently called ‘gender expression,’ and may or may not conform to social stereotypes associated with a particular gender.” See Diversity & Inclusion Reference Materials, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ (last visited May 9, 2016).
Commission interprets Title VII as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.\textsuperscript{40} In 2015, the ABA House adopted revised Criminal Justice Standards for the Defense Function and the Prosecution Function. Both sets of Standards explains that defense counsel and prosecutors should not manifest bias or prejudice based on another’s gender identity. To ensure notice to lawyers and to make these provisions more parallel, the Goal III Commission on Sexual Orientation and Gender Identity recommended that gender identity be added to the black letter of paragraph (g). New Comment [3] notes that applicable law may be used as a guide to interpreting paragraph (g). Under the Americans with Disabilities Act discrimination against persons with disabilities includes the failure to make the reasonable accommodations necessary for such person to function in a work environment.\textsuperscript{41}

Some commenters objected to retaining the term “socioeconomic status” in new paragraph (g). This term is included in the current provision and also is in the Model Judicial Code. The term has not been applied indiscriminately or irrationally in any jurisdiction which has adopted it. The Indiana disciplinary case \textit{In re Campiti}, 937 N.E.2d 340 (2009) provides guidance as to the meaning of the term. In that matter, a lawyer was reprimanded for disparaging references he made at trial about a litigant’s socioeconomic status: the litigant was receiving free legal services. SCEPR concluded that the unintended consequences of removing this group would be more detrimental than the consequences of keeping it in.

Discrimination against persons based on their source of income or acceptance of free or low-cost legal services would be examples of discrimination based on socioeconomic status. However, new Comment [5] makes clear that the Rule does not limit a lawyer’s ability to charge and collect a reasonable fee and reimbursement of expenses, nor does it affect a lawyer’s ability to limit the scope of his or her practice.

SCEPR was concerned, however, that this Rule not be read as undermining a lawyer’s pro bono obligations or duty to accept court-appointed clients. Therefore, proposed Comment [5] does encourage lawyers to be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 to not avoid appointments from a tribunal except for “good cause.”

\textbf{E. Promoting Diversity}

Proposed new Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity. As stated in the first Goal III Objective, the Association is committed to promoting full and equal participation in the Association, our profession and the justice system by all persons. According to the ABA Lawyer Demographics for 2016, the legal profession is 64\% male and 36\% female.\textsuperscript{42} The most recent figures for racial

\begin{footnotesize}
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  \item [40] https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm
  \item [41] A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. Examples of reasonable accommodations include making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position.
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demographics are from the 2010 census showing 88% White, 5% Black, 4% Hispanic, and 3% Asian Pacific American, with all other ethnicities less than one percent. Goal III guides the ABA toward greater diversity in our profession and the justice system, and Rule 8.4(g) seeks to further that goal.

F. How New Rule 8.4(g) Affects Other Model Rules of Professional Conduct

When SCEPR released a draft proposal in December 2015 to amend Model Rule 8.4, some commenters expressed concern about how proposed new Rule 8.4(g) would affect other Rules of Professional Conduct. As a result, SCEPR’s proposal to create new Rule 8.4(g) now includes a discussion of its effect on certain other Model Rules.

For example, commenters questioned how new Rule 8.4(g) would affect a lawyer’s ability to accept, refuse or withdraw from a representation. To make it clear that proposed new Rule 8.4(g) is not intended to change the ethics rules affecting those decisions, the drafters included in paragraph (g) a sentence from Washington State’s Rule 8.4(g), which reads: “This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.” Rule 1.16 defines when a lawyer shall and when a lawyer may decline or withdraw from a representation. Rule 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if: “(1) the representation will result in violation of the rules of professional conduct or other law.” Examples of a representation that would violate the Rules of Professional Conduct are representing a client when the lawyer does not have the legal competence to do so (See Rule 1.1) and representing a client with whom the lawyer has a conflict of interest (See Rules 1.7, 1.9, 1.10, 1.11, 1.12).

To address concerns that this proposal would cause lawyers to reject clients with unpopular views or controversial positions, SCEPR included in proposed new Comment [5] a statement reminding lawyers that a lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities, with a citation to Model Rule 1.2(b). That Rule reads: “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”

Also, with respect to this rule as with respect to all the ethics Rules, Rule 5.1 provides that a managing or supervisory lawyer shall make reasonable efforts to insure that the lawyer’s firm or practice has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Such efforts will build upon efforts already being made to give reasonable assurance that lawyers in a firm conform to Rule 8.4(d) and are not manifesting bias or prejudice in the course of representing a client that is prejudicial to the administration of justice.

G. Legitimate Advocacy

New Comment [5] to Rule 8.4 includes the following sentence: “Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation.” This retains and updates the statement on legitimate advocacy that is contained

43 Id.
in the current provision. The current provision reads: “Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).”

H. Peremptory Challenges

The following sentence appears in the current provision: “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” This statement is analogous to a statement in Disciplinary Rule 4-101 of the 1969 Model Code of Professional Responsibility, where the ethical obligation of confidentiality was linked to the legal evidentiary standard of attorney-client privilege. Just as the Model Rules subsequently separated the evidentiary standard from the ethical standard, so too SCEPR determined to separate a determination by a trial judge on peremptory challenges from a decision as to whether there has been discrimination under the Model Rules. The weight given to the trial judge’s determination should be decided as part of the disciplinary process, not determined by a comment in the Model Rules of Professional Conduct. Thus, SCEPR concluded that this question might more appropriately be addressed under the Model Rules for Lawyer Disciplinary Enforcement or the Standards for Imposing Lawyer Sanctions.

V. CONCLUSION

As noted at the beginning of this Report the Association has a responsibility to lead the profession in promoting equal justice under law. This includes working to eliminate bias in the legal profession. In 2007 the Model Judicial Code was amended to do just that. Twenty-three jurisdictions have also acted to amend their rules of professional conduct to address this issue directly. It is time to follow suit and amend the Model Rules. The Association needs to address such an important and substantive issue in a Rule itself, not just in a Comment.

Proposed new paragraph (g) to Rule 8.4 is a reasonable, limited and necessary addition to the Model Rules of Professional Conduct. It will make it clear that it is professional misconduct to harass or discriminate while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.

As the premier association of attorneys in the world, the ABA should lead anti-discrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us. Adopting the Resolution will advance this most important goal.

Respectfully submitted,

Myles V. Lynk, Chair
Standing Committee on Ethics and Professional Responsibility
August 2016

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Dennis Rendleman, Ethics Counsel

1. **Summary of Resolution(s).** The resolution would amend Model Rule of Professional Conduct 8.4, *Misconduct*, to create new paragraph (g) that would create in the black letter of the Rules an anti-discrimination and anti-harassment provision. The resolution also amends Comment [3], creates new Comments [4] and [5] to Rule 8.4 and renumbers current Comments [4] and [5].

2. **Approval by Submitting Entity.** The Standing Committee on Ethics and Professional Responsibility approved filing this resolution in April 2016. Co-sponsors, the Civil Rights & Social Justice Section, the Commission on Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession signed on during the months of April and May 2016. The Commission on Hispanic Legal Rights & Responsibilities and the Center for Racial and Ethnic Diversity voted to support the resolution in May 2016.

3. **Has this or a similar resolution been submitted to the House or Board previously?** This resolution is new. But, the House has acted on similar resolutions. For example, in February 1994 the Young Lawyers Division authored a resolution to bring an anti-discrimination and anti-harassment provision into the black letter of the ABA Model Rules of Professional Conduct. It was withdrawn. Also in February 1994, the Standing Committee on Ethics and Professional Responsibility authored a similar provision. It, too, was withdrawn.

In February 1995, the House adopted Resolution 116C submitted by the Young Lawyers Division. Through that resolution the Association condemned lawyer bias and prejudice in the course of the lawyer’s professional activities and opposed unlawful discrimination by lawyers in the management or operation of a law practice.

In February 1998, the Criminal Justice Section recommended that the Model Rules of Professional Conduct include within the black letter an anti-discrimination provision. At the same meeting, the Standing Committee on Ethics and Professional Responsibility submitted a resolution recommending a Comment that included an anti-discrimination provision. Both resolutions were withdrawn.

In August 1998, a joint resolution of the Standing Committee on Ethics and Professional Responsibility and the Criminal Justice Section was submitted and was adopted. The resolution created Comment [3] to Rule 8.4 suggesting that it could be misconduct that is prejudicial to the administration of justice when a lawyer, in the course of representing a client, knowingly manifest by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.
4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct. Goal III of the Association—to promote full and equal participation in the Association, the profession, and the justice system by all persons and to eliminate bias in the legal profession and the justice system—would be advanced by the adoption of this resolution.

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

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 Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments, and also will publish electronically other newly adopted policies. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies proposed that are adopted by the House of Delegates.

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

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

10. **Referrals.** The Standing Committee on Ethics and Professional Responsibility has been transparent in its research and drafting process for this resolution. First, the Committee appointed a Working Group to research and craft a proposal. The Working Group included representatives from the following Goal III Commissions: Disability, Racial and Ethnic Diversity in the Profession, Sexual Orientation and Gender Identity, and Women in the Profession. The Ethics Committee then hosted two public events—an informal Roundtable in July 2015 at the ABA Annual Meeting in Chicago on its summer 2015 Working Discussion Draft and a formal public hearing in February 2016 at the ABA MidYear Meeting in San Diego on its draft proposal. At these two events, the Ethics Committee accepted written and verbal comments on two different discussion drafts.

    The Ethics Committee developed a Rule 8.4 website to communicate information about its work. Drafts and comments received were posted. Through this website, the Committee received more than 450 comments to its December 2015 draft rule.

    Using email, the Ethics Committee reached out directly to numerous sections and committees communicating with both the entity’s chairman and the entity’s staff person about the public hearings and procedure for providing comments. Groups solicited included: the Standing Committees on Professional Discipline, Professionalism, Client Protection, Specialization, Legal Aid and Indigent Defendants, the Commissions on Law and Aging and Hispanic Rights and Responsibilities, the Sections on Business Law, Litigation, Criminal Justice, Family Law, Trial Tort and Insurance Practice, and the Judicial Division, the Solo, Small
Firm and General Practice Section, the Senior Lawyers Division, and the Young Lawyers Division.

The Ethics Committee’s work on this issue was the subject of news articles in the Lawyers’ Manual on Professional Conduct and the ABA Journal.

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution amends Model Rule of Professional Conduct 8.4, Misconduct, to create new paragraph (g) that establishes a black letter rule prohibiting discrimination and harassment. The resolution also amends Comment [3], creates new Comments [4] and [5] to Rule 8.4 and renumbers current Comments [4] and [5].

Discriminate and harass are both defined in amended Comment [3]. Discrimination is harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Protected persons include those listed in current Comment [3] (persons discriminated on the basis of race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status) and also includes persons discriminated on the basis of ethnicity, gender identity, and marital status. This brings the Model Rules more into line with the Model Code of Judicial Conduct and the Criminal Justice Standards for the Prosecution Function and Standards for the Defense Function.

The scope of new paragraph (g) is “conduct related to the practice of law.” The resolution defines covered conduct as “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.” Adoption of policy on the terms and conditions of lawyer employment is not foreign to the House of Delegates.

New Rule 8.4(g) includes the statement, “This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.” ABA Model Rule of Professional Conduct 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if “the representation will result in violation of the rules of professional conduct or other law.” Examples of a representation that would violate the Rules of Professional Conduct is representing a client when the lawyer does not have the legal competence to do so (Rule 1.1) and representing a client with whom the lawyer has a conflict of interest under the Rules including Rule 1.7 (current client) and Rule 1.9 (former client).

2. Summary of the Issue that the Resolution Addresses

This Resolution is a reasonable and rational implementation of ABA’s Goal III: to eliminate bias in the justice system. The ABA has adopted anti-discrimination and anti-bias provisions in the black letter of the Model Code of Judicial Conduct and in the black letter of the Criminal Justice Standards for the Prosecution Function and the Defense Function. Twenty-three jurisdictions have already adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules. It is time for the Association to now address bias and prejudice squarely in the black letter of the Model Rules of Professional Conduct.
3. Please Explain How the Proposed Policy Position will address the issue

In the 23 jurisdictions that have adopted a black letter rule that provides it is misconduct for a lawyer to discriminate or harass another, disciplinary agencies have investigated and successfully prosecuted lawyers for discriminatory and harassing behavior.

For example, in 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four women clients and one female employee. In Wisconsin, the Supreme Court disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a $350,000 home. The victim reported she felt that if she did not respond, the district attorney would not prosecute the domestic violence complaint.

The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him.

The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.”

Those states are leading while the ABA has not kept pace.

This proposal is a measured response to a need for a revised Model Rule of Professional Conduct that implements the Association’s Goal III – to eliminate bias in the legal profession and the justice system.

4. Summary of Minority Views

As explained in the Report, over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998.

In December 2015, SCEPR published a revised draft of a proposal to amend Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association,
including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016. Written comments were also invited.

After the comment period closed in March 2016, SCEPR made substantial and significant changes to the Resolution based on minority views submitted. Changes include:

- At the request of the ABA Section of Real Property, Trust and Estate Law, the Resolution now defines discriminate in Comment [3]; it explains that disciplinary counsel may use the substantive law of antidiscrimination and anti-harassment to guide application of paragraph (g) in Comment [3]; and provides additional guidance including a statement that lawyers who charge and collect reasonable fees do so without violating paragraph (g)'s prohibition on discrimination based on socioeconomic status in Comment [5].
- At the request of the ABA Labor and Employment Law Section, this Report now explains that the terms and conditions of employment are included within the scope of “operating or managing a law firm.” Labor and Employment Law requested that the proposal include a statement that the Rule be interpreted and implemented in accordance with Title VII case law. This Report explains why the Sponsors rejected this recommendation and the Sponsors’ position that legal ethics rules are not dependent upon or limited by statutory or common law claims.
- At the request of the ABA Business Law Section Professional Responsibility Committee, the Resolution defines “conduct related to the practice of law” in Comment [4]; it includes guidance on how lawyers may ethically limit their practice under Model Rule 1.16; and it explains that paragraph (g) does not prohibit conduct to promote diversity.

In response to the language released April 12, 2016, concerns have been expressed to the Sponsors about the following:

- That paragraph (g) should include a mens rea of “knowing.” The Report addresses this issue and explains why the Sponsors did not include a mens rea.
- That the Comment should retain the statement, “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” This Report addressed this issue and explains why the Sponsors did not want to mix evidentiary law with the professional responsibility rules.
- That current Comment language, “Legitimate advocacy respecting the foregoing factors does not violate paragraph (d),” should be retained. The Report addresses this issue and explains why the Sponsors did retain this sentence, as amended.
- That social activities in connection with the practice of law should be more clearly defined. The Sponsors concluded that the definition provided in the Comment is
sufficient for the variety of activities addressed. The critical common factor of such activities is their relationship to the practice of law.

- That Sponsors delete “operating and managing a law firm” from the scope of the Rule or that the Rule require a prior adjudication of discrimination or harassment by a competent tribunal. The Report addresses this issue and explains why the Sponsors determined that creating two separate spheres of conduct, one inside the law firm and one outside the law firm, was inappropriate.

- Finally, some opponents express the opinion that no black letter rule is necessary.\(^45\)

\(^{45}\) Not every concern raised is listed here but we have identified the significant concerns that were expressed.
RESOLVED, That the American Bar Association urges federal, state, local and territorial law-enforcement authorities to provide a culturally, substantively and accurate translation of the Miranda warning in Spanish.
I. INTRODUCTION.

Fifty years after *Miranda*, law enforcement has made no effective effort to develop a culturally and substantively accurate translation of the *Miranda* warning. This is an issue. Best estimates imply that law enforcement Spanish language *Miranda* warnings are necessary in nearly 900,000 instances per year. Experience suggests, and case law confirms, that many of the translations used by authorities are inaccurate. These inaccurate warnings violate individual rights and undermine law-enforcement efforts, particularly as courts subsequently exclude statements due to their inaccuracy. An accurate translation that can be used by local, state and federal law enforcement is long overdue. The ABA Special Committee on Hispanic Legal Rights and Responsibilities ("Hispanic Special Committee") is a natural entity, given its mission and jurisdiction statement, to lead this effort taking into account input from internal and external stakeholders on the topic of *Miranda*. The success of a culturally and substantively accurate Spanish translation of the *Miranda* warning could be expanded to other languages.

II. THE NEED FOR ACCURATE, READILY AVAILABLE SPANISH *MIRANDA* WARNINGS.

The Census Bureau estimates that about 14% of adults in this country speak a language other than English. Spanish or a Spanish Creolo make up a majority of those persons. There are 38 million Spanish speakers in the U.S., 26.7 million of which are adults between ages 18 and 64. Of those adults, just over half, 52.5%, say they speak English "very well." The remaining 47.5% do not, which amounts to 12.7 million people. The numbers climb higher adding in the 1.8 million children (ages 5-17) and 1.8 million seniors (age 65 and over) who also do not speak English very well.¹

Inevitably, some fraction of those people who do not speak English "very well," have contacts with law enforcement and are questioned by police officers. In 2011, the U.S. Department of Justice estimated that about 0.6% percent of the total population had been subjected to street stops (not traffic stops) and that Black/African Americans were stopped at about the same rate as Whites (both 0.6%) and that Hispanic/Latinos were stopped at a slightly higher rate (0.7%).² Given a total U.S. population of around 323 million³ that would mean about 2.3 million Hispanic/Latinos are stopped annually.⁴ The overlap between Spanish speakers and Hispanic/Latinos is far from perfect, but research suggests that about 38% of Hispanic adults are Spanish-language dominant, another 38%  

² Given the much larger White population, these numbers indicate a serious racial/ethnic disparity, but that is not the issue in this Report.
³ http://www.census.gov/popclock/
⁴ http://www.bjs.gov/content/pub/pdf/pbtss11.pdf
are bilingual, and 24% are English-language dominant.\(^5\) Putting those numbers together, that means that every year there are 874,000 people stopped by police who would need their *Miranda* rights read in Spanish, and another equal number who are bilingual but might prefer Spanish. In 2006, the Bureau of Justice Statistics reported 119,200 detainees of Hispanic origin, or approximately 15.6% of the jail population. (Behav, 2009).\(^6\)

III. PROBLEMS WITH *AD HOC* TRANSLATIONS.

The reported case law suggests that many attempts to provide an accurate translation of the *Miranda* rights are woeful. One case from the U.S. Ninth Circuit gained a fair amount of publicity when an officer mistranslated the word “free” (as in “a free lawyer”) as *libre*, rather than *gratis*—meaning that the lawyer was at liberty and not incarcerated rather than the lawyer would be provided at no cost. *United States v. Botello-Rosales*, 728 F. 3d 865, 867 & n.1 (9th Cir. 2013). Regrettably, that is far from the only case, or the only mistranslation. In some cases, the appellate court granted relief due to the mistranslation problems, in others the appellate courts found them inconsequential. The result is not as important as the fact of the mistranslation, however.

**Failures to Use Actual Spanish**

- **Giving *Miranda* Warnings in Spanglish**
  
  *Avincola v. Stinson*, 60 F. Supp. 2d 133, 139 (S.D.N.Y. 1999) (official court interpreter’s take on police officer’s translation was: “With my command of two languages I understood. It is not a perfect Spanish, it would be hard to understand for a non-educated person.”); *United States v. Barrena*, 2007 WL 5312565 (E.D. Tenn. 2007) (required knowing both English and Spanish to fully understand police officer’s translation); *State v. Santiago*, 556 NW.2d 687, 691 (Wis. 1996) (translated into Spanish “street language”).

- **Right to Silento**
  

- **Poira**
  
  Another non-word in Spanish. The correct word was *podra*, meaning “can” or “be able to,” as used in the phase “can and will be used against you.” *State v. Carrasco-Calderon*, 2008 WL 5377923 (Ariz. Ct. App. 2008).

- **Corte de Ley**
  


• *Empleca*

• *Ud.*
  An abbreviation for the word *usted*, meaning “you,” but was literally pronounced by the officer. Similar to pronouncing *Mrs.* as “mers.” *People v. Hernandez*, 2002 WL 31109643 (N.Y. Westchester Cnty. Ct. 2002).

**Mistranslations of Specific Words**

• **Right-hand Side**

• **Right to “Carry” Silence**

• **“Before” a Court of Law**
  Police used the word *antes* rather than *ante*. *Antes* is temporal (prior to); *ante* is presence (in front of). This means that anything the defendant said would be used prior to, rather than in front of, a court of law. *State v. Carrasco-Calderon*, 2008 WL 5377923 (Ariz. Ct. App. 2008).

• **Right to Point At Counsel**

• **Right to Have Counsel Selected for Defendant**

• **Occupy an Attorney**
  Using the word *ocupar*, which can mean “to occupy” or “to employ.” *State v. Torres*, 87 Wash. App. 1089 (Wash. Ct. App. 1997) (unpublished opinion).

• **Right to Design Counsel**
  The verb *designer* can mean to appoint or to design. *People v. Aguilar-Ramos*, 86 P.3d 397, 399 (Colo. 2004).

• **Counsel Might be Appointed**
  Using *puede*, which means “could, may or can,” but not “will,” as in “a lawyer will be appointed.” *Fernando-Grandos v. Houston*, 2007 WL 673172 (D. Neb. 2007); *United States v. Botello-Rosas*, 728 F. 3d 865, 867 (9th Cir. 2013) (“could be given to you”).
• **If You Cannot Get a Lawyer**
   Used *conseguir*, which means “to get” instead of “to afford” a lawyer, resulting in the warning failing to convey that if the defendant could not afford a lawyer, one would be appointed free of charge. *People v. Diaz*, 140 Cal. App. 3d 813, 819 (Cal. Ct. App. 1983); see also *State v. Ortez*, 631 S.E.2d 188, 192 (N.C. Ct. App. 2006) (“[I]f you want a lawyer and cannot get one, for you one will be named for you so that for you he can represent you during the interrogatory.”)

• **Right to Counsel Assisting You, and Everybody Else**

• **Giving Warning in Very Formal Spanish**
   Instead of translating “give” as *dar*, the more common word, the officer used the word *proporcionar*, which is rarely used. *State v. Teran*, 862 P.2d 137, 138 (Wash. Ct. App. 1993).

**Inaccuracies in Describing Rights Due to Mistranslations**

• **Right to Stop Questioning in Any Weather**

• **Right to Answer Questions**

• **Right Not to Say Nothing**
   *State v. Dominguez-Ramirez*, 563 N.W.2d 245, 250 (Minn. 1997).

• **Right to Maintain Yourself in Silence**

• **Right “the something can be used against you in a court of law”**

• **Right to Interrupt the Conversation at any Moment**

• **Statements “can be used against the court”**

• **Right “to have your attorney present to notify you before and during questions of a policeman or of lawyers representing the state.”**
• Right for Police to “write you down a lawyer, before I ask you rights.”  
State v. Moreno, 265 S.W.3d 751, 753 (Ark. 2007).

• Right to an Attorney “before asking questions.”  
State v. Ortiz, 766 N.W.2d 244, 248 (Iowa 2009)

• Right to Petition for an Attorney  
No indication that the court would always provide one. United States v. Higareda-Santa Cruz, 826 F. Supp. 355, 357 (D. Or. 1993) (Warning meant: “In case you do not have money, you have the right to petition an attorney from the court”); see also United States v. Perez-Lopez, 348 F.3d 839, 842 (9th Cir. 2003) (“En caso de que no tenga dinero, Ud. tiene el derecho de solicitar de la corte un abogado.” Which means: “In case you don't have enough money or funds, you have the right to solicit the Court for an attorney.”).

• Right to “remain before you consult with an attorney, before answering any question”  

• Right to Have a Lawyer Present During Questioning  
But not before. United States v. Castro-Higuero, 473 F.3d 880, 883 (8th Cir. 2007) (The interpreter also told the defendant that he could “request that a lawyer be with you for any type of information or for any conversation you want to establish”).

• Right to Have a Free Lawyer Before Questioning  
But not during. State v. Ramirez, 732 N.E.2d 1065, 1069 (Ohio Ct. App. 1999) (“And, also, if you can’t pay for a lawyer, it is possible to have a lawyer without paying before the questioning.”).

**General Failures to Translate the Miranda Warnings**

• Failure to Give Miranda Warnings in Spanish  
United States v. Alarcon, 95 F. App’x 954, 955 (10th Cir. 2004).

• Incomplete Warnings  
The Spanish Miranda card omitted statement that was on the English Miranda card that a person could stop the questioning at any time by invoking their rights. Rivera-Reyes v. Commonwealth, 2006 WL 2986495 (Ky. 2006).

• Failure to Warn that Statements Could be Used Against Defendant in Court  
IV. SOURCES OF MISTRANSLATIONS

These same cases indicate that the sources of the translation errors are varied. That variety itself points to the need for an accurate translation that is readily available to the law-enforcement community.

• Police Officers Themselves
  Many of these cases also involve police officers calling on their own education or abilities in Spanish, which are sometimes quite limited. Commonwealth v. Ochoa, 32 Mass. L. Rptr. 153 (Mass. Super. 2014) (police officer schooled exclusively in English, but spoke Spanish at home); People v. Aguilar-Ramos, 86 P.3d 397, 399 (Colo. 2004) (1-2 years of Spanish in high school); State v. Carrasco-Calderon, 2008 WL 5377923 (Ariz. Ct. App. 2008) (going off script and asking only if the defendant understood “that” (implying the last right) rather than all of the rights); State v. Moreno, 265 S.W.3d 751, 752 (Ark. 2007) (Officer grew up speaking Spanish because he lived with Spanish-only grandparents, but had no formal training); United States v. Perez-Lopez, 348 F.3d 839, 842 (9th Cir. 2003); State v. Jaco, 949 P.2d 1077, 1080 (Idaho Ct. App. 1997) (Spanish-speaking officer paraphrasing); State v. Santiago, 556 NW.2d 687, 691 (Wis. 1996) (Spanish-speaking officer who is not literate in Spanish); Melchor-Gloria v. State, 660 P.2d 109, 111 (Nev. 1983) (Spanish-speaking officer omitting one warning). Some are better than others. Avincola v. Stinson, 60 F. Supp. 2d 133, 139 (S.D.N.Y. 1999) (not too bad, except for inventing a right to answer questions); State v. Dominguez-Ramirez, 563 N.W.2d 245, 250 (Minn. 1997) (not too bad, except for right not to say nothing); Lopez v. Grams, 2009 WL 5092866 (W.D. Wis. 2009). Some tried to compensate by over explaining, so that it was less a translation and “more akin to a running commentary.” United States v. Barrena, 2007 WL 5312565 (E.D. Tenn. 2007).

• Unofficial Interpreters

• Official Interpreters
  Sometimes the police use official, seemingly well-trained, interpreters who apparently misinterpret on the fly. Albarran v. Alabama, 96 So. 3d 131, 150 (2011) (misinterpretation with non-word “Silento” by college Spanish professor).
United States v. Castro-Higuero, 473 F.3d 880, 883 (8th Cir. 2007) (not saying that a defendant had the right to consult with an attorney before and during questioning).

- **Official Miranda Cards in Spanish**

V. THE ADVANTAGES OF A CULTURALLY AND SUBSTANTIVELY ACCURATE TRANSLATION.

A reliable, readily available translation is not a panacea and will not solve the problems with interpreters later contradicting well-written Spanish Miranda warnings. *See People v. Mejia-Mendoza*, 965 P.2d 777, 778-79 (Colo. 1998) (*en banc*). But it will at least assist law enforcement personnel in administering accurate Miranda warnings in Spanish so the Spanish-speaking suspects can know their rights.

The Hispanic Special Committee, through the ABA, has the nationwide standing and resources to make available to federal, state, and local law enforcement agencies a well-researched and well-thought translation. This effort, also, will help further introduce the ABA as a resource to Hispanic communities. The translation should be made available on the internet in a way that it would be one of the first options that appears after searching for “Miranda” and “Spanish.”

Respectfully Submitted,

R. Alexander Acosta, Chair
Special Committee on Hispanic Legal Rights and Responsibilities
August 2016
GENERAL INFORMATION FORM

Submitting Entity: Special Committee on Hispanic Legal Rights and Responsibilities ("Hispanic Special Committee")
Submitted By: R. Alexander Acosta, Chair, Special Committee on Hispanic Legal Rights and Responsibilities

1. **Summary of Resolution(s).** This resolution calls upon the American Bar Association ("ABA") to urge federal, state, territorial and local law enforcement authorities to provide a culturally substantive and accurate translation of the *Miranda* warning in Spanish, one that is culturally and substantively accurately translated. Spanish is the most spoken language other than English in the United States. Every year there are 874,000 people stopped by police who would need *Miranda* rights read in Spanish, and another equal number of people who are bilingual but might prefer Spanish. There are many instances reported in case law that reflect mistranslations ranging from inaccuracies, ad hoc translations, and failure to use actual Spanish language. A culturally and substantively accurate translation of the *Miranda* warning is long overdue. The resolution will assist law enforcement personnel in administering accurate *Miranda* warnings in Spanish so the Spanish-speaking suspects can know their rights.

2. **Approval by Submitting Entity.** The Special Committee on Hispanic Legal Rights and Responsibilities approved of this resolution on February 5, 2016.

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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** Resolution 102B, passed by the House of Delegates at the 2010 Midyear Meeting "urges federal, state, territorial and local legislative bodies and governmental agencies to support the development of simplified *Miranda* warning language for use with juvenile arrestees." The proposed resolution would assist with the implementation of Resolution 102B.

Resolution 104, passed by the House of Delegates at the 2010 Midyear Meeting "urges law enforcement authorities to implement *Miranda*-like warnings advising foreign nationals of their rights and fundamental protections under Article 36 to the Vienna Convention on Consular Relations ("Article 36"), consular notification requirement, as soon as they are detained and identified. The proposed resolution would assist with the implementation of resolution 104.

Resolution 125, passed by the House of Delegates at the 1998 Annual Meeting "urges federal, state, territorial and local law enforcement authorities to adopt a warning of rights similar to the "*Miranda*" standard, advising foreign nationals of their right to consular assistance pursuant to Article 36 of the Vienna Convention on Consular Relations. The proposed resolution would assist with the implementation
of resolution 125.
Resolution 113D, passed by the House of Delegates at the 1999 Annual Meeting
"urges to reaffirm the principle set forth in Miranda that individuals should be
advised of their rights prior to custodial interrogation." The proposed resolution
would assist advance the implementation of resolution 113D.

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. Implementation will involve three steps. First, the Hispanic
Special Committee will develop a Spanish translation of the Miranda warning with
input from internal and external stakeholders on the topic. Second, the ABA will
maintain the translation on the internet in a way that it would appear after searching
for "Miranda" and "Spanish." Third, the sponsors by way of ABA Communications
Media Resources and/or other internal divisions will make available the translation so
that it is provided and/or made available to all federal, state, and local law
enforcement agencies.

8. Cost to the Association. (Both direct and indirect costs) No direct costs will result
from this policy. Indirect costs will be from volunteer and staff resources that already
exist within the ABA. No additional costs will be incurred.


10. Referrals. The resolution has been circulated to the following entities, seeking their
insights:
- Standing Committee on Legal Aid and Indigent Defendants
- Standing Committee on Pro-Bono and Public Service
- Standing Committee on the Delivery of Legal Services
- Section of Civil Rights and Social Justice
- Section of Criminal Justice
- Judicial Division
- Latin America and Caribbean law Initiative Council
- Commission on Immigration
- Commission on Youth at Risk
- Commission on Human Rights
- Commission on Racial and Ethnic Diversity in the Profession
- Center for Racial and Ethnic Diversity
- Center for Professional Responsibility - Ethics
- Coalition on Racial and Ethnic Justice
- Forum on Construction Law
- Young Lawyers Division
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution calls upon the American Bar Association ("ABA") to urge federal, state, territorial and local law enforcement authorities to provide a uniform translation of the *Miranda* warning in Spanish, one that is culturally and substantively accurately translated.

2. Summary of the Issue that the Resolution Addresses

Spanish is the most spoken language other than English in the United States. Every year there are 874,000 people stopped by police who would need *Miranda* rights read in Spanish, and another equal number of people who are bilingual but might prefer Spanish. In 2006, the Bureau of Justice Statistics reported 119,200 detainees of Hispanic origin, or approximately 15.6% of the jail population. There are many instances reported in case law that reflect mistranslations ranging from inaccuracies, ad hoc translations, and failure to use actual Spanish language. A culturally and substantively accurate translation of *Miranda* is long overdue.

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

The resolution will assist law enforcement personnel in administering accurate *Miranda* warnings in Spanish so the Spanish-speaking suspects can know their rights. The Spanish translation will be developed by the Hispanic Special Committee given its mission and jurisdiction statement.

4. Summary of Minority Views

None to date.
RESOLVED, That the American Bar Association urges state, local, territorial and tribal legislatures to enact laws that criminalize internet grooming tactics that target children and make them vulnerable to victimization.

FURTHER RESOLVED, That the American Bar Association encourages states to review their criminal laws and engage stakeholders to ensure that their laws governing sexual misconduct involving the internet are sufficient to protect children.
REPORT

What is "Grooming"?

"Grooming" is a tactic used by sexual predators to manipulate young people they target online to meet with them offline.¹ Online grooming takes place when an adult who is seeking a child to meet offline pretends to be a child online, but more often they do not hide their age. The adult pretends to share the child's interest and manipulates the child into a sexual relationship.² Online grooming is a process that can take place in a short time or over an extended period of time. It often involves flattery, gift giving, excessive compliments, money, or modeling jobs. Grooming is used by internet predators to establish a relationship to gain a child's trust. This tactic leads children to believe that no one can understand them or their situation like the groomer. After the child's trust develops, the groomer may use sexually explicit conversations to test boundaries and exploit a child's natural curiosity about sex. The ultimate goal of the "groomer" is to build trust and arrange an in-person meeting to engage in sexual contact with the child or teen.³ The grooming process fosters a false sense of trust and authority over a child in order to desensitize or break down a child's resistance to sexual abuse.⁴

The Threat to Children

As the internet and access to technology has exploded over the last twenty years, fears have been raised that children will be exposed to and become the victims of predators through the internet. This is understandable as 95% of teens age 12-17 are online.⁵ 80% of those teens are active on social media.⁶

While, the extent of instances of internet sexual offenses in the United States is difficult to estimate (given that there is no national system for integrating information about internet offenders), estimates indicate that arrests for internet sex crimes have tripled from 2000 to 2009.⁷ At the same time however, child sexual assault cases have decreased over the same amount of time.⁸ In fact, studies of unwanted sexual activity have shown a steep decline from 19% in 2000,

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⁶ Id.
⁸ Id.
to 13% in 2005, and 9% in 2010. Some researchers have suggested that internet sexual crimes are a new phenomenon that may not be influenced by the same contextual factors as other sexually based crimes. Others have suggested that online safety messages are resonating strongly with today’s youth who may be more aware of the potential dangers of online activity.

Yet, the increase in the number of arrests seems to suggest that the threat to children and teenagers from internet criminals is real. What is likely to happen is for adults to use the internet to meet and seduce underage adolescents and have them willingly participate in sexual encounters that they are unable to consent to by law. Offenders often use promises of love and romance to seduce adolescents. These conversations start out innocently and often occur with someone the adolescent knows in person. Over time, sexual images can be introduced and as their trust is gained the relationship can turn sexual. As discussed above, this tactic of gaining the victims’ trust and then slowly turning the relationship into a sexual one is called “grooming.”

As the crime data shows, the use of the internet to commit these crimes has grown exponentially. Studies have shown that in most cases, the perpetrator and victim are using online means to communicate. When these grooming relationships develop, the data shows that sexual encounters occur on multiple occasions.

Federal Law

Federal law makes it a crime for an individual to coerce or entice an individual to travel for the purposes of prostitution or to engage in a sexual activity for which the person can be convicted of a crime. The same statute criminalizes the use of the mail or “any facility or means of interstate commerce” for the purposes of coercing or enticing a minor to engage in prostitution or illegal sexual activity. However, there is no specific language regarding the use of the internet or other electronic means to coerce underage minors to travel to engage in sexual activity. The complete statute reads as follows:

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any

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10 Seto, supra note 7.
11 Mitchell et al, supra note 9.
12 Id.
14 Id.
15 Id.
16 Id.
17 http://www.unh.edu/ccrc/pdf/CV263.pdf
person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life. 19

State Law

Similar to federal law, many states criminalize the enticement or luring of a minor for sexually exploitative purposes. To help provide a clearer understanding of the legal framework across the country, a 50 state survey was conducted (the survey is available online at http://americanbar.org/content/dam/aba/administrative/young_lawyers/public_service/world_wide_web/grooming_state_statutes.pdf). The survey and a 2014 study conducted by the National Conference of State Legislatures indicate that all 50 states have some law that criminalizes luring or enticing a minor for sexual acts. 20 However, the 2014 study also revealed that some states do not have a law that specifically mentions the internet or electronic means. 21 (The District of Columbia, Maine, Massachusetts, South Carolina, New York, Pennsylvania, and Wyoming.)

Further, few states specifically outlaw the use of specific grooming tactics to lure children into sexual activity. A review of states found only two states that have specific anti-grooming statutes. 22 Those states include Arkansas 23 and Illinois. 24 The survey, taken into consideration with the research above which indicates the growth of targeting children on the internet, supports the need for a statute that criminalizes grooming as a tactic and supports the need for states to examine their current statutes to make sure they are adequate for deterring crime in the digital age.

Why a Specific Grooming Crime?

Many states only prosecute child grooming or targeting of children through existing exploitation crimes that do not explicitly mention the internet. As outlined previously, only two states have a criminal statute that specifically addresses grooming. It is important to remember that grooming is a tactic, and often that behavior is legal and no crime occurs until there is some agreement to meet or further conduct on behalf of the perpetrator. Thus, without a specific

19 Id.
21 Id.
22 Our team reviewed state statutes for specific instances of statutes that criminalized grooming.
grooming statute, sexual contact will have to occur, or the victim will have to travel to meet the perpetrator, before any crime is committed.

Creating a crime that criminalizes grooming as a tactic will give prosecutors an important tool to stop the conduct as soon as they are aware of it, and could allow prosecutors to stop exploitation before it occurs. Grooming prosecutions will additionally provide a strong incentive for individuals to refrain from grooming children for sexual purposes and will also serve to highlight the problem of grooming for a wider audience that not only includes prosecutors but also includes the general public.

**Suggested Statutory Language**

*A person commits an offense of grooming when he or she knowingly uses a computer on-line*\textsuperscript{25} service, internet*\textsuperscript{26} service, or any other device capable of electronic*\textsuperscript{27} data storage or transmission, with the intent to seduce, solicit, lure, or entice, or to attempt to seduce, solicit, lure, or entice, a child to commit any sexual conduct prohibited by state law.

**First Amendment Concerns**

Grooming statutes are typically challenged under First Amendment “overbreadth” grounds, which is evident from a review of case law.

Under the First Amendment’s “overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs.”\textsuperscript{28} The Supreme Court explained the overbreadth doctrine, especially its limitations, when it stated:

*On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute’s overbreadth be substantial, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.*\textsuperscript{29}

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\textsuperscript{25} "On-line" is defined as connected by computer to one or more other computers or networks, as through a commercial electronic information service of the Internet.
\textsuperscript{26} "Internet" is defined as the vast computer network linking smaller computer networks worldwide including commercial, educational, governmental, and other networks, all of which use the same set of communications protocols.
\textsuperscript{27} "Electronic" is defined as operating through the use of many small electrical parts such as microchips and transistors.
\textsuperscript{29} *Id.*
\end{flushright}
The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Accordingly, the Court has advised that "[i]nvalidation for overbreadth is strong medicine that is not to be casually employed.

In the most recent case to deal with a state anti-grooming statute, the United States Court of Appeals for the Ninth Circuit struck down an Oregon law based upon overbreadth. In *Powell's Books, Inc. v. Kroger*, the Ninth Circuit addressed a statute that "criminalize[d] providing minors under the age of eighteen with visual, verbal, or narrative descriptions of sexual conduct for the purpose of sexually arousing the minor or the furnisher, or inducing the minor to engage in sexual conduct." Ultimately, the Ninth Circuit ruled that the statute was "facially overbroad and criminalize[d] a substantial amount of constitutionally protected speech."

The Ninth Circuit noted that the statute "sweep[s] up material that, when taken as a whole, has serious literary, artistic, political, or scientific value for minors and thus also has at least some redeeming social value" while also "not limit[ing] [itself] to material that predominantly appeals to minors' prurient interest" which results in a statute that "reach[es] a substantial amount of constitutionally protected speech." Here, the court noted that sexual education textbooks, historical and classical works, "coming of age" and related juvenile novels, and the average romance novel could become contraband under the statute because they contain descriptions of sexual conduct and inherently have the effect of arousing the natural curiosity that minors will have in sex and titillating the reader. Finally, the Ninth Circuit ruled that the statutory language did not allow for a "disjunctive" reading of offensive elements that might have saved it by allowing a limited construction, and for this reason the entire statute required striking.

In an earlier case, the United States Court of Appeals for the Second Circuit struck down as overbroad a Vermont anti-grooming statute which stated that "[n]o person may, with knowledge of its character and content, and with actual knowledge that the recipient is a minor, sell, lend, distribute or give away [pornographic material] which is harmful to minors." The Second Circuit ruled that this statute was not "narrowly tailored" and burdened protected speech, and in particular, the court pointed out that the statute could ensnare people who posted material online to chatrooms or discussion groups which are visited by both minors and adults. Here, the court noted that such a result would be overbroad because even if the uploader knew that minors would be able to view the materials, "[t]he Constitution permits a state to impose restrictions on a minor's access to material considered harmful to minors even if the material is

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30 Id. at 303 (citation omitted).
31 Id. at 293 (quotations and citations omitted).
32 *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1207 (9th Cir. 2010).
33 Id.
34 Id. at 1213 (quotations omitted).
35 See id. at 1213-15
36 Id. at 1210-11, 1215.
37 *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 100 (2d Cir. 2003) (citation omitted).
38 Id. at 100-02.
not obscene with respect to adults ... but such restrictions aimed at minors may not limit non-obscene expression among adults.”

Finally, the court rejected Vermont’s argument that the statute would only be enforced against “transmissions such as email sent directly to a minor when the sender has actual knowledge that the recipient is a minor” because “Vermont did not pass such a narrow statute” although such a more narrowly-written statute that regulated “such two-person email correspondence would [more likely] be constitutional.”

Drawing on the guidance from a review of case law, the statute we proposed has been carefully and narrowly constructed to avoid being overbroad. The language has been constructed in a manner to draw a distinction between the statutes discussed above which were determined to be overbroad and which were found to sweep in First Amendment protected speech. Here, rather than focusing on the speech itself, in the form of sexually explicit material, the statute focuses primarily on the actor and his intent in using the speech to solicit or lure a child for illegal activity.

**Review of Existing Law**

Additionally, we respectfully urge states to review their child protection laws to ensure that they effectively protect children and teenagers in this modern age. As new technology continues to proliferate, our body of statutes runs the risk of becoming irrelevant. Case in point—several states have laws on the books designed to protect children from predators which do not specifically criminalize conduct on the internet. This oversight creates an unnecessary risk for the well-being of our children. While prosecutors can and do use these laws to prosecute internet based crimes against children, without specific mention of the internet, there are risks in bring such cases, as well as evidentiary concerns. Thus, it would be effective for states to conduct a review of existing laws and engage law enforcement, prosecutors, and other groups to make sure that our criminal laws are doing their best to protect children from predators.

**Summary**

The recommended steps will allow the ABA to continue to support effective statutory protections for children. As technology—including the internet, smartphones, and social media—continue to change and our children continue to use these technologies in new ways, it is important that states have effective deterrents that discourage criminals, protect our children, and prevent perpetrators from sexually exploiting children.

Respectfully submitted,

Lacy L. Durham, Chair
Young Lawyers Division
August 2016

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39 *Id.* at 101 (citations omitted).
40 *Id.* at 101 (quotations omitted).
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Young Lawyers Division

Submitted By: Lacy L. Durham, Chair, ABA Young Lawyers Division

1. **Summary of Resolution(s).** The resolution encourages state legislatures across the country to enact legislation to criminalize grooming.

2. **Approval by Submitting Entity.** Approved by the Assembly of the ABA Young Lawyers Division on February 6, 2016.

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 promotes Goal IV (Advance the Rule of Law), particularly the objective that we “work for just laws, including human rights, and a fair legal process.”

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)

   See attached 50 state survey.

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

   The goal will be to lobby for the enactment of the statute in select states, and otherwise encourage other states to adopt the provision

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

   None

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

   N/A
10. **Referrals.**

The following have agreed to be supporters of this resolution:

Section of State and Local Government Law  
Commission on Youth At Risk

We are awaiting responses to requests to be supporters from the following, which were contacted in May 2016:

Criminal Justice Section  
Section of Family 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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*Although Blake Klinkner is not currently a member of the House of Delegates, we expect him to serve as a proxy for one of the ABA YLD House of Delegates Representatives during the 2016 Annual Meeting. However, in the event he is not able to serve as a proxy, Andrew Schpak (or another delegate) will move the resolution and we will request that Blake Klinkner receive privileges of the floor pursuant to § 44.1.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution encourages legislatures across the country to enact legislation to criminalize grooming.

2. Summary of the Issue that the Resolution Addresses

"Grooming" is a tactic used by sexual predators to manipulate young people they target online to meet with them offline. Because grooming is a tactic, and is often based on behavior that is otherwise legal, no crime occurs until there is some agreement to meet or further conduct on behalf of the perpetrator. Thus, without a specific grooming statute, sexual contact will have to occur, or the victim will have to travel to meet the perpetrator, before any crime is committed. Creating a crime that criminalizes grooming as a tactic will give prosecutors an important tool to stop the conduct as soon as they are aware of it, and could allow prosecutors to stop exploitation before it occurs.

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

The resolution addresses the issue by urging legislatures to criminal electronic grooming. If legislatures do so, it would provide prosecutors with a new tool to prosecute child sexual predators before any sexual exploitation actually takes place.

4. Summary of Minority Views

The resolution passed the ABA YLD Assembly unanimously on the consent calendar.
RESOLUTION

RESOLVED, That the American Bar Association urges state, local, territorial and tribal legislatures to abolish “offender funded” systems of probation supervised by private, for profit companies.
REPORT

“In states that permit private probation, the companies become, in effect, collection agencies for the courts, routinely holding the threat of arrest over the heads of those who can’t pay...‘They never look down the road where constitutional precepts are being trampled’...”.

I. INTRODUCTION

Late one evening, a man found himself wandering the dark streets of the unforgiving town of his youth. He had left it only once to serve his country overseas—to defend his country in battles that still haunt his dreams. Yet upon his return, he found himself destitute, living off the pittance provided to him for his service—an amount barely sufficient to pay his board at a rooming house and purchase the bare essentials for his life. Despite repeated attempts, he was unable to find a job to supplement this income and was left with little hope for a change in his life.

On this evening in particular, the man let himself cave to despair and temptation, spending the remainder of his monthly allowance on a few drinks. Soon he was wandering the streets in a haze of intoxication, unsure of where he was going or what he was doing. A police officer spotted the man. The officer approached but found the man unwilling to cooperate and raging about the unfairness of his treatment by the country he had given his best years to protect. The officer arrested the man and locked him up to sleep off his anger.

The next day, the man was woken roughly and taken to court to stand before a judge who, in a matter of seconds, issued him a fine exceeding his monthly allowance to punish him for his night of intoxication. He was handed over to a creditor hired by the court for the sole purpose of ensuring the man’s payment.

The months that followed brimmed with uncertainty. The man tried to find the money to pay. He even offered to do community service to pay off the fine. The creditor allowed this, and the fine owed to the court was soon discharged. But the fees he was required to pay directly to the creditor were not. The creditor would not allow the man to work off these fees—these were the creditor’s profit.

The man sought ways to pay off the fees, even going without food. But inevitably, the creditor called for him. Acting as an arm of the court, the creditor filed an order that sent the police to the man’s door. He was again taken before the judge. This time, when the judge made his pronouncement aided by the creditor’s testimony, the man found himself in a cell with no release date on the horizon. The man found himself in debtors’ prison.

While some artistic liberties have been taken, the bare facts of the above story belong to Georgia resident and veteran, Hills McGee. Charged with public drunkenness and obstruction of a police officer in connection with his actions in October of 2008, McGee was fined $270 and

2 This Report has been derived from a law review note originally written by Sarah Bellacicco Zimbardi, whose dedication and research on this issue has cast light upon the practices many private probation companies in Georgia prefer kept in the shadows. See Bellacicco, Sarah, Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtor’s Prison System, 48 Ga. L. Rev. 229. But for her efforts, many would not know the extent of abuses in the private probation system in Georgia.

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put on probation under the supervision of a private, for profit company, Sentinel Offender Services, LLC (Sentinel). In addition to his fine, McGee had to pay a monthly supervision fee to Sentinel. McGee, only receiving a monthly income of $243 in veterans’ benefits, was allowed to convert his fine to forty-one hours of community service, which he quickly completed.

Rather than converting the monthly supervision fees owed to Sentinel into community service, or waiving them entirely, Sentinel required McGee to continue to make payments. It soon became apparent that McGee was unable to pay. As a result, Sentinel issued a warrant for revocation of McGee’s probation, requiring McGee to attend a probation revocation hearing, and conditioning his release upon his payment of $186, the amount he owed in past fees. At the hearing the court revoked McGee’s probation “for two . . . months or the payment of past due [Sentinel] fees of $186,” whichever occurred first. In a habeas corpus petition for McGee’s release, his attorney stated that having McGee “incarcerated for failing to pay a fee to a private probation company is similar to debtors’ prison.”

There have been many other cases similar to that of Hills McGee. One woman, Ora Lee Hurley, failed to pay a $705 fine as a condition of her probation and was imprisoned in the Gateway Diversion Center in Atlanta. Her release was conditioned on her payment of the fine. While she was allowed to leave the Diversion Center to go to work, the only job she could find paid $6.50 an hour. Almost all of this income was taken by the Diversion Center to pay for her room and board, and the rest went towards paying the fine. After almost a year in the Diversion Center, her counselor reported that her fine had actually gone up to $1,103.90 because

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4 Id. at 4.
5 Id.
6 Id. (“[B]ecause of Petitioner’s indigency, [Sentinel] could have waived its fee or converted it to community service, but chose not to do so.”).
7 Id. Requiring McGee to pay his fees despite his indigency appears contradictory to a provision of Sentinel’s contract with the State Court of Richmond County, which states: “If a determination is made by Sentinel that the probationer lacks the resources to be able to make weekly or monthly payments, every effort will be made to convert the remaining fines or costs to community service hours.” Id. at 6 (emphasis added).
8 Id. at 5, 23.
9 Id. Probation revocation is a practice in which, following a probation violation such as failure to pay a fine or committing another crime, a judge at a probation revocation hearing can decide to terminate in part or whole a probationer’s remaining probation sentence, a process which puts the probationer in prison for the period of time revoked. See Jack Goger, Georgia Criminal Trial Practice § 30-8 (2012–2013 ed.) (discussing the result of a probation violation).
10 McGee Petition for Writ of Habeas, supra note 3, at 8.
12 Hurley Petition, supra note 11, at 3.
13 Id. at 3, 5.
14 Id.
of the added cost of room and board.\textsuperscript{15} Upon the filing of a habeas corpus petition on her behalf, some of the rent Ms. Hurley had paid to the Diversion Center was applied to pay off her fine, and she was immediately released from the center thereafter.\textsuperscript{16}

Blake Johnson suffered a similar fate. Following a series of charges for possession of marijuana, which resulted in a fine and probation time, Johnson’s probation was revoked for failing to pay the court-ordered fines and fees.\textsuperscript{17} The court held an evidentiary hearing “at which Johnson testified that he did not have a job; that he had applied for employment at several places, which he named; [and] that his family did not have the resources to help him pay his probation costs . . . .”\textsuperscript{18} Though Johnson demonstrated that his failure to pay the fine was not willful, he was sentenced to serve one year in a detention center.\textsuperscript{19} He appealed this decision, and the revocation decision was reversed on the grounds that the trial court had failed to “make a finding as to Johnson’s willfulness” in not paying the fine.\textsuperscript{20}

These are just a few documented examples of the de facto debtors’ prison system that has arisen in Georgia and elsewhere. However, there are likely multiple others whose experiences are undocumented, who have not been able to contact an attorney for assistance, or whose families have pulled together their meager resources to pay for their family member’s release. These practices are sustained by the fine collection methods used by private misdemeanor probation companies hired by many counties in states that have privatized misdemeanor probation. The practices of many of these companies and the results they induce are unconstitutional under state and Federal laws. Despite state constitutional bans on imprisonment for debt, many courts continued to imprison those who could not pay court-imposed fines and fees. Georgia is only one of more than a dozen states, including Alabama, Colorado, Florida, Idaho, Illinois, Michigan, Mississippi, Missouri, Montana, Tennessee and Utah, that have privatized probation for misdemeanors.\textsuperscript{21}

These practices gave rise to the landmark Supreme Court case \textit{Bearden v. Georgia}, which established that before imprisoning a defendant for failure to pay a fine, a court must first conduct a hearing on the willfulness of the defendant’s failure to pay and consider alternative methods of sentencing.\textsuperscript{22} Despite this holding, some courts, including those in Georgia, still use various methods to distinguish the cases before them from Bearden in order to allow imprisonment for failure to pay a fine, despite a lack of willfulness.

The practices of many private probation companies for misdemeanor supervision in some states generally encourage probation revocation for indigents who fail to pay a fine, though the court has made no finding of willfulness.\textsuperscript{23} The most recent challenges to these practices have

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{15} \textit{In for a Penny: The Rise of America’s New Debtors’ Prisons}, ACLU 56 (Oct. 2010), http://www.aclu.org/files/assets/InForAPenny_web.pdf.
\item \textsuperscript{16} \textit{In for a Penny: The Rise of America’s New Debtors’ Prisons}, ACLU 56 (Oct. 2010), http://www.aclu.org/files/assets/InForAPenny_web.pdf.
\item \textsuperscript{17} \textit{Johnson v. State}, 707 S.E.2d 373, 374 (Ga. Ct. App. 2011).
\item \textsuperscript{18} \textit{Id.} at 373-74.
\item \textsuperscript{19} \textit{Id.} at 374.
\item \textsuperscript{20} \textit{Id.} at 375.
\item \textsuperscript{21} \textit{Privatized Probation Becomes a Spiral of Added Fees and Jail Time}, ABA Journal (Oct. 2014), \textit{Id.}
\item \textsuperscript{22} \textit{Bearden v. Georgia}, 461 U.S. 660, 672 (1983) (noting that community service or a reduced fine may “adequately serve the State’s goals of punishment and deterrence”),
\item \textsuperscript{23} See Ethan Bronner, \textit{Poor Land in Jail as Companies Add Huge Fees for Probation}, N.Y. Times, July 2, 2012, http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?pagewanted=all&_moc.semityn.wwww. r=1& (discussing the numerous for-profit probation companies in Georgia given authority to issue warrants for probationers who fail to pay fines or fees); see also discussion \textit{infra} Part II.B.
\end{enumerate}
\end{footnotesize}
focused on the unequal impact of the practices of private probation companies on indigent probationers, challenging these practices as violating the Equal Protection Clause, Due Process Clause, and Protection against Excessive Fines Clause.24

State legislatures should take a more active role in curtailing the power of private probation companies. Until such recommendations are heeded, little change is likely to come: “[W]ith the private [probation] companies seeking a profit, with courts in need of income and with the most vulnerable caught up in the system, ‘we [end up] balancing the budget on the backs of the poorest people in society.’ ”25

II. BACKGROUND

A. THE HISTORY OF DEBTORS’ PRISONS

For many, the phrase “debtors’ prison” conjures images of seventeenth- and eighteenth-century England where fathers were thrown into prison for their inability to pay a debt, leaving their families to struggle to earn the money necessary for their release.26 What many Americans may not realize is that this scenario was not uncommon in the American colonies. People were sometimes jailed for as little as $1—the equivalent of $25 today.27 In the mid-1800s, the practice of imprisoning debtors fell into disfavor in both England and America, and in the years surrounding the Civil War, many states banned the practice.28

1. The Rise of Modern-Day Debtors’ Prisons. Despite constitutional bans on imprisonment for debt, many states have devised creative methods for continuing to imprison debtors.29 Two of the most common methods are (1) imposing a sanction of imprisonment on someone who is held in civil contempt for failure to pay judicially imposed fines such as child

25 Bronner, supra note 23 (quoting Stephen Bright, President and Head Attorney at the Southern Center for Human Rights, Atlanta, GA) (providing examples of the abuses of for-profit probation companies).
27 Id.
28 Id. For example, Kentucky has made imprisonment for debt unconstitutional where no evidence of fraud exists. Ky. Const. § 18. Georgia’s constitution provides “There shall be no imprisonment for debt.” Ga. Const. Art. I, § 1, para. XXIII.
29 See generally Richard E. James, Note, Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors’ Prison System, 42 Washburn L.J. 143 (2002) (arguing that, although currently unconstitutional, de facto debtors’ prisons still exist in America and that they should be formalized so as to create a standardized system for instilling fear in debtors).
support\textsuperscript{30} and (2) revoking probation for failure to pay a fine or fee imposed as a condition of probation.\textsuperscript{31}

The seminal case regarding imprisonment for debt in the criminal context is \textit{Bearden v. Georgia}, in which the Supreme Court addressed the issue of probation revocation for failure to pay a fine.\textsuperscript{32} In this case, the petitioner, Danny Bearden, pled guilty to the felony charges of burglary and theft by receiving stolen goods.\textsuperscript{33} Bearden was put on probation for four years with the added condition that he pay a $500 fine and $250 in restitution—$200 to be paid within the first two days and the other $550 over the course of four months.\textsuperscript{34} Bearden made the initial $200 payment with help from his parents but was unable to pay the other $550 after being laid off from his job.\textsuperscript{35} Despite repeated attempts, Bearden was unable to find another job, and the State filed a petition to revoke his probation.\textsuperscript{36} After an evidentiary hearing, Bearden’s probation was revoked for failing to pay the balance of his fine, and he was sentenced to serve the remaining period of probation in prison.\textsuperscript{37}

The Supreme Court granted certiorari, noting that the initial sentencing decision to put Bearden on probation rather than in prison was indicative of the level of punishment the State felt was necessary.\textsuperscript{38} Though Bearden’s efforts to find a job were unsuccessful and he could not pay the fine, imprisoning Bearden would not further the State’s interest in receiving payment.\textsuperscript{39} The Court further noted that such a policy could even have the negative effect of causing probationers threatened with impending imprisonment to acquire money illegally.\textsuperscript{40}

For these reasons, the Supreme Court found that a petitioner’s lack of fault in failing to pay provides a “substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate”\textsuperscript{41} and that depriving a defendant of his “freedom simply because, through no fault of his own, he cannot pay a fine . . . . would be contrary to the fundamental fairness required by the [Due Process Clause of the] Fourteenth Amendment.”\textsuperscript{42} Based on these findings, the Court held that before probation can be revoked for failing to pay a fine, a court must perform an assessment of the probationer’s willfulness in not paying the fine and consider reasonable alternatives to imprisonment.\textsuperscript{43}

\textit{2. An Exception to the Bearden Rule}. Since the 1990s, many state courts have attempted to create an exception to the Bearden rule by distinguishing a judge-imposed sentence as used in Bearden from one agreed to in a plea bargain, finding that the latter category does not require a finding of willfulness since the defendant affirmatively agreed to pay the fine by accepting the

\begin{footnotes}
\item[30] Id. at 149.
\item[31] See footnotes 3-20 and accompanying text, supra.
\item[33] Id. at 662.
\item[34] Id.
\item[35] Id. at 662-63.
\item[36] Id.
\item[37] Id. at 663.
\item[38] See id. at 670 ("The decision to place the defendant on probation . . . reflects a determination by the sentencing court that the State’s penological interests do not require imprisonment.")
\item[39] Id.
\item[40] Id. at 670-71.
\item[41] Id. at 669 (alterations in original) (quoting \textit{Gagnon v. Scarpelli}, 411 U.S. 778, 790 (1973)).
\item[42] Id. at 672-73.
\item[43] See id. at 672 (noting that community service or a reduced fine may “adequately serve the State’s goals of punishment and deterrence”).
\end{footnotes}
plea bargain. These courts reason, by analogy, that a defendant’s agreement to a plea bargain is similar to the establishment of a private contract between the probationer and the State, thus granting the courts leeway in enforcing this “contract.”

Despite precedents clearly prohibiting imprisonment for a non-willful failure to pay a fine other than restitution, criminal defendants in Georgia and other states are regularly imprisoned following a probation revocation. This is due in part to the practices of private, for-profit probation companies, which have been given charge over misdemeanor probation in many counties in Georgia and elsewhere.

B. THE PRIVATE PROBATION SYSTEM

1. The Development of Private Probation Systems. More than a dozen states, including Alabama, Colorado, Georgia, Florida, Idaho, Illinois, Michigan, Mississippi, Missouri, Montana, Tennessee and Utah, have privatized probation for misdemeanors. The industry’s pitch caught on with court systems looking for ways to save money and ensure collection of what they’re owed: as many models are offender funded, the locality pays no costs, and the collection companies rake in large profits in addition to the court fines and fees imposed. Thus, even tiny places with courts not-of-record can turn their jurisdictional claim to as little as a mile of major road into significant revenue from traffic tickets. In states that permit private probation, the companies become, in effect, collection agencies for the courts, routinely holding the threat of arrest over the heads of those who can’t pay. These companies generally charge the government nothing for their services, instead charging probationers monthly supervision and enrollment fees to turn a profit. The offenses involved in private probation systems are typically misdemeanors, quasi-criminal ordinance violations, or civil infractions. Typically, courts do not sentence these defendants to a term of incarceration, opting for the imposition of fines in most cases.


45 Wagner, supra note 44, at 396 n.74 (citing State v. Thorstad, 261 N.W.2d 899, 902 (N.D. 1978) (“Plea bargaining has been officially accepted in North Dakota, and ... contract criteria have been superimposed upon it. This gives courts justification to treat court-approved plea bargain agreements similarly to contracts.”))

46 See ACLU, supra note 16, at 55 (“[I]ndigent Georgians are often jailed solely for the nonpayment of fines and fees.”).

47 See generally id. at 60–63 (describing private probation companies’ practices leading to imprisonment of probationers).


49 See ACLU, supra note 16, at 60 (internal quotation marks omitted) (“[T]he problem with outsourcing probation services is that it involves the wrong incentives. Private businesses want to make a profit ... .”)

50 Privatized Probation Becomes a Spiral of Added Fees and Jail Time, ABA Journal (Oct. 2014), Id.

51 Id.

52 Bronner, supra note 23.

2. The Practices of Some Private Probation Companies. A study on the practices of private probation companies is troubling and revealing.\textsuperscript{54} In some courts, if defendants are financially unable to pay a fine on the day they are sentenced, they are placed on supervised probation until they pay off the fine.\textsuperscript{55} While this may seem beneficial to a defendant with little or no income, many of the private probation companies charge between $35 and $44 in monthly supervision fees, totaling between $420 and $528 over the course of a year.\textsuperscript{56} This means that a person who is unable to pay a $200 fine on the day of sentencing and is placed on probation may ultimately pay a tripled or even quadrupled amount over the course of one year as compared to a person of means who would not face probation fees.\textsuperscript{57}

Many of the people who are caught in this payment system would not be considered a threat to society so as to warrant supervision, but are often people like Carla, a twenty-five-year-old single mother on probation in Americus, Georgia, who was too poor to pay a fine on the day of court, she was placed on probation with a private company.\textsuperscript{58} While this may seem beneficial to a defendant with little financial ability to pay a fine on the day they are sentenced, they are placed on supervised probation until they pay off the fine.\textsuperscript{55} While this may seem beneficial to a defendant with little or no income, many of the private probation companies charge between $35 and $44 in monthly supervision fees, totaling between $420 and $528 over the course of a year.\textsuperscript{56} This means that a person who is unable to pay a $200 fine on the day of sentencing and is placed on probation may ultimately pay a tripled or even quadrupled amount over the course of one year as compared to a person of means who would not face probation fees.\textsuperscript{57}

One probationer under the supervision of Middle Georgia Community Probation Company (MGPC) reported asking his probation officer for assistance in battling alcoholism only to be told, “We don’t do that.”\textsuperscript{59} This lack of assistance seems contradictory to the purpose of probation, a sentence which has “traditionally been used by trial judges in Georgia as [an] effective tool[ ] of rehabilitation. . . .”\textsuperscript{60} In contrast, the felony probation system, which is still

\textsuperscript{55} Sarah Geraghty & Melanie Velez, Bringing Transparency and Accountability to Criminal Justice Institutions in the South, 22 Stan. L. & Pol’y Rev. 455, 475 (2011). See, e.g., Petition to Modify Probation Sentence at 1, Georgia v. Conner, No. 07-RCSST-15889 (St. Ct. Richmond Cnty., Ga. Dec. 1, 2007) (“Because Ms. Conner is poor and was unable to pay [the fine of] $140 on the day of court, she was placed on probation with a private company . . . .”).
\textsuperscript{57} S. Ctr. for Human Rights, supra note 55, at 2. For example, in the case of Marietta Conner, over the course of four months the probation company’s monthly supervision fees in addition to her initial fine of $140 nearly doubled the total amount she had to pay. This amounted to a 100% interest rate—a rate far in excess of that allowed by Georgia’s usury laws in O.C.G.A. § 7-4-18 (2000), which limit any person or company from charging more than 5% interest per month. Conner Petition, supra note 54, at 5.
\textsuperscript{58} Celia Perry, Probation Profiteers, Mother Jones (July 21, 2008 12:00 AM), http://www.motherjones.com/politics/2008/07/probation-profiteers (“These [probationers] are not cold, hardened criminals,’ [said Americus, Georgia] NAACP chapter president Matt Wright . . . . “These are just people struggling, trying to make it.””)
\textsuperscript{59} S. Ctr. for Human Rights, supra note 55, at 6.
\textsuperscript{60} Id.
\textsuperscript{61} Id.; see also Brief of Amicus Curiae the Southern Center for Human Rights on Behalf of Cross-Appellant Lisa Harrelson at 19, Sentinel Offender Servs. v. Harrelson, 286 Ga. 665 (2010) (hereinafter Harrelson Brief) (“[T]he fees . . . do not go toward the provision of services for probationers.”)
\textsuperscript{62} Perry, supra note 57.
under the control of the Georgia Department of Corrections, operates several units providing intense programming to assist probationers with battling addictions and developing marketable skills.  

Some of these private companies take the first cut from a probationer’s payment to satisfy their supervision fees; this policy makes it difficult for a probationer to make progress in paying off his or her initial fine if his monthly income is basic, as is often the case. Further, probationers are often either not told that they can convert their fine into community service or are required to pay a certain amount before being allowed to do so.

At least one private probation company links probation officers’ job security to the amount of money they collect each month. Crystal Paige, the area manager for the Sentinel branch in one Georgia county, testified that officers are given bonuses based on profitability. If an officer does not collect enough from the people on his caseload, he may be fired. In 2009, a former Sentinel probation officer, Rudolph Falana, testified that he had been fired for not issuing the required weekly quota of warrants for probation revocation. Falana stated that it was part of his job description to issue around twenty-five warrants a week for probation revocation, make phone calls, and send out letters in order to improve collections. Other practices used to improve collections are to increase the frequency of supervision meetings or verbally threaten probationers with incarceration.

Some companies encourage the incarceration of probationers by allowing defaulting probationers to be removed from a probation officer’s caseload if the officer issues a warrant for probation revocation. This enables the officer to avoid the negative consequences of having a defaulting probationer under his supervision. So as to maintain the appearance of not revoking probation solely for failing to pay a fine or fee, probation officers will commonly increase the frequency of required meetings for defaulting probationers until they miss a meeting. The probation officer is then able to list as violations both failure to pay fines or fees and failure to

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65 S. Ctr. for Human Rights, *supra* note 55, at 6. One Georgia probationer, Lisa Harrelson, made a payment of $500 to Sentinel towards paying off her initial $651 fine. Almost 40% of this payment went towards paying Sentinel’s fees rather than Harrelson’s fine. Harrelson Brief, *supra* note 60, at 12, 16 n.3.
67 *Id.* at 8.
68 McGee Petition for Writ of Habeas, *supra* note 3, at 43 (quoting Transcript of Oral Argument at 75, *Sentinel Offender Servs., LLC v. Harrelson*, 286 Ga. 665 (2010) (“Q. And, ma’am, your company is a profit motivated company; is that right? A. That would be correct. Q. And you are – are you ever paid a bonus based on the profits of this company? A. Uh, we – there is a bonus plan; however, uh, it varies. Me, personally, uh, I’ve probably in ten years, maybe five times. Q. And so, is that based on the profitability, ma’am? A. Yes, sir.”)).
71 *Id.* at 57.
72 See ACLU, *supra* note 16, at 59 (“Jail for nonpayment is a constant threat and a frequent reality among those trapped by private probation companies.”).
74 See *id.* (noting link between job security and earnings of probation officers and money collected from probationers).
75 See, e.g., *id.*, at 6 (describing a situation in which a probationer saw his probation meetings multiply when he could not make full payments).
report. However, release for this revocation is often conditioned on the payment of the balance of the fine or fee, thus indicating that the imprisonment is for the fine or fee, not for the failure to report. Moreover, private, for-profit probation companies have an incentive to incarcerate probationers who do not pay since this then shifts the cost of collection to the state and taxpayers who pay for the probationer to remain incarcerated until he pays off his fines and fees.

While the above practices of private probation companies in Georgia have been compiled based on first-hand accounts of probationers, testimony of probation officers, and observation of court sentencing practices, the totality of private probation companies’ practices remain unknown.

These practices are not isolated to Georgia but have been the subject of recent complaints in multiple other states including Missouri, Alabama, and Illinois. In a 2012 Harpersville, Alabama case similar to McGee, Judge Hub Harrington issued a scathing rebuke of the city’s court system and use of the services of Judicial Corrections Services, a private probation company based in Georgia. Judge Harrington stated that

> when viewed in a light most favorable to Defendants, their testimony concerning the City’s court system could reasonably be characterized as the operation of a debtors prison . . . . [A] more apt description of the Harpersville Municipal Court practices is that of a judicially sanctioned extortion racket. Most distressing is that these abuses have been perpetrated by what is supposed to be a court of law. Disgraceful.

"The harm caused by unlawful practices in these jurisdictions can be profound. Individuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape." The practice has been likened to a "judicially sanctioned extortion racket." In addition to being unlawful, to the extent these practices are not geared toward addressing public safety, but rather towards raising revenue, they can cast doubt on the

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76 See, e.g., McGee Petition for Writ of Habeas, supra note 3, at 9 (stating that the amount owed probation company is $186 and the payment necessary for release is $186).
77 See id. (stating that by incarcerating probationers, probation companies eliminate the minimal costs to them of supervising the probationer and shift to taxpayers the costs of incarcerating probationers at approximately $45 to $50 per day); see also ACLU, supra note 16, at 61 ("Since private probation companies do not bear the costs of incarceration or overburdened courts . . . . there is nothing discouraging them from referring large numbers of defaulting probationers to the courts and, potentially, jail.").
78 Interview with Stephen Bright, President and Senior Attorney, S. Ctr. for Human Rights, in Athens, Ga. (Sept. 19, 2012).
79 Zweig, supra note 26.
The impartiality of the tribunal and erode trust between local governments and their constituents. The U.S. Department of Justice has recently recognized this problem and urged local government reform. State courts and legislatures should follow suit and recognize the unconstitutionality and disgracefulness of these practices.

III. ANALYSIS

The United States Supreme Court precedent in Bearden is ignored in many courts, leading to the incarceration of probationers for failing to pay fines and fees, and creating a modern-day debtors’ prison. In order to combat this problem, legal practitioners must be advised that this is occurring, state appellate courts should hear cases raising these and related issues, and state legislatures should adopt legislation offering greater protection to indigent defendants.

A. AWARENESS AMONG LEGAL PRACTITIONERS

In order to end the repeated violations of the Supreme Court’s ruling in Bearden, attorneys and judges across the nation should be informed of the Bearden requirements and reminded of the general prohibition of imprisonment for debt. One key problem is that in many states defense attorneys are not constitutionally required to be present at probation revocation hearings, and even when they are, some may be uninformed on the law surrounding imprisonment for failure to pay a fine. Generally, indigent probationers do not have a right to appointment of counsel at a probation revocation hearing, as it is not considered a critical “stage of criminal prosecution.” The Supreme Court has recognized that there are some limited circumstances in which a probationer may request counsel, such as when the probationer is disputing the probation violation and needs to present witness testimony to verify his story.

At a probation revocation hearing for a probationer who has minor, undisputed violations such as failing to pay fines or fees, the court may not appoint an attorney for indigent defendants. This means that there may be no one speaking directly on the probationer’s behalf to ensure that the court undertakes an analysis of the probationer’s willfulness in failing to pay the fine, as Bearden requires. This can lead to the court disregarding evidence of non-

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87 Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); see also Vaughn v. Rutledge, 462 S.E.2d 132, 133 (Ga. 1995) (“[A] probationer has no Sixth Amendment right to counsel at a revocation hearing.
88 Gagnon, 411 U.S. at 790 (“Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.”).
89 See, e.g., Banks v. State, 620 S.E.2d 581, 584 (Ga. Ct. App. 2005) (holding that the trial court was correct to deny probationer’s request for counsel because she admitted to probation violation).
90 See Bearden v. Georgia, 461 U.S. 660, 668–69 (1983) (requiring courts to conduct a hearing to determine a probationer’s willfulness in failing to pay a fine prior to revoking his probation).
willfulness as demonstrated in Johnson, where the court heard evidence that Johnson, who did not have an attorney present, had been unable to find a job despite multiple attempts, yet still sentenced him to one year in a detention center. Even worse are the probation revocation hearings where, as in McGee, the court makes no determination of the probationer’s willfulness prior to revoking probation.

Increased funding would allow more public defenders to be hired and workloads to decrease. Well-developed training programs and mentors are also needed, so as to create support networks and foster an environment in which issues like Bearden can be raised. In a system where courts are clearly overstepping their bounds, whether intentionally or not, public defenders have to be prepared to represent indigent defendants to ensure that they are given constitutional hearings.

Further, judges should be reminded of the constitutional restraints on their contempt power to punish debtors who have been unable to pay fines or fees and that, according to Bearden, judges must conduct findings on and take into account a probationer’s willfulness in failing to pay a fine or fee prior to probation revocation. Probation officers need training to be informed of constitutional and non-harassing methods of supervision and means of properly assessing the viability of probation revocation—a procedure requiring a full probation revocation hearing and findings on willfulness before a judge—as compared to converting the fine into community service—a procedure requiring only court approval of a request to modify the terms of probation—prior to seeking a probation revocation hearing. Not only would this improve the efficiency of court systems, it would also reduce the stress of the many probationers who are faced with warrants for probation revocation based on their inability to pay a fine. This training should be made a condition of contract renewal.

By applying the methods suggested above, awareness can be raised amongst the many actors in the probation process. This awareness is essential to decreasing the regularity with which these unconstitutional practices occur.

B. LEGISLATIVE ACTION

For a greater and more immediate solution to the actions of courts and private probation companies described in this Report, corrective or preventative action on the part of state legislatures is necessary.

92 McGee Petition for Writ of Habeas, supra note 3, at 5 (stating that, despite the Bearden requirement, no determination on the willfulness of McGee’s failure to pay $186 in fees to Sentinel was made).
94 See, e.g., Ga. Const. art. I, § 1, para. XXIII (“There shall be no imprisonment for debt.”).
96 See, e.g., McGee Petition for Writ of Habeas, supra note 3, at 22 (recording the court’s approval of an order to modify the terms of probation by converting McGee’s fines to community service).

An analysis of different state statutes is instructive of the deficiencies in those states who have a system of privatized probation. In Texas, for example, "[a] court may waive payment of a fine or cost imposed on a defendant who defaults in payment if the court determines that: (1) the defendant is indigent; and (2) each alternative method of discharging the fine . . . would impose an undue hardship on the defendant." South Carolina provides that upon imposition of a fine, if the judge determines that the defendant is indigent, she must set up a payment schedule that takes into account the “income, dependents and necessities of life of the individual.” Each of these statutes forces the court to consider the ability of a defendant to pay as well as the fact that imposing immediate payment of a fine on an indigent defendant may lead to a greater punishment than intended.

The best example of a statutory scheme which fairly addresses the situations of indigent defendants is found in Kentucky. There, when a person claims indigency, the pretrial release officer must consider an enumerated list of factors to determine whether the person is considered “needy” under the statute. This evaluation must occur no later than the defendant’s first appearance in court and is reassessed at each step in the proceedings. If the defendant is found to be “needy,” the pretrial release officer must certify by an affidavit of indigency the factors relating to the defendant’s inability to pay. The affidavit of indigency, included in the statute, sets out such material factors as the defendant’s employment status, any government assistance he receives, and all dependents under his care.

Once this affidavit is on file with the court, the court must then act accordingly, such as by appointing counsel and abiding by statutory exceptions applicable to indigent defendants. Perhaps most important to the situations described in this Report is the exception provided in both Ky. Rev. Stat. Ann. § 534.040 and Ky. Rev. Stat. Ann. § 534.030, which set out a statutory scheme of fines that may be imposed for misdemeanor violations and felony violations respectively. Section four of each of these statutes states that “[f]ines required by this section shall not be imposed upon any person determined by the court to be indigent . . . .” In determining fines for felonies, Ky. Rev. Stat. Ann. § 534.030 also protects low-income defendants by requiring the court to consider factors such as the “defendant’s ability to pay the fine” and the “hardship likely to be imposed on the defendant’s dependents” by the fine. While the above Kentucky statutes do not explicitly state what alternative sentences may be imposed.

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100 Id. § 31.120(1).
101 Id. § 31.120(2).
102 Id. § 31.120(3).
103 See, e.g., id. § 31.110(1)(a) (“A needy person who is . . . under formal charge . . . is entitled to be represented by an attorney.”); § 534.040(4) (“Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.”).
rather than fines, other statutes do set out alternative sentences—including community service and participation in a counseling program—that may be considered in every case. 106

With such statutes in place, courts are forced to consider the financial position of the defendant. Other statutes should adopt a similar statutory scheme, requiring an officer of the court to submit an affidavit of indigency prior to a defendant’s first appearance in court. The court should then take the circumstances enumerated in the affidavit into consideration when imposing any sentence, including a fine. If a fine is deemed the appropriate sentence, it should be adjusted accordingly so as to impose hardship on an indigent defendant that is proportional to that imposed on a non-indigent defendant. Imposing a flat rate percentage, such as 25% of a defendant’s monthly income, would facilitate proportional fines among defendants and thereby cure the current constitutional flaws in the criminal process.

As another alternative, some sort of graduated system could be created in which the typical fine for a violation is reduced based on multiple defendant-specific factors including income, number of dependents, and extraordinary expenses, such as medical expenses. While a graduated fine scheme may appear complicated, a simple chart could be constructed based on the recommendations of economists, which includes various categories of deductions. The guidelines for fines set out in this chart would remain subject to the discretion of the court depending on the particular circumstances of the case, yet would still provide some guidance in understanding the difficulties a fine could impose on an indigent defendant.

Further, rather than putting a defendant convicted of a minor offense on probation merely to allow payment of a fine over time, as is often done in Georgia, state legislatures should adopt legislation similar to that of South Carolina set out above that requires an indigent defendant to make payments directly to the magistrate or clerk of court. 107 If the defendant repeatedly defaults on scheduled payments, he could be called before a judge for a hearing to assess the willfulness of this default as described in Bearden, at which time the court may consider alternative sentences as encouraged by the Texas statute set out above. 108

Further, state legislatures could adopt a system similar to that recently suggested by the Vera Institute of Justice following a study of the negative impact that the imposition of fines and fees has on the reentry and rehabilitation of indigent defendants. 109 This system offers individuals credit towards their monetary legal debt in exchange for their participation in programs such as substance abuse treatment programs, workforce development programs, and counseling programs. 110 Participation in rehabilitative programs such as these, more directly addresses and attempts to eliminate the causes of a specific individual’s criminality—such as unemployment, addiction, or mental illness—rather than simply placing an additional financial burden and stressor on a defendant that is already struggling financially. 111 While still holding defendants accountable, this system would likely reduce recidivism and increase the successful

107 See supra note 95 and accompanying text.
108 See supra note 94 and accompanying text.
110 Id. at 63.
111 Id. (noting that 80-90% of criminal defendants qualify for public defenders).
participation of past offenders in society. Further, this type of system would increase the efficiency of the courts as it would focus collection resources on defendants who are financially able to pay. This sort of program has been implemented on a small scale in the Roxbury Division of the Boston Municipal Court in Suffolk County, Massachusetts, where it has enjoyed success.

By adopting a statutory scheme that embraces all or portions of these suggestions, the law would require courts to recognize the unique circumstances of indigent defendants and the greater hardship that fines and fees impose on them as compared to other defendants.

2. State Legislatures Should Abolish Systems of Private Probation That Shift Operations Costs to Indigent Defendants. States like Georgia which have adopted “offender funded” models of private probation supervision provide ample opportunity for abuse by companies who value their net profits above the constitutionally protected rights of indigent defendants. State legislatures should place greater restraints on private probation companies by enumerating acceptable methods of supervision, requiring that rehabilitative services be provided, and emphasizing that probation revocation is intended as a method of last resort. In addition, legislatures should prohibit assessment of supervision fees by these companies, or alternatively adopt affordable statutory caps on the amount of supervision fees that may be collected. Conditions should be set under which these fees should be reduced or converted to community service based on indigent status. Such statutory provisions would ensure that private probation companies act in the best interest of probationers as well as the government, rather than seeking to turn a profit for personal gain.

Further, state legislatures should ensure that private probation companies are not shielded from public scrutiny. The practices of these companies must be closely scrutinized and controlled. Doing so would allow legal practitioners concerned with the unconstitutional methods employed by these companies to fully scrutinize those practices and bring the companies to court when necessary.

If the changes suggested above are unavailing to curtail the unjust practices of private probation companies, state legislatures should abolish laws which authorize counties to contract with private probation companies. Only then will indigent probationers be fully protected from the practices of probation officers who have a personal financial incentive in the probationers’ criminal status.

IV. Summary

This Report is not intended to excuse nonpayment of fines or ask for lesser punishment for indigent defendants; rather it is intended to call attention to the unconstitutional practices of different state courts who utilize a system of private probation and those private probation companies that have overstepped their constitutional bounds, using punitive methods that unfairly impact indigent defendants.

112 Id. at 64.
113 Id.
114 See id. at 63 (discussing the Clapham Set which offered twenty-six men with felony convictions the opportunity to earn credit by participating in counseling, substance abuse treatment, and workforce development programs).
115 See, e.g., O.C.G.A. § 42-8-106 (“All reports, files, records, and papers of whatever kind relative to the supervision of probationers by a private corporation . . . are declared to be confidential . . .”).
Many actors in the judicial system have played a role in sustaining these unconstitutional practices. Judges repeatedly place people on probation merely because they cannot pay a fine on the day of sentencing. They repeatedly revoke probation when the fine is not paid without conducting a full Bearden analysis. Some defense attorneys may not be familiar with the Bearden requirements, and need to know how to recognize and stop violations of Bearden when they occur. Legislatures in many states have chosen to favor private probation companies over the rights of their citizens by enacting legislation which shields these companies from public scrutiny of their practices. Private probation companies repeatedly prioritize their desire to make a profit over the traditional purpose of probation—to rehabilitate probationers. These actors must be better informed of the law in these areas and held accountable when they disregard it; many of their current practices should be declared unconstitutional; and indigent defendants need to be given greater statutory protection.

With the current state of private probation, the poorest are bullied by judicially-sanctioned probation companies. Those in need most are robbed of their already-limited resources by fines and fees that can place families living on the verge of homelessness. The indigent are imprisoned because of practices that the United States Supreme Court has declared unconstitutional.

We as bar leaders must ask ourselves what purpose probation revocation of people who cannot pay off fines or fees truly serves. Is it to uphold justice, punish criminals, and deter criminal behavior? Or is it to balance a state’s budget on the backs of the poorest people in society, and pad the pockets of for-profit companies? This practice of private probation is "[d]isgraceful"[17] and should not continue. We should send a message to state legislatures that the constitutional rights of the public must be protected, particularly the indigent who are without adequate representation and fall prey to the current state statutory schemes of private probation.

Respectfully submitted,

Lacy L. Durham, Chair
Young Lawyers Division
August 2016

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116 Bronner, supra note 23.
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Young Lawyers Division

Submitted By: Lacy L. Durham, Chair, ABA Young Lawyers Division

1. **Summary of Resolution(s).** The purpose of this resolution is to urge states to end the current system of privatized probation, which exists in a handful of states. This system allows private companies to act as officers of state courts in assuming the traditionally governmental function of probation supervision, while shifting the costs to defendants, most of whom are indigent. These companies often place their direct financial interest in making a profit over the civil rights of the probationers they service.

2. **Approval by Submitting Entity.** Approved by the Assembly of the ABA Young Lawyers Division on February 6, 2016.

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 promotes Goal IV (Advance the Rule of Law), particularly the objective that we “work for just laws, including human rights, and a fair legal process,” and “assure meaningful access to justice for all persons.” These goals would be furthered by the resolution, which aims to reduce the importance of one’s finances on the chances of successfully completing probation.

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)

   A bill has been introduced in Congress, H.R. 4364, which would prohibit Edward Byrne Memorial Justice Assistance Grants from being made available to any state or municipality that engages with for-profit probation companies. However, this resolution does not urge passage of that legislation, but instead urges states to cease the practice voluntarily.

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

   If possible, a copy of the resolution could be transmitted to legislative leaders in the states that continue to operate private probation systems.
8. **Cost to the Association.** (Both direct and indirect costs)

None

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

N/A

10. **Referrals.**

The resolution will be referred to will be referred the Criminal Justice Section, the Standing Committee on Legal Aid and Indigent Defendants, and the Commission on Homelessness and Poverty.

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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* Although John R.B. Long is not currently a member of the House of Delegates, we expect him to serve as a proxy for one of the ABA YLD House of Delegates Representatives during the 2016 Annual Meeting. However, in the event he is not able to serve as a proxy, Christopher Rogers (or another delegate) will move the resolution and we will request that John R.B. Long receive privileges of the floor pursuant to § 44.1.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The purpose of the resolution is to urge states to end the current system of privatized probation. This system allows private companies to act as officers of state courts in assuming the traditionally governmental function of probation supervision, while shifting the costs to defendants, most of whom are indigent. These companies often place their direct financial interest in making a profit over the civil rights of the probationers they service.

2. Summary of the Issue that the Resolution Addresses

Private probation is a concept which was developed in the late 1980s. Some local governments use it to shift administrative probation costs to criminal defendants. Over the last few years, it has received international attention, with the media comparing the system to a modern debtor’s prison. For a good overview of the issue, please see Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors’ Prison System, 48 GA. L. REV. 227 (2013).

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

The resolution addresses this issue by urging that state legislatures to abolish “offender funded” probation systems that have created modern-day debtors prisons.

4. Summary of Minority Views

None known.
AMERICAN BAR ASSOCIATION

SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SECTION OF INTELLECTUAL PROPERTY LAW
SECTION OF PUBLIC UTILITY, COMMUNICATIONS, AND TRANSPORTATION LAW
SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW
SECTION OF SCIENCE & TECHNOLOGY LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to enact legislation that requires the following when a federal agency proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization:

(a) The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public.

(b) If the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material.

(c) The required public access must include at least online, read-only access to the incorporated portion of the standard, including availability at computer facilities in government depository libraries, but it need not include access to the incorporated material in hard-copy printed form.

(d) The legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other current law.

FURTHER RESOLVED, That the American Bar Association urges Congress to permanently authorize agencies subject to these provisions to enter into agreements with copyright holders to accomplish the access described above.

FURTHER RESOLVED, That the American Bar Association urges Congress to require each agency, within a specified period, to:

(a) identify all privately drafted standards and other content previously incorporated by reference into that agency’s regulations;
(b) determine whether the agency requires authorization from any copyright holder in order to provide public access to the materials as described above; and

(c) establish a reasonable plan and timeline to provide public access as described above, including taking any necessary steps (i) to obtain relevant authorizations, or (ii) to amend or repeal the regulation to eliminate the incorporation by reference.
REPORT

This resolution is a successor to Resolution 106A, which the Section of Administrative Law and Regulatory Practice submitted to the House of Delegates for action at the 2016 Midyear Meeting. That earlier version would have urged Congress to amend the Administrative Procedure Act to require “meaningful free public availability” of all text incorporated by reference into proposed and final substantive rules of general applicability.

However, that resolution elicited objections from several Sections. They asked Administrative Law to withdraw Resolution 106A from the Midyear Meeting agenda and to form an inter-Section task force charged with devising a substitute resolution that could attract broad support within the House. Administrative Law acceded to this request. As a result, a Task Force on Incorporation by Reference, composed of fifteen members from six Sections and one Division, was convened. After extensive discussions, the task force recommended this resolution.

The resolution is intended to advance the general principle that citizens in a democratic society must be able to consult the laws that govern them. A corollary of that principle is that all citizens should have access in full to binding federal regulations. Regulations themselves are published in the Federal Register and are freely available online and at all federal depository libraries. Under present law as implemented, however, affordability problems often undermine the principle of public access with respect to material that has been included in such rules through incorporation by reference (IBR). The legislation proposed in the resolution would provide for a common baseline of availability by requiring agencies to provide an online source at which IBR material in such rules may be consulted without charge. The legislation would also provide for access without charge to material incorporated by reference into proposed rules while those rules are under consideration, so that citizens may comment on those proposals.

At the same time, federal law recognizes the valuable contributions that voluntary consensus standards make to the nation’s regulatory system. Moreover, the purposes and public interest served by copyright laws also deserve recognition and support. Recognizing these concerns, the resolution’s proposed legislation is aimed at ensuring meaningful citizen access without unduly impairing the ability and incentive of organizations to produce standards that can be incorporated by reference into federal regulations.

1 Entities represented on the task force included the Sections of Administrative Law and Regulatory Practice (James W. Conrad, Jr., Ronald Levin (chair), Nina Mendelson), Civil Rights and Social Justice (Estelle Rogers), Intellectual Property Law (Janet Fries, Susan Montgomery, Mary Rasenberger), Public Utility, Communications, and Transportation Law (William Boswell, Patricia Griffin), Real Property, Trust and Estate Law (James Durham), and Science & Technology Law (Ellen Flannery, Roderick Kennedy, Oliver Smoot), and the Government and Public Sector Lawyers Division (Gregory Brooker, Regina Nassen).
I. BACKGROUND

For over two centuries, the principle that all citizens should be able to read the law has been bedrock. Since the 1800s, Congress has provided public access to federal statutes without charge and, since the 1930s, to federal regulations as well, through a network of state and territorial libraries, followed by the creation of the Federal Depository Library System.\(^2\) Congress has further extended the public access framework, first by requiring the Government Printing Office to provide universal online access to statutes and regulations,\(^3\) and then by requiring online public access to other government documents and materials in the Electronic Freedom of Information Act Amendments of 1996 and the e-Government Act of 2002.\(^4\)

The Freedom of Information Act generally requires Federal Register publication of all agency “substantive rules of general applicability” and “statements of general policy or interpretations of general applicability.”\(^5\) However, it allows, in the so-called “incorporation by reference” (IBR) provision of 5 U.S.C. § 552(a)(1), that “matter reasonably available to the class of persons affected thereby [may be] deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”\(^6\) Although the Office of the Federal Register (OFR) must approve all agency incorporations by reference, its regulations do not specify what level of access makes a particular standard “reasonably available” and thus eligible for incorporation by reference.\(^7\)

Both the National Technology Transfer Act of 1995 and Office of Management and Budget Circular A-119 encourage federal agencies to rely on private voluntary consensus standards.\(^8\) Accordingly, agencies have, on a great many occasions, worked with private standards development organizations (SDOs) and incorporated privately drafted standards by reference into thousands of federal regulations. These privately drafted standards unquestionably have significant public value. SDOs often support and sometimes even seek to have their

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\(^3\) 44 U.S.C. § 4102(b)(2006) (capping recoverable costs as “incremental costs of dissemination” and requiring no-charge online access in government depository libraries). The GPO charges no fee whatsoever for online access.


\(^6\) Id.

\(^7\) See 1 C.F.R. 51.7(a).

privately drafted standards adopted as the law of the land. And agencies indisputably find it useful to draw upon this stock of standards.

The Code of Federal Regulations (C.F.R.) presently contains nearly 9,500 agency incorporations by reference of standards. These “IBR rules” have the same legal force as any other government rule. Some IBR rules incorporate material from other federal agencies or state entities, but thousands of these rules are privately drafted standards prepared by SDOs. SDOs range from the ASTM International (formerly the Association for Testing and Materials) to the Society of Automotive Engineers and the American Petroleum Institute.

Federal agencies use privately-drafted IBR rules for a host of subjects, ranging from toy safety, crib and stroller safety, safety standards for vehicle windshields (so they withstand fracture), placement requirements for cranes on oil drilling platforms on the Outer Continental Shelf, and food additive standards, to operating storage requirements for propane tanks, aimed at limiting the tanks’ potential to leak or explode. Agencies are encouraged to participate actively in SDO technical committees that draft standards under their jurisdiction.

However, obtaining public access to IBR standards can be difficult. In many cases, IBR rules cannot be accessed without charge either online or in the nearly 1,800 government depository libraries. Under OFR’s current approach, the public can access these rules without charge in OFR’s Washington, D.C. reading room, but only by written request for an

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9 http://www.archives.gov/federal-register/cfr/ibr-locations.html#why (as explained by OFR, “This material, like any other properly issued rule, has the force and effect of law...mak[ing] privately developed technical standards Federally enforceable.”)


11 E.g., 16 C.F.R. §§ 1505.5, 1505.6 (CPSC requirements for electrically operated toys, including toys with heating elements, intended for children’s use, incorporating by reference National Fire Protection Association and ANSI standards)

12 49 C.F.R. § 571.2015.


appointment. Apart from this, OFR refers the public to the SDO. IBR standards accordingly are distributed across many individually-maintained private websites and available for purchase from the SDO and from third-party resellers.

SDOs typically sell or license publications of their standards for a fee, which may be in excess of the copying cost or other simple cost of making a standard available. SDOs maintain that publication income supports the work of preparing the standards. When SDOs elect to charge for an individual standard, the price can range from $40 to upwards of $1,000. The incorporated safety standard for seat belts on earthmoving equipment such as bulldozers is currently priced at $74; the incorporated safety standard for hand-held infant carriers is $43, and the current edition of the Food Chemical Codex, which the FDA has incorporated by reference into food additive standards, is priced at $499. The cost of reading the two newly-incorporated-by-reference standards for the packaging and transportation of radioactive material, to avoid radiation leakage in transit, is $213. As Professor Emily Bremer has reported, the average price for just one incorporated pipeline safety standard is $150, while a complete set of IBR standards implementing the Pipeline and Hazardous Materials Safety Act cost nearly $10,000 as of September 2014.

As publicly-filed comments and other public sources indicate, these fees constrain some citizens and entities from seeing the law’s text. Regulated entities are often small businesses for whom the mass of necessary standards may be a significant cost. For example, as the

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18 Membership in an SDO usually affords discounted access to its standards, but such memberships can be costly; for example, the American National Standards Institute charges $750 per year.


20 See 16 C.F.R. 1225.2 (incorporating by reference ASTM F 2050-13a); www.astm.org. For unexplained reasons, the standard is absent from the online reading room ASTM maintains for government-incorporated standards.

21 See 21 C.F.R. 172.185(a) (test methods standard for TBHQ in the food additive); https://store.usp.org/OA_HTML/ibeCCtpltmDspRte.jsp?item=344067.


23 Emily Bremer, On the Cost of Private Standards in Public Law, 63 U. Kansas L. Rev. 279 (2015). SDOs occasionally charge more for an older version that an agency has incorporated by reference into binding law—a reflection of its governmentally-created value—than for the SDO’s current version of those same standards. See Strauss, supra note 10, at 509-10.

24 Public comments filed with OFR made this problem clear. The National Propane Gas Association, an organization whose members are overwhelmingly (over 90%) small businesses, commented in response to OFR’s notice of proposed rule that the costs of acquiring access “can be significant for small businesses in a
Modification and Replacement Parts Association stated in its public comment to OFR: “The burden of paying high costs simply to know the requirements of regulations may have the effect of driving small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult due to fees . . .”25 Frequently, members of the public affected by regulatory frameworks relying upon IBR rules also cannot afford to read these standards. For example, a staff attorney at Vermont Legal Aid filed a public comment indicating that the costs of accessing IBR rules interfered with the ability of Medicare recipients to know their rights.26

Some SDOs have created online reading rooms in which the public can view standards that agencies have incorporated by reference into federal regulations without payment of a fee. But these reading rooms do not consistently make all relevant standards available, and the organizations uniformly reserve the right to revoke the access at will.27 Some IBR content in rules, particularly older ones, is now simply unavailable from the SDOs at any price.28

highly regulated environment, such as the propane industry.” See Comments of Robert Helminiak, National Propane Gas Ass’n, OFR 2013-0001-0019 (Dec. 30, 2013), at 1; Comments of Jerry Call, American Foundry Society, NARA-12-0002-0147 (June 1, 2012), at 1-2 (“Obtaining IBR material can add several thousands of dollars of expenses per year to a small business, particularly manufacturers . . . [T]he ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg on safety standards.”); Comments of National Tank Truck Carriers, NARA-2012-0002-0145 (small businesses “have no option but to purchase the material at whatever price is set by the body which develops and copyrights the information. . . . [W]e cite the need for many years for the tank truck industry to purchase a full publication from the Compressed Gas Association just to find out what the definition of a ‘dent’ was. . . . HM241 could impact up to 41,366 parties and . . . there is no limit on how much the bodies could charge . . .”); Comments of American Foundry Society, NARA-2012-0002-0147 (“$75 is not much for a standard, but a typical small manufacturer, including a foundry, may be subject to as many as 1,000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg. . . .”).


26 E.g., Comments of Jacob Speidel, Senior Citizens Law Project, Vermont Legal Aid, OFR-2013-0001-0037 (Jan. 31, 2014), at 1 (price precludes “many Vermont seniors” from accessing materials). See also Comments of Robert Weissman, Public Citizen, OFR 2013-0001-0031 (Jan. 31, 2014), at 1 (reporting on behalf of multiple nonprofit, public interest organizations that “free access . . . will strengthen the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges . . . and strengthen citizen participation in our democracy”); Comments of George Slover and Rachel Weintraub, Consumers Union and Consumers Federation of America, OFR 2013-0001-0034 (Jan. 31, 2014) (noting importance of transparent standards to identify products that are not in compliance with applicable standards so as to notify the agency and alert consumers).

27 E.g., ANSI, IBR Standards Portal, ibransi.org (May 2, 2016) (“I agree that ANSI may terminate my access to the Licensed Materials at any time and for any reason. . ..”); NFPA, "Accept Terms for Access," www.nfpa.org (May 2, 2016) ("NFPA may suspend or discontinue providing the Online Document to you with
To date, despite recent reviews by OFR and the Office of Management and Budget on related IBR practices, the executive branch has not acceded to proposals to provide for public access to IBR material in regulations without charge. In November 2013, OFR began a rulemaking in response to a 2012 rulemaking petition filed by Columbia Law School Professor Peter L. Strauss and joined by nearly two dozen signatories, mainly law professors. Arguing that the “reasonably available” language in 5 U.S.C. § 552(a) of the Freedom of Information Act had to be understood to require such access, the petition had asked OFR to approve IBR rules only if read-only access to the text without charge was provided to the public.29 Ultimately, however, OFR declined to significantly revise its approach.30 OFR has continued to approve the incorporation by reference of standards that remain difficult to locate and expensive to read.31

II. THE RESOLUTION

A. Premises of the Resolution

This resolution would put the ABA on record in support of legislation that would promote public access to law, as well as public participation in federal regulation. The ABA should appeal to Congress now for two reasons: First, as noted, OFR has already engaged in a recent reexamination of its approach to implementing its responsibilities under the Freedom of Information Act. Adoption of the resolution would not signify any ABA view regarding OFR’s

28 See American Petroleum Institute Acceptance of Terms, http://publications.api.org/GoCited_Disclaimer.aspx ("API may suspend or discontinue providing the Online Document to you with or without cause and without notice.")

29 For example, the following editions of privately-drafted standards, both incorporated by reference into agency rules, seem completely unavailable to read or buy on the SDOs’ websites: American Conference of Governmental Industrial Hygienists, “Industrial Ventilation: A Manual of Recommended Practice” (22d ed. 1995), incorporated by reference in 29 C.F.R. 1910.124 (ventilation requirements for dip tanks); and ANSI 10.4-1963, "Safety Requirements for Personnel Hoists and Employee Elevators," incorporated by reference in 29 C.F.R. 1926.552(c) (hoist safety).

30 See Incorporation by Reference, 79 Fed. Reg. 66,267, 66,270 (Nov. 7, 2014) (final rule). Rather than requiring any greater public access to the text of incorporated standards, OFR essentially reaffirmed the status quo, adding only a requirement that the rulemaking agency seeking approval of an incorporation by reference explain “the ways that the materials it incorporates by reference are reasonably available to interested parties” and “summarize” the incorporated material. See 1 C.F.R. § 51.5(b)(2), (3). Further, although an agency is required to “summarize” in the preamble to a final rule “the material it incorporates by reference,” that summary does not have to include the full text. 1 C.F.R. § 51.5(a)(2); 1 C.F.R. § 51.5(b)(3) (2015). In any event, preambles are published neither in the Code of Federal Regulations nor on agency websites containing regulations.

31 The Nuclear Regulatory Commission is currently proposing to incorporate by reference a variety of standards for nuclear plants; as the agency reports, the purchase prices for individual documents range from $225 to $720, and the cost to purchase all documents is approximately $9,000. Nuclear Regulatory Commission, Proposed Rules: Incorporation by Reference of American Society of Mechanical Engineers Codes and Code Cases, 80 Fed. Reg. 56,820, 56,848 (Sept. 18, 2015).
interpretation of its authority under current law; it would, however, advocate a different approach under which a greater level of access would be required. Second, agency use of privately-drafted material incorporated into rules is likely to remain extensive, given continuing agency resource constraints, as well as executive and congressional policy favoring agency reliance on voluntary consensus standards. At this time, congressional action seems the most promising option to provide a higher, consistent level of public access.

As discussed above, facilitation of the public’s ability to know the contents of binding law is a longstanding tradition in this country, tangibly reflected in the provisions of the Freedom of Information Act. Indeed, this objective harmonizes with central principles of our constitutional tradition. After all, an essential element of due process of law is that “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”

Similarly, broader access to the contents of regulations would advance principles underlying the First Amendment, because “‘a major purpose of that Amendment was to protect the free discussion of governmental affairs,’ [and thereby] ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”

It should be noted that the public needs access to IBR material in proposed regulations no less than in adopted regulations. As well-established principles governing the rulemaking process require, an agency’s notice of a proposed rule must be published in the Federal Register with the detail needed to facilitate a meaningful opportunity to comment. These procedural requirements, which serve to maintain the legitimacy of agency rulemaking, require that “interested persons” be able to participate in rulemaking by submitting “data, views, or arguments” – public comments – to the agency. Yet an “interested person” cannot meaningfully exercise his or her right to comment without access to the substance of the standard on which comment is to be filed. Requiring an “interested person” to pay a fee to learn the content of a proposed rule is a genuine obstacle impeding that person’s right to comment under the Administrative Procedure Act.

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On the other hand, many SDOs reportedly rely heavily upon the revenue derived from the sale of their copyrighted standards in order to conduct their operations. They maintain that unconstrained public access to such material would leave them unable to continue to develop and produce the standards themselves unless an alternative revenue stream were made available. At the same time, many agencies would be unable, unwilling, or without sufficient resources to replicate what the SDOs currently do. Indeed, as discussed above, agencies often find that they greatly benefit from their ability to make use of these standards. Consequently, any legislation in this area should avoid creating a situation in which access to IBR material in regulations would be provided without charge, but the standards themselves would cease to be developed by the SDOs due to inadequate funding.

As discussed in greater detail below, the resolution incorporates a number of limitations on the recommended public access requirements, so as to ameliorate any reduction in the economic value of copyrighted standards. In some instances, however, these limitations may not obviate the need for additional funding from the government to compensate SDOs for the use of their standards. The extent to which the access requirements contemplated by the resolution would give rise to a need for compensation in a host of different contexts cannot be predicted with certainty. The resolution leaves these determinations to be made between agencies and SDOs during the process through which authorization for use of copyrighted material is secured. The ultimate point, however, is that society benefits from the public’s ability to obtain access to requirements incorporated by reference into federal regulations; thus, in situations in which agencies elect to continue to rely on IBR rules and conclude, in consultation with SDOs, that compensation is appropriate, the expenditure of public resources to support such access should be considered legitimate and worthwhile, and Congress should be willing to fund such expenditures.


In light of the objectives discussed above, the resolution urges Congress to enact carefully limited statutory requirements that would come into play when a federal agency proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization. The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public. To the extent that the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material. The agency might determine, as a threshold matter, that the particular material that the agency intends to incorporate by reference is not copyrightable or that the intended use is within the scope of fair use. But if the material is indeed subject to copyright protection, authorization from the copyright holder would be required. The Copyright Office should consider providing guidance to agencies as to how to handle copyright questions that would frequently arise in this connection, and agencies themselves should consider promulgating their own rules or internal guidance to regularize their responses to recurring situations that fall within their respective fields of authority.
The resolution also urges Congress to give agencies permanent authority to enter into agreements with copyright holders to implement the access requirements of the proposed legislation, such as license or assignment agreements, that would grant the agencies the right to implement the access requirements of the proposed legislation and to pay the copyright holders any negotiated fees. Long-term authorization would contribute greatly to the stability of the proposed regime by providing a basis for agency-SDO negotiations to ensure the newly required level of access.

C. Access Provisions

Under the legislation proposed in the resolution, the public access provided by the agency should include, at a minimum, true read-only access to the incorporated portions of the standard, available without charge on a website. The legislation should also provide that such access must be available on computer facilities at government depository libraries; this requirement would address “digital divide” concerns by ensuring meaningful access for persons who do not have computers of their own. The recommended legislation would not, however, require access to a hard-copy version of the incorporated material. This limitation is one way in which the resolution seeks to respect the proprietary interests of SDOs. Read-only access should generally be sufficient to enable citizens to ascertain the contents of proposed or final rules that may affect their rights or obligations. On a voluntary basis, however, SDOs might choose (as some already do) to allow the agency to make downloadable text freely available, or to permit access to hard copies at depository libraries.

Furthermore, as noted, the public access required by the legislation would apply only to the portions of a standard that have been incorporated by reference into a regulation. This limitation is another accommodation to the interests of SDOs. To the extent that those organizations have customers that are willing to purchase an entire copy of a given standard, or other products or services derived from it, the organizations would continue to be able to rely on profits from sales to such customers to recoup costs of creating the standards.

Another practical issue is that the “incorporated portion” of a standard may contain cross-references to a separate part of the standard, which in turn contains cross-references to a different part, and so forth. Agencies will need to be given discretion to make reasonable judgments about how much cross-referenced text they will need to make available through public access. In view of the competing policy considerations underlying the resolution, the legislation should make clear that the goal of this discretion should be to make available enough of the standard to enable members of the public to have access to and understand the portions of the standard that have been made part of federal law, but need not provide more than that limited amount.

Agencies providing public access should ensure that the incorporated material will be presented in a manner that enables reading such material in the context of the relevant section(s)
of the associated regulation. For example, the software might provide for a hyperlink between
the text of the regulation and the IBR text. However, data formats may vary according to the
characteristics of the software platform and may evolve over time. Accordingly, the resolution
leaves the details to Congress and the agencies to work out as present and future circumstances
may warrant. Agencies providing public access will also need to be attentive generally to other
accessibility concerns, including ensuring that the relevant text is available over time and that the
public is readily able to locate and use the website on which the text appears.

D. Transition and Ancillary Provisions

Under the resolution, the foregoing requirements and expectations would apply to
regulations issued after the effective date of the proposed legislation. In principle, access to IBR
text in existing regulations is also highly desirable. However, the administrative burdens of
bringing all existing IBR regulations into compliance with the access requirements of the
proposed legislation would be considerable. Accordingly, the resolution urges Congress to
require each agency to establish a reasonable plan and timeline to provide public access to IBR
text in regulations as described herein, including obtaining relevant authorizations and amending
or repealing regulations to eliminate incorporations by reference for which authorization is not
obtained. The availability of funding to compensate SDOs for use of copyrighted material may
be one factor that such plans would need to take into account.

Finally, the proposed legislation should provide that it will have no effect on any rights or
defenses that any person may possess under the Copyright Act or other currently applicable law.
For example, whatever rights a copyright holder may possess under current law to bring suit
against a third party for infringement of their copyright interests in IBR material in regulations
would continue to exist under the regime that the resolution advocates.

E. The Scope of the Resolution

By adopting the resolution, the ABA would not, itself, endorse any view regarding the
copyright status of any privately developed standards currently incorporated by federal agencies
into regulations. Thus, the resolution would not imply a position regarding any pending
litigation related to that issue. Nor would the resolution imply any ABA view regarding the
desirability of additional legislation that would require public access on any broader basis than
the statute that the resolution itself advocates.

However, voluntary agreements between agencies and SDOs to provide broader public
access to IBR text than would be required by the legislation recommended herein would be
entirely compatible with the spirit of the resolution. In considering the possibility of entering
into those agreements, agencies and organizations should take account of the guidelines stated in
Recommendation 2011-5 of the Administrative Conference of the United States and Circular

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A-119 of the Office of Management and Budget. 39 Other recommendations to agencies in these pronouncements also deserve sympathetic consideration, such as their admonition that agencies should update incorporations by reference on a timely basis.

III. CONCLUSION

This resolution seeks to protect and promote two essential public interests: the ability of the public to ascertain the requirements imposed by binding regulations governing private conduct, and the intellectual property interests of private entities whose standards may be incorporated by reference into those regulations. It is submitted that the resolution proposes a reasonable balance between these interests and deserves favorable consideration by the House of Delegates, and then by Congress.

Respectfully submitted,

Jeffrey A. Rosen
Chair, Section of Administrative Law and Regulatory Practice
August 2016

1. **Summary of Resolution(s).**

The resolution proposes legislation that would require federal agencies to provide an online source at which material that has been incorporated by reference into proposed or final regulations can be consulted without charge. At least read-only access would have to be afforded. This requirement would serve to enhance citizens' ability to see the law, to ascertain their legal obligations, and to comment on pending rulemaking proposals. The proposed legislation would contain limitations that are designed to accommodate the intellectual property interests of organizations that create incorporated standards.

2. **Approval by Submitting Entity.**

The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on May 2, 2016.

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

Resolution 106A, dealing with similar subject matter, was submitted to the House for consideration at the 2016 Midyear Meeting. Opposition to that resolution led to its withdrawal and to formation of an inter-entity task force. That task force, after deliberations, drafted and recommended this resolution.

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

None is directly relevant.

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

N/A

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

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

Policy could be implemented by legislative action.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

The five Sections that are cosponsoring the resolution were represented (along with Administrative Law, the principal sponsor) on the task force that drafted and recommended the resolution. The Government and Public Sectors Lawyers Division was also represented on the task force.

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

Professor Nina A. Mendelson
University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109
(734) 936-5071 (o)
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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.)

Professor Ronald M. Levin
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution proposes legislation that would expand public access to material that has been incorporated by reference into proposed or final federal regulations.

2. Summary of the Issue that the Resolution Addresses

Thousands of binding federal regulations “incorporate by reference” material that is contained in standards drafted by private organizations. In many instances, members of the public can obtain access to such material only by visiting a reading room in Washington, D.C., or by purchasing a copy of the standard from the organization that created it. This limited access can create a cost barrier for small businesses that wish to ascertain their obligations under these regulations, as well as for citizens who wish to comment on pending regulations. The policy challenge is to ensure public access to incorporated material in a manner that acknowledges the intellectual property interests of standards development organizations and that does not unduly impair their ability and incentive to continue to produce such standards.

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

The resolution urges Congress to require that when a federal agency intends to incorporate material from an industry code into a proposed or final regulation, it must obtain authorization from the copyright holder for any portion of the incorporated material that is subject to copyright protection. The authorization must at least provide for members of the public to have access without charge to a read-only online copy of the incorporated material. Access to the online content must be available on computer facilities in depository libraries. The proposed legislation would also permanently authorize agencies to enter into agreements with copyright holders to accomplish the access requirements. Under the legislation, agencies would be expected to apply the access requirements directly to newly adopted regulations and to establish reasonable plans and timelines to bring existing regulations into conformity with the same regime.

4. Summary of Minority Views

None identified.
RESOLUTION

RESOLVED, That the American Bar Association urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and

FURTHER RESOLVED, That the American Bar Association urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys; and

FURTHER RESOLVED, That for purposes of this resolution, “diverse attorneys” means attorneys who are included within the ambit of Goal III of the American Bar Association.
I. Introduction

The American Bar Association ("ABA") has four Goals. When the Goals were established, it was determined that no one goal is more important or carries more weight than the others. Goal III is to eliminate bias and enhance diversity,¹ and was borne as an extension of former Goal IX. As amended, Goal IX was “to promote the full and equal participation in the profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.” It is well established that when organizations are diverse and inclusive at every level, clients and the public are better served, which favorably impacts the ABA’s Goal II, to improve our profession. Moreover, the well-established business case for diversity and inclusion demonstrates that clients, the legal profession and society are best served when the makeup of lawyers reflects the community in which legal services are provided.² Against this backdrop, the ABA President created the Diversity & Inclusion 360 Commission (the “Di360 Commission”) to examine the many facets of diversity and inclusion in the profession, and to formulate methods, policy, standards and practices to best advance diversity and inclusion over the next ten years.

The underlying sense of urgency for the Di360 Commission’s work and its one-year timeframe stem from the crisis in confidence that many Americans – particularly young Americans – feel about the fairness of our justice system. The ABA has the responsibility to do what only a national association of nearly 400,000 attorneys and judges can do: help restore confidence in our justice system. The ABA strives to uphold the principles of fairness, equality and inclusion, yet the legal profession lags behind other professions in reflecting the diversity of our nation.³

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¹ Goal III: Eliminate Bias and Enhance Diversity. Objectives:
   1. Promote full and equal participation in the association, our profession, and the justice system by all persons.


To fulfill its mission, the DI360 Commission is developing sustainable action plans, producing practical tools, and recommending specific action items to move the needle on diversity and inclusion in an impactful way. The DI360 Commission has conducted its 360-degree review through four working groups, one of which is the Economic Case working group, which seeks to identify specific ways to expand economic opportunities for diverse attorneys.  

The economic well-being and success of diverse attorneys makes a difference and is crucial to moving the needle on diversity and inclusion. Diverse attorneys need meaningful opportunities to compete for and attain the best client work. Their success would positively impact other aspects of diversity and inclusion. The economic success of diverse attorneys would attract others into the profession, thereby building the pipeline; upend the implicit bias that stifles opportunities now; and result in the full and unhindered participation of diverse attorneys in the profession, thereby making the profession more representative of the populations it serves. Undoubtedly, a win for diversity and inclusion and the realization of Goal III is a win for our entire profession and the society we serve. As explained below in Section II of this report, the resolution is consistent with Goal III and would take diversity and inclusion to the next level by calling for specific and measurable action by entities that employ lawyers and by clients.

II. Justification for Expanding Economic Opportunities for Diverse Attorneys

A. Survey Data

Despite significant efforts, the legal profession lags behind other professions when it comes to diversity and inclusion. Members of racial and ethnic groups, women, members of LGBT groups and lawyers with disabilities continue to be vastly underrepresented in the legal profession. According to the Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms, the nation’s largest law firms have made virtually no progress since the first survey conducted by the National Association of Women Lawyers (NAWL) in 2006 in promoting women into the highest ranks, whether measured by the percentage of equity partners, compensation, representation on the firm’s highest governance committees, or rainmaking credit. While focusing its attention on the status of women lawyers in law firms, the NAWL survey reveals that the data are just as challenging for other diverse groups, including lawyers of color and LGBT lawyers.
The demographics of large law firms have not kept pace with an increasingly diverse pool of talent. The percentage of law school graduates of color has almost doubled in the past two decades to just over 25 percent.\(^7\) And the percentage of associates who are of color increased to 21.63 in 2014 from 8.36 percent in 1993.\(^8\) Yet, lawyers of color accounted for only 7.33 percent of partners in the nation's top 200 law firms in 2014.\(^9\) According to the latest Vault/MCCA Law Firm Diversity Survey Report, “[a] higher proportion of minority partners are salaried than hold equity in their firms. Attorneys of color represent 10.21% of non-equity partners, compared to 7.53% of equity partners. Among women of color specifically, the contrast between equity and non-equity status is even greater: just 2.27% of equity partners are minority women, compared to 4.35% of non-equity partners.”\(^10\)

B. The Role of Law Firms

Many law firms have diversity and inclusion programs. Despite valiant and commendable efforts, however, our profession has been unable to move the needle in a meaningful way. This resolution urges law firms to expand and increase opportunities at all levels of responsibility for diverse attorneys.\(^11\) Due to the increasing numbers of diverse law school graduates, the partnership pipeline is richer today more than ever. Yet women comprise just 18 percent of the equity partners in firms responding to the Ninth Annual NAWL Survey.\(^12\) Attorneys of color comprise a mere 8 percent of equity partners, of whom few are women, and at firms reporting data for partners who identify as LGBT, only 2 percent of female and 1 percent of male equity partners are LGBT.\(^13\) Information about lawyers with disabilities is difficult to come by in reported surveys. According to a press release issued in February 2015 by the National Association for Law Placement, “the information that is available suggests that partners with disabilities (of any race or gender) are scarce, with about one-third of 1 percent of partners reported as having a disability in the three most recent years.”\(^14\)

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\(^9\) Id.


\(^11\) While the resolution focuses on the ability of clients to impact economic opportunities for diverse attorneys in the law firms with which they do business, it also urges all providers of legal services to increase opportunities at all levels of responsibility for diverse attorneys. This could include entities that employ attorneys in both the public and private sectors.


\(^13\) Id.

Equity partnership is but one measure of economic success for diverse attorneys in law firms. The ABA must urge law firms to provide opportunities for diverse attorneys to develop and advance to meaningful levels and positions of responsibility within their firms, including:

- Firm chair, managing partner, or co-managing partner
- Senior leadership (Executive/Management Committee or equivalent)
- Regional office managing partner
- Practice group or department leader
- Committee chair
- Partner Review Committee (or equivalent) member
- Compensation Committee member
- Hiring partner or equivalent
- Relationship partner receiving origination credit
- Lead partner for significant matters
- Equity partner

C. The Role of Clients

Corporate clients are frustrated. Despite the business imperative for diversity, law firm demographics have not kept pace with the demand by clients for meaningfully diverse teams to handle their matters. In order for clients to understand and properly demand results, clients must collect specific data on the diversity and inclusion practices of firms they engage or are considering engaging; set clear expectations with law firms; and include diversity and inclusion performance as a criterion in their decisions on which firms they retain. To assist in these efforts and to provide efficiency and uniformity in the collection of data, the DI360 Commission has developed a Model Diversity Survey, as described and explained below in Section II.D of this report.

Specifically, this resolution urges clients to assist in the facilitation of opportunities for diverse attorneys and to direct a greater percentage of the legal services they purchase to diverse attorneys (whether practicing as solo practitioners, in firms whose majority ownership is by diverse attorneys, or in majority-owned firms).

Many corporations have supported diversity within their approved law firms for years, if not over a decade, and more companies join this quest each year. These corporations have collectively spent hundreds of millions of dollars in support of legal diversity through sponsorship, legal spend, and otherwise. Yet, data reveal that little has changed in our nation’s law firms and, for some, it is getting worse.

Corporations want to see a return on their investment and they want to know that they are using law firms that reflect the diversity of their employees, customers, other stakeholders, and society as a whole. Corporations as clients need a resource to help ensure that they are engaging law
firms that embrace these laudable goals. Law firms that are truly reflective of our diverse society at all levels need a uniform way to demonstrate their dedication. More importantly, corporations that are new to, but interested in, this effort need guidance and uniform information on the metrics that are most important to fulfilling our shared goals. Law firms that are not currently part of these efforts need inspiration and a uniform tool to help them move forward.

The business case for diversity applies equally to other clients, including municipal corporations, state and federal agencies, and other governmental entities. In their procurement of legal services, they, too, would benefit from the ability to understand the diversity and inclusion practices of law firms with which they do business.

D. The Role of the ABA

To serve these needs, the DI360 Commission is creating a means for all stakeholders to understand and improve diversity and inclusion through use of a model survey and accompanying guidance on best practices for its effective use. No organization but the ABA has the breadth and diversity of membership to take on this task and fulfill our collective goal of increasing diversity and inclusion in our profession.

Specifically, the DI360 Commission has developed a Model Diversity Survey ("ABA Model Survey")\textsuperscript{15} that will enable clients to measure the effectiveness of diversity and inclusion in the legal teams that they engage. The ABA Model Survey will allow clients to gather diversity data from law firms that are uniform and consistent, and not based just on anecdotal brochures. Uniformity of data will allow for: (1) uniform measurement and comparison; (2) better business decisions by clients and law firms; and (3) reduction in the time, cost and burden for legal professionals to respond to myriad and voluminous requests for diversity data.\textsuperscript{16}

Although other organizations conduct surveys on law firm diversity, these surveys have significant limitations. Many are directed to large law firms only, to the exclusion of mid-to-small firms and, significantly, to women-owned and minority-owned firms, which often fall in the small-firm category. Some surveys focus on only a subset of Goal III attorneys, so they fail to capture comprehensive data on all diverse attorneys. The results of some surveys are available only for a fee, and yet another survey charges a fee to law firms in order to complete the survey.

The ABA Model Survey will overcome these limitations by capturing key data from law firms of all sizes on their diversity and inclusion practices as they apply to all attorneys considered diverse under Goal III. The ABA Model Survey will be available at no cost and its accompanying toolkit will provide guidance to corporate clients on how best to use the tool in

\textsuperscript{15} The current version of the ABA Model Survey is available by clicking on this hyperlink:

\textsuperscript{16} According to a law firm diversity professional who is a member of the DI360 Commission, a firm typically receives more than 50 diversity surveys per year from existing or prospective clients.
making decisions about which law firms to retain and in evaluating their performance and progress in the diversity and inclusion arena. In addition, the ABA Model Survey will relieve law firms of the burden of completing many different, well-intentioned surveys, developed by various clients and groups. It will become the “gold standard” and will continue to evolve and improve over time.

The ABA is uniquely qualified to take the lead in spearheading a much-needed model tool in the diversity arena. The ABA will provide law firms and clients the means to accomplish the objective of the resolution by introducing the ABA Model Survey and providing instruction and guidance to corporate clients on its most effective use. Further, the work of the DI360 Commission lays the foundation for the collection and aggregation of law firm data gathered by the uniform survey. Through publication of the aggregate data on the ABA website, the profession and the public we serve will be able to assess annual changes in diversity metrics and gain an understanding of the legal providers that are making the most progress on diversity. In addition, a buyer of legal services will be able to compare responses from the firms they use to the aggregated data. This will enable clients to determine how focused – or not – their providers are on improving diversity.

The DI360 Commission anticipates that the ABA Model Survey will be the most utilized survey of its kind due to the fact that it will be made available, unlike similar surveys, for free and to the widest selection of law firms and corporations in the legal world. The survey and resulting data should become the standard-bearer for measuring our profession’s progress in this imperative, yet slow-moving, charge. While we create uniformity, simplicity, and education in this space, we also believe that collection and aggregation of this data will facilitate the addition of newcomers to this effort.

III. Why the ABA Should Take Action Now

A. Why is the House of Delegates Being Asked to Adopt this Resolution?

The ABA serves as the national representative of the legal profession, and also is the world’s largest organization of lawyers and judges. Leadership by the ABA can stir the conscience of the legal profession and inspire individual and collective commitments and, most importantly, action and results. Consistent with its status as the world’s leading organization of lawyers and judges, the Association must take a leadership position. Adoption of this resolution would provide an example for other organizations and the profession to follow. By urging action, this resolution would increase economic opportunities for diverse lawyers and thereby help realize the objective of Goal III.

B. The ABA Plays a Unique Role in the Legal Profession

No segment of society is so strategically positioned to address the issues of diversity as the legal profession. No other profession has a higher duty to do so. That duty arises out of the unique
offices that lawyers hold as ministers of the law and guardians of its conscience. The legal profession has a long and proud heritage as champions of individual rights and freedoms. The Association is uniquely qualified for the task. If adopted by the House of Delegates, this resolution would allow the ABA to play a crucial role in leading the legal profession to embrace and promote diversity at a higher level in law firms and corporations. Adoption of this Resolution would proclaim the Association’s unwavering commitment to equality for all lawyers.

C. The ABA’s Historical Stances on Diversity in the Legal Profession

The ABA has a long and proud history of demanding equality for lawyers of color and women. With the passage of Goal IX, “to achieve the full and equal participation of minorities and women within the profession,” and the creation of the Commission on Opportunities For Minorities in the Profession (currently known as the Commission on Racial & Ethnic Diversity in the Profession) in 1986, the ABA took bold steps to create its first and now the oldest entity to deal with facilitating racial and ethnic change in the ABA and the legal profession. The ABA’s creation of the Commission demonstrates one of the most successful, decisive and comprehensive actions taken by the legal profession to achieve the goal of equal opportunities for diverse lawyers.

Among the recommendations from the 1986 Report that created the Commission on Racial & Ethnic Diversity, Recommendation 3.4 directed the ABA to “take concrete actions with regard to the hiring, recruitment, promotion and advancement of minority lawyers.”17 In fact, the 1986 Report laid the foundation for the issues that this resolution addresses. Then, in 2008, the ABA adopted Goal III to eliminate bias and enhance diversity. Goal III replaced original Goal IX and demonstrated to the legal profession and the greater public that the ABA embraced diversity and inclusion as a core value. As a testament to the ABA’s leadership and influence, we witnessed an increase in the adoption of goals similar to Goal III by bar associations, law firms, corporations, and other legal entities throughout the country.

This resolution provides continuity with the 1986 Report and fulfills its mandate for “concrete actions.” This resolution also goes beyond the mandate of the 1986 Report by applying to all Goal III attorneys.

IV. Conclusion

The ABA represents the earliest coalescence of the legal profession. It is the seminal foundation for myriad legal organizations around the world and is, without question, the most diverse and influential of all voluntary legal organizations. The stated mission of the ABA includes serving equally its members, our profession, and the public, by defending liberty and delivering justice as the national representative of the legal profession. In order to achieve that mission, our

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profession must be truly diverse at all levels, in all areas, and in all occupations. We must relentlessly pursue Goal III by promoting full and equal participation in the ABA, the profession, and the justice system. In order to do so, all areas of the profession must be wholly reflective of the diversity we find in our society. While we have work to do in all areas of the profession, we have great work to do in law firms.

As the buyers of legal services, corporations and other types of clients may have the greatest impact in increasing diversity in the legal profession. They can use their power to drive change through the buying choices they make in their retention of legal services and their decisions regarding the continued use of certain legal providers, all based on the diversity of the firms and their progress toward improvement. Corporate America is well aware of the value of embracing diversity and inclusion and the correlation between its support and corporate results, employee engagement, and the need to focus on the broad customer base. With more consistent data available, corporates boards, chief executive officers, and general counsels can rationally and consistently measure and be held accountable for how they are doing.

This resolution calls for a two-pronged approach by urging law firms to focus on their diversity and inclusion practices in a meaningful way, and clients to use their purchasing power to increase economic opportunities for diverse attorneys. Working together, law firms and clients can have tangible impact in moving the needle on diversity and inclusion in the legal profession.

The Diversity and Inclusion 360 Commission respectfully urges the House of Delegates to adopt this resolution.

Respectfully submitted,

Eileen M. Letts, Co-Chair
David B. Wolfe, Co-Chair
Diversity & Inclusion 360 Commission
GENERAL INFORMATION FORM

Submitting Entity: Diversity & Inclusion 360 Commission Submitted

By: Eileen Letts and David Wolfe,
Co-Chairpersons, ABA Presidential 360 Commission

1. Summary of Resolution(s). The resolution is not proposed to exclude any demographic, but to be more inclusive of those covered within the ambit of Goal III. To that end, the resolution urges (a) all providers of legal services, including corporations and law firms, to expand and create opportunities at all levels of responsibilities for diverse attorneys; and (b) clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys.

2. Approval by Submitting Entity. This Resolution and Report was formally approved by a vote of the Diversity & Inclusion 360 Commission during its meeting in Short Hills, New Jersey, on April 18, 2016. (Commission member Paul Fishman abstained due to conflict of interest issues related to his employment.)

3. Has this or a similar resolution been submitted to the House or Board previously? This specific resolution has not been previously submitted. In 1986, however, the HOD adopted a resolution for the ABA to “take concrete actions with regard to the hiring, recruitment, promotion and advancement of minority lawyers.” The instant resolution is the logical progression of the 1986 resolution passed by the HOD and is necessary to further advance diversity and inclusion in the legal profession.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The relevant policies are referenced in the Introduction of this Report: specifically, Goal II, “improving our profession,” and Goal III, “eliminate bias and enhance diversity.” Adopted in 2008, Goal III objectives are to “1. Promote full and equal participation in the association, our profession and the justice system by all persons. 2. Eliminate bias in the legal profession and the justice system.” The 360 Commission’s proposed policy resolution supports ABA Goals II and III.

5. What urgency exists which requires action at this meeting of the House? Since the HOD adopted the resolution in 1986 to “take concrete actions with regard to the hiring, recruitment, promotion and advancement of minority lawyers,” unfortunately, very little has changed. Additionally, based upon available research from NALP, Catalyst and other reputable organizations, including the American Bar Association, over the past few decades, little progress has been made. Thus, this resolution not only addresses those concerns, but, expands the covered group to include all attorneys who are within the ambit of Goal III, including women, racially and ethnically diverse attorneys, attorneys with disabilities and attorneys who are members of LGBT groups.

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There is further urgency because without regard to how noble our profession is, it remains the least diverse profession of all comparable professions. It is submitted that more diversity will occur if those attorneys covered by Goal III believe economic and promotional opportunities will be available to them on an equal basis. The fact that the legal profession is the least diverse in many ways contributes to 50% of all young people believing the justice system is not fair (according to a recent Harvard study). Despite noble efforts, our apparent inability to adequately address such serious deficiencies in our own profession causes this resolution to be extremely urgent.

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

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

   A newly formed Corporate Counsel Subcommittee of the Commission on Racial and Ethnic Diversity will be responsible for implementation of the policy resolution and the ABA Model Diversity Survey. It is reasonably certain that a research organization (to collect and codify data relating to the survey) will assist in the implementation of the Resolution.

   This Resolution will allow the ABA to be a leader in diversity and inclusion, playing a crucial and unique role, as the national voice of the legal profession in the U.S. The ABA will lead the profession to embrace and promote diversity at higher levels in law firms and corporations.

8. **Cost to the Association.** (Both direct and indirect costs) Modest funding (20,000) has been requested for FY2017 for costs associated with the implementation of this policy resolution and the ABA Model Diversity Survey.

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

10. **Referrals.**

    Judicial Division
    Section of Litigation
    Section of Tort Trial and Insurance Practice
    Business Law Section
    Family Law Section
    Section of Civil Rights and Social Justice
    Section of Intellectual Property Law
    International Law Section
    Labor and Employment Law Section
    Law Practice Management Section
Law Student Division
Section of Real Property, Trust and Estate Law
Senior lawyers Division
Solo, Small Firm and General Practice Division
Section of State and Local Government Law
Taxation Section
Young Lawyers Division
Council for Racial and Ethnic Diversity in the Educational Pipeline
Commission on Disability Rights
Coalition on Racial and Ethnic Justice
Center for Racial and Ethnic Diversity
Commission on Racial and Ethnic Diversity in the Profession
Commission on Sexual Orientation and Gender Identity
Commission on Hispanic Legal Rights
National Bar Association
National Hispanic Bar Association
National Asian Pacific American Bar
National Native American Bar Association

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   818.257.1260
   wendy.shiba@me.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.)
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    darcher@dickinson-wright.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution is not proposed to exclude any demographic, but to be more inclusive of those covered within the ambit of Goal III. To that end, the resolution urges (a) all providers of legal services, including corporations and law firms, to expand and create opportunities at all levels of responsibilities for diverse attorneys; and (b) clients to assist in the facilitation of opportunities for diverse attorneys, and direct a greater percentage of legal services they purchase, both currently and in the future, to diverse attorneys.

2. Summary of the Issue the Resolution Addresses

For years organizations have worked to achieve greater diversity and inclusion in the legal profession. Unfortunately, the legal profession remains the least diverse profession of all comparable professions (e.g. physicians, engineers, accountants, et al.). Well-recognized studies report very little or no progress has been made to increase diversity and inclusion in our profession. We are a proud and noble profession that can do better. It is well settled that the public, the legal profession and clients are best served when lawyers reflect the demographics of the community in which legal services are provided. Increasing economic opportunities for diverse attorneys will be highly impactful in changing the trajectory of diversity and inclusiveness in the legal profession. The economic success of diverse attorneys is an effective means by which legal service providers can attract and retain more diverse attorneys to the profession.

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

The policy, through the use of various recommended tools, including a uniform survey for use by both clients and lawyers who represent them, will assist law firms, lawyers and clients in achieving greater diversity and inclusiveness in the profession, consistent with Goal III, enhancing diversity and by application, also Goal II, improving our profession.

4. Summary of Minority Views

N/A
RESOLVED, That the American Bar Association urges courts and other governmental entities, bar associations, non-profit organizations and entrepreneurial entities that make forms for legal services available to individuals through the Internet to provide clear and conspicuous information on how people can access a lawyer or a lawyer referral service to provide assistance with their legal matters.
REPORT

This resolution is designed to expand access to legal services that are provided by lawyers in an affordable manner to those who are otherwise attempting to address their legal matters without the assistance of a lawyer and may otherwise not understand the value of the lawyer’s role in providing that assistance.

Self-help legal resources first emerged 50 years ago with the publication of a book entitled “How to Avoid Probate,” which helped guide people through a complicated legal system in New York on their own.1 In the 1970s, Nolo Press emerged as a self-help legal publishing house, first providing do-it-yourself books in California and then on a national basis. The Standing Committee on the Delivery of Legal Services first charted the trend toward self-representation 30 years ago. Researching both divorce and bankruptcy cases in Maricopa County, Arizona, the Committee documented the increases in self-representation in those matters. Self-help divorces nearly doubled over six years. In 1980, 24 percent of divorce cases proceeded pro se. By 1985, that number had grown to 47 percent. Self-help bankruptcy, on the other hand, was limited, increasing from seven percent to 11 percent over that time.2

A 1992 report from the National Center for State Courts examined the incidence of divorce cases with and without lawyers in 16 US cities. In seven of those cities, at least a third of the cases proceeded without a lawyer representing either party. In none of the cities were both parties represented by a lawyer in more than half the cases.3 In the 25 years since then, domestic relations matters have transitioned from those that are primarily lawyer represented to those that are primarily self-represented. Self-representation has also increased in other areas of the law, but less substantially.

A 1998 report from the American Judicature Society and State Justice Institute speculated on the reasons for the rise of pro se litigation, including:

- Anti-lawyer sentiment;
- The cost of litigation;
- The growth in “do-it-yourself” law businesses;
- The breakdown in social institutions;
- Cuts in governmental legal services appropriations; and

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• Improved “customer service” by the courts.\textsuperscript{4}

Another perspective suggests the determination of whether a person proceeds with a lawyer or through self-representation focuses on the specific types of matters and identifies the factors as:

• Affordability;
• Value;
• The complexity of the matter; and
• The consequences, including whether the outcome is with prejudice.\textsuperscript{5}

The increased incidence of self-representation, particularly in family law matters, led to responses from various stakeholders. Based on the research from the ABA Standing Committee on the Delivery of Legal Services in the 1980s and 1990s, the district court in Maricopa County, Arizona, first dedicated a court clerk to specifically assist self-represented litigants. This model of dedicated clerks was then adopted by courts in California and Washington State. The Maricopa County court did not find this resource to be sufficient to meet the needs of self-represented litigants and subsequently redesigned a portion of its public law library to create the nation’s first court-based self-help center. The center included legal forms, how-to-do-it instructions, access to legal aid lawyers for those who qualified and folders with resumes of mediators and lawyers who were experienced in unbundled legal services. The center opened shortly before the Internet became a widely available resource and all of the documents were paper-based. That has, of course, evolved to a point where court forms and related materials are widely available online. Over the past 20 years, the self-help center model has been adopted in approximately 500 venues and serves about 3.7 million users annually.\textsuperscript{6}

As noted above, the American Judicature Society report indicates that self-representation may have increased in part as a result of the growth in do-it-yourself law businesses. This may be a cyclical circumstance where do-it-yourself businesses have grown as a result of the increases in self-representation. Regardless of the cause and effect, these businesses, which began with self-help books in the 1960s, evolved into software and now fundamentally provide services via the Internet, have proliferated in the past 20 years.

In addition, lawyers have adapted their delivery model to include limited scope representation, or unbundled legal services, in order to recapture a portion of that market that has been proceeding on a pro se basis.\textsuperscript{7} Nearly half of solo and small firm lawyers – those most likely to provide

\textsuperscript{4} Supra note 1.
\textsuperscript{5} Defining the Role of Lawyers in Pro Se Litigation, The Judges’ Journal, Fall 2002, at 7.
\textsuperscript{6} Self-Help Center Census: A National Survey, ABA Standing Committee on the Delivery of Legal Services, 2014.
\textsuperscript{7} See ABA Resolution 108 (February 2013) indicating the ABA’s support for unbundled legal services, at
personal legal services—offer their services on an unbundled basis. Consequently, some of those who may appear to be self-represented litigants in fact receive assistance from a lawyer to the extent the litigant desires.

Seemingly, no single factor has done more to change the dynamics of the delivery of personal legal services in general and self-representation in particular over the past 20 years than technology overall and the availability of the Internet specifically. While the legal profession frequently associates technology with entrepreneurial endeavors that provide online forms and document preparation for fees, the Internet is also the conduit for distribution of legal forms and information by courts, other governmental entities such as state secretaries of state and attorneys general and federal agencies, bar associations, and non-profit organizations.

Both long-established and recently-emerging authorities recognize that legal matters that seem to be straight-forward can have complex twists as a result of the specific factual circumstances and therefore legal matters that a computer has the technological capacity to accomplish can benefit from the scrutiny of a lawyer.

Texas amended its definition of the practice of law in 1999 to specifically preclude materials distributed on the Internet as long as those materials “clearly and conspicuously state that the products are not a substitute for the advice of an attorney.”

A 2015 consent judgment in North Carolina determined that an online document vendor was not providing legal services in violation of the unauthorized practice of law provisions in the state if it met a series of conditions, including one requiring the vendor to “communicate to the North Carolina consumer that the forms or templates are not a substitute for the advice or services of an attorney.”

http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_resolution_108.authcheckdam.pdf


9 See, for example, Can Robots Replace Lawyers? Computers, Lawyers and the Practice of Law, Remus & Levy, Dec. 30, 2015, at http://papers.ssrn.com/sol3/papers.cf?abstract_id=2701092, where the authors write extensively about commercial vendors that provide online legal forms, but make no mention of similar forms provided by courts, governmental entities, bar associations or non-profit organizations.

10 Section 81.101(c) of the Texas Government Code states, “(c) In this chapter, the 'practice of law' does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.”

11 LegalZoom.com, Inc. v. N.C. State Bar, 2015 NCBC 96
While these authorities clearly indicate it is in the public interest to require commercial vendors to inform potential customers that those customers may benefit from the advice of a lawyer, no requirements exist nor encouragement extended to help people who are using online legal documents from any source to find a lawyer.

The Standing Committee on the Delivery of Legal Services has reviewed self-help resource and online forms from the judiciaries of every state, from the secretaries of state offices of every state and from a sampling of federal agencies. These sites vary considerably in terms of their layout, content and navigation, presumably as a result of the organic nature of the emergence of the Internet and limited use of uniform templates. Critically, they vary substantially in their assistance to users who may benefit by being able to access the services of lawyers to the matters those users are pursuing.

The state self-help materials from the judiciaries fall into five categories:

- A few states provide forms but no disclaimers, no advice about the benefits of obtaining counsel and no linkage to additional resources.

- Other states provide disclaimers in an effort to limit their responsibilities when users rely on their information and forms, with nothing more. For example, one state indicates: "[Court] presents this information without warranties, express or implied, regarding the information's accuracy, timeliness, or completeness. Use of the information is the sole responsibility of the user."

- A few states take another step and inform the user that the site “cannot replace the advice of competent legal counsel licensed in the state” or that they may benefit from the assistance of a lawyer, but the sites do not provider the user with linkage to further resources.

- Most states provide users with resources for additional help. These include law librarians, self-help centers, legal aid offices and lawyer referral services. In some states this information is conspicuous, but in others it is obscure, particularly for the consumer who is not familiar with legal issues. For example, in one state, the user must go to the “self help” tab at the top of the page of the court’s website, then to the “self help center” tab on the left-hand navigation bar, then to the “lawhelp.org” tab on the left-hand navigation bar, then to the “legal assistance” tab at the top of that page. Notwithstanding the good intentions of these courts, it is unlikely novice consumers will be able to navigate sites with code words or trade terms such as “lawhelp” when they may be looking for a tab that simply states, “find a lawyer.”

- The fifth category employed by state court websites to help those who come to their self-help resources is uncommon. It involves an explanation of the importance of consulting
with a lawyer, along with conspicuous linkage. For example, the Court Assistance Office of the State of Idaho Judicial Branch states$^{12}$:

**When should I consider talking to an attorney?**

The materials and assistance you receive on this web site or in your local Court Assistance Office are no substitute for talking with a lawyer. Laws and court rules are very complex. Consequently, keep in mind, even if you follow the instructions provided and use our forms you are not guaranteed to win your case.

The materials on this site are meant to help you educate yourself through the process. It is always advisable to talk to a lawyer before proceeding on your own, especially if your situation is complicated or you expect difficulties. Visit the Idaho State Bar Lawyer Referral Service to find a lawyer.

Some governmental sites provide similar narratives. For example, the US Patent and Trademark Office website includes this statement$^{13}$:

$^{12}$ At http://www.courtsselfhelp.idaho.gov/

$^{13}$ At http://www.uspto.gov/trademarks-getting-started/using-legal-services/do-i-need-trademark-attorney
Do I Need a Trademark Attorney?

**WARNING:** While an applicant can file his or her own trademark application, and while these videos highlight aspects of the filing process, attorneys (not associated with the USPTO) who are familiar with trademark matters represent most applicants. Some trademark owners may have valid and protected trademark rights that do not result from federal registration with the USPTO, and those marks may not appear in the USPTO's Trademark Electronic Search System (TESS) database. Before ever filing a trademark application, a trademark attorney can conduct a more comprehensive search for potential problems with your use of a proposed mark than you will be able to conduct in TESS. The attorney then can counsel you regarding use of the mark, recommend whether to file a trademark application, and advise you on your likelihood of success in the registration process.

The filing of a trademark application begins a legal proceeding having many legal requirements and strict time deadlines. Not all applied-for trademarks register, and filing fees are not refunded. Whether you ultimately proceed on your own behalf or a trademark attorney represents you, all substantive and procedural requirements of the Trademark Act and Trademark Rules of Procedure must be met. Should you wish to consult an attorney, you can find the names of attorneys who handle trademark matters in telephone listings or by using the attorney referral service of a state bar or local bar association (see American Bar Association Lawyer Referral Directory). The USPTO cannot aid in the selection of an attorney, nor can the Trademark Assistance Center provide any legal advice.

On the other hand, the US Bankruptcy Court provides online forms, including one for the voluntary petition for individuals filing bankruptcy. That form includes a provision, which must be acknowledged and signed, that states, in part, “The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified lawyer.**”

Yet, neither the form nor the web page from which it is launched provide viewers with any direction on how to obtain a lawyer or any linkage to lawyers who are qualified to provide these services.¹⁴

In addition, a review of the state secretaries of state websites shows that every state provides consumers with the opportunity to fill out and/or file articles of incorporation online. Some states provide FAQ’s or instructional information, but no state provides people with direction on obtaining assistance from a lawyer or linkage that helps people find one.

Selecting, completing and filing forms online can be convenient and efficient for consumers. However, the consequences of making a mistake - of selecting the wrong form, of providing the wrong or incomplete information, of failing to properly follow through - can be grave. Sometimes these mistakes become readily obvious, where, for example, the litigant attempts to file inappropriate or mistaken forms for a divorce. Other times, the errors can lay dormant for

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¹⁴ At http://www.uscourts.gov/forms/individual-debtors/voluntary-petition-individuals-filing-bankruptcy
long periods. The owner of an improperly formed corporation may not realize the problem until efforts are made to sell or dissolve the company or to become involved in litigation. Of course, an improperly or insufficiently executed will is not likely to be discovered until the testator has died and the estate is executed or challenged. Leaving decision-making about which form to use or what information to provide to the novice consumer with limited guidance on obtaining additional resources creates substantial risks on an unparalleled scale.

To illustrate this scale, recent research conducted by the American Bar Foundation shows that a substantial portion of people with justiciable problems are likely to turn to self-help remedies. Nearly half of those with legal matters (46 percent) indicated they address problems through self-help, while only 15 percent turn to an advisor or representative.15 Put another way, three times the number of people pursue their legal matters through self-help than through an advisor of any nature.

As the 1986 report from the Standing Committee on the Delivery of Legal Services concludes, “Self-help law is here to stay.”16 Yet, we have evolved to a point where self-help does not, and should not, be at the total exclusion of a lawyer. Unbundled legal services expand the affordability for those who pursue legal matters fundamentally on their own and enable those consumers to get just the resources they need as they make decisions about which forms to use, what information to provide and how to follow up for the necessary compliances.

The creation of pipelines to lawyers or referral services through clear and conspicuous links from online self-help materials generated by those in all settings can improve access to affordable and trusted personal legal services in ways that are designed to limit the risk of errors that may have catastrophic consequences to the consumer. In creating such pipelines, efforts should be made to broaden access by following the ABA Standards for Language Access in Courts, adopted by the ABA House of Delegates at the 2012 Midyear Meeting.17

Respectfully Submitted,

William T. Hogan III, Chair
Standing Committee on the Delivery of Legal Services

August 2016

16 Supra note 2, at 71.
17 At http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_s_claid_standards_for_language_access_proposal.authcheckdam.pdf
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on the Delivery of Legal Services

Submitted By: William T. Hogan, III, Chair, Standing Committee on the Delivery of Legal Services

1. **Summary of Resolution(s).** This resolution calls upon courts and other entities that provide online legal forms that are accessible by those who are self-represented to include clear and conspicuous direction on how those form users may gain access to a lawyer to provide them with assistance with their legal matters. Given the scope of self-representation and the complexity of legal matters, the resolution will enable people to have better access to the information necessary to properly complete legal forms and move forward with the resolution of their legal matters in a cost-effective manner.

2. **Approval by Submitting Entity.** The Standing Committee on the Delivery of Legal Services approved of this resolution on February 6, 2016.

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

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

   Resolution 108, passed by the House of Delegates at the 2013 Midyear Meeting “encourages practitioners, when appropriate, to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services.” The resolution advances unbundled legal services.

   Resolution 108, passed by the House of Delegates at the 2014 Annual Meeting “urges national, state, local and territorial bar associations and foundations; courts; law schools; legal aid organizations; and law firms to create and advance initiatives that marshal the resources of newly-admitted lawyers to meet the unmet legal needs of underserved populations in sustainable ways.” The resolution advances access to underserved populations through the use of newly-admitted lawyers who are providing unbundled legal services.

   Resolution 113, passed by the House of Delegates at the 2012 Midyear Meeting adopted the ABA Standards for Language Access in the Courts. The Standards assist in creating language access services making the system of justice more fair and accessible.

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.** Implementation will involve three methods. First, the sponsors will reach out to organizations of entities that provide online legal documents, including the courts and other governmental units and bar associations, and encourage them to advocate for the implementation of the policy with their constituents. Second, the sponsors will reach out to secondary sources and advance use online legal documents, such as self-help centers, and encourage their advocacy for necessary changes. Finally, the sponsors will create and circulate examples of those entities that advance the use of lawyers and provide clear and conspicuous links to those resources.

8. **Cost to the Association.** (Both direct and indirect costs) No direct costs will result from this policy. Indirect costs will be from volunteer and staff resources that already exist within the ABA. No additional indirect costs will be incurred.

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

10. **Referrals.** The resolution has been circulated to the following entities, seeking their insights:

    - Standing Committee on Lawyer Referral and Information Service
    - Standing Committee on Group and Prepaid Legal Services
    - Standing Committee on Legal Aid and Indigent Defendants
    - Standing Committee on Pro Bono & Public Service
    - Standing Committee on Legal Assistance for Military Personnel
    - Commission on Homelessness & Poverty
    - Solo, Small Firm and General Practice Division
    - Law Practice Division
    - Section of Family Law
    - Business Law Section
    - Section of Real Property, Trust and Estate Law
    - Judicial Division
    - Standing Committee on Ethics and Professional Responsibility
    - Standing Committee on Specialization
    - Standing Committee on Professional Discipline
    - Standing Committee on Professionalism
    - Standing Committee on Client Protection
    - Standing Committee on Bar Activities and Services
    - Committee on Disaster Response and Preparedness
    - Young Lawyers Division
    - Law Student Division
    - Standing Committee on Paralegals
    - Standing Committee on Technology & Information Systems
    - Commission on Domestic & Sexual Violence
    - Commission on Interest on Lawyers' Trust Accounts
    - Commission on Immigration
    - Commission on Sexual Orientation and Gender Identity
    - Section of Dispute Resolution
    - Government and Public Sector Lawyers Division
Section of State and Local Government Law
Forum on Affordable Housing and Community Development Law
Commission on Hispanic Legal Rights & Responsibilities

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls upon courts and other entities that provide online legal forms that are accessible by those who are self-represented to include clear and conspicuous direction on how those form users may gain access to a lawyer to provide them with assistance with their legal matters. Given the scope of self-representation and the complexity of legal matters, the resolution will enable people to have better access to the information necessary to properly complete legal forms and move forward with the resolution of their legal matters in a cost-effective manner.

2. Summary of the Issue that the Resolution Addresses

Courts and other governmental entities, bar associations, non-profit organizations and entrepreneurial entities are providing online legal documents that enable self-represented people to advance their legal matters. Often the sites providing these materials do not offer users the information or resources necessary to enable them to be assured they are proceeding in a proper manner. Even when links are provided to resources such as lawyer referral services, those links are often not conspicuous, limiting the ability of users to find lawyers who would be able to assist them.

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

Urging entities that provide online legal documents to include clear and conspicuous links to lawyers provides a pipeline to those who have doubts about their decision-making when attempting to use the forms. At the modest end, the policy enhances the convenience of those making use of the forms and expands access to affordable legal services. At an outer end, the policy will protect consumers of legal services from mistakes they may make that would undermine their efforts and lead to adverse consequences.

4. Summary of Minority Views

The Section of Family Law states that it was not consulted in the development of the solutions included in this Resolution. The Section opposes the Resolution and Report in their present form and urges their withdrawal at this time. The Section believes that the Resolution and Report fail to address many issues specific to the needs of and dangers to the public in decision-making and drafting of documents with legal consequences in family law cases.
RESOLVED, That the American Bar Association urges all federal, state, territorial and local legislative bodies and governmental agencies to:

(a) adopt policies, legislation and initiatives designed to eliminate the school to prison pipeline whereby students of color, students with disabilities, LGBTQ (lesbian, gay, bisexual, transgender, questioning, or queer) students and other marginalized youth constituencies are disproportionately impacted by systemic inequities in education and over-discipline resulting in disparate school drop-out or “push-out” rates and juvenile justice system or prison interactions, i.e., school to prison;

(b) adopt laws and policies supporting legal representation for students at point of exclusion from school, including suspension and expulsion;

(c) support ongoing implicit bias training for teachers, administrators, school resource officers, police, juvenile judges, prosecutors, and lawyers and others dealing with juveniles;

(d) require data reporting relating to school discipline, including distinctions between educator discipline and law enforcement discipline to the Office of Civil Rights;

(e) support legislation that eliminates the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses; and

FURTHER RESOLVED, That the American Bar Association urges state and local prosecutors’ offices, and national and state prosecutors associations to develop screening and charging policies and statements of best practices for school referred cases to juvenile courts.
In 2014, the American Bar Association (ABA) Coalition on Racial and Ethnic Justice (COREJ) turned its attention to the continuing failures in the education system where certain groups of students—for example, students of color (African-American, Hispanic, Asian and Native American) with disabilities, or LGBTQ—are disproportionately over-or incorrectly categorized in special education, are disciplined more harshly, including referral to law enforcement for minimal misbehavior, achieve at lower levels, and eventually drop or are pushed out of school, often into juvenile justice facilities and prisons—a pattern now commonly referred to as the School-to-Prison Pipeline (StPP). While this problem certainly is not new, it presented a convergence of several laws, policies, and practices where the legal community’s intervention is critical.

Joined by the ABA Pipeline Council and Criminal Justice Section, and supported by its sister ABA entities, COREJ sponsored a series of eight Town Halls across the country to investigate the issues surrounding this pipeline. The focus of these Town Halls was to 1) explore the issues as they presented themselves for various groups and various locales; 2) gather testimony on solutions that showed success, with particular focus on interventions where the legal community could be most effective in interrupting and reversing the StPP; and 3) focus on the role implicit bias plays in creating and maintaining this pipeline. This report is a result of those convenings. Also a result was the formation of a Joint Task Force among the three convening entities to provide an organizational structure to address Reversing the School-to-Prison Pipeline (RStPP):

1. To analyze the complexities surrounding the school-to-prison pipeline and identify potential solutions to reverse these negative trends, the Joint RStPP Task Force: conducted eight Town Hall meetings in various parts of the United States during which area experts and community members voiced concerns, discussed the problems, and proposed solutions; analyzed and cumulated national data from the U.S. Department of Education’s Civil Rights Data Collection and other available local data to gauge the magnitude and scope of the problems; served as a clearinghouse for information and reports relevant to the RStPP effort; examined relevant national and state laws and local school district’s policies; evaluated evidence-based policies and practices that various schools have implemented to reverse the school-to-prison pipeline.


**Definition of Disproportionality**

Disproportionality refers to the difference between a group’s representation in the population at large and its over or under representation in specific areas. African-American students offer an illustration. African-American students comprised only sixteen percent of the student population during the 2011–2012 school years, but they represented thirty-two percent of students who received an in-school suspension; thirty-three percent of students who received one out-of-school
suspension; forty-two percent of students who received more than one out-of-school suspension; and thirty-four percent of students who were expelled.\(^1\) During that same time frame, African-American students represented twenty-seven percent of the students who were referred to law enforcement, and thirty-one percent of students who were subject to a school-based arrest.\(^2\) In addition, although African-American children represented eighteen percent of preschool enrollment, they represented forty-eight percent of the preschool children who received more than one out-of-school suspension.\(^3\)

While disproportionality is most often discussed in terms of African-American boys, as the summary above suggests, the problem is not limited to this group. Operative variations and disproportionalities exist within each broad category and across geographical areas.\(^4\) While other groups may not have been studied as deeply,\(^5\) the disproportionalities and concerns are real for example by gender,\(^6\) by disability,\(^7\) or by age.\(^8\) Also significant in considering the data is the

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\(^1\) See U.S. Dep’t of Educ. Office for Civil Rights, supra note 4, at 1–6; Daniel J. Losen & Jonathan Gillespie, Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School 6 (2012), http://civilrightsproject.ucla.edu/resources/projects.center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-cerr-research/losen-gillespie-opportunity-suspended-2012.pdf (finding that one out of every six Black students enrolled in K–12 public schools has been so suspended at least once, but only one out of twenty White students has been suspended).


\(^3\) U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, supra note 4, at 1.

\(^4\) See, e.g., LOSEN & GILLESPIE, supra note 9, at 18-21 (reviewing disproportionality in discipline/special education by state).

\(^5\) KIMBERLÉ WILLIAMS CRENSHAW, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED, AND UNDERPROTECTED 7 (2015) (“[M]uch of the existing research literature excludes girls from the analysis, leading many stakeholders to infer that girls of color are not also at risk.”); DANIEL LOSEN, CHERI HODSON, MICHAEL A. KEITH II, KATRINA MORRISON & SHAKTI BELWAY, ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? 30 (2015) [hereinafter ARE WE CLOSING] (“Given the high rates and extraordinarily large gaps revealed by the intersection of race and gender, we join the call for more research into the discipline gap at these intersections, as they raise questions about the possible influence of race-specific gender bias and stereotypes.”).

\(^6\) For example, disproportionality is evident in differential treatment by gender where African-American girls are more often and more severely disciplined than other girls, see, e.g., Jamilia J. Blake, Bettie Ray Butler, Chance W. Lewis & Alicia Darenbourg, Unmasking the Inequitable Discipline Experiences of Urban Black Girls: Implications for Urban Educational Stakeholders, 43 URB. REV. 90 (2011); CRENSHAW, supra note 5, at 7 (“[P]unitive disciplinary policies also negatively impact Black girls and other girls of color”); This is true further along the pipeline as well where the data shows that the proportion of female youth arrested and entering the juvenile justice system for law violations has increased from 1980-2010 across the spectrum of crimes from less to most serious.” OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 121 (Melissa Sickmund & Charles
tendency of negatives of groups to compound where a student is part of more than one group, e.g., students of color who are also students with disabilities or LGBTQ students.  

**Overview of the School-to-Prison Pipeline Problem**

The school-to-prison pipeline—the metaphor encompassing the various issues in our education system that result in students leaving school and becoming involved in the criminal justice system—is one of our nation’s most formidable challenges. It arises from low expectations, low academic achievement, incorrect referral or categorization in special education, and overly harsh discipline including suspension, expulsion, referral to law enforcement, arrest, and treatment in the juvenile justice system.

While many have known about the problems associated with the school-to-prison pipeline for years, recent data from the U.S. Department of Education’s Civil Rights Data Collection (“CRDC”) now elucidate the magnitude of various disciplinary actions including referral to alternative schools suspensions, expulsions, referral to law enforcement, and arrest. According to the CRDC, during the 2011–2012 school years, schools referred approximately 260,000 students to law enforcement, and approximately 92,000 students were arrested on school property during

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the school day or at a school-sponsored event.\textsuperscript{11} Local data provide additional sobering evidence of this problem,\textsuperscript{12} especially in light of the substantial evidence that many of these referrals to law enforcement were for minor offenses.\textsuperscript{13} The number of student suspensions and expulsions have also dramatically increased in recent years.\textsuperscript{14} According to the CRDC, approximately 3.45 million students were suspended at least one time during the 2011–2012 school year, and approximately 130,000 were expelled from school during that same time period.\textsuperscript{15} As with referrals to law enforcement and school-based arrests, data also indicate that the majority of these suspensions and expulsions resulted from only trivial infractions of school rules or offenses, not from offenses that endangered the physical well-being of other students.\textsuperscript{16}


\textsuperscript{12} See Nance, \textit{supra} note 1 (documenting data that school-based arrests have increased in several states and in several school districts throughout the country).

\textsuperscript{13} See, \textit{e.g.}, Fla. State Conference NAAPC, Advancement Project & NAACP Legal Defense and Educ. Fund, Inc., Arresting Development: Addressing the School Discipline Crisis in Florida 6 (2006) [hereinafter Arresting Development], http://b.3cdn.net/advancement/e36d17097615e7c612_bbm6vub0w.pdf (stating that during the 2004–2005 school year, there were 26,990 school-based referrals to the Florida Department of Juvenile Justice and seventy-six percent of those referrals were for disorderly conduct, trespassing, and fighting without a weapon); Action for Children, From Push Out to Lock Up: North Carolina’s Accelerated School-to-Prison Pipeline 9–10 (2013), http://www.ncchild.org/wp-content/uploads/2014/05/2013_STPP-FINAL.pdf. (“Students were most commonly referred to the juvenile justice system for low-level offenses.”); Justice Policy Inst., Education Under Arrest: The Case Against Police in Schools 15 (2011) [hereinafter Education Under Arrest], http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf (observing that during the 2007–08 school year in Jefferson County, Alabama, ninety-six percent of students referred to juvenile court were for misdemeanors that included disorderly conduct and fighting without a weapon).


\textsuperscript{15} See U.S. Dep’t of Educ. Office for Civil Rights, \textit{supra} note 4.

These disciplinary actions, are consistently harmful to young people, particularly African American youth and youth with disabilities. Students of color are disproportionately

- lower achievers and unable to read at basic or above
- damaged by lower expectations and lack of engagement
- retained in grade or excluded because of high stakes testing
- subject to more frequent and harsher punishment
- placed in alternative disciplinary schools or settings
- referred to law enforcement or subject to school-related arrest
- pushed or dropping out of school
- failing to graduate from high school
- feeling threatened at school and suffering consequences as victims

For students with disabilities, disproportionality manifests itself in similar ways, and race and ethnicity, gender, and disability compound. Students with disabilities (or those who are labeled as disabled by the school) are disproportionately

- students of color, especially in discretionary categories under the Individuals with Disabilities Education Act (IDEA)
- less likely to be academically proficient
- disciplined, and more harshly so
- retained in grade, but still dropping out or failing to graduate
- more likely to be placed in alternative disciplinary schools or settings or otherwise more likely to spend time out of the regular classroom, to be secluded or restrained
- referred to law enforcement or subject to school-related arrest and incarceration.

Students who are LGBTQ face similar disproportional negative treatment and are more likely victimized and blamed as victims, and, again, the negatives compound. These same differences plague the juvenile justice system where youth of color, youth with disabilities, and LGBTQ youth are typically disproportionally arrested, referred, detained (longer), charged, found delinquent (or transferred to adult court). They are disproportionately confined instead of being placed on probation or into a diversion program. And all along the way, these young people caught in the school-to-prison pipeline are less likely to have access to meaningful education to allow them to graduate from high school and prepare for higher education and work opportunities.

**Bad or Worse Behavior is not the Explanation for Disproportionality**

Disproportionate treatment of students and their overrepresentation in the negatives of our education and juvenile justice systems cannot be explained away because certain groups are
more likely to be engaged in bad or delinquent behavior. According to the U.S. Department of Education’s Office of Civil Rights, discipline and other disparities are based on race and cannot be explained by more frequent or serious misbehavior by minority students. As the Department recently stated, quite emphatically and unambiguously, “in our investigations we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students. In short, racial discrimination in school discipline is a real problem.” Substantial empirical research corroborates the U.S. Department of Education’s conclusion. School discipline records and students’ self-reports also show that the concerning differences and disproportionality are not simply attributable to the stigmatized group behaving “badly” relative to their peers or to socioeconomic factors. The Discipline Disparity Collaborative reports, “regardless of the method, such studies have provided little to no evidence that African-American students in the same school or district are engaging in more seriously disruptive behavior that could warrant higher rates of exclusion or punishment.”

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18 Dear Colleague Letter, supra note 3.
19 Id. (emphasis added).
20 See, e.g., Catherine P. Bradshaw et al., Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals, 102 J. EDUC. PSYCHOL. 508, 508 (2010) (finding that after controlling for teacher ratings of students’ behavior problems, African-American students were more likely than White students to be referred to the office for disciplinary reasons); Sean Kelly, A Crisis in Authority in Predominantly Black Schools?, 112 TCHRS. C. REC. 1247, 1261–62 (2010) (examining data from teacher surveys and finding that when controlling for factors such as low achievement and poverty, that African-American students were no more disruptive than other students); Anna C. McFadden et al., A Study of Race and Gender Bias in the Punishment of Handicapped School Children, 24 URB. REV. 239, 246–47 (1992) (finding that African-American male disabled students were punished more severely than other students for the same offenses); Russell J. Skiba et al., Where Should We Intervene? Contributions of Behavior, Student, and School Characteristics to Out-of-School Suspension, in CLOSING THE SCHOOL DISCIPLINE GAP, supra note 13, at 132–133, 134 (finding that race was a strong predictor of out-of-school suspensions); Michael Rocque & Raymond Paternoster, Understanding the Antecedents of the “School-to-Jail” Link: The Relationship Between Race and School Discipline, 101 J. CRIM. L. & CRIMINOLOGY 633, 653–54 (2011) (finding that African-American students are significantly more likely than Whites to be disciplined even after taking into account other salient factors such as grades, attitudes, gender, special education or language programs, and their conduct in school as perceived by teachers); Russell J. Skiba et al., Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline, 40 SCH. PSYCHOL. REV. 85, 95–101 (2011) (finding significant disparities for minorities with respect to school discipline after examining an extensive national sample).
Exclusion and Detention do not Achieve Better Outcomes for Students

As some of the leading researchers in the field have concluded, high suspension rates fail to improve learning conditions.\(^\text{22}\) It perhaps goes without saying that time spent learning is among the strongest predictors of achievement.\(^\text{23}\) Results of being out of school directly disadvantage the students and the impact is likely circular and cumulative.\(^\text{24}\)

Student underachievement often leads to student misbehavior in the classroom. Empirical studies confirm that it is common for low-performing students to misbehave out of frustration or embarrassment when they are unable to learn the academic material and meet grade-level expectations.\(^\text{25}\) For example, research shows that when students are retained in grade, this does not improve their subsequent academic achievement.\(^\text{26}\) As many educators well understand, when students begin to comprehend that the educational process is not working for them—that they will not be admitted to college, have access to a good-paying job, or enjoy a promising career—they have fewer incentives to obey school rules and take school seriously,\(^\text{27}\) leading to disciplinary exclusion, often for trivial violations of school rules.\(^\text{28}\) Student misbehavior and

\(^{22}\) ARE WE CLOSING, supra note, at 9; see also Amy P. Meek, Note, School Discipline “As Part of the Teaching Process”: Alternative and Compensatory Education Required by the State’s Interest in Keeping Children in School,” 28 YALE L. & POL’Y REV. 155, 158 (2009).

\(^{23}\) ALAN GINSBURG, PHYLLIS JORDAN AND HEDY CHANG, ABSENCES ADD UP: HOW SCHOOL ATTENDANCE INFLUENCES STUDENT SUCCESS 1, 4 (2014), http://www.attendanceworks.org/wordpress/wp-content/uploads/2014/09/Absences-Add-Up_September-3rd-2014.pdf ("The association between poor attendance and lower NAEP scores is robust and holds for every state and for each of the 21 urban districts regardless of size, region or composition of the student population.")

\(^{24}\) GINSBURG, ET AL., supra note 23, at 2.

\(^{25}\) See MATTHEW P. STEINBERG ET AL., STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS supra note Error! Bookmark not defined., at 46 (observing that low-performing students are less likely to be engaged in school and more likely to be frustrated and misbehave); Matthew P. Steinberg et al., What Conditions Support Safety in Urban Schools?, supra note 13, at 125 (maintaining that low-performing students are less likely to be engaged and more likely to act out).

\(^{26}\) HATTIE, supra note 22, at loc. 2301-06 (summarizing research re: negative effects of retention in grade on achievement and behavior).

\(^{27}\) STEINBERG ET AL., supra note, at 27–31, 46 (finding that students’ academic skills are highly correlated with overall safety at the school); PAUL WILLIS, LEARNING TO LABOR: HOW WORKING CLASS KIDS GET WORKING CLASS JOBS 72 (1977) (explaining that “teachers’ authority becomes increasingly the random one of the prison guard, not the necessary one of the pedagogue” when students think that the knowledge, skills, and credentials acquired in school are irrelevant); Pedro A. Noguera, Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices, 42 THEORY INTO PRAC. 341, 342 (2003).

\(^{28}\) See AM. BAR ASS’N JUVENILE JUSTICE COMM’N, supra note 9, at 2; ACTION FOR CHILDREN, supra note 6, at 9–10. ("Students were most commonly referred to the juvenile justice system for low-level offenses.").
discipline often lead to student underachievement,\textsuperscript{29} in a “downward spiral of academic failure, disengagement from school, and antisocial behaviors.”\textsuperscript{30} Analyzing longitudinal data from Florida, scholars Robert Balfanz, Vaughan Byrnes, and Joanna Hornig Fox found that the odds of a student dropping out of school increased from sixteen percent to thirty-two percent the first time that a student was suspended in the ninth grade and increased each additional time that student was suspended.\textsuperscript{31} Further, when controlling for other factors such as student demographics, attendance, and course performance, they found that each suspension decreased the odds that a student would graduate from high school by twenty percent and decreased the odds of a student attending a postsecondary institution by twelve percent.\textsuperscript{32} Similarly, analyzing longitudinal data from Texas, scholar Miner P. Marchbanks III and his colleagues discovered that when a student received some type of exclusionary discipline, including an in-school suspension, out-of-school suspension, expulsion, a disciplinary alternative placement, or a juvenile justice placement, that student was 23.5 percent more likely to drop out of school after accounting for other salient factors. Marchbanks claimed that even this was a conservative measure,\textsuperscript{33} and that “[w]hen a student was suspended or expelled, his or her likelihood of being involved in the juvenile justice system the subsequent year increased significantly.”\textsuperscript{34} And once students so disciplined they are significantly more likely to find themselves moving further along the pipeline toward prison. Once involved with the juvenile justice concerning results continue.\textsuperscript{35}
At the prison end of the pipeline educational opportunity is severely limited in most states. Nor do schools with high levels of exclusionary discipline attain a higher level of academic achievement for the school as a whole: “Perhaps more important, recent research indicates a negative relationship between the use of school suspension and expulsion and school-wide academic achievement, even when controlling for demographics such as socioeconomic status.” What is more “when harsh exclusionary policies are discontinued in schools, referrals to juvenile correctional facilities also decrease.”

Once in the juvenile justice system and prison part of the pipeline, the results are the same. Detention does not accomplish one of its primary objectives, which is to deter criminal behavior. In a comprehensive meta-analysis examining 7,304 juveniles across twenty-nine studies over a thirty-five year period, scholars Anthony Petrosino, Carolyn Turpin-Petrosino, and Sarah Guckenburg found that juvenile justice processing did not effectively deter delinquency; instead, it actually increased delinquency and future involvement in the justice system. In short, the research overwhelmingly demonstrates that the “official processing of a juvenile law violation may be the least effective means of rehabilitating juvenile offenders.”

**Nor Do Exclusive Measures Create Safer Schools**

The negative disproportionalities might be understood if indeed removals from school were in fact making schools safer, or, if indeed, confinement in juvenile detention or other facilities led to improved outcomes. This does not appear to be the case in practice or in theory. As

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37 Am. Psychol. Ass’n Zero Tolerance Task Force, supra note 9, at 854.
40 Hobbs, et al., supra note 66, at 81 (emphasis added).
researchers Dan Losen and Russell Skiba summarize, “There is no evidence that frequent reliance on removing misbehaving students improves school safety or student behavior.” In school situations, many removals are for behaviors that do not invoke real safety concerns; the vast majority of suspensions—95% of the 3.3 million children suspended from school each year—are for nonviolent offenses such as violating the dress code or “disruptive” behavior. As researcher Daniel Losen summarizes: "Contrary to popular belief, most suspensions are not for guns, drugs or violence. . . . Accordingly, the high rates of disciplinary removal from school currently seen in American schools cannot reasonably be attributed to the necessary responses to unlawful or dangerous misbehavior." 45

The Role of Implicit Bias and Related Unconscious Associations/Decisions
A particularly alarming aspect of the school-to-prison pipeline is that certain groups of students, especially minority students, are disproportionately affected. At each juncture of the pipeline—from failing to receive a quality education, failing to graduate, being suspended or expelled, or being referred to law enforcement for violating a school rule and then on into the juvenile justice system—there are differences along group lines that are not readily explicable. The differences and disproportionalities discussed in this report are so well-documented, so large, and so well known that one must question why the pattern has not yielded to change. As many researchers now agree, a primary cause of differential treatment is the implicit bias of decision makers. Explicit bias is a preference deliberately generated and consciously
experienced as one’s own; implicit bias is an association or preference that is unconscious and experienced without awareness.\(^{47}\) Implicit biases may well be dissociated from what we actively and honestly believe.\(^{48}\)

**Summary of Implicit Bias Research**

The following summary of concepts of implicit bias research suggests how an understanding of implicit bias and its implications might offer a new approach for understanding and decreasing disproportionality in education and juvenile justice decisions:

- Implicit biases are measurable by social psychology and neuroimaging.\(^{49}\)
- Implicit biases are “pervasive.”\(^{50}\)
- Implicit biases are different from what we self-report.\(^{51}\)
- IAT results show high levels of implicit bias against the disabled (76% of the sample show a pro-abled implicit preference, 9% pro-disabled).\(^{52}\)

behaviors to those individuals); see also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1570 (2013) (“Despite our largely egalitarian attitudes and beliefs, social science research over the past decade has shown that a majority of Americans are implicitly biased against Blacks.”).

\(^{47}\) See Jerry Kang, Nat’l Ctr. for State Courts, Implicit Bias: A Primer for Courts (2009); see also generally Neuroscience of Prejudice and Intergroup Relations 175 (Belle Derks, Daan Scheepers & Naomi Ellemers eds., 2013) (“Stereotypes are cognitive structures stored in memory that represent attributes associated with a social group.”) (citation omitted).

We use the implicit bias/association vocabulary here, but the vocabulary describing the brain’s dual response mechanisms does vary.


\(^{49}\) See supra note.

\(^{50}\) Project Implicit, supra note 337.


\(^{52}\) Disability IAT Results: Feedback, Project Implicit, https://implicit.harvard.edu/implicit/ (last visited Jan. 14, 2016). While research concerning implicit bias in favor of the abled and against the disabled is less developed than the research on race, this is one of the strongest and widely held of biases. See Nosek et al., supra note 339, at 36; see also Mark E. Archambault et al., Utilizing Implicit Association Testing to Promote Awareness of Biases Regarding Age and Disability, 19 J. Physician Assistant Educ. 20 (2008) (discussing health care providers and suggesting a link between implicit bias and clinical decision making including IAT results for medical students biased toward abled).
• IAT results show high levels of implicit bias against African Americans (70% of the sample show a pro-white implicit preference, 12% pro-African American) and against persons with disabilities. Implicit biases are sensitive to being primed. Implicit biases may “become activated automatically, without a person’s awareness or intention, and can meaningfully influence people’s evaluations and judgments.” Implicit biases are often dissociated from what a person actively and honestly believes or endorses. But are not necessarily dissociated from—indeed often predictive of—explicit action or decisions. Implicit bias may cause some youth to seem more threatening than others. Implicit biases are more prevalent in ambiguous situations.

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53 Black-White IAT Results: Feedback, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/Study;jsessionid=8760807505217DD039F6B457199FA0A6.dev2?tid=0 (last visited Jan. 14, 2016). The remaining percent score shows preference in neither direction. The bias is more dominant in White test takers, but some Blacks also show pro-White results, though in a more nuanced way. Project Implicit reports that “Data collected from this website consistently reveal approximately even numbers of Black respondents showing a pro-White bias as show a pro-Black bias. Part of this might be understood as Black respondents experiencing the similar negative associations about their group from experience in their cultural environments, and also experiencing competing positive associations about their group based on their own group membership and that of close relations.


55 See generally MASON D. BURNS, LAURA RUTH M. PARKER & MARGO J. MONTEITH, SELF-REGULATION STRATEGIES FOR COMBATTING PREJUDICE 3 (2016).

56 See supra at note 48 and accompanying text.


59 Kurt Hugenberg & Galen V. Bodenhausen, Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat, 14 PSYCHOL. SCI. 640, 640 (2003) (showing White observers are quicker to observe anger in ambiguously hostile African American faces African American faces than in White); see also Kurt Hugenberg & Galen V. Bodenhausen, Ambiguity in Social
New Response to the School-to-Prison Pipeline: A Focus on Implicit Bias

It is easy to conceptualize how a White female educator or decision-maker, facing a decision involving disciplining a twelve year old African-American boy who was involved in a shoving incident finds herself in a context where race has been shown to matter (at least implicitly). That white educator is more likely to implicitly respond negatively to him (than to a similarly situated White boy), based on implicit associations and group identification. If she is in a poor, urban school with a majority of students of color, there are more likely to be School Resource Officers present. She may be more likely to call for help from the SRO than to send the boy to the principal’s office or some lesser intervention. When the SRO arrives he/she is likely to

Categorization: The Role of Prejudice and Facial Affect in Race Categorization, 15 PSYCHOL. SCI. 342 (finding that hostility influences categorization of racially ambiguous faces).

60 Jacoby-Senghor, Sinclair & Shelton, supra note 24, at 53.


63 See, e.g., Jennifer L. Eberhardt et al., supra note 377, at 876; Phillip A. Goff et al., The Essence of Innocence: Consequences of Dehumanizing Black Children, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014).

64 Michael J. Bernstein, Steven G. Young & Kurt Hugenberg, The Cross-Category Effect: Mere Social Categorization Is Sufficient to Elicit an Own-Group Bias in Face Recognition, 18 PSYCHOLOGICAL SCI. 706, 706, 710 (2007); see also, e.g., HANDBOOK OF SOCIAL PSYCHOLOGY (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010).

65 See, e.g., Yael Granot et al., supra note 393, at 2196 (finding that where study participants “fixated frequently on outgroup targets, prior identification influenced punishment decisions”).
view the scene less favorably than he/she might for a white student, especially if the teacher labels the offender as a troublemaker. As the incident proceeds along, it is also easy to see how misremembering might come into play and the behavior of the Black boy remembered as more aggressive. And these first decisions will carry on along the pipeline, where this young student will more likely find himself arrested and detained.

When these implicit dynamics are viewed in the context of the tremendous discretion at play along the pipeline, in decisions like this one and in so many others, including discretionary special education decisions, discretionary referral to law enforcement, discretionary arrest and detention, the critical role of the decision maker is obvious. As one of the recent supplementary papers issued by the Disparity Collaborative summarizes:

[T]here is clear evidence that children of color are punished more severely than White children for relatively minor, subjective offenses in schools.

That is, what we know about implicit associations and biases call for a pause in the process. Not every decision is one that calls for a stare not a blink, but some are. That the decision maker needs to be deciding without bias, explicit or implicit, is also critical. In its recent report on Reforming Juvenile Justice, the National Academies of Science highlighted the importance of addressing bias in discretionary decision making for juvenile justice, though their conclusion is equally important to decisions further back on the school-to-prison pipeline: “juvenile justice officials should embrace activities designed to increase awareness of unconscious biases and to counteract them, as well as to detect and respond to overt instances of discrimination.”

Respectfully Submitted,

Leigh-Ann Buchanan, Chair
Coalition on Racial & Ethnic Justice
August 2016

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66 See supra note 58.
GENERAL INFORMATION

Submitting Entity: Coalition on Racial and Ethnic Justice (COREJ)

Submitted By: Leigh-Ann Buchanan, Chairperson, Coalition on Racial and Ethnic Justice

1. **Summary of Resolution(s).** The resolution urges federal, state, territorial and local legislative bodies, governmental agencies and applicable entities to adopt policies, legislation and initiatives designed to eliminate the school to prison pipeline whereby students of color, students with disabilities, LGBTQ students and other marginalized youth constituencies are disproportionately impacted by systemic inequities in education and over-discipline resulting in disparate school drop-out or “push-out” rates and juvenile justice system or prison interactions school to prison;

2. **Approval by Submitting Entity.** Approval by the Coalition on Racial and Ethnic Justice (COREJ) on February 5, 2016.

3. **Has this or a similar resolution been submitted to the House or board previously?** There have been policies in the past that address isolated issues that touch on the “school-to-prison-pipeline”, but, there no existing or similar policies that call for the whole scale dismantling of the “school-to-prison-pipeline.”

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The ABA HOD has adopted numerous policies related to the “school to prison pipeline,” among them in 2009 ABA adopted several policies: urges federal agencies to assure accountability and to ensure that no group of students is disparately subjected to school discipline or exclusion; policy was adopted on a youth’s right to remain in school and the policy also called for reducing the criminalization of truancy, disability related behavior and other school related conduct; and in addition, the ABA adopted a resolution that called for full procedural protections, including the opportunity to have representation by counsel in proceedings where they risk exclusion from their regular educational program. COREJ is cognizant of the fact that the proposed resolution will build on these existing policies and address additional concerns that will help to dismantle the school-to-prison-pipeline.

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

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

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The Coalition on Racial and Ethnic Justice and the School-to-Prison Pipeline Project in conjunction with its co-sponsors and supporters will work with the ABA Governmental Affairs Office to advocate legislative bodies to adopt and implement the policy. In addition, the StPP will continue to collaborate with state, local and bars of
color, civil rights organizations and school districts to eliminate the school-to-prison-pipeline.

8. **Cost to the Association.** None

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

10. **Referrals.**
    Criminal Justice Section
    Council for Racial and Ethnic Diversity in the Educational Pipeline
    Center for Children in the Law
    Commission on Youth at Risk
    Commission on Disability Rights
    Section of Litigation Tort & Insurance Practice Section
    Center for Racial and Ethnic Diversity
    Commission on Hispanic Legal Rights
    Commission on Racial and Ethnic Diversity in the Profession
    Commission on Sexual Orientation and Gender Identity
    Young Lawyers Division National Bar Association
    National Hispanic Bar Association
    National Asian Pacific American Bar Association National
    Native American Bar Association

11. **Contact Name and Address Information. (Prior to the meeting).** Please include name, address, telephone number and e-mail address) Rachel Patrick, Director, ABA Coalition on Racial and Ethnic Justice, 321 N. Clark St. Chicago, IL 60654, (312) 988-5408, Rachel.patrick@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.)** Leigh-Ann Buchanan, leighann.buchanan@gmail.com, 1946 SW 20 Street, Miami, FL 33145, (561) 985-3892
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolutions urge federal, state, territorial and local legislative bodies, governmental agencies and applicable entities to adopt policies, legislation and initiatives designed to eliminate the school to prison pipeline whereby students of color, students with disabilities, LGBTQ students and other marginalized youth constituencies are disproportionately impacted by systemic inequities in education and over-discipline resulting in disparate school drop-out or “push-out” rates and juvenile justice system or prison interactions. School to prison.

2. Summary of the Issue that the Resolution Addresses

Due to a lack of policies, legislation and specific programs, students of color, students with disabilities, LGBT students and other groups suffer disproportionately from inadequacies and inequities in the education system and as a result are inappropriately and disproportionately dropped out or are pushed out of school and into situations which lead to their disproportionate involvement in the juvenile justice system and prison. These students are disproportionately trapped in the School-to-Prison Pipeline;

Insufficient support for ongoing implicit bias training for decision makers involved in the School-to-Prison Pipeline e.g. including teachers, administrators, school resource officers, law enforcement, juvenile judges, prosecutors, and other lawyers and those dealing with the juveniles;

A critical need to develop detailed, uniform, data reporting relating to school discipline, including distinctions between educator discipline and law enforcement discipline; Implementation of legislation that eliminates the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses;

Development by state and local prosecutors’ offices and national and state prosecutors’ associations of screening and charging policies and statements of best practices for school referred cases to juvenile courts.

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

This proposed policy position demonstrates how and what legislative bodies, governmental agencies and decision makers can do to bring about change and how to do a whole-scale dismantling of the “School-to-Prison-Pipeline.”

4. Summary of Minority Views

N/A.
RESOLUTION

RESOLVED, That the American Bar Association amends Principles 2(B) and 6 of the ABA Principles for Juries and Jury Trials as follows:

2(B) Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, marital status, sexual orientation, gender identity, gender expression or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

6(C) The court should:

1. Instruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it; and

2. Encourage the jurors to resist making decisions based on personal likes or dislikes or gut feelings.
The Commission on the American Jury recommends amendments to two of the
*ABA Principles for Juries and Jury Trials* that were approved by the House of Delegates in 2005. The first recommendation amends the list of those groups which should not be excluded from jury service to include marital status, gender identity and gender expression. The second recommends that jurors be educated as to implicit bias and how to avoid such bias in the decision making process.

**Principle 2**

The purpose behind Principle 2 is to make certain that the jury pool and ultimately juries are representative of the communities that they serve. The broader the participation, the greater will be the public trust and confidence in the decisions made by the jury and the judgements of the court. The United States has had a long history of continuously expanding jury participation, however slow it has been to change. The first change amends the list of groups which should not be denied or limited eligibility for jury service to include marital status, gender identity and gender expression (Principle 2(B)). The American Bar Association’s Goal III -- Eliminating Bias an Enhancing Diversity -- is one of the Association’s four core goals. Goal III has two objectives: 1) Promoting full and equal participation in the association, the profession, and the justice system by all persons; and 2) Eliminating bias in the legal profession and the justice system. The proposed resolution addresses this second objective.

Appreciation for the ABA’s longstanding commitment to Goal III and recognition that the legal profession needs to make more meaningful progress in advancing diversity and inclusion led President Brown to request that the Board of Governors (BOG) create the ABA Diversity & Inclusion 360 Commission (360 Commission). The 360 Commission is charged with taking a comprehensive “360 degrees” look at the state of diversity and inclusion in the legal profession and producing sustainable action plans that will significantly move the needle forward. Consistent with this charge, the 360 Commission analyzed diversity and inclusion in the legal profession, the judicial system, and the American Bar Association with a goal of developing sustainable action plans.

The 360 Commission has four Working Groups: 1) Pipeline Projects, which is working to address the barriers facing diverse students at critical points along the pipeline - K-12, College/Pre-Law, and Law School/Bar Passage as well as exploring other entry points into the profession; 2) Diversity & Inclusion Guidelines and Implementation, which is examining what the ABA can do to lead efforts around diversity and inclusion for itself and local and state bar associations; 3) Economic Case, which is expanding economic opportunities for diverse attorneys by developing model tools for use by corporations and law firms to benchmark diversity, and proposing a policy that urges greater economic opportunities for diverse lawyers. The final 360 Working Group addresses implicit bias. The Implicit Bias Working Group is creating training materials and videos for judges, prosecutors and public defenders to explore what can be done to address inherent bias. It is also advancing this policy resolution to ensure that jurors are aware of and consider their implicit biases before trial proceedings commence.
As part of this effort, the 360 Commission is working to expand the definition of Goal III to encompass the full range of diversity so that it includes not only race, national origin, gender, disability, and sexual orientation but also age, religious belief, income, occupation, marital status, gender identity and gender expression. Thus, the resolution calls for revisions to Jury Principle 2(B) so that eligibility for jury service is not denied or limited on the basis any of the above or any other factor that discriminates against a cognizable group.

The proposed amendment would include the groups "gender identity" ("gender identity" refers to one's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth. http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions); "gender expression" ("gender expression" refers to external appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine. http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions); and "marital status" ("marital status" refers to a person’s state of being single, married, separated, divorced, or widowed. http://www.oxforddictionaries.com).

Principle 6

The second change is to insert a new Principle 6(C) to include education of jurors on the impact of implicit bias on the decision making process.

According to Professor Jerry Kang, a UCLA Law Professor who specializes in implicit bias training for the legal profession, "implicit bias refers to the attitudes, or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control…” (See Jerry Kang, A Primer For State Courts, August 2009).


Studies show that implicit racial bias is something that can be controlled, if individuals are equipped with the tools necessary to address it. Educational programs on implicit bias offer judges and court staff those tools.

Exercising fairness and equality in the court system is of critical importance to lawyers, judges, jurors and staff. Jurors and judges must be held to an even higher standard due to the significant importance of their decisions on the lives and future of all consumers of the justice system.
This Amendment requests that an important educational instruction be given to juries regarding what implicit bias is and how it might affect outcomes and decisions in the courtroom.

Courts must find practical ways of eliminating implicit bias in jurors. Due to the limited opportunities to educate jurors in the courtroom setting, the importance of a well-crafted, specialized jury instruction may be the only available practical option of making jurors aware of implicit bias. One study found that the greater impact would be from preliminary instructions rather than post-evidence instructions on judgments of guilt or innocence (Saul M. Kassin & Lawrence S. Wrightsman, On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts, 37 J. Personality & Soc. Psychol. 1877, 1882 (1979)). Therefore this change to the principle encourages judges to give the instruction to jurors prior to trial. In addition, this approach is relatively inexpensive, expedient and easy to administer. This approach places the responsibility of managing implicit bias of jurors in the hands of the judge. Judges may be encouraged to utilize specialized instruction on implicit bias similar to the instructions developed and utilized by Judge Mark Bennett in the Northern District of Iowa. (Bennett, Mark W., Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions Harvard Law & Policy Review, Vol. 4, p. 149, 2010). Similarly The California courts use a model jury instructions on bias providing: “Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.” (California Civil Jury Instructions (CACI) 113). Courts should be encouraged to use these type of instructions in all cases.

This policy resolution seeks revision and amendment of Jury Principle 6 in order to provide the courts with inexpensive, expedient, fair and equitable ways of managing implicit bias of juries.

Respectfully Submitted,

Hon. Christopher Whitten  
Chair, Commission on the American Jury

Eileen M. Letts  
David B. Wolfe  
Chairs, Diversity & Inclusion 360 Commission  
August 2016
APPENDIX

PRINCIPLE 2 – CITIZENS HAVE THE RIGHT TO PARTICIPATE IN JURY SERVICE AND THEIR SERVICE SHOULD BE FACILITATED

A. All persons should be eligible for jury service except those who:

1. Are less than eighteen years of age; or

2. Are not citizens of the United States; or

3. Are not residents of the jurisdiction in which they have been summoned to serve; or

4. Are not able to communicate in the English language and the court is unable to provide a satisfactory interpreter; or

5. Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision.

B. Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, marital status, sexual orientation, gender identity, gender expression or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

PRINCIPLE 6 – COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL

A. Courts should provide orientation and preliminary information to persons called for jury service:

1. Upon initial contact prior to service;

2. Upon first appearance at the courthouse; and

3. Upon reporting to a courtroom for juror voir dire.
B. Orientation programs should be:

1. Designed to increase jurors' understanding of the judicial system and prepare them to serve competently as jurors;

2. Presented in a uniform and efficient manner using a combination of written, oral and audiovisual materials; and

3. Presented, at least in part, by a judge.

C. The court should:

1. Instruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it; and

2. Encourage the jurors to resist making decisions based on personal likes or dislikes or gut feelings.

D. Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.

1. The court should give preliminary instructions directly following empanelment of the jury that explain the jury's role, the trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.

2. The court should advise jurors that once they have been selected to serve as jurors or alternates in a trial, they must consider only the applicable law and evidence presented in court, and must refrain from communicating about the case with anyone outside the jury room until the trial is over and the jury has reached a verdict. This instruction should explain that the ban on outside communication is broad, encompassing not only oral discussions in person or by phone, but also communications through e-mails, texts, Internet postings, blog postings, social media websites like Facebook or Twitter, and any other method for sharing information about the case with another person or gathering information about the case from another person. At the time of such instructions in civil cases, the court may inform the jurors about the permissibility of discussing the evidence among themselves as contemplated in Standard 13 F. The court should also instruct jurors that they do not themselves investigate the facts of the case, the law governing the case, or the parties, lawyers, or judges in the case. The court should explain that a juror’s duties to avoid communicating about the case outside the jury room and to refrain from independent
investigations about the case are extremely important, and that the court has the authority to impose serious punishment upon jurors who violate those duties.

3. The court should give such instructions during the course of the trial as are necessary to assist the jury in understanding the facts and law of the case being tried as described in Standard 13 D. 2.

4. Prior to deliberations, the court should give such instructions as are described in Standard 14 regarding the applicable law and the conduct of deliberations.
GENERAL INFORMATION FORM

Submitting Entities: Commission on the American Jury and Diversity & Inclusion 360 Commission

Submitted By: Hon. Christopher Whitten, Chair, Commission on the American Jury
Eileen M. Letts and David B. Wolfe, Co-Chairs, Diversity & Inclusion 360 Commission

1. Summary of Resolution(s). The resolution asks the House to amend the *ABA Principles for Juries and Jury Trials* Principles 2(B) and 6(C).

2. Approval by Submitting Entity. The change to the Principles was approved by an email vote of the members of both the 360 Commission and the Commission on the American Jury.

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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The Resolution asks the House of Delegates to amend the *ABA Principles for Juries and Jury Trials* adopted previously by the House of Delegates at the ABA Midyear Meeting in 2005 and amended by the House of Delegates at the ABA Midyear Meeting in 2013.

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) N/A.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The 360 Commission intends to create curriculum and programming for training judges based on the Principles for dissemination to all state and federal trial judges and judicial educators. The Commission on the American Jury will disseminate the amended and new principles to all the courts that currently use the ABA Jury Principles; will disseminate them to the Conference of Chief Justices; and will post the principles to their website.
8. **Cost to the Association.** (Both direct and indirect costs)  
   N/A

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

10. **Referrals.**

    **Commission Partners:**  
    Judicial Division  
    Section of Criminal Justice  
    Section of Litigation  
    Section of Tort Trial and Insurance Practice  

    **Other Sections and Divisions:**  
    Administrative Law and Regulatory Practice  
    Antitrust Law  
    Business Law  
    Civil Rights and Social Justice  
    Dispute Resolution  
    Environment, Energy and Resources  
    Family Law  
    Government and Public Sector Lawyers Division  
    Health Law  
    Intellectual Property Law  
    International Law  
    Labor and Employment Law  
    Law Practice Management  
    Law Student Division  
    Section of Litigation  
    Public Contract Law  
    Public Utility, Communications and Transportation Law  
    Real Property, Trust and Estate Law  
    Science and Technology Law  
    Senior Lawyers Division  
    Solo, Small Firm and General Practice Division  
    State and Local Government Law  
    Taxation  
    Tort Trial Insurance Practice Section  
    Young Lawyers Division  
    Affordable Housing and Community Development Law  
    Air and Space Law  
    Communication 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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Judge Christopher Whitten  
125 W Washington St.  
Phoenix, AZ 85003  
(602) 372-1164  
whitten@superiorcourt.maricopa.gov

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 Christopher Whitten  
125 W Washington St.  
Phoenix, AZ 85003  
(602) 372-1164  
whitten@superiorcourt.maricopa.gov
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The Resolution amends two of the 19 *ABA Principles for Juries and Jury Trials* previously passed by the House in 2005 and amended in 2012. The first amendment, which applies to Principle 2, amends the list of those groups which should not be excluded from jury service to include marital status, gender identity and gender expression. The second amendment, which applies to Principle 6, recommends that jurors be educated as to implicit bias and how to avoid such bias in the decision making process.

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

   1. The exclusion of potential jurors based on marital status, gender identity and gender expression.
   2. The impact of implicit bias on the decision making process.

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

   These amendments are needed to address critical issues that have arisen since the Principles were first drafted and last amended. The first amendment clarifies that eligibility for jury service should not be denied or limited on the basis of marital status, gender identity and gender expression, confirming that no diverse group should be excluded from access or participation in the justice system. Being able to fully participate as a juror enhances public support for and confidence in the justice system. The second amendment relays that exercising fairness and equality in the court system is of critical importance to lawyers, judges, jurors and staff. Jurors and judges must be held to an even higher standard due to the significant importance of their decisions on the lives and future of all consumers of the justice system. This amendment requests that an important educational instruction be given to juries regarding what implicit bias is and how it might affect outcomes and decisions in the courtroom.

4. **Summary of Minority Views**

   None are known.
RESOLUTION

RESOLVED, That the Association policies set forth in Attachment 1 to Report 400A, dated August 2016, 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.
26. Patent Infringement
   Section of Intellectual Property Law
   February 2006 (Report 303 - 06MM303)

   RESOLVED, that the American Bar Association supports the granting of a
   permanent injunction enjoining a patent infringer from future infringement of a
   patent that has been adjudicated to be valid, enforceable and infringed, in
   accordance with the principles of equity on such terms as the court deems
   reasonable;

   FURTHER RESOLVED, that the Association opposes consideration of the
   extent to which the patent owner has practiced the patented invention or has
   licensed others to do so, except when determining whether grant of a permanent
   injunction would adversely affect public safety, public welfare, the national
   security, or the like.

48. Discretionary Review by the Supreme Court
   Judicial Division
   August 2006 (Report 116 - 06AM116)

   RESOLVED, That the American Bar Association urges Congress to
   amend 28 U.S. C. §1259(3) and (4) to permit discretionary review by the
   Supreme Court of the United States of decisions rendered by the United States
   Court of Appeals for the Armed Forces that deny petitions for review of courts-
   martial convictions or deny extraordinary relief.

53. Darfur Peace Accord
   Section of Litigation
   August 2006 (Report 120B - 06AM120B)

   RESOLVED, That the American Bar Association urges the United States
   Government to support the Darfur peace accord signed on May 5, 2006; and to
   support the work of the International Criminal Court in investigating and
   prosecuting the individuals responsible for crimes in Darfur, Sudan, the
   humanitarian work of the United Nations in Darfur, Sudan, the peacekeeping
   efforts of the African Union, and any eventual peacekeeping efforts of the United
   Nations in Darfur, Sudan.

   FURTHER RESOLVED, That the American Bar Association urges the
   United States Congress to enact and the President of the United States to sign
   into law legislation which would:
(1) block assets and restrict visas of any individual the President of the United States determines is complicit in, or responsible for, acts of genocide, war crimes, or crimes against humanity in Darfur, including the family members or any associates of such individual to whom assets or property of such individual was transferred on or after July 1, 2002;

(2) authorize the President of the United States to provide assistance to support the African Union Mission in Sudan;

(3) encourage the Secretary of State to designate the Janjaweed militia as a foreign terrorist organization under section 219 of the Immigration and Nationality Act; and

(4) encourage the President of the United States to appoint a Presidential Envoy for Sudan to steward efforts to implement the Comprehensive Peace Agreement for Sudan, bring stability and peace to the Darfur region, address instability elsewhere in Sudan and northern Uganda, and pursue a truly comprehensive peace throughout the region.

FURTHER RESOLVED, That the American Bar Association urges the President of the United States to take action to implement such legislation immediately upon its enactment into law.
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 2006.

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 72 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 34 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 2016
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 complied and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.

4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.

5. Those policies which are not archived will be subject to review every ten years thereafter.

6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.

7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.
FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.
APPENDIX B

The entities below reviewed and recommended disposition of the policies contained in the report:

Sections and Divisions

Administrative Law and Regulatory Practice
Antitrust Law
Business Law
Civil Rights and Social Justice
Criminal Justice
Dispute Resolution
Family Law
Health Law
Intellectual Property Law
International Law
Judicial
Legal Education and Admission to the Bar
Litigation
National Conference of Federal Trial Judges
Science and Technology Law
Solo, Small Firm and General Practice
Taxation
Tort Trial and Insurance Practice
Young Lawyers

Standing Committees

Legal Aid and Indigent Defendants
Medical Professional Liability
Paralegals
Pro Bono and Public Service
Professional Discipline
Public Education
Racial and Ethnic Diversity in the Profession

Special Committees and Commissions

Domestic and Sexual Violence
Hispanic Rights and Responsibilities
Homelessness and Poverty
Law and Aging
State, Local and Territorial Bar Associations

Colorado Bar Association
New York State Bar Association
Tennessee Bar Association

Individuals

ABA President Michael S. Greco
Appendix C

Retained Policies

1. Revisions to the Rules of Procedures for Approval of Law Schools
   Section of Legal Education and Admission to the Bar
   February, 2006

2. Approval and Reapproval of Legal Assistant Education Programs
   Standing Committee on Paralegals
   February, 2006

3. Discrimination on the Basis of Sexual Orientation in Foster Care Placement
   Section of Family Law
   February, 2006

4. Opposition to Limits on Recoverable Damages in Medical Malpractice Claims
   Standing Committee on Medical Professional Liability
   February, 2006

5. Model Rules of Professional Conduct 6.1
   Standing Committee on Pro Bono and Public Service
   February, 2006

6. State and Federal Tort-Based Asbestos Related Claims
   Tort Trial and Insurance Practice
   February, 2006

7. Compensation of an Asbestos-Related Inquiry Subject to Tort-Based Claims
   Tort Trial and Insurance Practice Section
   February, 2006

8. Upfront Financing in Tort-Based Asbestos Related Claims
   Tort Trial and Insurance Practice Section
   February, 2006

   Tort Trial and Insurance Practice Section
   February, 2006
10. Right to Counsel for all Persons in Removal Proceedings
   Special Committee on Hispanic Legal Rights and Responsibilities
   February, 2006

11. Safe Immigration System
   Special Committee on Hispanic Legal Rights and Responsibilities
   February, 2006

12. Due Process in all Immigration Application and Appeals
   Special Committee on Hispanic Legal Rights and Responsibilities
   February, 2006

13. Efficient System for Immigration Laws
   Special Committee on Hispanic Legal Rights and Responsibilities
   February, 2006

14. Detention of Non-Citizens Immigration Removal Proceedings
   Special Committee on Hispanic Legal Rights and Responsibilities
   February, 2006

15. Access to Legal Protection for Refugees, Asylum Seekers and Torture Victims
   Special Committee on Hispanic Legal Rights and Responsibilities
   February, 2006

16. Public Benefits for Victims and Family Members of Human Trafficking
   Special Committee on Hispanic Legal Rights and Responsibilities
   February, 2006

17. Equal Justice for Persons of African Descent Living in the United States
   Section of Civil Rights and Social Justice
   February, 2006

18. Native Hawaiians Governing Entity
   Section of Civil Rights and Social Justice
   February, 2006

19. Federal Consent Decrees
   Section of Dispute Resolution
   February, 2006
20. Unsworn Declarations  
Section of International Law  
February, 2006

21. Statement of Core Principles of the Legal Profession  
ABA President Michael S. Greco  
February, 2006

22. Treatment of Federal Agency Records  
Section of Administrative Law and Regulatory Practice  
February, 2006

23. Pardon Power  
Criminal Justice Section  
February, 2006

24. Filing of Electronic Documents in Bankruptcy Courts  
Solo, Small Firm and General Practice Division  
February, 2006

25. U.S. President to Abide by the U.S. Constitutional System of Checks and Balances  
Tennessee Bar Association  
February, 2006

27. Approval of the University of St. Thomas School of Law  
Section of Legal Educational and Admission to the Bar  
February, 2006

28. Provisional Approval of the University of LaVerne College Of Law  
Section of Legal Educational and Admission to the Bar  
February, 2006

29. Provisional Approval of the Liberty University School of Law  
Section of Legal Educational and Admission to the Bar  
February, 2006
30. Federal Government Response in Natural Disasters  
   Tort Trial and Insurance Practice Section  
   February, 2006

31. Government Services for at Risk Youth and their Caretakers  
   Colorado Bar Association  
   August, 2006

32. Paralegal Education Programs  
   Standing Committee on Paralegals  
   August, 2006

33. Model State Administrative Tax Tribunal Act  
   Section of Taxation  
   August, 2006

34. Civic Education  
   Standing Committee on Public Education  
   August, 2006

35. Rules 1 and 10 of the Model Rules for Lawyers’ Funds for Client Protection  
   Standing Committee on Client Protection  
   August, 2006

36. Development of Transparency Disciplines on Domestic Regulation  
   Standing Committee on Professional Discipline  
   August, 2006

37. Standards for Approval of Law Schools and the Interpretations of the Standards  
   Section of Legal Education and Admission to the Bar  
   August, 2006

38. Black Letter ABA Criminal Justice Standards on DNA Evidence  
   Criminal Justice Section  
   August, 2006

39. Homeless Court Programs  
   Commission on Homelessness and Poverty  
   August, 2006
40. Definition of Homeless Person
Commission on Homelessness and Poverty
August, 2006

41. Protocols and Standards of Care for Treatment of Drugs and Alcohol Abuse
Health Law Section
August, 2006

42. Domestic Violence in Civil Protection Order Statutes
Commission on Domestic and Sexual Violence
August, 2006

43. Standards for the Provision of Civil Legal Aid
Standing Committee on Legal Aid and Indigent Defendants
August, 2006

44. Legal Counsel as a Matter of Right at Public Expense for Low Income Persons
Business Law Section
August, 2006

45. Principles of a State System for the Delivery of Civil Legal Aid
Business Law Section
August, 2006

46. Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases
Young Lawyers Division
August, 2006

47. Courthouse Rental Cost
National Conference of Federal Trial Judges
August, 2006

49. Attorney Discipline Amendments to the Federal Rules of Bankruptcy Procedure
Business Law Section
August, 2006

50. Guidelines to Allow Pro Bono Legal Service by Qualified, Retired or Inactive Lawyers
Commission on Law and Aging
August, 2006
51. Amendment of the Lobbying Disclosure Act of 1995
Section of Administrative Law and Regulatory Practice
August, 2006

52. Protection of Discovery in Accordance of Attorney-Expert Communications
Section of Litigation
August, 2006

54. Alternatives to Mandatory Minimum Billing Requirements
Section of Litigation
August, 2006

55. Inadvertent Disclosure of Materials Protected by the Attorney-Client Privilege
Section of Litigation
August, 2006

56. Pro Bono Policies and Procedures
Standing Committee on Pro Bono and Public Service
August, 2006

57. Pro Bono Disclosure Requirements for Law School Recruiters
Standing Committee on Pro Bono and Public Service
August, 2006

58. Pro Bono Representation of Indigent Parties in Civil Cases
Standing Committee on Pro Bono and Public Service
August, 2006

59. Policies and Procedures Relating to Capital Punishment and Mental Illness
Section of Civil Rights and Social Justice
August, 2006

60. Discrimination Based on Gender Identity or Expression in Employment, Housing
and Public Accommodations
Section of Civil Rights and Social Justice
August, 2006

61. Hague Convention on Choice of Court Agreements
Section of International Law
August, 2006
62. Migration and Agreements Governing the Flow of Workers  
Section of International Law  
August, 2006

63. Revisions to the Model Rule for the Licensing and Practice of Foreign Legal Consultants  
Section of Legal Education and Admission to the Bar  
August, 2006

64. Revisions to the Standards for Approval of Law Schools and the Interpretations  
Section of Legal Education and Admission to the Bar  
August, 2006

65. Preservation of the Attorney-Client Privilege and the Work Product Doctrine  
Tennessee Bar Association  
August, 2006

66. Employee's Fifth Amendment Rights against Self-Incrimination  
New York State Bar Association  
August, 2006

67. United Nations Convention on the Use of Electronic Communications in International Contracts  
Section of Science and Technology Law  
August, 2006

68. Presidential Signing Statements  
Criminal Justice Section  
August, 2006

69. Patent Eligibility  
Section of Intellectual Property Law  
August, 2006

70. Definition of Conspiracy in Violation of the Sherman Act  
Section of Antitrust Law  
August, 2006
71. Statutory Office of Inspector General for Judicial Branch
   Judicial Division
   August, 2006

72. Problems Facing Minorities within Pipeline to the Profession
   Commission on Racial and Ethnic Diversity in the Profession
   August, 2006
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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution archives Association Policies 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 1996 which were previously considered for archiving but retained as set forth in Attachment 1 to Report 400B dated August 2016, 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. Certification Programs  
   Standing Committee on Specialization  
   February, 1996

13. Judicial Retirement Plans  
   Judicial Division  
   February, 1996

14. Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means  
   Standing Committee on Pro Bono and Public Service  
   February, 1996

31. Habeas Corpus Relief  
   Standing Committee on Armed Forces Law  
   August, 1996

37. Universal Citation System in Courts  
   Section of Litigation  
   August, 1996

43. Certification Programs  
   Standing Committee on Specialization  
   August, 1996
12. Certification Programs  
Standing Committee on Specialization  
February, 1996 Report 109

RESOLVED, That the American Bar Association accredits the following designated specially certification programs for lawyers: Estate Planning Law Specialist program of the National Association of Estate Planners & Councils of Marietta, Georgia.

13. Judicial Retirement Plans  
Standing Committee on American Judicial System  
February, 1996 Report 110

Resolved, That the American Bar Association supports enactment of federal legislation similar to H. R. 1314, 104th Congress, which excepts state judicial retirement plans from the non-discrimination rules of sections 401(a)(3), 401(a)(4) and 410(b) of the Internal Revenue Code of 1986; and

Further Resolved, That any legislation which excepts governmental plans generally from the non-discrimination rules of section 401(a)(3), 401(a)(4) and 410(b) of the Internal Revenue Code of 1986 should also except state judicial retirement plans.

14. Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means  
Standing Committee on Pro Bono and Public Service  
February, 1996 Report 111

Resolved, That the American Bar Association adopts "Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means," dated February 1996, including the Introduction; and

Further Resolved, That the American Bar Association recommends appropriate implementation of these Standards by entities providing civil pro bono legal services to persons of limited means.

31. Habeas Corpus Relief  
Standing Committee on Armed Forces Law  
August, 1996 Report 101B

RESOLVED, that the American Bar Association urges that military capital prisoners be provided with the same opportunity for the assistance of counsel in seeking federal post-conviction habeas corpus relief as is now provided by federal law for persons sentenced to death in the civilian courts of this country.
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:

   A. 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, 22F.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.
Business Bankruptcy Law and Consumer Bankruptcy Law programs of the American Bankruptcy Board of Certification of Alexandria, Virginia; Business Bankruptcy and Creditors' Rights programs of the Commercial Law League of America Academy of Commercial and Bankruptcy Law Specialists of Chicago, Illinois; and Civil Trial Advocacy and Criminal Trial Advocacy programs of the National Board of Trial Advocacy of Boston, Massachusetts.
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 1996 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 51 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 28 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 2016
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.
11. Educational Programs  
   Commission on Domestic Violence  
   February, 1996

15. Standards of Practice for Representing a Child in Abuse and Neglect Cases  
   Section of Family Law  
   February, 1996

16. IRS  
   Section of Family Law  
   February, 1996

17. Social Security  
   Section of Family Law  
   February, 1996

18. Federal Asset Forfeiture Laws  
   Criminal Justice Section  
   February, 1996

19. Terminal Ill Inmates  
   Criminal Justice Section  
   February, 1996

20. Access to Justice  
   Tort Trial and Insurance Practice Section  
   February, 1996

21. Social Security  
   Commission on Law and Aging  
   February, 1996

22. Independence of the Judiciary  
   Section of Litigation  
   February, 1996

23. International Monetary Fund  
   Section of International Law  
   February, 1996

24. Model Rules for Lawyer Disciplinary Enforcement  
   Philadelphia Bar Association  
   August, 1996
25. Discrimination
   King County Bar Association
   August, 1996

26. Term Limits
   State Bar of Nevada
   August, 1996

27. Amendment to Standard 405 School Working Conditions
   Illinois State Bar Association
   August, 1996

28. Amendment to Standard 302(d) Require Schools to offer Live Client Experiences
   Illinois State Bar Association
   August, 1996

29. Bar Associations to Monitor and Implement New Codifications
   Illinois State Bar Association
   August, 1996

   Commission on Domestic Violence
   August, 1996

32. Elder Abuse
   Commission on Law and Aging
   August, 1996

33. Approval and Reapproval of Legal Assistant Education Programs
   Standing Committee on Paralegals
   August, 1996

34. Federal Prosecutorial Agency
   Criminal Justice
   August, 1996

35. Correctional Custody
   Criminal Justice
   August, 1996

36. Model Rule for Continuing Legal Education
   Standing Committee on Continuing Legal Education
   August, 1996
38. Bankruptcy Judge Reappointments
   Standing Committee on American Judicial Systems
   August, 1996

39. Terminally Ill Prisoners
   Section of Civil Rights and Social Justice
   August, 1996

40. Elimination of exploitation of Persons under the age of eighteen (18)
   Young Lawyers Division
   August, 1996

41. Waiting Room for Children in Courthouses
   Young Lawyers Division
   August, 1996

42. Counseling for Child Victims of Abuse
   Young Lawyers Division
   August, 1996

44. National Investments
   Section of International Law
   August, 1996

45. Amendments to the Bankruptcy Code
   Section of Business Law
   August, 1996

46. Workplace Guidelines for Employees of Domestic Violence
   Commission on Domestic Violence
   August, 1996

47. Recodification of American Bar Association Standards of the Approval of Law Schools
   Section of Legal Education and Admission to the Bar
   August, 1996

48. Approval of Regent University School of Law
   Section of Legal Education and Admission to the Bar
   August, 1996

49. Amendment to Rule 34(d) of the Rules of Procedure
   Section of Legal Education and Admission to the Bar
   August, 1996
50. Approval of Seattle University School of Law  
    Section of Legal Education and Admission to the Bar  
    August, 1996

51. Provisional Approval to Thomas Jefferson School of Law  
    Section of Legal Education and Admission to the Bar  
    August, 1996
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 1996 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 28 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 1996 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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