

Resolutions with Reports to the House of Delegates

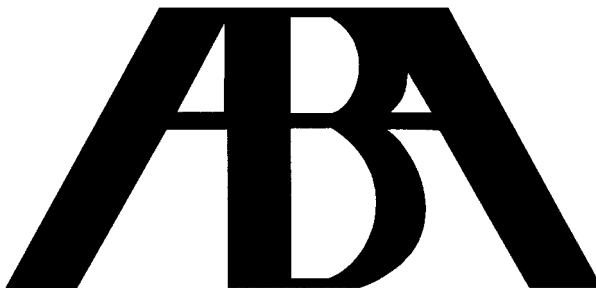
AMERICAN BAR ASSOCIATION



2017 MIDYEAR MEETING • MIAMI, FLORIDA • FEBRUARY 6, 2017

**Resolutions with Reports
to the House of Delegates**

AMERICAN BAR ASSOCIATION



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RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES

Hyatt Regency Miami Hotel
James L. Knight Center, 3rd Floor
Miami, Florida

February 6, 2017

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Resolutions with Reports numbered 10A, 100 through 118 and 300 can be found in this book. Additional Resolutions with Reports submitted by state and/or local bar associations will be numbered in the "10" series and additional late Resolutions with Reports submitted 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/2017-miami-midyear-meeting.html (click on Informational Reports).

*This report can be found with the Blue Late Report and Supplemental Materials to be distributed at the opening session of the House of Delegates meeting.

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*This resolution with report was received after the November 16 filing deadline. Pursuant to §45.5 of the House Rules of Procedure, this late resolution will be considered by the House of Delegates if the Committee on Rules and Calendar recommends a waiver of the time requirement and the recommendation is approved by a two-thirds vote of the delegates voting.

**PRELIMINARY CALENDAR
of the
HOUSE OF DELEGATES
of the
AMERICAN BAR ASSOCIATION**

**Hyatt Regency Miami Hotel
James L. Knight Center, 3rd Floor
Miami, Florida**

February 6, 2017

All sessions of the House of Delegates will be held on Monday, February 6, 2017, in the James L. Knight Center, 3rd Floor, at the Hyatt Regency Miami Hotel, in Miami, Florida. It is anticipated that the House meeting will begin at 8:30 a.m., and will adjourn no later than 5:30 p.m. when the House has completed its agenda.

The Final Calendar of the House of Delegates meeting will be placed on House members' desks at the opening session on Monday morning, February 6. Sections, committees, delegates, affiliated organizations and bar associations, which have submitted Resolutions with Reports, oral information or late reports authorized by the Committee on Rules and Calendar, will be calendared.

The index, which appears at the end of this book, will assist House members in finding reports received by the November 16, 2016 filing deadline. Resolutions with Reports numbered 10A, 100 through 118, and 300 appear in this book. Informational Reports can be found on the ABA's website at http://www.americanbar.org/groups/leadership/house_of_delegates/2017-miami-midyear-meeting.html (*click on Informational Reports*).

Any late Resolutions with Reports, those received after November 16, 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,
Deborah Enix-Ross, Presiding**

Presentation of Colors

Invocation

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

Approval of the Roster

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

Approval of the Final Calendar

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

Approval of the Summary of Action

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

5. Statement by the President
Linda A. Klein, Georgia

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 Resolutions with Reports of Sections, Committees and Other
Entities

100-118

Resolutions with Reports

300

Late Resolutions with Reports

ADJOURNMENT

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2016-2017
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Tenth District	2019 David S. Houghton, Omaha, NE
Eleventh District	2019 Hon. Leslie Miller, Tucson, AZ
Twelfth District	2017 Harry Truman Moore, Paragould, AR
Thirteenth District	2019 Maryann Elizabeth Foley, Anchorage, AK
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Fifteenth District	2018 A. Vincent Buzard, Pittsford, NY
Sixteenth District	2018 Hon. William C. Carpenter, Jr., Wilmington, DE
Seventeenth District	2018 Alan Van Etten, Honolulu, HI
Eighteenth District	2019 Paula E. Boggs, Sammamish, WA

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**REPORT OF THE
ABA PRESIDENT
TO THE
HOUSE OF DELEGATES**

The report of the President will be presented at the time of the Midyear Meeting of the House of Delegates.

**REPORT OF THE TREASURER
TO THE
HOUSE OF DELEGATES**

To permit the presentation of current financial data, the written report of the Treasurer will be distributed at the time of the Midyear Meeting of the House of Delegates.

**REPORT OF THE EXECUTIVE DIRECTOR
to the
HOUSE OF DELEGATES**

(submitted December 8, 2016)

This report highlights American Bar Association activities from May 26, 2016 to December 8, 2016.

Introduction

After I graduated law school, one of the first things I hung on my wall was my American Bar Association membership certificate. I was proud to be a member of our national professional association, an organization with a long and storied history in the defense of the rule of law and pursuit of justice. I know many of you had similar thoughts after first getting your ABA certificate in the mail. That's one of the reasons you stepped up to become leaders of our Association -- to be part of something greater than ourselves ... to change our legal system and profession for the better.

Thanks to our members, staff, and volunteers -- here in America and in more than 100 countries -- the ABA makes a real and tangible difference no other organization approaches. Whether it's pro bono work for those in need, assisting developing nations advance the rule of law, or fighting bias in the legal system, the ABA has touched the lives of countless people around the world. In my formal remarks to the House of Delegates at the Midyear Meeting in Miami, I will share a few of the ABA success stories with you.

The fact ABA provides such indispensable and unparalleled work underscores the urgency of addressing the major financial challenges we face. In recent years, we have spent far too much money from our investment portfolio to fund our activities. The money was spent for important purposes, but it has helped to reduce our investment balance by \$34 million, more than 10 percent, over the last two years alone. This cannot continue without threatening the long-term financial stability of the ABA.

The driving force behind our fiscal challenges remains declining dues revenue and the lack of meaningful gains from non-dues revenues sources. Between Fiscal Year 2007 and FY 2016, dues revenue dropped about \$12 million. This slide will likely continue: the ABA projects we will see less than \$58 million in dues revenues at the end of FY 2017 compared to about \$59 million the previous year.

A bright spot has been our substantial success limiting spending. If the ABA had kept up with inflation over the last decade, our general operations expense budget would be about \$30 million more than it is. We continue to make progress in this area. This fiscal year, we project our final general operations spending will be \$99.7 million -- \$3.3 million less than FY 2016, and we are budgeting for a substantial reduction again next year.

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As successful as we've been keeping costs down, it hasn't been enough. While we have several promising plans in place to increase our revenue collection, until they show results we'll need to look at our current spending. This will mean making tough decisions, since about 85 percent of our general operations expenses consist of staff and space-related costs.

One way the ABA hopes to achieve significant savings is through reducing our space at the Association's 321 North Clark Street Headquarters in Chicago. Discussions continue with the building's owners to gauge interest in taking over one or more of the ABA's floors. The lease runs out in 2024, which gives us ample time to reach an agreement that would yield major cost-savings from the reduction of our footprint. Whatever course of action we take will ensure we have the necessary space to conduct our vast member service operations, continue our global advocacy outreach, and provide an appropriate, professional work environment for our staff.

The ABA Board of Governors realizes and acknowledges the fiscal challenge before us. At its November 2016 meeting in Atlanta, the Board agreed on seven criteria to be used to determine how we fund the Association's programs:

- Does it serve existing members, retain members, or attract new members?
- Does it serve the goals of the Association?
- Does it conform with a long-range plan?
- Is it a duplication or redundant of an existing one?
- Is it a successful program, based upon data and other evidence?
- Does it have other possible sources of funding than ABA general operations revenue funds?
- Does it stress the ABA's uniqueness -- are we the only organization that can provide it?

Also at that meeting, the Board tasked ABA staff to come up with a list of possible actions that would create \$10 million in savings in FY 2018. I am currently working with senior staff to come up with options that will enable us to meet that number without jeopardizing the ABA's unique role as the voice of the legal profession. The Board will consider these recommendations at the 2017 Midyear Meeting in Miami.

The financial situation before us is unprecedented. It's going to take some tough and perhaps even painful decisions to resolve. But the cost of taking no action is even higher. Our ability to serve our members -- and advance justice and the rule of law around the world -- depends on a fiscally sound ABA that can adequately fund its priorities.

We are all in this together. I look forward to your feedback as we embark on a collaborative and transparent process involving volunteer leaders, members, and staff to address our fiscal challenges and put the ABA on solid financial ground in the years ahead.

Membership

At the end of November 2016, our membership stood at 415,113 -- a 3.7 percent increase over the same time last year. This was driven by remarkable, record-setting growth in our law

student members, who currently number almost 100,000. We also saw a 5.1 percent increase in our Associate members to 16,759, and while lawyers members decreased 4.5 percent to 298,977.

We are committed to programs that will help to increase and retain members. One vehicle is our new ABA insurance program, which offers very tangible benefits we expect to help attract and retain lawyers, associates, and students. In general, the savings members can expect to achieve from high-quality and competitive policies are well above what they pay in Association dues. Since its soft launch in April, we have revealed more than 10 types of products, most recently pet, long term care, auto, and home insurance. During the first quarter of 2017, we expect to expand that number to approach 20 products that cover such additional areas as ID theft, business overhead expenses, and Medicare supplement insurance.

Since our Annual Meeting in San Francisco, we have increased publicity of the insurance program. On September 8, President Linda Klein sent an email announcement to members, followed by direct mail pieces and a September 13 press release highlighting the program. We have also prominently featured our insurance offerings on the ABA's homepage and throughout the site. The website has thus far been viewed more than 65,000 times since its launch.

We have several initiatives at various stages of development which will not only generate revenue for the ABA, but will also help our members and the profession. One is ABA Legal Career Central, our online jobs board aimed at connecting legal professionals seeking work with potential employers. This year, we made significant upgrades and improvements to the site -- our goal is to make it the best in the country so lawyers, law students, paralegals, and anyone else looking for a job in the profession knows to look at our website first. Among the enhancements:

- **Responsive design** that now uses the latest technology in a mobile-friendly design that is flexible and offers a seamless user-experience
- **Free resume evaluation** is offered to anyone who uploads a resume to the site
- **Simple sign-on** so ABA members can easily access the jobs board using their ABA login
- **Career resources** that give job seekers a wide-range of information, from professional development tips to determining fields of law that best match applicants' interests

Since upgrading ABA Legal Career Central earlier this year, we've seen a major increase in the number of jobs posted. Two years ago, fewer than 200 jobs were listed. The latest postings include more than 1,450 jobs, and we anticipate even greater growth in the future. This success has the added benefit of increasing ABA revenues related to the site. Over the past several years, the job board brought in well under \$100,000 annually. Based on revenues from the first three months since the upgrade, we project it will generate over \$200,000 in FY 2017.

To help guide our job board in the future, Mark Weber now serves as Chair of the ABA Legal Career Central Board. He has more than 20 years of experience counseling and advising students and attorneys about their careers. Mark is currently the Assistant Dean for Career Services at Harvard Law School, having earlier performed the same duties at the University of Illinois College of Law. He is especially well suited to help us build on the job board's recent growth and enhancements.

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We are expanding our efforts to help solo and small firm lawyers get the tools they need to run their practices. ABA Blueprint launched in early November 2016, with the ABA moving swiftly to deliver a product that was conceived in early 2016. The application is designed to solve a problem that President Linda Klein identified during her listening tours: Solo and small firm practitioners all over the country are too often overwhelmed by the number of products and services offered, and they want expert advice on what to use for a given problem. The project has two goals: to increase value to existing ABA members and to convert more solo/small firm lawyers to become ABA members by displaying unquestionable value.

ABA Blueprint helps users find the products and services they need to run their firm in an easy-to-use, streamlined format. The application is available to all solo/small firm users, with special features for ABA members:

- Discounts on the products and services, including some very unique discounts, like 25 percent off Clio subscriptions and a new Solo Plan offered by Ruby Receptionists and only available on Blueprint
- Live chat to answer quick questions
- Ability to receive a free 30-minute consultation from an independent practice management expert. Since the launch, the application has been featured in several legal technology blogs and has received much attention on social media.

Since its recent launch, the application has been visited by more than 3,000 unique users and the most clicked link is the one to become an ABA member. We anticipate these numbers will only continue to grow, given how the most recent statistics show 62 percent of all private practitioners are in solo or small firms with five lawyers or less.

Our Group membership and Full Firm programs continue to grow and bring new members into the Association. As of November 25, Group membership is at 70,735 which is an increase of .8 percent year-to-year, and FY 2017 dues revenue collection is up 16.9 percent from this time last year at \$17,862,509.

ABA Leverage, which offers meeting planning services, has now been operating for two years. To date, it has worked with 30 clients comprised of firms, legal associations, and law schools. Actual booked business through 2020 should realize \$464,500 in commissions and Leverage is actively working on another \$136,000 in commissions to be booked by January 2017. Leverage has obtained more than \$1.7 million in projected savings and value-added concessions for clients. This is an average savings to each Leverage client of about 10 percent per contract.

Our ABA Advantage program continues to provide value to members, saving them more than \$10 million over the past year in discounted products and services. With revenue from about 20 companies, ABA Advantage also generates approximately \$6 million in marketing fees, royalties, and sponsorships each year. The newest additions to the program are: BARBRI financial and e-discovery training and certification for lawyers, and Deluxe business checks and supplies.

Through August of calendar year 2016, ABA members spent nearly \$340 million with ABA Advantage program partners. Bank of America, Hertz, Mercedes, and Ricoh each enjoyed member sales of at least \$8 million.

ABA Emails

In 2015, the ABA sent out about 300 million emails -- double what it had been five years earlier. Instead of helping us communicate with members and others, this only caused our message to be diluted as inboxes are inundated and ABA emails are views as spam. Clearly, this is unacceptable. Last year, I appointed a staff task force to study the issue. In addition to staff members, we invited more than 100 member liaisons, mostly from sections, divisions, and forums, to participate in the task force's work.

The task force made a number of recommendations, and we are acting upon them aggressively. In May 2016, we hired an Email Manager to provide training and guidance on the most effective ways to communicate via email. We are seeing positive results:

- Development of new email templates which have been fully tested for rendering on all platforms and mobile devices, providing a much better user experience
- Implementation of new email policies for the ABA Journal expected to result in 23 million fewer emails sent every year
- Limits on the number of recipients ABA entities can send emails to at one time
- Monitoring of member feedback to better track and address complaints to the Call Center involving ABA emails
- Project planning that has helped one entity, the Tort Trial and Insurance Practice Section, reduce its email volume last quarter from 2.1 million to 1 million compared to the previous year
- Overall, ABA has sent about 127 million emails over the last six months, which already projects to reduce the number of ABA messages distributed by 16 percent

Another recommendation was the creation of an Email Policy Oversight Committee, made up of members and staff, to provide the Email Manager with suggestions on how to balance the competing needs of cost-effective communications with members with making sure they are not overwhelmed with email. We formed the Committee in December and it has begun working with the Email Manager to develop policies.

Center for Innovation

Technology and globalization are transforming the world around us, including the legal sector. The ABA is well suited to lead the efforts of the legal profession. In this era of change, we must work on innovative ways to improve how legal services are delivered and accessed.

The Center for Innovation officially began operations September 1, with two particular goals: To improve the practice of law and increase access to legal services. It will also demonstrate how we are embracing technological change and taking advantage of best modern

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practices. By taking a leading role in this area, the ABA will show the continuing relevancy of the Association. The Center will drive innovation in the justice system and the legal profession by serving as a resource for ABA members, maintaining an inventory of the ABA's innovation efforts and the efforts of the domestic and international legal services community, and operating a program of innovation fellowships to work with other professionals, such as technologists, entrepreneurs, and design professionals, to create models and improve the justice system.

The Center is off to a busy start. Four committees have been established: Programs and Projects; Fellows; Membership Benefits; and Events, Communication, and Outreach. It is developing a nationwide "Call for Project Proposals" competition to facilitate the development and implementation of projects that advance legal technology and improve access to justice. The Center is assisting the New York State Unified Court system with a court-annexed online dispute resolution pilot project to help resolve consumer debt cases more efficiently. It is developing a free, online legal checkup tool to help members of the public identify legal issues in specific subject areas and refers them to appropriate resources. The Center is also in partnership with Stanford University, CuroLegal, and leading national civil rights groups to launch a new comprehensive online application to assist the victims of hate crimes.

Other initiatives being developed by the Center include:

- An awards competition to recognize important innovation efforts
- Online learning opportunities for lawyers focusing on the effective use of technology to enhance the workplace
- Programming specifically designed to reach young lawyers, law students, and law schools
- Collaborations with ABA entities on innovative programs and projects
- A new membership program for the Center for Innovation that will provide a suite of benefits for both individuals and entities

ABA Website

Following the Board of Governor's approval of funding for the remainder of the website project on September 30, the ABA signed the Statement of Work with Code and Theory for the remainder of the project. Code and Theory is a highly-respected web design firm known for its prominent clients, including its work with the New York State government to update and modernize its website.

One of the top priorities has been the development of business protocols to operate the website, with strong inputs from content-producing entities. The new site will update both americanbar.org and shopABA.org sites. Our website team is committed to continue working with members and staff as we define business rules and processes and move from the Define Phase to the Design and Development Phases of the project. The team has already covered the homepage design and navigation for the new site, as well as the ABA Newsroom landing page and general article pages.

The Design and Development Phases are anticipated to be completed by September 2017, followed by a period of testing and website adjustments. We anticipate the new website rollout will occur in early 2018.

On November 18, the website team held a Website Redesign Open Forum for interested leaders and staff. Emails were sent to the Section Officers Conference (SOC), Standing Committee on Membership (SCOM), Standing Committee on Technology and Information Systems (SCOTIS), Standing Committee on Publishing Oversight (SCOPO), and Standing Committee on Continuing Legal Education (SCOCLE) to solicit those who wished to be included in the discussion. The initial presentation included an overview of the project, timing, process, and business objectives. The Forum had more than 100 attendees, including staff from both DC and Chicago and member leaders on teleconference call. Future forums will be held quarterly to update those interested on project progress. Additionally, the website overview was presented at a joint SCOPO/SCOCLE/SCOTIS meeting on November 17.

In conjunction with the website project, three business projects have been kicked off and teams are currently being formed to address business rules changes for the new website. The three projects are Quality Assurance Changes, Taxonomy (including Areas of Interest), and Pricing/Discounting. Developing protocols in these areas is critical. We are collaborating with all interested parties to a maximum extent.

On a more technical level, a proof-of-concept exercise is underway to vet the proposed ecommerce architecture. Discussions and planning with recommended software vendors is progressing.

Law Students

The ABA continues to build on its recently enhanced outreach to law schools. As of the end of November, 99,377 students (including graduates not yet admitted to practice) were members of the Association; at the end of FY 2014, that number was 38,700. Overall, 63 percent of law school students are now members of the Law Student Division.

We continue to give a priority to the Full School Enrollment Program, which gives law schools the opportunity to enroll all law students at one time. Currently, 83 law schools participate in the program. We expect many additional schools this year, in large part due to efforts of the ABA's Board of Governors. The Board has been challenged by President Klein to assist with outreach and work with schools that have not yet provided the ABA with a list of students.

The "Rep Rewards Program and microsite for use by ABA representatives on law school campuses launched in August. To complement the interactive microsite, ABA communicates with ABA Reps regularly through email and social media. ABA Reps recruit new members, host tabling events on campus, share membership on social media, and other recruitment activities to earn points which translate into great prizes such as one-on-one sessions with an experienced lawyer and Amazon gift cards.

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ABA Premium, offering law students an additional range of benefits for a \$25 annual fee, officially launched in August. Promotions dedicated to Premium include web ads on both the ABA and Law Student Division websites, social media posts and ads, dedicated emails using the ABA's new marketing automation tool, advertisements in the *Student Lawyer* magazine and e-newsletter, and a cover-onset dedicated to Premium benefits. As of the end of November, more than 9,500 law students have enrolled. More than 6,000 Premium enrollments have come as a direct result of the ABA's relationship with BARBRI Bar Review. Everyone signing up for BARBRI's Bar Review course has an opportunity to sign-up for ABA Premium and thereafter receive a \$250 discount on the very popular BARBRI program.

The ABA and BARBRI are also collaborating on an outreach project for students who have been admitted to law school but have not yet started their first year. The project is a scholarship contest called "One Lawyer Can Change the World" in which prospective law students record a video and write an essay on how they hope to change the world with their law degree. The winner will receive a \$10,000 scholarship, and second-place receives a \$5,000 scholarship. BARBRI conducted this campaign last year and received 1,500 entries.

Free Legal Answers

To assist the Association's mission to deliver justice to Americans, we launched ABAFreeLegalAnswers.org in August, providing income-eligible users the ability to pose civil legal questions to volunteer attorneys. The site will help to expand legal services for low-income individuals, who must meet income eligibility guidelines in each state. Forty-two states are participating or have committed to participate in the website. As of the end of November 2016, lawyers have responded to nearly 1,400 questions from clients since the launch.

Our national site administrator is working to support the network of state administrators and to refine the overall service in light of what we have learned during the initial phase. State administrators are actively recruiting pro bono attorneys. A publicity campaign has been launched in the initial states to increase public awareness.

Diversity

The ABA is very dedicated to our Goal III: eliminating bias and enhancing diversity both within and outside the Association. On the staff side, for the sixth consecutive year, in September we invited all staff to participate in our voluntary and anonymous Diversity and Inclusion Assessment Survey. About 70 percent of ABA staff (644 individuals) participated in the survey and many shared comments to add their perspectives on how to make our Association a more welcoming and inclusive place to work.

While the overall results are very similar to last year's, when viewed over a six-year period the ABA's progress is apparent. In 2011, the first year we conducted the survey, 42 percent of respondents reported that we retain a diverse workforce at all levels of the Association. This year, that number increased to 60 percent -- an all-time high. Likewise, the ABA has made progress with a welcoming environment for staff; 76 percent agreed with that statement this year compared to 66 percent in 2011.

In the survey, several staff members expressed concerns about implicit bias, and how it negatively impacts our attempts to foster a diverse, inclusive, and welcoming environment at the ABA and otherwise. Research shows clearly that everyone possesses a degree of unconscious bias that's influenced by our background, cultural environment, and past experiences.

With enhanced awareness and training, negative impacts of unconscious bias can be addressed and minimized. Accordingly, we initiated mandatory implicit bias training, including online quizzes and videos, for all staff members. The first phase of training will be concluded by the end of calendar year 2016, and various tools will be used beginning in January to reinforce the messages.

Another way we're seeking to improve is through our revamped "We Are the ABA" campaign to foster staff communications and interaction. Almost 80 staff members have submitted photos and short descriptions, which have been put on posters throughout the Chicago and DC offices. Staff member descriptions of their life interests, goals, and values demonstrate the rich diversity of our workforce. The campaign will also have a home on the ABA Intranet, including videos of staff members engaging in activities that inspire them.

In FY 2016, the ABA's, Center for Racial and Ethnic Diversity had several notable achievements thanks to former President Paulette Brown's signature initiative, the ABA Diversity and Inclusion 360 Commission. The Diversity Center had four full-time staff members providing significant staff support to develop and execute all of the 360 Commission's initiatives and thanks to their work, we were able to accomplish them while saving tens of thousands of dollars in the process through staff consolidation and other cost efficiencies. The initiatives include:

- **Diversity & Inclusion Portal:** Launched on June 6, the Portal is a highly visible online platform demonstrating the ABA's commitment to Goal III via a new custom layout that allows visitors easy access to more than three times the diversity and inclusion programs, resources, and information in less than half the space of the previous diversity web page. This includes Association-wide diversity and inclusion information never before available or compiled in one place, such as links to the diversity web pages for the Sections, Divisions, and Forums; information on fellowships, scholarships, toolkits, projects, and awards; upcoming CLE programs; and a Twitter feed with real-time posts on the latest diversity related topics and discussions.
- **Internal Diversity and Inclusion CLE Policy:** The Diversity Center provided substantive staff support and assisted with the draft proposal that was approved by the ABA Board of Governors for the ABA's new Diversity and Inclusion CLE Policy, which takes effect March 2017. The policy would have every CLE panel or program sponsored or co-sponsored by the ABA to meet the aspirations of Goal III by having the faculty include members of diverse groups as defined by Goal III (race, ethnicity, gender, sexual orientation, gender identity, and disability).

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- Model Diversity and Inclusion Plan: Serves as a template to assist ABA entities with developing new or reviewing and updating existing diversity plans tailored to their specific needs, missions, and governance structures
- National Pipeline Diversity Initiatives Directory: A new searchable, online database of educational pipeline programs across the country

Cyber Week

The ABA again featured “Cyber Week” following Thanksgiving to sell books and CLE at discounted rates on ShopABA.org. Prior to 2015, the ABA traditionally executed a one day Cyber Monday sale. The program was expanded last year to include more and diverse product offerings at special rates.

As in years past, Cyber Monday 2016 sold books and CLE products at a 40 percent discount. We expanded Tuesday’s offering to include both live and on-demand CLE products at a 25 percent discount. On Wednesday, Ankerwycke publishing titles were featured and sold at a 15 percent discount. A new offer was tested Thursday: free ground shipping for domestic sales. It replaced a discount on CLE webinars. And finally, the Friday offer replicated last year: 50 percent off “older” book and CLE titles. “Cyber Week” coded sales totaled \$122,103, surpassing \$100,000 for the 5th consecutive year.

Veterans

The ABA Veterans Legal Services Initiative, initiated by President Linda Klein, is working to address legal needs of veterans through three goals: creating centralized resources, developing policy, and supporting the delivery of legal services. Key efforts already undertaken by the Initiative Commission include:

- Fundraising to provide sustainable support for veteran-focused projects into the future, the most significant of which is an intended re-launch of the successful ABA Veterans Claims Assistance Network
- Encouraging legal organizations across the country to commit to pro bono projects for veterans as a part of the National Celebration of Pro Bono -- more than 50 organizations committed to such projects around this past Veterans Day and also Memorial Day 2017
- Developing Toolkits based on successful models created by state bars that can be adopted and utilized by organizations to establish veterans legal clinics; these are expected to be rolled out at the Midyear Meeting
- Creation of a nationwide “Mentor Guide,” which will allow pro bono attorneys working with veterans to connect with experienced practitioners who can provide consultation, guidance, and support
- Webcasting sessions on topics related to veterans legal services, including a program scheduled for December 14 on how to establish a veterans clinic

- Delivering Presidential Showcase programming at Midyear and Annual; the Midyear program will be on Saturday and is titled “Called to Serve: Addressing the Legal Needs of Veterans”

The successful work of the Initiative is drawing on the strengths of the ABA, a recognized leader in support of the legal needs of military families and veterans.

Continuing Legal Education (CLE)

The Center for Professional Development (CPD) and MCLE Department recently finalized a new business plan, based on the need to maintain the ABA’s role as a leader in continuing education for the legal community and assisting the ABA’s entities by making entities’ education programming higher quality, easier to produce, and more cost-effective/. We understand the need to deliver product and process innovation through new technology, solid metrics, and talent development. The CPD and MCLE departments identified initiatives upon which to focus, to achieve the following:

- Build a high-performing team across business units and integrate processes and functionality across all entities and formats to ensure optimal functionality
- Develop and execute a content strategy focused on producing the right programming at the right time for the broadest legal professional audience, created and provided with a high-quality, customer-focused delivery
- Provide an industry-leading customer experience (registration, viewing, accreditation, and record-keeping) while developing best practices and systems to support the work of ABA CLE entities, and the CPD and MCLE departments

The ABA continues to provide webcasts with entity partners. Between September and November 2016, the Association offered 92 webinar programs, including 36 basic service webinars -- up six from the same period last year -- and 56 CPD webinars.

ABA Fund for Justice and Education (FJE)

FJE contributions are more than double what they were at this time in FY 2016. The programs support an exceptional range of charitable causes to secure equal access to justice and advance the rule of law around the world. So far this fiscal year, more than \$826,000 has been donated to the Fund. \$250,000 of that amount will be given to the ABA Veterans Legal Services Initiative by a single law firm’s foundation which has prioritized serving veterans to develop and pilot a robust portal that will serve as a national tool to recruit pro bono lawyers and link them with veterans who need legal services. A \$125,000 contribution will help the evaluation of three key pipeline programs at the ABA: Legal Opportunity Scholarship Fund, Judicial Internship Opportunity Program, and Judicial Internship Program.

Advocacy

On November 16, the United States District Court for the Northern District of Texas issued a permanent nationwide injunction blocking implementation of the Department of Labor’s

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final “persuader” rule, an ABA-opposed measure that would have required many labor lawyers and law firms representing employers in unionization disputes to report confidential client information to the government. Previously, the Court had issued a similar preliminary injunction, in which it quoted extensively from the ABA’s original 2011 comment letter to DOL and the ABA’s statement for the record of an April 27 hearing on the rule held by the House Education and the Workforce Subcommittee on Health, Employment, Labor and Pensions.

On October 24, ABA President Linda Klein submitted a comment letter to the Consumer Financial Protection Bureau urging it to modify its proposed rule on Disclosure of Records and Information to clarify that the Bureau cannot share privileged information it receives from supervised or regulated entities with any other foreign, state, or other non-federal government agency, as such sharing could threaten the privileged status of the information.

GAO (Governmental Affairs Office) met with senior Congressional and state legislative affairs staff of the American Institute of Certified Public Accountants (AICPA) on November 9 to discuss how the two associations can work more closely together to oppose legislative and regulatory measures that would be harmful to their respective members. During the meeting, GAO and the AICPA representatives discussed strategies for defeating numerous state proposals to tax legal services, federal legislation that would regulate lawyers and accountants under the Bank Secrecy Act, congressional proposals that would require many law and accounting firms to switch from cash to accrual accounting and therefore pay taxes on phantom income long before it is actually received, and other issues of mutual interest.

On September 19, Association leaders met with the Honorable Ted Mitchell, the U.S. Under Secretary of Education. The delegation was led by President Klein and President-Elect Hilarie Bass. The meeting addressed the Department of Education’s surprise decision late last year to no longer recognize the ABA as an eligible employer under the federal Public Service Loan Forgiveness (PSLF) program. We were advised the Department was applying a new, nonpublic standard retroactively, rescinding prior year approvals the Department had provided to ABA staff members who sought it through the well-established process. This ruling would rescind as many as eight years of previously-granted approvals. We have not yet received a substantive response and are weighing additional options to secure a fair result for affected staff.

The GAO set up and participated in a meeting involving President Klein, Rule of Law Initiative (ROLI) staff, and State Department officials led by Assistant Secretary Victoria Nuland to discuss the current situation in Turkey and how that might affect both ABA human rights advocacy and ROLI programs. President Klein reiterated the concerns voiced in the recently adopted House of Delegates Resolution calling on the Turkish government to respect the independence of lawyers and judges in that country. The Assistant Secretary encouraged the ABA to stay engaged in Turkey and with the Turkish bar, suggesting that resolution of the governmental attacks on the bench and bar would likely take a long time.

On September 6, President Klein sent a letter to Senate leaders urging them to promptly schedule floor votes on the 20 district court nominees pending on the Senate calendar. These nominees, who were reported to the Senate with overwhelming bipartisan support, already have waited months for an up-or-down confirmation vote.

On July 6, the House passed the Helping Families in Mental Health Crisis Act (H.R. 2646) with almost unanimous support. Since it was introduced in 2015 the ABA opposed provisions in the original bill that would have would prevented Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) programs from engaging in advocacy and litigation on behalf of individuals with serious mental illness. Those provisions were removed from the bill and were not included in the final legislation that was adopted by the House.

Communications and Publicity

“Celebrate Pro Bono Week 2016” took on special significance with its focus on President Linda Klein’s Veterans Legal Services Initiative, extending the annual October campaign to November 11, Veterans Day. In an op-ed that appeared in nearly a dozen news outlets across the country -- including the Philadelphia Inquirer, Minnesota Post Bulletin, Charleston Gazette-Mail, and San-Antonio Express -- Klein stressed the importance of serving “our nation’s heroes”: “At least half of the top 10 problems leading to homelessness among veterans are legal problems,” she wrote, noting that there are nearly 40,000 veterans living on the streets in America.

This year’s pro bono celebration included some 1,155 events across the country held by more than 600 organizations in 49 states, plus Washington, D.C. In recognition of an annual pro bono effort in Texas, Veterans Legal Aid Week, our Communications and Media Relations (CMR) team distributed to media an op-ed bylined by Klein and Texas Chief Justice Nathan L. Hecht. Published throughout Texas in such newspapers as the Houston Chronicle, Corpus Christi Caller-Times, San Angelo Standard-Times, and San Antonio Express, Klein and Hecht’s editorial urged the legal profession to help the more than 1.5 million veterans who live in poverty. About 90 other events also focused on providing pro bono legal assistance for veterans, including Jones Day’s VetLex Program featured in the Crain's Cleveland Business and Bloomberg, and Dinsmore & Shohl’s program for homeless veterans, which was inspired by Klein’s initiative and was profiled by the Chicago Daily Law Bulletin.

ABA Publishing’s John Lennon vs. the USA, detailing the Beatle member’s legal troubles, continues to generate a great deal of media interest. It has been covered by Rolling Stone twice, the Washington Post, the New York Post, Parade, and many more.

CMR’s outreach on the 2016 Annual Meeting attracted strong media coverage, with the address by FBI Director James Comey topping media interest. Comey’s remarks on emerging issues in national security drew several national and local news outlets, including the Associated Press; National Law Journal; San Francisco Chronicle; Yahoo News; ABC-TV, NBC-TV and their local affiliates; as well as radio stations such as KCBS-AM in San Francisco, WLS-AM and WGN-AM in Chicago, and KOGO-AM in San Diego.

Other ABA meeting headliners included three attorney-celebrities: Hollywood screenwriters David E. Kelley and Jonathan Shapiro, along with former O.J. Simpson prosecutor Marcia Clark. In two CMR-produced programs on August 5, Shapiro and Kelley talked about mining their legal backgrounds for television writing in “Pop Culture and the Perception of Justice,” while Clark participated in a question-and-answer session and signed copies of her new

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book, “Blood Defense,” at the ABA Expo Reception. Video highlights from the Shapiro-Kelley panel hosted by NPR’s Renee Montagne is available [here](#).

Several other newsworthy Annual Meeting programs ensured strong coverage in media outlets nationwide. Some examples: Both [Bloomberg](#) and [Above the Law](#) discussed a program on the U.S. Supreme Court under Justice John Roberts. CBS radio in San Francisco and [Corporate Counsel](#) covered a panel discussion on the readiness of the United States to tackle the Zika virus. WJR-AM in Detroit shared news of former ABA President Dennis Archer receiving the ABA Medal. [The Bay Area Reporter](#) and [Bloomberg](#) responded to issues raised during an ABA panel on transgender rights. The Wall Street Journal, [National Law Journal](#), Dallas Morning News and [Bloomberg](#) were among publications that reported on a legal education hearing on strengthening bar passage standards for law schools. C-SPAN recorded for later airing an ABA program on sexual violence on college campuses and another on the general counsel of several top technology companies. And finally, CBS-TV covered a program on the tensions between law enforcement and communities of color.

Besides the speakers and programs at our Annual Meeting, several policy measures received attention from the media. One was a new model rule that prohibits discrimination and harassment in the practice of law; that was the subject of dozens of news stories, including those in [The New York Times](#), [Huffington Post](#), [Chicago Tribune](#), [Seattle Times](#), [Time](#), [Philadelphia Inquirer](#), Washington Post, [Christian Science Monitor](#), and many others. [Univision](#), NPR, and the [National Law Journal](#) were among news outlets reporting on a measure that urges law-enforcement authorities to develop an accurate Spanish translation of the Miranda warning. [Indiana Lawyer](#) covered a resolution that approves paid externships for law students. And [Bloomberg](#) and [The Lawyerist](#) reported on a House resolution that urges all providers of legal services to expand opportunities for diverse lawyers.

CMR continues to expand its database of ABA member experts available to speak with news media. Following new contacts added after the Division’s meet-and-greet reception at the Annual Meeting, the database now includes 783 ABA members. In addition to connecting these experts with reporters researching a variety of topics, CMR pro-actively promotes legal experts to media when warranted, such as in October, when the Division sent an [e-let](#) on ABA experts for news stories on Hurricane Matthew. CMR recently connected an ABA family law expert with the New York Times, resulting in the September 29 story, “[Should you intervene when a parent harshly disciplines a child in public.](#)”

In the wake of the July 7 ambush shooting of Dallas police officers, CMR issued a [media statement](#) on behalf of then-President Paulette Brown that emphasized the importance of the rule of law. Cited in [The American Lawyer](#), Brown said that such violence is an inappropriate response to perceived unfairness in the justice system. Referencing the recent shootings of black men by white officers in Louisiana and Minnesota, Brown said that “we must not let these tragic events define us as a nation or send us down the wrong path.”

As President Klein began her term, several news outlets reported on her priorities for the coming year, building on previous coverage that announced the change in leadership in early August. In an August 24 feature story published by Law360, Klein said she began practicing law

to help people and will focus her work on improving access to justice for those who need it, particularly America's veterans. "Many veterans face legal problems, including evictions, child-custody disputes, wrongful denial of benefits, and credit problems. About half of the top 10 problems leading to homelessness among veterans cannot be solved without legal help," Klein told the Orlando Sentinel, explaining that the Veterans Legal Services Initiative will help connect former service members with the assistance they need.

Rule of Law Initiative (ROLI)

During the Annual Meeting, ROLI's Board and Asia Council met and undertook a number of activities aimed at raising awareness of our programs among ABA members and area donors. On August 4, it joined with "Cynthia's Sisters," a Bay-Area group of donors who support ROLI's scholarship program for female law school students in the Democratic Republic of Congo (DRC), and hosted a reception for donors and ABA leaders. Attendees heard from two of the scholarship recipients and our DRC Country Director, all of whom traveled from the DRC for the event. They described our efforts to combat sexual violence in the DRC and how the scholarship program is making a difference, investing in the next generation of female lawyer leaders. On August 6, the ROLI Board joined with the leadership of the Sections of International Law, Litigation, and Social Justice and Civil Rights, as well as the Center for Human Rights, in the presentation of the ABA's first-ever Human Rights Award to Chinese human rights lawyer Wang Yu.

In China, ROLI hosted a multi-stakeholder conference in late July featuring over 150 domestic violence experts from law schools, as well as lawyers, judges, and representatives from police departments and the All-China Women's Federation. The conference brought these experts and practitioners together to discuss the implementation of provisions in China's new Anti-Domestic Violence Law on protection orders, mental health and shelter services, and domestic violence case-handling. The conference provided a critical opportunity for a diverse set of domestic violence service providers and stakeholders to engage in cross-sector communication and improve their coordination.

On August 5 and 6, ROLI organized a conference in China attended by 32 partners from three domestic violence legal clinics as well as other law schools interested in developing clinical programs. The three clinics are China's first university-based clinical legal programs to offer counseling and advocacy for domestic violence survivors and the conference allowed them to share their work with other clinical legal programs and government stakeholders. In addition, by attending the conference, law schools interested in developing their own clinical programs gained a better understanding of how to establish domestic violence clinics and how law students can provide legal assistance to survivors while also honing practical skills.

Also in China, ROLI conducted a criminal defense training on legal aid in Anyang City, Henan Province in October. It lasted three days and was fully covered by the official TV Station of Anyang City. About 250 lawyers specializing in criminal legal aid participated in the training, which was led by four experienced lawyers, including notable criminal lawyer Zhang Yansheng, senior forensic expert Song Yiguang, and criminal law professional Zhao Tianhong.

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In Peru, the ROLI Regional Anti-Corruption Advisor (RACA) organized the Pathfinder Dialogue III which took place in Lima, Peru on August 18-19. Pathfinder was hosted by the US and Peruvian Governments under the auspices of the Asia-Pacific Economic Cooperation (APEC) organization. The event was designed to identify specific anti-corruption measures APEC economies could implement in order to combat corruption in environmental crime and human trafficking. On the first day of Pathfinder, the US Ambassador to Peru gave keynote remarks as well as other high-level government officials from Latin America and Southeast Asia.

Also in Peru, ROLI's "Justice Sector Support Project" conducted a week-long study tour in September for four high-level justice sector officials from Peru, including the Peruvian Attorney General and Chief Justice, Pablo Sánchez Velarde; Victor Ticona Postigo, Chief Justice of the Peruvian Supreme Court; and two other justice sector officials. U.S. Embassy staff also joined the delegation. The delegates participated in several meetings with representatives from the following institutions: U.S. Supreme Court, during which Justice Roberts made an unexpected appearance; U.S. District Court in Washington, D.C. with Judge Hiram Puig-Lugo; at a U.S. Federal Court in Greenbelt, MD hosted by Judge Messitte; the Administrative Office of the U.S. Courts; the Inter-American Commission of Human Rights; Senator Leahy's office; and some donors.

In September, ROLI organized a meeting for the Libyan Women's Legal Network, a workshop for prosecutors on Investigation and Prosecution of Human Trafficking and Smuggling. ROLI completed printing 50,000 copies of the Libyan constitution and delivered 35,000 copies to the Constitutional Drafting Assembly for distribution. The remaining 15,000 copies are being distributed to international implementers and local partners within ABA ROLI's network.

Also in Libya, ROLI held a one-day legal education and human rights conference in July in Tripoli for all the regional bars and universities in Libya. ROLI also held two workshops for the Constitutional Drafting Assembly, a roundtable with mayors from approximately 15 municipalities across Libya, and a roundtable on the Constitutional Referendum Law, which included members of the House of Representatives and the High National Election Commission.

On August 24, ROLI's "Program to Strengthen the Haitian Criminal Justice Sector" presented a major program achievement for its police station detention component at a donor-implementer coordination meeting. The objective of this activity was to improve procedures and oversight at Port-au-Prince police stations to decrease lengthy detentions. The presentation demonstrated that, as a result of ROLI's creation of a steering committee, and support for the adoption of good procedures and practices, the number of detainees who spent more than 48 hours in detention in the program's pilot police station drastically declined by 93 percent. ROLI's activities are directly assisting the police stations to comply with the Haitian constitution, which mandates detainees must be seen by a judge within 48 hours.

Also in Haiti, ROLI's "Program to Strengthen the Haitian Criminal Justice Sector" participated in the first strategic session of the Haitian National Committee on Trafficking in Persons. The Committee praised ROLI's technical assistance that led to the first conviction in a TIP case in Haiti.

In October, President Linda Klein and President-elect Hilarie Bass met with leaders of the Vietnam Bar Federation to discuss possible ROLI support for legal profession capacity-building, renewing the ABA's license in Vietnam and a proposed MOU between the organizations.

ROLI held workshops in Ankara, Turkey in September for Syrian women on legal issues and for Turkish lawyers on refugee rights. ROLI has held 23 legal information sessions for Syrian refugees and 127 requests for legal assistance were handled through the SMS helpline.

In September, ROLI organized an event in Tangiers, Morocco at a First Instance Court to discuss the rights and obligations of victims, witnesses, defendants and accused; more than 400 citizens attended. ROLI's human rights curriculum for judges, lawyers, and clerks was launched at an event attended by the Dutch ambassador and local stakeholders.

In November, ROLI hosted a delegation of 10 educators from law schools and the police training academy in Tajikistan in the United States on a study tour as part of the Legal Education Reform Program. The delegates stopped first in Washington, DC, where they met with ABA staff to learn more about the work of the ABA, particularly in the realm of legal accreditation.

Conclusion

The ABA faces significant fiscal pressures, and we are taking a variety of steps to resolve them. Thanks to the cost-savings measures the ABA has taken over the last several years, we have kept spending in check and prevented an even worse financial picture today. But until we can bring in new sources of revenue, we must carefully examine our current expenditures to determine where we can make reductions.

The choices we face are difficult, and we cannot delay any longer. As Benjamin Franklin observed in his *Poor Richard's Almanac*, "You may wait, but time will not, and lost time is never found again." For the ABA's fiscal situation, time has run out -- we no longer have the financial resources to do everything we're currently doing. It is imperative we prioritize our activities and programs to ensure we maintain the first-class work we do on behalf of our members, our profession, and the public, while curbing redundancies and activities less essential to the ABA's mission.

We are fortunate to be part of the world's largest and most prominent organization dedicated to defending liberty and delivering justice. With more than 400,000 members, we have a strong voice on a global scale others do not. It is incumbent upon us to take the necessary steps to ensure the ABA has the financial resources to remain that voice far into the future.

Respectfully submitted,

Jack L. Rives
Executive Director and
Chief Operating Officer

AMERICAN BAR ASSOCIATION
COMMITTEE ON SCOPE AND CORRELATION OF WORK
INFORMATIONAL REPORT
TO THE HOUSE OF DELEGATES

The following are the activities in which the Committee on Scope and Correlation of Work ("Scope") has engaged since its last report to the House of Delegates at the American Bar Association's 2016 Annual Meeting. Scope has continued to fulfill its constitutional mandate as a Committee of the House of Delegates, and the only one elected by it. It has carried forward its review of the structure, function and activities of Association committees and commissions to evaluate the effectiveness of their functioning and determine if overlapping functions exist.

Scope held its last meeting Saturday, December 10, 2016 in Chicago, Illinois. Scope will meet again in conjunction with the ABA's Midyear Meeting on Saturday, February 4, 2017, in Miami, Florida.

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:

Amicus Curiae Briefs, Standing Committee on - Scope commended the Standing Committee on Amicus Curiae Briefs for its excellent work.

Election Law, Standing Committee on - Scope commended the Standing Committee on Election Law for its good work.

Governmental Affairs, Standing Committee on - Scope noted that the Standing Committee on Governmental Affairs' (Standing Committee) role has been limited to the core activities in recent years but there may be additional ways in which the members could serve the work of the Governmental Affairs Office. Scope urges the Standing Committee, when making recommendations to the president-elect during the appointment process, to identify lawyers who have the knowledge and experience to provide lobbying and political expertise to further support the work of the Governmental Affairs Office and utilize their talents for lobbying or educational purposes.

Gun Violence, Standing Committee on - Scope commended the Standing Committee on Gun Violence (Standing Committee) for its good work. Scope realizes the Standing Committee addresses an important and critical societal issue that cuts across legal practice or geographic location. While this is a divisive issue, the Standing Committee has avoided taking positions on the Second Amendment debate but instead addresses public safety. This aligns it closely with other national professional associations such as the American Medical Association, American Psychiatric Association, and the American Public Health Law Association. Understanding it is possible this focus could change over time, the Standing Committee would need to be aware of and keep its focus consistent with the ABA's body of adopted policies and resolutions. Further, funding will always be an issue for this Standing Committee, but as long as the volunteers are willing to carry the work load, largely, and the

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Standing Committee is able to attract grants and sponsorships, the impact on the ABA's budget is minimal and the opportunity the Standing Committee offers to engage lawyer members who wish to engage in this work is important. Scope encourages the Standing Committee to continue to seek grants and sponsorships.

Law Library of Congress, Standing Committee on - Scope commended the Standing Committee on Law Library of Congress (Standing Committee) for its good work. Scope encourages the American Bar Association to support the Standing Committee in making an even more effective connection between ABA members and the Law Library of Congress, with the goal being to make the vast resources of the Law Library of Congress even more accessible online.

Recommendations still pending:

SpC on Hispanic Legal Rights and Responsibilities; Commission on Racial and Ethnic Diversity in the Profession; Center for Racial and Ethnic Diversity; Council for Racial and Ethnic Diversity in the Educational Pipeline; Coalition on Racial and Ethnic Justice; Commission on Women in the Profession; and Commission on Sexual Orientation and Gender Identity (SOGI)

Scope's 2017 Midyear Agenda will include:

StC on Public Education; StC on Gavel Awards; StC on Bar Activities and Services; StC on Publishing Oversight; StC on Continuing Legal Education; ABA Journal; Task Force on Gatekeeper Regulation and the Profession | *Follow-up Reviews*: StC on Medical Professional Liability; SpC on Bioethics and the Law

Respectfully Submitted,



Thomas M. Fitzpatrick, Chair
Amelia Helen Boss
W. Andrew Gowder, Jr.
Jennifer Busby
Richard Soden
Michael W. Drumke, Chair, SOC
G. Nicholas Casey, *ex-officio*
Pamela A. Bresnahan, *ex-officio*

/al

Dated: December, 2016

**AMERICAN BAR ASSOCIATION
THE VIRGIN ISLANDS BAR ASSOCIATION
REPORT TO THE HOUSE OF DELEGATES**

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges the Supreme Court of the United States to
2 establish a panel of attorneys, with criteria and assignment procedures that are publicly available,
3 from which to appoint *amicus curiae*, special masters, and other counsel in proceedings before it;
4 and
5
6 FURTHER RESOLVED, That the American Bar Association urges the Supreme Court of the
7 United States to consider racial, ethnic, disability, sexual orientation, gender identity, and gender
8 diversity in the selection process to the panel and for appointment of *amicus curiae*, special
9 masters, and other counsel.

REPORT

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

- **Louis D. Brandeis**, Associate Justice of the Supreme Court of the United States

Advancing diversity and inclusion in the judiciary and government is especially important. These fields not only administer, but also represent democratic rule of law in our multicultural society. The absence of diversity and inclusion in the judiciary and government can malign the legitimacy of not only lawyers, but also of the law itself.

- **American Bar Association**, Diversity in the Legal Profession: The Next Steps

BACKGROUND

Every year, the Supreme Court of the United States appoints counsel in cases before it. This occurs most often when certiorari has been granted in a case where all parties have conceded that the lower court committed error. In such a circumstance, the U.S. Supreme Court appoints an attorney to appear as an *amicus curiae* to defend the lower court's decision on appeal.¹ However, the U.S. Supreme Court may also appoint counsel if it has agreed to hear a case where one of the parties has appeared *pro se*,² or where it has questioned its own subject-matter jurisdiction despite the parties' agreement that jurisdiction exists.³ Moreover, it also frequently appoints attorneys to serve as special masters to hear evidence and issue non-binding recommendations in original jurisdiction cases.⁴

When it is necessary to appoint an attorney to represent a party in a proceeding, the lower federal courts virtually always select court-appointed counsel from a panel of attorney volunteers.⁵ Although appointment of attorneys from a panel is statutorily-mandated by Congress in criminal cases,⁶ many lower federal courts also utilize a panel system to appoint counsel in civil cases as well, and limit appointments of non-panel attorneys only to rare cases, such as where no members

¹ Since 1926, it appears that the U.S. Supreme Court has appointed *amicus curiae* counsel for this purpose in 59 cases. Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533, 1594 (2016). However, it has done so more frequently in recent years, with nineteen such appointments having been made since 2008. *Id.* at 1594-95.

² For example, after it agreed to hear *Gideon v. Wainwright*—which Clarence Earl Gideon had originally filed *pro se*—the U.S. Supreme Court appointed future Associate Justice Abe Fortas to represent Gideon on appeal. *See* ANTHONY LEWIS, *GIDEON'S TRUMPET* 49, 54 (1989).

³ In fact, the U.S. Supreme Court did so just last term, when it *sua sponte* appointed an attorney to argue against its own subject-matter jurisdiction in *Montgomery v. Louisiana*, 577 U.S. ____ (2016).

⁴ *See* Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625 (2002).

⁵ *See In re Snyder*, 734 F.2d 334, 339 & n.9 (8th Cir. 1984) (noting that the Criminal Justice Committee of the United States Judicial Conference promulgated a model plan “which contemplate[d] that only lawyers who willingly volunteer for appointments will be assigned to indigent cases”) (citing Model Plan for the Composition, Administration and Management of the Panel of Private Attorneys Under the Criminal Justice Act, *Guidelines for the Administration of the Criminal Justice Act*, Vol. VII, App. G, Guide to Judiciary Policies and Procedures).

⁶ 18 U.S.C. § 3006A(a)(3).

of the panel possess the necessary expertise to undertake the representation.⁷ Likewise, virtually all states and territories utilize a panel or contract system to appoint counsel in cases where the public defender's office or similar entity is not able to undertake the representation.⁸ Even though pay is low (or sometimes non-existent), the application process to become a member of a panel is highly competitive.⁹

THE NEED FOR REFORM

The U.S. Supreme Court does not appoint counsel in the same manner as the lower federal courts or America's state and territorial courts. Rather than making appointments from a panel of volunteers through a formalized process, the U.S. Supreme Court typically assigns such cases to its former law clerks on an *ad hoc* basis.¹⁰ For instance, forty of the fifty-nine attorneys invited to serve as *amicus curiae* counsel by the U.S. Supreme Court served as a former law clerk to one of the Justices.¹¹ However, "of the twenty-five most recent invitations, all twenty-five went to the Justices' former clerks."¹²

Unlike the panels established by federal, state, and territorial courts, which often possess minimum experience requirements, virtually all of the attorneys appointed by the U.S. Supreme Court "[a]re making their Supreme Court debuts."¹³ Therefore, a former law clerk who receives an appointment from the U.S. Supreme Court is receiving a "big break" for a young lawyer¹⁴ that is tantamount to "plac[ing] a young attorney in the 'pipeline to power.'"¹⁵

The practice of providing appointments to former law clerks on an *ad hoc* basis without any written procedures or guidelines has deprived women and minority lawyers from entering this "pipeline to power." Of the last fifty-nine *amicus curiae* appointments made by the U.S. Supreme Court, a mere six—or slightly over 10 percent—were to women attorneys.¹⁶ In fact, prior to 2009, only one woman had ever been invited by the U.S. Supreme Court to argue a case as an *amicus curiae*.¹⁷ This is significantly lower than the percentage of women who argue before the U.S. Supreme Court on a regular basis, which studies show range between 17% to 23%.¹⁸ Similarly,

⁷ See Terrence J. Benshoof, *Appointments in the Federal Court Pro Bono Program*, 23 DCBA BRIEF 30 (2011).

⁸ UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008-2012 (2015), <http://www.bjs.gov/content/pub/pdf/idsus0812.pdf>.

⁹ Hon. John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 653-54 & n.60 (2008).

¹⁰ Debra Cassens Weiss, *Supreme Court Favors White Males in Amicus Appointments, Study Says*, ABA JOURNAL, http://www.abajournal.com/news/article/supreme_court_favors_white_males_in_amicus_appointments_study_says (May 17, 2016).

¹¹ Shaw, *supra* note 1, at 1556.

¹² *Id.* (emphasis added).

¹³ Adam Liptak, *When Appointing Friends of Court, Justices are Friendliest Toward White Men*, N.Y. TIMES, <http://www.nytimes.com/2016/05/17/us/politics/when-appointing-friends-of-court-justices-are-friendliest-toward-white-men.html?smid=pl-share&r=0> (May 16, 2016).

¹⁴ *Id.*

¹⁵ Shaw, *supra* note 1, at 1564 & n.164 (quoting Linda Greenhouse, Keynote Speech at the 2012 Pipeline to Power Symposium (2012)).

¹⁶ *Id.* at 1561.

¹⁷ *Id.*

¹⁸ *Id.* at 1562 (collecting studies).

only three of the last fifty-nine attorneys—or 5%—appointed as an *amicus curiae* were African-American, Latino, or Asian-American, in contrast to 11% of U.S. Supreme Court practitioners.¹⁹

THE ROLE OF THE AMERICAN BAR ASSOCIATION

The American Bar Association, as the national representative of the legal profession, has established goals to further its mission of defending liberty and delivering justice. Specifically, the American Bar Association has made it its objective to “[p]romote pro bono and public service by the legal profession,” ABA Goal II.3, to “[p]romote full and equal participation in . . . our profession, and the justice system by all persons,” ABA Goal III.1, and to “[w]ork for just laws . . . and a fair legal process.” ABA Goal IV.3.

The ABA has already adopted *The Ten Principles of a Public Defense Delivery System*, which includes the principle that “[t]he appointment process should never be ad hoc, but should be according to a coordinated plan.”²⁰ The ABA has adopted virtually identical policies in the case of civil appointments as well.²¹ And just last year, the ABA urged the U.S. Supreme Court to increase transparency in other aspects of its operations by providing for video recordings of its oral arguments.²² A formal and transparent appointment system not only promotes public confidence in the Judicial Branch, but also ensures that all interested lawyers are able to volunteer their time, regardless of who they know.

At its most recent Annual Meeting, the ABA urged the federal courts “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.”²³ The same reasons that support promoting diversity within the Judicial Branch also apply to promoting diversity amongst those appointed to argue cases before the U.S. Supreme Court. Given the significant career advantages that are associated with arguing a U.S. Supreme Court case, providing these opportunities to women attorneys and to lawyers of color would not just diversify the Supreme Court Bar, but also promote the pipeline that feeds into the federal bench as well as the most elite positions in the private and public sector.

CONCLUSION

Virtually every federal, state, and territorial court appoints counsel—whether at the trial or appellate level—from a panel of attorney volunteers, using a transparent appointment process. The U.S. Supreme Court should do the same.

Respectfully submitted,

J. Russell B. Pate
President, Virgin Islands Bar Association
February 2017

¹⁹ *Id.*

²⁰ ABA Resolution 107 (approved by the ABA House of Delegates at the February 2002 ABA Midyear Meeting).

²¹ *See, e.g.*, ABA Resolution 105 (adopted by the ABA House of Delegates at the August 2010 ABA Annual Meeting); ABA Resolution 112A (adopted by the ABA House of Delegates at the February 1996 ABA Midyear Meeting).

²² ABA Resolution 110 (adopted by the ABA House of Delegates at the February 2016 ABA Midyear Meeting).

²³ ABA Resolution 102 (approved by the ABA House of Delegates at the August 2016 ABA Annual Meeting).

GENERAL INFORMATION FORM

Submitting Entity: Virgin Islands Bar Association

Submitted By: J. Russell B. Pate, President

1. Summary of Resolution(s).

This resolution urges the U.S. Supreme Court to appoint counsel from a panel of attorneys, and to recognize the importance of diversity in the appointments process.

2. Approval by Submitting Entity.

Approved by the Virgin Islands Bar Association Board of Governors on November 14, 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?

The resolution directly advances the following ABA policies:

ABA Goal II.3 – Promote pro bono and public service by the legal profession.

ABA Goal III.1 – Promote full and equal participation in the association, our profession, and the justice system by all persons.

ABA Goal IV.3 – Work for just laws, including human rights, and a fair legal process.

In addition, the resolution is a natural extension of the following previously adopted resolutions:

ABA Resolution 102 (August 2016; 16A102) – among other things, urges the federal courts “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.”

ABA Resolution 110 (February 2016; 16M110) – urges the U.S. Supreme Court to provide transparency in its operations by providing video recordings of its oral arguments.

ABA Resolution 105 (August 2010; 10A105) – adopted the *Basic Principles of a Right to Counsel in Civil Legal Proceedings* and the accompanying commentary, which among other things provides that appointed counsel “has the relevant experience and ability . . . to fulfill the basic duties appropriate for each type of assigned case.”

ABA Resolution 107 (February 2002; 02M107) – adopted *The Ten Principles of a Public Defense Delivery System* and accompanying commentary which, among other things, includes the principle that “[t]he appointment process should never be ad hoc, but should be according to a coordinated plan.”

ABA Resolution 112A (February 1996; 96M112A) – adopted the *Standards of Practice for Representing a Child in Abuse and Neglect Cases* and accompanying commentary, which among other things “reject the concept of ad hoc appointments of counsel that are made without regard to prior training or practice.”

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

N/A

6. Status of Legislation. (If applicable)

N/A

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

A copy of the resolution would be distributed to the Chief Justice of the United States.

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

None, other than the costs of transmitting the resolution.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

American Bar Association Coalition on Racial & Ethnic Justice
 American Bar Association Commission on Disability Rights
 American Bar Association Commission on Hispanic Legal Rights & Responsibilities
 American Bar Association Commission on Racial & Ethnic Diversity in the Profession
 American Bar Association Commission on Sexual Orientation and Gender Identity
 American Bar Association Commission on Women
 American Bar Association Council for Racial & Ethnic Diversity in the Educational Pipeline
 American Bar Association Criminal Justice Section
 American Bar Association Judicial Division
 American Bar Association Judicial Division Appellate Judges Conference
 American Bar Association Judicial Division Lawyers Conference
 American Bar Association Judicial Division National Conference of the Admin. Law Judiciary

10A

American Bar Association Judicial Division National Conference of Federal Trial Judges
American Bar Association Judicial Division National Conference of Specialized Court Judges
American Bar Association Judicial Division National Conference of State Trial Judges
American Bar Association Section of Civil Rights and Social Justice
American Bar Association Section of Litigation
American Bar Association Section of State & Local Government Law
American Bar Association Standing Committee on the American Judicial System
American Bar Association Standing Committee on Legal Aid and Indigent Defendants
American Bar Association Tort Trial and Insurance Practice Section
American Bar Association Young Lawyers Division

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

Anthony M. Ciolli
P.O. Box 590
St. Thomas, VI 00804
aciolli@gmail.com
917-362-1355

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.)

Anthony M. Ciolli
P.O. Box 590
St. Thomas, VI 00804
aciolli@gmail.com
917-362-1355

EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges the U.S. Supreme Court to appoint counsel from a panel of attorneys, and to recognize the importance of diversity in the appointments process.

2. Summary of the Issue that the Resolution Addresses

The U.S. Supreme Court currently appoints counsel through an *ad hoc* process that differs from the formalized process utilized by other federal, state, and territorial courts.

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

The proposed policy addresses this issue by urging the U.S. Supreme Court to establish a panel of attorney volunteers from which to appoint counsel, and to further urge the Court to consider diversity in the appointment process.

4. Summary of Minority Views

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

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress to enact legislation to repeal
2 the restrictions on federal student aid eligibility contained in the Higher Education Act, 20
3 U.S.C. § 1091(r), which affects eligibility for federal student aid based on certain drug
4 convictions;

5 FURTHER RESOLVED, That the American Bar Association urges that, in conjunction with the
6 repeal of 20 U.S.C. § 1091(r), the Department of Education revise the *Free Application for*
7 *Federal Student Aid* form, required of all applicants seeking federal student aid, to eliminate
8 questions seeking disclosure of certain drug convictions; and

9 FURTHER RESOLVED, That the American Bar Association urges that, in conjunction with the
10 repeal of 20 U.S.C. § 1091(r), Congress and the Department of Education require higher
11 education institutions to notify students who were deemed ineligible for federal student aid
12 pursuant to that provision (and whose eligibility has not been restored) that they are now eligible
13 for such aid.

REPORT

Introduction

Many individuals convicted of criminal offenses in the United States suffer negative effects of those convictions long after they have fulfilled the terms of their court-imposed sentences. Restrictions on participation in government programs and loss of access to government benefits are two of the most devastating types of collateral consequences that an individual attempting to rebuild following a criminal conviction can face.

When the individual is a student who has committed a misdemeanor or felony drug offense, access to education hangs in the balance. Under current law, a student who commits a drug offense while receiving federal student aid faces a harsh consequence separate from criminal sentencing: automatic loss of that aid. The restriction on aid eligibility can be temporary or permanent, depending on the student's prior record.

Students who are denied access to financial aid because of drug-related transgressions face enormous hurdles in attending and finishing college. While the United States offers the most diverse post-secondary education system in the world, access to this system comes with a steep price tag. Over the past decade, the cost of pursuing post-secondary education in the United States has risen dramatically. The average tuition for a four-year public institution, after adjusting for inflation, is 40% higher than it was in 2005. The figures for four-year private institutions (29% higher than in 2005) and two-year public institutions (26% higher than in 2005) do not lag far behind.¹

Not surprisingly given these numbers, more than 75% of college undergraduates in the United States rely on some form of financial aid to afford these costs. The federal government offers aid to students from limited-income and other qualifying backgrounds, in the form of grants, loans, and work-study subsidies, to support their pursuit of post-secondary education. The major sources of this funding are the programs set out in Title IV of the Higher Education Act of 1965 (20 U.S.C. § 1070 *et seq.*) (the “HEA”).²

¹ The College Board, “Trends in College Pricing 2015,” at 3, available at <http://trends.collegeboard.org/sites/default/files/trends-college-pricing-web-final-508-2.pdf>

² These federal student aid funds include, but are not limited to: Perkins Loans; Federal Family Education Loans; Direct Loans; Pell Grants; Academic Competitiveness Grants; National SMART Grants; Federal Supplemental Educational Opportunity Grants; TEACH Grants; Iraq and Afghanistan Service Grants; and Federal Work-Study. *See generally* <https://studentaid.ed.gov/sa/types>; *see also* http://federalstudentaid.ed.gov/site/front2back/programs/programs/fb_03_01_0030.htm; U.S. Department of Education Federal Student Aid Handbook (2015), Chapter 2 (4-21), available at <http://ifap.ed.gov/fsahandbook/attachments/1516FSAHbkActiveIndexMaster.pdf>

In 1998, Congress added a new provision to the HEA, 20 U.S.C. § 1091(r), that disqualifies students with drug convictions from eligibility for federal aid. Since 1998, Congress has twice modified the provision, referred to as the “Aid Elimination Penalty,” to curtail its broad reach. But even in its amended form, as described below, the law makes no distinction between felony and misdemeanor offenses, or between state and federal offenses. It is estimated that, between 2013 and 2014, more than 1,100 students were denied aid under the Aid Elimination Penalty – a number that does not include students who did not apply for federal aid at all because they believed their drug convictions made applying futile.³

Research shows that the Aid Elimination Penalty disproportionately affects students from low- and middle-class families, who lack other means to finance their education if federal aid is unavailable. The Penalty also has a disparate impact on students of color, a phenomenon directly related to the severe racial inequalities in drug arrests and convictions in the United States.

The Penalty hurts hardworking students who are performing well in school. Because students who receive federal aid (and are thus eligible to lose it) must meet academic performance criteria as a condition of receiving aid, the Penalty only harms students who are meeting or exceeding performance standards.⁴

Challenges to the Penalty as unjust and unconstitutional date back nearly a decade. Over the years, members of Congress have introduced legislation calling for repeal of the Penalty, but so far those bills have failed. As described herein, there are currently three pieces of legislation pending in Congress – two (one in the Senate and one in the House) calling for repeal of the Penalty as an unfair collateral consequence of student drug convictions, and a third (in the House) seeking to exclude minor marijuana offenses from the Penalty’s broad reach.

The HEA is overdue for a comprehensive reauthorization, having last been reauthorized in 2008. As a Task Force created by a bipartisan group of U.S. Senators recently concluded, the pending reauthorization of the HEA provides an ideal opportunity to examine the provisions of the HEA and to strike those, like the Aid Elimination Penalty, that are more burdensome than beneficial, and that have a disparate impact on certain communities of students pursuing educational opportunities.

This Resolution and Report urges Congress to pass the pending bipartisan legislation or, if that legislation is unsuccessful, to introduce and pass new legislation – as part of a comprehensive reauthorization of the HEA or otherwise – that repeals the Aid Elimination Penalty. This Resolution and Report also urges that, in conjunction with the repeal, (1) the

³ “College Kids Caught With Drugs May Not Get Kicked Off Financial Aid Anymore,” Feb. 11, 2016, http://www.huffingtonpost.com/entry/drug-policy-financial-aid-college_us_56bcbe7fe4b08ffac1242cf9

⁴ “Staying Eligible” Fact Sheet, U.S. Department of Education, Federal Student Aid Office: <https://studentaid.ed.gov/sa/eligibility/staying-eligible#satisfactory-academic-progress>

Department of Education should remove the question about drug convictions that appears on the Free Application for Federal Student Aid (“FAFSA”), and (2) colleges and universities should be required to inform students who were ruled ineligible under the Penalty (and who have not regained their eligibility) that they are now eligible for federal aid.

History of the Aid Elimination Penalty

Ineligibility for federal student aid was first linked to drug offenses in 1988, at the height of the war on drugs. Amidst the backdrop of zealous anti-drug sentiment – a time marked by the rollout of the emblematic “Just Say No” and “This is Your Brain on Drugs” campaigns – Congress enacted the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690). A provision of the Act, codified at 21 U.S.C. § 862, authorized federal and state judges to deny certain federal benefits, including federal student aid, as part of sentences for individuals convicted of drug trafficking or possession offenses.⁵ The law set forth certain parameters for refusal of student aid benefits, including that ineligibility periods would be scaled in severity based on prior convictions, and that the penalties would be more severe for drug traffickers than for drug possessors.

This provision of the Anti-Drug Abuse Act – which remains in force today – was little used once it was enacted. Between 1988 and 1990, no judge suspended federal student aid based on it.⁶ Thereafter, judges used it, but only very rarely – *i.e.*, in less than approximately 1% of cases.⁷ Members of Congress expressed frustration about the “case-by-case” decision-making process and argued that it was resulting in a failure by judges to impose “accountability” on drug users.⁸ They pushed various pieces of legislation that would make denial of student aid to drug offenders mandatory, and would expand the power to refuse federal student aid benefits beyond the judiciary (*i.e.*, to the Department of Education).⁹ Their efforts were unsuccessful until 1998, when Congress enacted amendments to the Higher Education Act of 1965 (“HEA”), 20 U.S.C. § 1070 *et seq.* Contained in the 1998 amendments was an Aid Elimination Penalty, codified at 20 U.S.C. § 1091(r), that set forth a matrix for determining mandatory aid ineligibility according to (a) type of drug conviction (possession or sale) and (b) whether the student possessed qualifying prior convictions.¹⁰ Students could regain eligibility early, but only if they participated in a

⁵ 21 U.S.C. § 862; U.S. Department of Education Federal Student Aid Handbook (2015), Chapter 1 (1-15), accessible at <http://ifap.ed.gov/fsahandbook/attachments/1516FSAHbkActiveIndexMaster.pdf>

⁶ 136 Cong. Rec. 18,523 (1990); *see also* opening brief of Plaintiffs-Appellants in Students for Sensible Drug Policy Found. v. Spellings, No. 09-1159 (8th Cir., filed April 17, 2007), at 7-8.

⁷ Opening brief of Plaintiffs-Appellants in Students for Sensible Drug Policy Found. v. Spellings, No. 09-1159 (8th Cir., filed April 17, 2007), at 8.

⁸ *Id.* at 9 (citing 135 Cong. Rec. SS9936-01, S9940 (1989) and 136 Cong. Rec. H8746-02).

⁹ *Id.* at 9, 12 (citing 135 Cong. Rec. SS9936-01, S9940 (1989), 136 Cong. Rec. H8746-02, H8748 (1990); 137 Cong. Rec. E1480-01, E1480 (1991), 136 Cong. Rec. 18, 522 (1990)).

¹⁰ Pub. L. 105-244, codified at 20 U.S.C. § 1091(r).

government-approved rehabilitation program (at their own cost) and passed two drug tests. In 2006, Congress revised the Penalty provision to make it applicable only to students who are receiving federal aid when the offense is committed.¹¹ During the last HEA reauthorization process, in 2008, Congress scaled back the Penalty again, relaxing the requirements for regaining eligibility by no longer mandating participation in a government-approved rehabilitation program.¹² (As described below, students can now regain eligibility by passing two unannounced drug tests administered by a qualified rehabilitation center, without having to enroll in the program. Of course, this requires the student to find a qualified center that is willing to test him without requiring him to participate in a rehabilitation program, which can prove difficult.)

Though narrowed over the years, the Penalty remains controversial and raises serious questions about duplicative and excessive punishment. In 2006, the American Civil Liberties Union and the organization Students for Sensible Drug Policy challenged the Aid Elimination Penalty as unconstitutional, alleging in a lawsuit against the Department of Education that the provision violates the Double Jeopardy Clause of the Fifth Amendment and the Equal Protection Clause. In 2008, on appeal, the Eighth Circuit affirmed the lower court's dismissal of the case, finding that the Penalty does not constitute a criminal punishment, and that it is rationally related to non-punitive purposes (including promotion of drug-free learning environments and ensuring that tax dollars are spent on educational opportunities for law-abiding students).¹³

Current State of the Aid Elimination Penalty

Currently, under 20 U.S.C. § 1901(r), a student loses his or her eligibility for federal student aid if he or she:

- Is convicted of an offense involving the possession or sale of drugs under Federal or state law; and
- If the offense conduct (not the conviction) occurred during a time that the student was receiving federal aid funds.¹⁴

The location of the conduct leading to conviction is inconsequential under the law. For example, if a student commits a violation in Texas and is convicted in Texas, but attends school in California, the Texas offense will serve to disqualify the student – regardless of whether California criminalizes that conduct in the same manner, or at all.

¹¹ 71 FR 45696 (Aug. 9, 2006).

¹² The Higher Education Opportunity Act of 2008 (PL 110-315).

¹³ Students for Sensible Drug Policy Found. v. Spellings, No. 09-1159, 523 F.3d 896 (8th Cir 2008).

¹⁴ 34 C.F.R. 668.40(a).

The law is primarily enforced through the student's self-reporting on the Free Application for Federal Student Aid ("FAFSA"). Question 23 of the FAFSA requires a student applicant to disclose any "convictions for possessing or selling illegal drugs (not including alcohol and tobacco) for an offense that occurred while the student was receiving federal student aid."¹⁵ If the student responds in the affirmative, or provides no response, he or she is directed to an eligibility worksheet that sets forth the steps for determining whether the conviction disqualifies the student from receiving federal student aid.¹⁶

A conviction that satisfies the disqualification criteria results in a period of federal student aid ineligibility that is based on two factors: (1) whether the conviction is for possession or sale, and (2) whether the student has prior drug convictions that triggered the Penalty. The law makes no distinction between misdemeanor and felony convictions. The chart below illustrates the durations of ineligibility, by number of offense.

	Possession of controlled substance	Sale (including conspiracy to sell) of controlled substance
First offense	1 year from date of conviction	2 years from date of conviction
Second offense	2 years from date of conviction	Indefinite ban
Third or greater offense	Indefinite ban	

Under the law, a student can regain eligibility early by one of two means: (1) by participating in a qualified drug rehabilitation program that meets enumerated criteria and by passing two unannounced drug tests, or (2) by passing two unannounced drug tests administered by a qualified rehabilitation program, without having to complete the treatment program.¹⁷ As noted above, Option (2) was added to the law in 2006 to provide a more viable alternative for students who cannot afford costly rehabilitation programs. But, in reality, many facilities that meet the government's criteria will not perform drug tests on persons not admitted to their treatment programs.

The Penalty does not affect aid for students whose convictions are reversed or set aside; nor does it affect students whose convictions occurred before they reached the age of 18, unless the student was tried as an adult.¹⁸ The Penalty also does not apply if the student is arrested for the drug offense during a time he or she is not enrolled/receiving aid. A student is not considered to be enrolled/receiving aid during a summer break (assuming he or she is not

¹⁵ <https://fafsa.ed.gov/fotw1516/help/faadef51.htm>

¹⁶ <https://ifap.ed.gov/drugworksheets/attachments/1617SAEWkshtEN.pdf>

¹⁷ 34 C.F.R. 668.40(d).

¹⁸ 34 C.F.R. 668.40(a).

enrolled in classes during that summer); but a student *is* considered to be enrolled/receiving aid, and thus the Penalty can apply, during a holiday break in the school year.¹⁹

Recent Efforts to Curtail or Eliminate the Penalty

Over the years, there has been Congressional support for repealing the Penalty. For example, in 2009, former Representative Barney Frank (D-MA) introduced the “Removing Impediments to Students Education (RISE) Act of 2009,” which proposed repealing the aid penalty provision in its entirety. Despite bipartisan support for the bill, the RISE Act failed to pass the House.

In the fall of 2013, a bipartisan group of U.S. Senators created a task force, called the Task Force on Federal Regulation of Higher Education, to examine Department of Education regulations and other matters related to federal oversight of higher education. The Task Force, which included college and university presidents and higher education experts, completed its work in February 2015 and released a report in which it concluded, *inter alia*, that Congress should “remove the link between federal student aid eligibility and drug convictions.”²⁰ The Task Force’s report states:

“At its core, this provision represents an inappropriate attempt to address an unrelated broader social issue through the student financial aid process. Moreover, while drastically increasing the complexity of the application process for those individuals involved, the provision has very little impact and affects only a handful of students every year.”²¹

In the fall of 2015, following the issuance of the report, the House and the Senate each introduced various pieces of legislation seeking to strike or curtail the ban, including:

- **Eliminating the Penalty:** The Stopping Unfair Collateral Consequences from Ending Student Success (SUCCESS) Acts (S. 2557 and H.R. 4004). Introduced in November 2015 in the House and in February 2016 in the Senate, these bipartisan bills call for the full repeal of the Aid Elimination Penalty. The Senate bill (S. 2557) additionally calls for

¹⁹ U.S. Department of Education, Office of National Drug Policy, “FAFSA Facts,” at 2, available at <https://www.whitehouse.gov/sites/default/files/ondcp/recovery/fafsa.pdf>

²⁰ Report of Task Force on Federal Regulation of Higher Education, “Recalibrating Regulation of Colleges and Universities,” at 56, available at: http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf

²¹ *Id.* at 30.

elimination of the question concerning drug convictions (question 23) from the FAFSA. The bills have been referred to Committees in the House and Senate.²²

- **Curtailling the broad reach of the Penalty:** The Fair Access to Education Act of 2015 (H.R. 3561). This bill, introduced in fall 2015, would revise 20 U.S.C. § 1091(r) to carve out an exception for misdemeanor marijuana offenses, and would apply retroactively. The bill has been referred to a subcommittee of the House.²³

As of the date of the submission of this Report, all three pieces of legislation listed above are currently pending in Congress.

Legislative Status of the Higher Education Act

Since it was first enacted in 1965, the Higher Education Act (“HEA”) has been reauthorized eight times, in addition to being amended and extended on numerous occasions.²⁴ The HEA was most recently reauthorized in 2008, pursuant to the Higher Education Opportunity Act (P.L. 110-315).²⁵ Under that Act, many provisions of the HEA, including the Aid Elimination Penalty, were extended through FY 2014, with an automatic additional year’s extension to carry them to the end of fiscal year 2015.²⁶

Rather than reauthorizing the HEA at the end of fiscal year 2015, Congress has deferred reauthorization by issuing extensions pursuant to the Consolidated Appropriations Act of 2016 (P.L. 114-113)²⁷, the Continuing Appropriations Act, 2017 (P.L. 114-223)²⁸, and, most recently, the Further Continuing and Security Assistance Appropriations Act, 2017 (H.R. 2028, signed by President Obama on December 10, 2016).²⁹ The current extension expires on April 28, 2017.

²² Bill Information for S. 2557, available at <https://www.congress.gov/bill/114th-congress/senate-bill/2557/all-info?resultIndex=483>; Bill Information for H.R.4004, available at <https://www.congress.gov/bill/114th-congress/house-bill/4004?resultIndex=485>

²³ Bill Information for H.R.3561, available at <https://www.congress.gov/bill/114th-congress/house-bill/3561/all-info?resultIndex=25>

²⁴ Smole, D. and Hegji, A., “FY2016 Extension of the Higher Education Act: An Overview,” Congressional Research Service (Jan. 28, 2016), <https://fas.org/sgp/crs/misc/R44206.pdf>

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Full title of P.L. 114-223: “Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act.” See also <http://www2.ed.gov/about/overview/budget/news.html>.

²⁹ <https://www.congress.gov/bill/114th-congress/house-bill/2028>;
<https://www.whitehouse.gov/the-press-office/2016/12/12/statement-press-secretary-hr-2028>;

The transition to a new administration will likely delay the reauthorization of the HEA, at least in the short term. But Congress need not wait for a comprehensive reauthorization to act – rather, Congress can, and should, pass discrete legislation to address this problematic provision of the HEA.

Repealing the Aid Elimination Penalty is consistent with efforts by the Departments of Justice and Education, under the Obama administration, to reconsider the severity of collateral consequences of criminal convictions and to provide access to education to curb recidivism. In the summer of 2015, the Department of Education announced that it was beginning a pilot program, in conjunction with the Department of Justice, to restore access to Pell Grants to some prisoners.³⁰ Like Pell Grants for prisoners, eliminating roadblocks to federal aid for students with drug convictions (who may or may not be sentenced to time in prison – under the law, even a conviction for possession of a small amount of marijuana would disqualify the student) is a laudable criminal justice reform focused on curbing recidivism by providing access to education. This is a worthy goal for an administration of any political persuasion.

The Aid Elimination Penalty Should Be Repealed

This Report and Resolution urges the repeal of the Aid Elimination Penalty for the multitude of reasons set forth below.

1. The Penalty is an Unfair Collateral Consequence of a Drug Conviction, and an Excessive and Duplicative Punishment.

Students who are convicted of drug offenses, like other drug offenders, are punished through our criminal justice system. The mechanical application of an education law provision to temporarily or permanently deny those students access to financial aid on the basis of their convictions, separate from the criminal process, creates an unjust collateral consequence of conviction and constitutes a double punishment. The denial of aid can have long-lasting or even permanent effects on a student's future, far beyond the punishment that a court determines to be sufficient. This is particularly so in the case of first-time or minor drug offenses. For example, a first-time offender convicted of drug possession may receive probation with drug testing, and may never serve a day in custody. But because of the conviction on his record, that student will lose his federal aid for a full year unless he can meet the criteria for early restoration – regardless of whether a judge has determined that he needs it, or that he should be denied federal benefits.

³⁰ “U.S. Department of Education Launches Second Chance Pell Pilot Program for Incarcerated Individuals,” July 31, 2015, available at <http://www.ed.gov/news/press-releases/us-department-education-launches-second-chance-pell-pilot-program-incarcerated-individuals>; “Building a Prison-to-College Pipeline,” *The Atlantic*, Aug. 6, 2015, available at <http://www.theatlantic.com/politics/archive/2015/08/arne-duncan-pell-grants-prisoners/400565/>

2. The Ban Usurps Judges' Discretion and Creates an Unwarranted Burden on Prosecutors.

Under the current law, a judge has no say in whether restricting access to federal student aid is a worthy piece of an overall sentence for a drug conviction. Even if the judge disagrees that restricting aid is appropriate, the law usurps the judge's authority in this area and forces the Penalty on the student. This distorts the criminal justice system and significantly limits the ability of the judiciary to make comprehensive sentencing decisions. It also places an undue burden on the prosecutor, whose charging decision now essentially controls whether the student will be subjected to the Penalty (and, if so, whether to the possession penalties, or to the more severe selling penalties).

Repealing the HEA provision would not affect the discretion currently afforded to judges under the Anti-Drug Abuse Act to fashion a criminal sentence that includes restricting access to federal student aid.³¹

3. The Penalty Does Not Sufficiently Account for the Circumstances or Severity of the Drug Offense.

The Penalty applies broadly to any conviction for possession or sale of a controlled substance. It does not distinguish between federal and state convictions, nor between felonies and misdemeanors. It also does not take into account the type or amount of the controlled substance at issue. As such, a conviction for possession of marijuana, for example, produces the same outcome with respect to aid eligibility as a conviction for possession of heroin. This is discordant with U.S. drug policy, which assigns severity to drug offenses on the basis of the type and amount of the substance involved, including at charging and at sentencing.

Because of the Penalty, students convicted of possessing even an ounce of marijuana offenses have suffered the loss of student aid eligibility and, as a result, have had to give up pursuing a full course load (if they are able to continue with school at all).³² It is not sufficient to rely on prosecutors to exercise their discretion to drop charges or agree to diversion such that the student avoids a conviction (and thus avoids triggering the Penalty). There are simply too many

³¹ Under the Anti-Drug Abuse Act, individuals whose eligibility for aid is suspended under the Anti-Drug Abuse Act are placed on a Drug Abuse Hold List maintained by the government, and any federal student aid applications made by such individuals are checked against the list and rejected. *See* U.S. Department of Education, Office of National Drug Policy, "FAFSA Facts," <https://www.whitehouse.gov/sites/default/files/ondcp/recovery/fafsa.pdf>

³² Lott, M., "Drug Offenders to Get Federal Student Aid Under New Bill," FOXNews.com, Aug. 7, 2009, <http://www.foxnews.com/politics/2009/08/07/drug-offenders-federal-student-aid-new.html>

other factors that go into a prosecutor's charging discretion to make that a reliable safeguard against triggering of the Penalty in minor drug cases.

4. The Penalty Only Penalizes Students Who Are Meeting or Exceeding Academic Performance Standards At Their Schools.

Students who receive federal aid are required to maintain satisfactory academic progress as a condition of continuing to receive aid. Each higher education institution is responsible for developing a policy that spells out specifically what qualifies as satisfactory academic progress, but, in general, the requirements include a minimum grade-point average and a minimum number of class/credits.³³ Only students who meet these standards are permitted to receive federal aid. Thus, the Aid Elimination Penalty disproportionately affects students who are doing well in school (otherwise, they would already be ineligible for aid based on poor performance).

5. The Penalty Has a Disparate Impact on High-Risk Groups of Students and Minorities.

The Aid Elimination Penalty affects only students who qualify for federal aid, the majority of whom are students from low-income families that do not have the means to finance college without assistance from the federal government.³⁴ Research has shown that the Penalty disproportionately affects students whose mothers did not attend college and students living in urban areas, in addition to students from low-income families.³⁵ Of course, it is for these at-risk students that the future returns on higher education can be most critical.³⁶ Attending college can be a "turning point" in the lives of students from these populations.³⁷ It also can significantly reduce the risk that a student with a criminal conviction will commit additional crimes in the future.³⁸ Creating roadblocks to educational opportunities for these at-risk students can decrease their future potential and increase the likelihood of recidivism. Furthermore, it is consistent with federal education policy (and other provisions of the HEA) for the government to make concerted efforts to support first-generation students and students from low-income families. Grants and low-interest federal loans are two key ways that the government can support at-risk student populations.

³³ "Staying Eligible" Fact Sheet, U.S. Department of Education, Federal Student Aid Office: <https://studentaid.ed.gov/sa/eligibility/staying-eligible#satisfactory-academic-progress>

³⁴ See fn. 36.

³⁵ Lovenheim, M. and Owens, E., "Does Federal Financial Aid Affect College Enrollment? Evidence from Drug Offenders and the Higher Education Act of 1998," National Bureau of Economic Research Working Paper ("NBER Working Paper"), Feb. 2013, at 20.

³⁶ NBER Working Paper (fn. 32) at 3.

³⁷ NBER Working Paper (fn. 32) at 24 (citations omitted).

³⁸ NBER Working Paper (fn. 32) at 27.

Students from higher-income families who are better able to afford college likely enjoy additional advantages relevant to the Penalty. A student from a higher-income family is more likely than his counterpart from a low-income family to be able to afford a lawyer who can prevent a conviction from going on his record in the first place (and thus prevent the application of the Penalty entirely).³⁹ Additionally, in the event of a conviction, a student from a higher-income family likely has a better chance of regaining eligibility early, because he is more likely to be able to afford a private rehabilitation program.

Reflecting the racial inequalities inherent in drug arrests and convictions, the Penalty also disproportionately affects students of color.⁴⁰ Research shows that racial minorities use and sell drugs at same rates as whites, but are arrested, convicted, and incarcerated at much higher rates.⁴¹ For example, African-Americans and Latinos -- who comprise 13% and 17% of the U.S. population, respectively -- account for nearly 80% of individuals incarcerated for drug offenses in federal prison, and 60% of drug offenders incarcerated in state prison.⁴² As a result of the discriminatory enforcement of drug laws, students of color are disproportionately affected by punishments tied to drug convictions, such as the loss of federal benefits.⁴³

6. The HEA Permits Aid for Students Convicted of Other Crimes – Including Violent Crimes.

Under the current law, drug offenses are among the only offenses that can render students ineligible for federal aid. No such exclusionary rule applies to a student receiving aid who is

³⁹ Students for Sensible Drug Policy, “Why is Full Repeal of the HEA Aid Elimination Penalty Necessary?” http://ssdp.org/assets/files/campaigns/hea/Why_is_Full_Repeal_of_the_HEA_Aid_Elimination_Penalty_Necessary.pdf

⁴⁰ *Id.*

⁴¹ Drug Policy Alliance, “The Drug War, Mass Incarceration and Race” (February 2016), <http://www.drugpolicy.org/resource/drug-war-mass-incarceration-and-race>; Substance Abuse and Mental Health Services Administration, “Results from the 2014 National Survey on Drug Use and Health: Detailed Tables,” (Rockville, MD: Substance Abuse and Mental Health Services Administration, 2015), Table 1.19B.

⁴² Drug Policy Alliance, “The Drug War, Mass Incarceration and Race” (February 2016), <http://www.drugpolicy.org/resource/drug-war-mass-incarceration-and-race>; Bureau of Justice Statistics, “Federal Justice Statistics Program,” <http://www.bjs.gov/fjsrsrc/>; Carson, “Prisoners in 2014,” Appendix Tables 4 & 5.

⁴³ The Sentencing Project, “A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits,” Nov. 2013 (revised Jan. 2014), at 4. Available at: http://sentencingproject.org/doc/publications/cc_A%20Lifetime%20of%20Punishment.pdf (“[T]he racial/ethnic disparities in drug offender incarceration produced by the interaction of law enforcement and sentencing policies through the war on drugs [] translate into a disproportionate impact of the felony drug ban.”)

convicted of other crimes, such as burglary, arson, or even violent crimes. (Judges may have the discretion to deny access to federal benefits in these scenarios, but denial is not mandatory.) With the exception of some circumstances involving sexual offense convictions, drug convictions stand alone among criminal convictions as a basis for mandatory denial of federal student aid.

7. The Penalty Does Not Deter Drug Crime on College Campuses.

A 2013 study by the National Bureau of Economic Research found no evidence that the Aid Elimination Penalty actually deters drug offenses on college campuses, or reduces drug-related crime.⁴⁴ Indeed, in a 2005 report assessing the impacts of federal laws that provide for denial of federal benefits, the Government Accountability Office stated that it could not identify any studies evaluating whether the Penalty “actually helped to deter drug use.”⁴⁵

8. The Penalty Causes Students To Drop Out of School or Reduce Their Course Loads.

The number of students receiving aid has steadily increased over the past decade. Currently, more than 75% of college undergraduates rely on financial aid of some form to attend school.⁴⁶ Denying access to aid sets up a dangerous scenario whereby even a first-time offender can be sidelined from education for an entire year because he or she is unable to afford the cost of college without federal aid. If the student suffers this setback during his or her first year of college, it can be particularly detrimental to completion of college. Statistics compiled by the Department of Education show that 36% of students who leave four-year institutions after their first year of college do not return within five years. The number of non-returners climbs to 50% when looking at two-year institutions.⁴⁷

If they do not drop out of school entirely, students with reduced funds for schooling may be forced to reduce their course loads, thus elongating the time spent in college and delaying the higher earning potential that completing a college degree confers.⁴⁸

⁴⁴ NBER Working Paper (fn. 32) at 3.

⁴⁵ Government Accountability Office Report: “Drug Offenders: Various Factors May Limit the Impacts of Federal Laws that Provide for the Denial of Selected Benefits” (Sept. 26, 2006), at 59, <http://www.gao.gov/new.items/d05238.pdf>

⁴⁶ U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, “Fast Facts: Financial Aid,” <https://nces.ed.gov/fastfacts/display.asp?id=31>

⁴⁷ Students for Sensible Drug Policy, “Harms Caused By the HEA Aid Elimination Penalty,” <http://ssdp.org/campaigns/the-higher-education-act/legislative-guide/>

⁴⁸ Lott, M., “Drug Offenders to Get Federal Student Aid Under New Bill,” FOXNews.com, Aug. 7, 2009, <http://www.foxnews.com/politics/2009/08/07/drug-offenders-federal-student-aid-new.html>

9. The Penalty Can Drive Students to Predatory Lenders.

Not all students who lack access to federal aid drop out of school. A 2014 report by the Institute for College Access & Success found that students who do not have access to sufficient federal funding for other reasons (if, for example, the institution they attend chooses not to participate in the federal student loan program) do not necessarily borrow less money – instead, they turn to higher-risk means of obtaining the money they need to pay for college.⁴⁹ Liquidity-strapped students who need assistance to afford college can find themselves agreeing to take on riskier, more expensive private loans, many with predatory terms such as variable rates and minimal buyer protections.⁵⁰ These riskier loans often come with terms that can create incredible hardship for the student in the future – for example, no or very limited deferral of payments in the event of economic hardship (including unemployment), and fees that begin accruing even before graduation. Additionally, private loans often survive the closure of a school, whereas the government protects borrowers by allowing for cancellation of a loan in the event that the school closes.⁵¹

With respect to the Aid Elimination Penalty, one can reasonably infer from this data that some students who are ruled ineligible for funding on the basis of a drug conviction may resort to predatory private loans to fill the gap. Whether that gap can be filled in time sufficient to avoid an interruption in schooling is uncertain, so even students who take out risky private loans in the hope of staying in school may find their educations temporarily interrupted.

10. The Penalty Strips College Administrators Of Authority to Address Student Behavior.

The Aid Elimination Penalty is a self-executing provision that excludes colleges and universities from having any say in its application. School administrators have no opportunity to advocate for students, or to differentiate between students based on the circumstances of the drug conviction or on the student's academic performance. This offends the notion that colleges and universities should be the first line of authority when it comes to handling matters occurring on their campuses. Some schools, including the University of California-Berkeley, have reacted by crafting workarounds for their students, including by funding scholarships or finding other financial aid for students who lose federal aid as a result of the Penalty.⁵²

⁴⁹ “At What Cost? How Community Colleges That Do Not Offer Federal Loans Put Students At Risk,” Institute for College Access & Success, July 2014, at 3, <http://ticas.org/content/pub/what-cost-how-community-colleges-do-not-offer-federal-loans-put-students-risk>

⁵⁰ *Id.*

⁵¹ *Id.* at 5.

⁵² “Stoner Scholarship: UC Berkeley Amendment Bypasses Federal Aid Limits For Convicted Drug Offenders,” *The Daily Orange*, March 2, 2007, available at <http://www.csdp.org/news/news/heareform.htm>

Conclusion

Repealing the Aid Elimination Penalty will permit students – including the high-risk groups of students most affected by it – to have access to federal aid without any temporary or indefinite interruption in education. The Penalty is an excessive punishment with a discriminatory impact and an unfair collateral consequence of a drug conviction. Moreover, there is no evidence that the imposition of the Penalty deters drug activity on college campuses. To the contrary, the dire circumstances it creates may increase the risk of recidivism by the student.

The Aid Elimination Penalty distorts the function of criminal sentencing. Discretion to deny federal benefits to convicted drug offenders properly rests with the judiciary, not with the Department of Education. Repealing the Penalty does not mean that no drug offender could lose access to federal aid. Rather, it restores the judiciary’s role in making that determination as part of the larger sentencing process, pursuant to the authority set out elsewhere in the law (*i.e.*, in the Anti-Drug Abuse Act).

Congress is primed to act on this issue. The recent report by the Task Force on Federal Regulation of Higher Education, which unequivocally calls for repeal of the Penalty, notes that 20 U.S.C. § 1091(r) is an “inappropriate” provision that “drastically increase the complexity of the application process for those individuals involved.”⁵³ Moreover, the HEA is overdue to be reauthorized, and there are already bills pending in Congress calling for repeal. The time is right for Congress to remove this unjustified, unfairly punitive impediment to federal aid.

For these reasons and all others set forth in this Resolution and Report, we urge Congress to repeal the Aid Elimination Penalty of the Higher Education Act, 20 U.S.C. § 1091(r).

Respectfully submitted,

Laurence Pulgram
Chair, Section of Litigation

February 2017

⁵³ See fn. 20 (Task Force Report) at 30.

GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted By: Laurence G. Pulgram, Chair Section of Litigation

1. Summary of Resolution(s).

This Resolution urges Congress to repeal 20 U.S.C. § 1091(r), a provision of the Higher Education Act that denies eligibility for federal educational aid to students convicted of drug offenses (referred to as the “Aid Elimination Penalty”). There is currently legislation pending in Congress seeking repeal of the provision, and the Higher Education Act is also overdue for reauthorization.

The Resolution also urges that (1) the question about drug convictions on the Free Application for Federal Student Aid (“FAFSA”) be removed, and that (2) once the Aid Elimination Penalty is repealed, colleges and universities be required to inform students who were ruled ineligible under the Penalty (and who have not regained their eligibility) that they are now eligible for federal aid.

2. Approval by Submitting Entity.

Approved by the Council of the Litigation Section in April 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?

None.

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

N/A.

6. Status of Legislation. (If applicable.)

There is currently legislation pending in Congress seeking repeal of the provision, and the Higher Education Act is also overdue for reauthorization.

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

If the resolution were passed, the ABA could advocate on behalf of the pending legislation.

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

None

9. Disclosure of Interest. (If applicable.)

N/A

10. Referrals.

Criminal Justice Section
Law Student Division
Section of Legal Education
Health Law Section
Young Lawyers Division
Commission on Diversity Pipeline
Section of Civil Rights and Social Justice

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

Don Bivens
Section Delegate
Snell & Wilmer, LLP
One Arizona Center
400 East Van Buren, Suite 1900
Phoenix, AZ 85004
602/382-6549
dbivens@swlaw.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.)

Don Bivens
Section Delegate
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One Arizona Center
400 East Van Buren, Suite 1900
Phoenix, AZ 85004
602/382-6549
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges Congress to repeal 20 U.S.C. § 1091(r), a provision of the Higher Education Act that denies eligibility for federal educational aid to students convicted of drug offenses (referred to as the “Aid Elimination Penalty”). There is currently legislation pending in Congress seeking repeal of the provision, and the Higher Education Act is also due for reauthorization. The Aid Elimination Penalty is an excessive, duplicative punishment that disproportionately affects minorities and students from low- and middle-income families. Additionally, because students eligible to receive (and thus are eligible to lose) federal aid must meet academic performance criteria under the law, the Penalty only harms students who are meeting or exceeding performance standards.

The Resolution also urges that (1) the question about drug convictions on the Free Application for Federal Student Aid (“FAFSA”) be removed, and that (2) once the Aid Elimination Penalty is repealed, colleges and universities be required to inform students who were ruled ineligible under the Penalty (and who have not regained their eligibility) that they are now eligible for federal aid.

2. Summary of the issue which the Resolution Addresses

The resolution addresses current federal policy that denies federal educational aid to students convicted of drug offenses. The current policy disproportionately affects minorities and students from low- and middle-income families and impairs rehabilitation for non-violent offenders convicted of low-level drug crimes.

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

The proposed resolution will allow the ABA to advocate for the repeal of the current policy that denies federal educational aid to student convicted of drug offenses.

4. Summary of Minority Views

No opposing views have been expressed by other ABA entities or organizations as of the preparation of this summary.

AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES
JUDICIAL DIVISION
APPELLATE JUDGES CONFERENCE
NATIONAL CONFERENCE OF SPECIALIZED COURT JUDGES
NATIONAL CONFERENCE OF STATE TRIAL JUDGES
NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY
BUSINESS LAW SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress to amend Title 28 of the
2 United States Code to authorize the appointment of additional bankruptcy judges sufficient to
3 meet the demands within each district; and for other purposes;

4
5 FURTHER RESOLVED, That the American Bar Association urges Congress, as recommended
6 by the Judicial Conference of the United States, to convert certain temporary bankruptcy judges
7 to permanent bankruptcy judges in Florida, Maryland, Nevada, North Carolina, Puerto Rico,
8 Tennessee, and Virginia and to authorize the appointment of additional bankruptcy judges in
9 Delaware, Michigan, and the Middle District of Florida; and

10
11 FURTHER RESOLVED, That the American Bar Association urges Congress, in the event that
12 Title 28 is not amended in needed time, to consider, as recommended by the Judicial Conference
13 of the United States, a one-year extension of seven judgeships, which includes two positions in
14 Delaware, two in Florida-Southern, one in Virginia, one in Michigan-Eastern and one in Puerto
15 Rico.

REPORT

Introduction

The purpose of this Resolution is to encourage Congress to pass legislation which would convert certain temporary bankruptcy judgeships to permanent positions and create additional bankruptcy judgeships to meet the demonstrated demands for bankruptcy court services within each district, in order to allow the courts to perform their function and to maintain the administration of justice.

Background

Presently, there are twenty-nine judgeships in the bankruptcy system with a lapse date of May 25, 2017; without congressional action by May 25, 2017, all twenty-nine of these temporary judgeships would be eliminated, unless they are later created by new legislation.¹ A judge sitting in a temporary position can sit in that district to fulfill his or her term after May 25, 2017, and can seek reappointment. However, if any sitting judge in that district retires, dies, resigns, or becomes disabled after that date, the temporary position lapses, reducing the number of judgeships in that district.²

These temporary judgeships were originally created in 2005 under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).³ The temporary judgeships were created with the goal of more closely tying the growth of the judiciary with case filings, which tend to be cyclical.⁴ The positions are temporary because Congress set a time period, most often five years, when it figured case filings in those districts would no longer justify the need for additional judges.⁵ Congress provided that, at the expiration of that time period, the additional judgeships would be lost after the first vacancies thereafter, bringing the districts to their prior judgeship levels.⁶ After the lapse of these positions, new legislation would be necessary to create any new judgeship positions, allowing Congress to tie the growth of the judiciary to its need for judges.⁷ At the time, Congress thought bankruptcy issues arising as a result of the new law would die down due to the changes it had made in BAPCPA making bankruptcy less attractive to many parties.⁸

Bankruptcy filings are highly correlated to the performance of the economy; therefore, they are also highly volatile, without a clear trend on a year-to-year basis. However, non-business filings have shown a clear trend of increasing. While business bankruptcies rose in 2009 to levels of the early 1990s, the trend is still down. Yet, the trend does not counter the overall increasing trend due to the fact that consumer filings have consistently represented ninety percent of the docket.

¹ *Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships*, ABI JOURNAL, June 2016, at 8, 71.

² *Id.*

³ Diane Davis, *Loss of Temporary Bankruptcy Judgeships Would Be Significant*, BLOOMBERG BNA BANKRUPTCY LAW REPORTER, March 31, 2016, <http://www.bna.com/loss-temporary-bankruptcy-n57982069531/>

⁴ *Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships*, Supra note 1, at 8.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Diane Davis, Supra Note 3.

In line with prior experience, any persistent downturn or stagnation of the economy will result in a dramatic increase in filings. The caseloads will keep these courts permanently busy.

Thus, unless the sunset date of May 2017 is extended, or the judgeships are made permanent, any retirement or departure of a temporary judgeship will not be filled and many districts will lose judgeships.⁹ The loss of judgeships has a huge impact on the remaining judges' workloads.¹⁰

Pending Legislation

Recognizing this problem, the bills before Congress [H.R. 4225; S. 2448] create six new judgeships and convert sixteen temporary judgeships to permanent.¹¹ The Judicial Conference of the United States, the policy-making arm of the federal court system, has also recommended converting these sixteen temporary bankruptcy judgeships to permanent judgeships in nine districts that, for a variety of reasons, continue to have high caseloads.¹² Specifically, the pending bills and Judicial Conference recommend converting temporary bankruptcy judgeships in the following: Puerto Rico (First Circuit); Delaware (Third Circuit); Maryland, North Carolina-Eastern District, and Virginia-Eastern District (Fourth Circuit); Michigan-Eastern District and Tennessee-Western District (Sixth Circuit); Nevada (Ninth Circuit); and Florida-Southern District (Eleventh Circuit).¹³ In addition, the bills call for additional bankruptcy judges in Delaware, the Eastern District of Michigan, and in the Middle District of Florida.¹⁴

The Judicial Conference has explained that the nine districts in need of relief have a fifty-five percent increase in weighted bankruptcy filings from December 31, 2006, which was the last time new bankruptcy judges were authorized, through September 30, 2014.¹⁵ In making this decision, the Judicial Conference measured the weighted caseloads of all bankruptcy districts.¹⁶ This analysis justified the need for new judgeships in certain districts. Delaware, for example, where a disproportionate number of large business cases are filed, has one of the highest weighted caseloads for bankruptcy judges in the country, and filings are on the rise.¹⁷ The U.S. Bankruptcy Court for the District of Delaware has six judges, five of which are temporary judgeships.¹⁸ Thus, after May 25, 2017, if one of the five temporary judges departs for any reason or retires, the position would not be filled, and eventually, Delaware would be left with one judge to handle all cases.¹⁹ This would make it impossible for that judicial district to continue to serve the business community.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships*, *Supra* note 1, at 8.

¹² Diane Davis, *Supra* Note 3.

¹³ *Id.*; see also H.R. 4225, 114th Congress (2015-2016); S.2448, 114th Congress (2015-2016)

¹⁴ See H.R. 4225; S.2448, *Supra* Note 13.

¹⁵ Diane Davis, *Supra* Note 3.

¹⁶ *Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships*, *Supra* note 1, at 8.

¹⁷ Diane Davis, *Supra* Note 3.

¹⁸ *Id.*

¹⁹ *Id.*

Potential Negative Impact

Nevertheless, Congress remains reluctant to create these new judgeships with the current budget.²⁰ While current case filings in most districts are lower than recent years and allow for many bankruptcy courts to perform their critical functions with the present judge allocations, case filings are expected to increase.²¹ Once this happens, “the courts’ ability to timely and efficiently conduct hearings would be at risk. The threat to case administration becomes even more serious if the temporary judgeships are not made permanent and those districts are exposed to the loss of those positions upon retirement, death, resignation or disability of any sitting judge.”²²

Since the temporary judgeship positions were created, there have been lapses or losses of judgeships in five districts, including South Carolina, Colorado, New Hampshire, New York-Southern and Alabama-Northern.²³ The South Carolina position was restored by legislation, but the loss of the four judgeships, along with a position in Mississippi-Southern that lapsed and will create a loss at the next vacancy, coupled with the twenty-nine temporary judgeships set to lapse after May 25, 2017, “expose the bankruptcy system to a potential loss of [thirty-three] positions, which is roughly ten percent of the present judicial workforce.”²⁴ The last time the temporary judgeship positions were extended, Congress required new funding to balance the budget scoring, with the mindset that the loss of positions would reduce costs, so their continuation should be funded again.²⁵ At that time, funding came from a national increase in the Chapter 11 filing fee, which remains in effect today.²⁶

Chapter 11 bankruptcy exists to protect the assets of financially distressed firms from seizure by creditors while the firm considers how to restructure in a way that allows for their value to exceed liquidation value.²⁷ Bankruptcy proceedings filter distressed firms that are still economically viable from those whose assets should be redeployed, causing an important impact on the allocation of capital in our economy.²⁸ Efficient allocation of resources through restructuring also preserves and creates jobs. “Because bankruptcy proceedings can affect allocation of capital by changing the outcome of a case, the efficiency of the court itself significantly impacts the costs of financial distress and the ultimate outcome of the bankruptcy.”²⁹ A judge whose caseload is overflowing, or who has time constraints, may find it harder to closely consider all the information for each case, increasing the risk of error.³⁰ An overburdened judge may not be able to meet the tight deadlines often presented by cases. Studies demonstrate that as judges become busier, they become pro-debtor; firms whose cases

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships*, *Supra* note 1, at 71.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Benjamin Iverson, *Get in Line: Chapter 11 Restructuring in Crowded Bankruptcy Courts*, KELLOGG SCHOOL OF MANAGEMENT, NORTHWESTERN UNIVERSITY, December 2015, under review, <http://www.kellogg.northwestern.edu/faculty/iverson/papers.html>, at 1.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Benjamin Iverson, *Supra* note 11 at 2.

are dismissed from busy courts have a higher chance of refiling for bankruptcy again.³¹ Additionally, given that bankruptcy filings rise nationwide by about 32% during economic recessions, crowded courts impose additional costs on distressed firms, including increased time spent in bankruptcy.³²

If Congress fails to pass a conversion bill before May 25, 2017, there will, in time, be a major impact on bankruptcy practitioners practicing in the related districts; this will occur as those judges retire, resign or die in office.³³ At that time, practitioners and the public will likely experience a slowdown of case processing.³⁴ Emergency hearings may become difficult to schedule, with an overall slowdown of the system, and compliance with statutory deadlines, such as relief from stay motions, could be threatened.³⁵ Moreover, the efficient resolution of issues, necessary for reorganizations and fresh start and claims distribution, would be at risk without a complete judiciary.³⁶ All of these factors would be further exacerbated by the expected increase in case filings.³⁷

A Temporary Solution

Because the related bills are stuck in respective House and Senate Judiciary Committees, and the potential to lose critical temporary judgeships looms, the Judicial Conference has requested consideration of a one-year extension of seven judgeships in the Fiscal Year 2017 appropriations bill.³⁸ On March 25, 2016, the Judicial Conference submitted a request to the House and Senate Appropriations Committees identifying districts that combine high caseloads with even higher likelihood of judicial vacancies soon after the lapse date.³⁹ This group includes two positions in Delaware, two in Florida-Southern, one in Virginia, one in Michigan-Eastern and one in Puerto Rico.⁴⁰ If this extension is passed, Congress would have a little more time to consider retaining those judicial positions.⁴¹ While this step is positive, and supported by groups such as the National Conference of Bankruptcy Judges, it is important to remember the remaining nine judgeships identified as necessary in the pending bills.⁴²

Respectfully submitted,

Hon. Frank J. Bailey, Chair
National Conference of Federal Trial Judges
February 2017

³¹ Benjamin Iverson, Supra note 11 at 2-3.

³² *Id.*

³³ *Bankruptcy Judgeship Act Would Add, Extend Badly Needed Judgeships*, Supra note 1, at 71.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

GENERAL INFORMATION FORM

Submitting Entity: National Conference of Federal Trial Judges

Submitted By: Hon. Frank J. Bailey, Chair, National Conference of Federal Trial Judges

1. Summary of Resolution(s).

This Resolution urges Congress to amend Title 28 of the United States Code to authorize the appointment of additional bankruptcy judges sufficient to meet the demands within each district; and for other purposes. Moreover, in the event that Title 28 is not amended in needed time, this Resolution urges Congress to consider, as recommended by the Judicial Conference of the United States, a one-year extension of seven judgeships, which includes two positions in Delaware, two in Florida-Southern, one in Virginia, one in Michigan-Eastern and one in Puerto Rico.

2. Approval by Submitting Entity.

The National Conference of Federal Trial Judges voted unanimously to sponsor and submit this Resolution and Report for consideration of the ABA House of Delegates during its business meeting at the 2016 ABA Annual Meeting on Friday, August 5, 2016. After providing input, the Judicial Division voted to cosponsor at its JD Council meeting on September 21, 2016. The Business Law Section also provided input and voted to cosponsor at its Council meeting on September 8, 2016. Other Judicial Division conferences provided input and voted to cosponsor at various times thereafter, including the National Conference of State Trial Judges, the National Conference of Specialized Court Judges, the National Conference of the Administrative Law Judiciary and the Appellate Judges Conference.

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

No.

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

At the 2013 ABA Annual Meeting, the ABA House of Delegates adopted “Recommendation 115,” calling for, among other items, the enactment of comprehensive legislation to authorize needed permanent and temporary federal judgeships, with particular focus on the federal districts with identified judicial emergencies so that affected courts may adjudicate all cases in a fair, just and timely manner. While this policy targeted the Article III judiciary, and Bankruptcy judges are Article I adjuncts, it also supports the concept that district courts need a full complement of bankruptcy judges to perform all the functions assigned to them. This Resolution would complement that existing policy. This Resolution is also fully in sync with Goal IV of the ABA, to advance the Rule of Law by increasing public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world; holding government accountable under law; working for just laws, including human rights, and a fair

legal process; assuring meaningful access to justice for all persons; and preserving the independence of the legal profession and the judiciary.

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.

H.R.4225, known as the Bankruptcy Judgeship Act of 2015, was introduced in House on 12/10/2015. On 12/10/2015, it was referred to the House Committee on the Judiciary, and on 01/15/2016, it was referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law. There was no further action taken during the 114th Congress and it is unclear will happen in the next session.

The related Senate bill, S.2448, known as the Bankruptcy Judgeship Act of 2016, was introduced in the Senate on 01/19/2016. It was then read twice and referred to the Committee on the Judiciary. There was no further action taken during the 114th Congress and it is unclear will happen in the next session.

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

The Judicial Division will work with its members, lawyers and judges, along with related ABA entities and outside entities such as the National Conference of Bankruptcy Judges, to bring this policy and the importance of amending Title 28 of the United States Code to authorize the appointment of additional bankruptcy judges sufficient to meet the demands within each district, to the attention of Congress. With support of the full ABA, the Judicial Division intends to make this issue a focus of its "Lawyers Conference Day on the Hill" program, at which time members of the Lawyers Conference will lobby members of Conference on issues of significant importance to the federal judiciary.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Judicial Division
National Conference of State Trial Judges
National Conference of the Administrative Law Judiciary

National Conference of Specialized Court Judges
 Lawyers Conference
 Appellate Judges Conference
 Section of Antitrust Law
 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
 Solo, Small Firm and General Practice Division
 Tort Trial & Insurance Practice Section
 Young Lawyers Division
 Law Student Division
 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)

Hon. Frank J. Bailey
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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. Frank J. Bailey
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5 Post Office Square
Boston, Massachusetts
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges Congress to amend Title 28 of the United States Code to authorize the appointment of additional bankruptcy judges sufficient to meet the demands within each district; and for other purposes. Moreover, in the event that Title 28 is not amended in needed time, this Resolution urges Congress to consider, as recommended by the Judicial Conference of the United States, a one-year extension of seven judgeships, which includes two positions in Delaware, two in Florida-Southern, one in Virginia, one in Michigan-Eastern and one in Puerto Rico.

2. Summary of the Issue that the Resolution Addresses

The purpose of this Resolution is to encourage Congress to pass legislation which would convert certain temporary bankruptcy judgeships to permanent positions, and create additional bankruptcy judgeships where needed, in order to allow the courts to perform their function and to maintain the administration of justice.

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

The proposed policy position addresses the issue by calling on Congress to take action on pending legislation which resolves the issue at stake. The official approval of the ABA is a powerful voice of support for this issue.

4. Summary of Minority Views

There are no minority views known at this time.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON THE AMERICAN JUDICIAL SYSTEM
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION
SECTION OF LITIGATION
COMMISSION ON THE AMERICAN JURY
SECTION OF TORT TRIAL AND INSURANCE PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges all state courts to consider the
2 Recommendations of *Call to Action: Achieving Civil Justice for All* as appropriate guidance in
3 their endeavors to achieve demonstrable civil justice improvements with respect to the
4 expenditure of time and costs to resolve civil cases; and

5
6 FURTHER RESOLVED, That the American Bar Association urges all state courts to develop
7 and implement a civil justice improvements plan to improve the delivery of civil justice guided
8 by the Recommendations of *Call to Action: Achieving Civil Justice for All* as endorsed by the
9 Conference of Chief Justices in 2016; and

10
11 FURTHER RESOLVED, That the American Bar Association urges bar associations to promote
12 the Recommendations of *Call to Action: Achieving Civil Justice for All* and to collaborate with
13 judges and lawyers to improve the delivery of civil justice.

REPORT

I. Introduction

Everyone deserves access to a legal process that promptly resolves disputes, but high costs, delays, and complexity plague the American civil justice system. In 2013, the Conference of Chief Justices (“CCJ”) created a Civil Justice Improvements (“CJI”) Committee to examine the civil justice system holistically, consider the impact and outside assessments of recent pilot projects, and develop a comprehensive set of recommendations for civil justice reform to meet the needs of the 21st century. In 2016, the CJI Committee issued its report, *Call to Action: Achieving Civil Justice for All*,¹ setting forth 13 recommendations, which were endorsed by the CCJ and the Conference of State Court Administrators (“COSCA”).²

The Standing Committee on the American Judicial System is the entity within the ABA that shall “make recommendations to improve and enhance the American judicial system” and assist courts to prepare for and respond to “threats to the fair, impartial and efficient administration of justice.” Its Subcommittee on State Courts is specifically directed to maintain liaison with organizations concerned with judicial reform related to state courts, including the Conference of Chief Justices and the National Center for State Courts (“NCSC”). In fulfillment of those duties, SCAJS drafted this Resolution with the cooperation of the CCJ, NCSC, and IAALS, the Institute for the Advancement of the American Legal System.

This Resolution urges all state courts to consider the Recommendations of *Call to Action: Achieving Civil Justice for All* as appropriate guidance in their endeavors to achieve demonstrable civil justice improvements with respect to the expenditure of time and costs to resolve civil cases. It further urges all state courts to develop and implement a civil justice improvements plan to improve the delivery of civil justice.³ The Resolution also urges bar associations to promote the Recommendations of *Call to Action: Achieving Civil Justice for All* and to collaborate with judges and lawyers to improve the delivery of civil justice. While many of the Recommendations to reduce delay and improve access to justice can be implemented within existing budgets and under current rules of procedure, others will require steadfast, strong leadership to achieve these goals. To the extent that implementation of some of the Recommendations may require additional funding, existing ABA policy urges state, territorial, and local legislative bodies and governmental agencies to adopt laws and policies that ensure full and adequate court funding.⁴

¹ The majority of this Report is taken from *Call to Action: Achieving Civil Justice for All*, © 2016, National Center for State Courts.

² See CCJ/COSCA Resolution 8 In Support of the Call to Action and Recommendations of the Civil Justice Improvements Committee to Improve Civil Justice in State Courts, adopted July 27, 2016.

³ CCJ/COSCA Resolution 8 encourages CCJ and COSCA members to consider *Call to Action: Achieving Civil Justice for All* “as a worthy guide for their own state endeavors to improve the delivery of civil justice for all” and encourages “each state to develop and implement a civil justice improvements plan to improve the delivery of civil justice.”

⁴ 2013 AM 10C (adopting *Principles for Judicial Administration*); see also 2011 AM 302; 2004 AM 107.

II. Background, Fundamental Principles of the CJI Committee, and Research

State courts and the lawyers that practice in them are well aware of the cost, delay, and unpredictability of civil litigation. The dramatic rise in self-represented litigants and strained court budgets from two severe recessions have further hampered the ability of courts to promptly and efficiently resolve cases. In response, many litigants have begun to seek solutions outside of the courts and, in some instances, to forgo legal remedies entirely. As a result, public trust and confidence in the courts have decreased. While these concerns have been raised for more than a century and continue to worsen in many respects, court leaders in some states have begun to take concrete steps toward change. They are updating court rules and procedures,⁵ using technology to empower litigants and court staff, and rethinking longstanding customs about the process for resolving civil cases. A dozen states have implemented civil justice reforms over the past five years, either on a “pilot” or statewide basis. These reforms are encouraging, but limited in scope.

Given the profound challenges facing the civil justice system and the many recent reform efforts, the CCJ decided the time was right to take the lead in restoring function and faith in a system that is too important to lose. With the assistance of NCSC and IAALS, the CCJ named a diverse 23-member CJI Committee to research and prepare the recommendations. The members included trial and appellate court judges, trial and state court administrators, experienced lawyers representing the plaintiff and defense bars and legal aid, representatives of corporate legal departments, and legal academics. The CJI Committee was charged with “developing guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input; and making recommendations as necessary in the area of caseload management for the purpose of improving the civil justice system in state courts.”

Throughout the process of developing the recommendations, the CJI Committee followed a set of eight fundamental principles aimed at achieving demonstrable civil justice improvements that are consistent with each state’s existing substantive law.

FUNDAMENTAL FRAMEWORK/PRINCIPLES FOR RECOMMENDATIONS:

1. Recommendations should aim to achieve demonstrable improvements with respect to the expenditure of time and costs to resolve civil cases.
2. Outcomes from recommendations should be consistent with existing substantive law.
3. Recommendations should protect, support, and preserve litigants’ constitutional right to a civil jury trial and honor procedural due process.
4. Recommendations should be capable of implementation within a broad range of local legal cultures and practices.
5. Recommendations should be supported by data, experiences of Committee members, and/or “extreme common sense.”

⁵ Arizona, Colorado, Minnesota, New Hampshire, and Utah have changed their civil rules and procedures to require mandatory disclosure of relevant documents, to curb excessive discovery, and to streamline the process for resolving discovery disputes and other routine motions.

6. Recommendations should not systematically favor plaintiffs or defendants, types of litigants, or represented or unrepresented litigants.
7. Recommendations should promote effective and economic utilization of resources while maintaining basic fairness.
8. Recommendations should enhance public confidence in the courts and the perception of justice.

The CJI Committee worked for more than 18 months to examine and incorporate insights from courts around the country. Committee members reviewed existing research on the state of the civil justice system in American courts and extensive additional fieldwork by NCSC on the current civil docket; recent reform efforts, including evaluations of a number of state pilot projects; and technology, process, and organizational innovations.

To inform the deliberations of the CJI Committee, NCSC undertook a multijurisdictional study of civil caseloads in state courts. *The Landscape of Civil Litigation in State Courts* focused on non-domestic civil cases disposed between July 1, 2012 and June 30, 2013 in state courts exercising civil jurisdiction in 10 urban counties. The dataset, encompassing nearly one million cases, reflects approximately 5% of civil cases nationally.

The *Landscape* findings presented a very different picture of civil litigation than most lawyers and judges envisioned based on their own experiences and on common criticisms of the American civil justice system. Although high-value tort and commercial contract disputes are the predominant focus of most debates, collectively they comprised only a small proportion of the *Landscape* caseload. Nearly two-thirds (64%) of the caseload was contract cases. The vast majority of those were debt collection, landlord/tenant, and mortgage foreclosure cases (39%, 27%, and 17%, respectively). An additional 16% of civil caseloads were small claims cases involving disputes valued at \$12,000 or less, and 9% were characterized as “other civil” cases involving agency appeals and domestic or criminal-related cases. Only 7% were tort cases, and 1% were real property cases.

The composition of contemporary civil caseloads stands in marked contrast to caseloads of two decades ago. Secondary analysis was undertaken comparing the *Landscape* data with civil cases disposed in 1992 in 45 urban general jurisdiction courts. In the 1992 *Civil Justice Survey of State Courts*, the ratio of tort to contract cases was approximately 1:1. In the *Landscape* dataset, this ratio had increased to 1:7. While population-adjusted contract filings fluctuate somewhat due to economic conditions, they have generally remained fairly flat over the past 30 years. Tort cases, in contrast, have largely evaporated.

To the extent that damage awards recorded in final judgments are a reliable measure of the monetary value of civil cases, the cases in the *Landscape* dataset involved relatively modest sums. In contrast to widespread perceptions that much civil litigation involves high-value commercial and tort cases, only 0.2% had judgments that exceeded \$500,000 and only 165 cases (less than 0.1%) had judgments that exceeded \$1 million. Instead, 90% of all judgments entered were less than \$25,000; 75% were less than \$5,200.

Only 4% of cases were disposed by bench or jury trial, summary judgment, or binding arbitration. The overwhelming majority (97%) of these were bench trials, almost half of which (46%) took place in small claims or other civil cases. Three-quarters of judgments entered in contract cases following a bench trial were less than \$1,800.

Most cases were disposed without trial. A judgment without a trial was entered in nearly half (46%) of the *Landscape* cases, most of which were likely default judgments. One-third of cases were dismissed (possibly following a settlement, although only 10% were explicitly coded by the courts as settlements). Summary judgment is a much less favored disposition in state courts compared to federal courts. Only 1% were disposed by summary judgment. Most of these would have been default judgments in debt collection cases, but the plaintiff instead chose to pursue summary judgment, presumably to minimize the risk of post-disposition challenges.

The traditional view of the adversarial system assumes the presence of competent attorneys zealously representing both parties. One of the most striking findings in the *Landscape* dataset, therefore, was the relatively large proportion of cases (76%) in which at least one party was unrepresented, usually the defendant. Tort cases were the only case type in which attorneys represented both parties in a majority (64%) of cases. Surprisingly, small claims dockets in the *Landscape* courts had an unexpectedly high proportion (76%) of plaintiffs who were represented by attorneys. This suggests that small claims courts, which were originally developed as a forum for self-represented litigants to access courts through simplified procedures, have become the forum of choice for attorney-represented plaintiffs in debt collection cases.

The Recommendations arise from the realities made clear by the *Landscape* data as well as the experiences of pilot projects and rule changes around the country. They are founded on the premise that current civil justice processes are largely not working for litigants. A core contributing factor is that lawyers often control the pace of litigation, which has led to unnecessary delays in case resolution. Thus, the first recommendation advocates that courts take definitive responsibility for managing civil cases from filing to disposition. This includes effective enforcement of rules and orders designed to promote the just, prompt, and inexpensive resolution of civil cases. That recommendation is the lynchpin for all that follow.

The concept of effective civil caseload management is not new. Recognizing that few judges have the luxury of a caseload small enough to permit individual judicial attention in every case, the Recommendations promote the expansion of responsibility for managing civil cases from the judge as an individual to the court as a collective institution. The term “court” encompasses the entire complement of courthouse personnel—judges, staff, and infrastructure resources including information technology. This in turn will free the judge to focus on tasks that require the unique expertise of a judicial officer, such as issuing decisions on dispositive motions and conducting evidentiary hearings, including bench and jury trials.

The Recommendations also recognize that uniform rules that apply to all civil cases are not optimally designed for most civil cases. They provide too much process for the vast majority of cases, including uncontested cases. And they provide too little management for complex cases that comprise a small proportion of civil caseloads, but which inevitably require a disproportionate amount of attention from the court. Instead, cases should be “right-sized” and

triaged into appropriate pathways at filing. However, those pathways should be flexible enough to permit reassignment if the needs of the case change over time.

The pathway approach described in the Recommendations improves existing court structures and differentiated case management (“DCM”) systems. Many court systems are currently characterized by a tiered structure of general and limited jurisdiction courts that limit where civil cases can be filed based on case type or amount-in-controversy or both. DCM is a rule-based system that, at varying times after filing, assigns civil cases to case-processing tracks, usually based on case type or amount-in-controversy. Each DCM track features its own case-processing rules concerning presumptive deadlines for case events.

Tiered court systems and DCM offer little flexibility once the initial decision has been made concerning the court in which to file or the assigned DCM track. A case filed in the general jurisdiction court cannot gain access to procedures or programs offered to cases in the limited jurisdiction court and vice versa. A case assigned to one DCM track usually cannot be reassigned later to another track. The rules and procedures for each court or DCM track typically apply to all cases within that court or track, even if a case would benefit from management under rules or procedures from another court or track. Furthermore, experience has found that case type and amount-in-controversy—the two factors most often used to define the jurisdiction of courts in tiered systems or DCM procedures—do not reliably forecast the amount of judicial management that each case demands.

For these reasons it is imperative that courts develop rules and procedures for promptly assigning all cases to pathways designed to give each case the amount of attention that properly fits the case’s needs. As importantly, courts must implement business practices that ensure that rules and procedures are enforced. Rules and procedures for each pathway should move each case toward resolution in an expeditious manner. For example, empirical research shows that fact-pleading standards and robust mandatory disclosures induce litigants to identify key issues in dispute more promptly and help inform litigants about the merits of their respective claims and defenses. Other rules and procedures that have been shown to be effective are presumptive restrictions on the scope of necessary discovery and strictly enforced deadlines. These promote completion of key stages of litigation up to and including trials.

It is axiomatic that court rules, procedures, and business practices are critical for maintaining forward momentum in cases where all litigants are fully engaged in the adversarial process to resolve their disputed issues. These rubrics are even more critical in the substantial proportion of civil caseloads comprised of uncontested cases and cases involving large asymmetries in legal expertise. While most of these cases resolve relatively quickly, the *Landscape* study makes clear that significant numbers of cases languish on civil calendars for long periods of time for no apparent reason. Research shows that poor management of high-volume dockets can especially affect unrepresented parties.

Guided by the fundamental principles, existing research and that undertaken by NCSC, recent reform efforts, and lessons learned from their own experience as lawyers, judges, and administrators, the CJI Committee made 13 recommendations that provide courts with a roadmap to make justice for all a reality.

III. The Recommendations of *Call to Action: Achieving Civil Justice for All*

Courts must improve how they serve citizens in terms of efficiency, cost, and convenience and make the court system a more attractive option to achieve justice in civil cases. The 13 recommendations of the CJI Committee provide appropriate guidance for those states desiring to implement reforms to achieve demonstrable civil justice improvements with respect to the expenditure of time and costs to resolve civil cases.

The Recommendations of *Call to Action: Achieving Civil Justice for All* include:

- **Recommendation 1:** Courts must take responsibility for managing civil cases from time of filing to disposition.
- **Recommendation 2:** Beginning at the time each civil case is filed, courts must match resources with the needs of the case.
- **Recommendation 3:** Courts should use a mandatory pathway-assignment system to achieve right-sized case management.
- **Recommendation 4:** Courts should implement a Streamlined Pathway for cases that present uncomplicated facts and legal issues and require minimal judicial intervention but close court supervision.
- **Recommendation 5:** Courts should implement a Complex Pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.
- **Recommendation 6:** Courts should implement a General Pathway for cases whose characteristics do not justify assignment to either the Streamlined or Complex Pathway.
- **Recommendation 7:** Courts should develop civil case management teams consisting of a responsible judge supported by appropriately trained staff.
- **Recommendation 8:** For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case management practices.
- **Recommendation 9:** Courts should establish judicial assignment criteria that are objective, transparent, and mindful of a judge's experience in effective case management.
- **Recommendation 10:** Courts must take full advantage of technology to implement right-size case management and achieve useful litigant-court interaction.
- **Recommendation 11:** Courts must devote special attention to high-volume civil dockets that are typically composed of cases involving consumer debt, landlord-tenant, and other contract claims.
- **Recommendation 12:** Courts must manage uncontested cases to assure steady, timely progress toward resolution.
- **Recommendation 13:** Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.

These Recommendations will not be easy to implement. Doing so will require that state courts and judges take significant institutional and personal responsibility. It will require buy-in from the lawyers who practice in those courts. Everyone involved in the civil justice system will have to be open to new rules and procedures and changes that may not always be comfortable at first. *Call to Action: Achieving Civil Justice for All* provides useful commentary to assist courts as they work through the implementation of the Recommendations. Developing a civil justice improvements plan can serve as a useful tool to guide implementation. Other resources to assist with implementation include a roadmap, demonstration projects, and technical assistance by NCSC. However, successful implementation will only be possible through the commitment and hard work of state court judges, administrators, and staff and with the cooperation of the lawyers who practice in state courts.

IV. Bar Associations Must Educate Lawyers and Judges

A key to implementing these Recommendations is to persuade civil justice actors that there is a problem and that lawyers and judges have a shared responsibility to create solutions. When judges and lawyers honestly confront the facts about the civil justice system, they can work cooperatively to find ways to make civil litigation affordable, efficient, and fair for all.

The only way for implementation of these Recommendations to be successful is if lawyers, and not just judges, acknowledge there is a problem and are willing to participate in new methods of case management with open minds. Lawyers will need to learn new rules and procedures and implement processes in their own practices to ensure compliance. Lawyers will need to adequately evaluate cases and obtain relevant documents from their clients in a timely manner in order to comply with mandatory disclosures and be prepared for case management conferences. Lawyers will also have to be willing and able to explain to clients why changes are being implemented and how those changes will ultimately benefit the clients.

Bar associations should partner with judges and court administrators to create CLE programs and bench/bar conferences that help lawyers understand why changes are being undertaken and what will be expected of lawyers. Bar associations and other lawyer groups can also educate key constituencies about the state's civil justice needs, and the demonstrated effectiveness of these Recommendations. Advocates for any Recommendations can use the findings, proposals, and evidence-based resources in *Call to Action: Achieving Civil Justice for All* to build trust among legislators, executive branch leaders, and the general public.

Bar associations should also provide training for judges in cooperation with offices of judicial education or other entities devoted to judicial education. As reforms are implemented, judges will not only need to learn the new rules and procedures, but will also benefit from training that enhances their ability to implement the changes, including how to fully utilize technology improvements, strategies for guiding their staff through transitional periods, and skills for how to effectively respond if and when they encounter resistance from lawyers. Judges will also benefit from programs that help them understand why changes are being undertaken, what the expectations are, and how the reforms will help ensure that the courts are once again the place where all people feel they can go to have their disputes fairly and promptly resolved.

V. Conclusion

The ABA should adopt this Resolution, because change is imperative in order for the American civil justice system to deliver justice in a fair, efficient, timely manner for all people, and the Recommendations of *Call to Action: Achieving Civil Justice for All* provide appropriate guidance to improve the civil justice system.

Respectfully submitted,
Wm. T. (Bill) Robinson III
Chair, Standing Committee on the American Judicial System
February 2017

APPENDIX

CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL
 Recommendations to the Conference of Chief Justices
 by the Civil Justice Improvements Committee, 2016

RECOMMENDATION 1

Courts must take responsibility for managing civil cases from time of filing to disposition.

1.1 Throughout the life of each case, courts must effectively communicate to litigants all requirements for reaching just and prompt case resolution. These requirements, whether mandated by rule or administrative order, should at a minimum include a firm date for commencing trial and mandatory disclosures of essential information.

1.2 Courts must enforce rules and administrative orders that are designed to promote the just, prompt, and inexpensive resolution of civil cases.

1.3 To effectively achieve case management responsibility, courts should undertake a thorough statewide civil docket inventory.

COMMENTARY

Our civil justice system has historically expected litigants to drive the pace of civil litigation by requesting court involvement as issues arise. This often results in delay as litigants wait in line for attention from a passive court—be it for rulings on motions, a requested hearing, or even setting a trial date. The wait-for-a-problem paradigm effectively shields courts from responsibility for the pace of litigation. It also presents a special challenge for self-represented litigants who are trying to understand and navigate the system. The party-take-the-lead culture can encourage delay strategies by attorneys, whose own interests and the interests of their clients may favor delay rather than efficiency. In short, adversarial strategizing can undermine the achievement of fair, economical, and timely outcomes.

It is time to shift this paradigm. *The Landscape of Civil Litigation* makes clear that relying on parties to self-manage litigation is often inadequate. At the core of the Committee's Recommendations is the premise that the courts ultimately must be responsible for ensuring access to civil justice. Once a case is filed in court, it becomes the **court's** responsibility to manage the case toward a just and timely resolution. When we say "courts" must take responsibility, we mean judges, court managers, and indeed the whole judicial branch, because the factors producing unnecessary costs and delays have become deeply imbedded in our legal system. Primary case responsibility means active and continuing court oversight that is proportionate to case needs. This right-sized case management involves having the most appropriate court official perform the task at hand and supporting that person with the necessary technology and training to manage the case toward resolution. At every point in the life of a case, the right person in the court should have responsibility for the case.

RE: 1.1

The court, including its personnel and IT systems, must work in conjunction with individual judges to manage each case toward resolution. Progress in resolving each case is generally tied both to court events and to judicial decisions. Effective caseload management involves establishing presumptive deadlines for key case stages, including a firm trial date. In overseeing civil cases, relevant court personnel should be accessible, responsive to case needs, and engaged with the parties—emphasizing efficiency and timely resolution.

RE: 1.2

During numerous meetings, Committee members voiced strong concern (and every participating trial lawyer expressed frustration) that, despite the existence of well-conceived rules of civil procedure in every jurisdiction, judges too often do not enforce the rules. These perceptions are supported by empirical studies showing that attorneys want judges to hold practitioners accountable to the expectations of the rules. For example, the chart below summarizes results of a 2009 survey of the Arizona trial bar about court enforcement of mandatory disclosure rules.

Surely, whenever it is customary to ignore compliance with rules “designed to secure the just, speedy, and inexpensive determination of every action and proceeding,”⁷ cost and delay in civil litigation will continue.

RE: 1.3

Courts cannot meaningfully address an issue without first knowing its contours. Analyzing the existing civil caseload provides these contours and gives court leaders a basis for informed decisions about what needs to be done to ensure civil docket progression.

RECOMMENDATION 2

Beginning at the time each civil case is filed, courts must match resources with the needs of the case.

COMMENTARY

Virtually all states have followed the federal model and adopted a single set of rules, usually similar and often identical to the federal rules, to govern procedure in civil cases. Unfortunately, this pervasive one-size-fits-all approach too often fails to recognize and respond effectively to individual case needs.

The one-size-fits-all mentality exhibits itself at multiple levels. Even where innovative rules are implemented with the best of intentions, judges often continue to apply the same set of rules and mindset to the cases before them. When the same approach is used in every case, judicial and staff resources are misdirected toward cases that do not need that kind of attention. Conversely, cases requiring more assistance may not get the attention they require because they are lumped in with the rest of the cases and receive the same level of treatment. Hence, the civil justice system repeatedly imposes unnecessary, time-consuming steps, making it inaccessible for many litigants.

Courts need to move beyond monolithic methods and recognize the importance of adapting court process to case needs. The Committee calls for a “right sizing” of court resources. Right sizing aligns rules, procedures, and court personnel with the needs and characteristics of similarly

situated cases. As a result, cases get the amount of process needed—no more, no less. With right sizing, judges tailor their oversight to the specific needs of cases. Administrators align court resources to case requirements —coordinating the roles of judges, staff, and infrastructure.

With the advent of e-filing, civil cover sheets, and electronic case management systems, courts can use technology to begin to right size case management at the time of filing. Technology can also help identify later changes in a case’s characteristics that may justify management adjustments.

This recommendation, together with Recommendation 1, add up to an imperative: Every case must have an appropriate plan beginning at the time of filing, and the entire court system must execute the plan until the case is resolved.

RECOMMENDATION 3

Courts should use a mandatory pathway-assignment system to achieve right-sized case management.

3.1 To best align court management practices and resources, courts should utilize a three-pathway approach: Streamlined, Complex, and General.

3.2 To ensure that court practices and resources are aligned for all cases throughout the life of the case, courts must triage cases at the time of filing based on case characteristics and issues.

3.3 Courts should make the pathway assignments mandatory upon filing.

3.4 Courts must include flexibility in the pathway approach so that a case can be transferred to a more appropriate pathway if significant needs arise or circumstances change.

3.5 Alternative dispute resolution mechanisms can be useful on any of the pathways provided that they facilitate the just, prompt, and inexpensive disposition of civil cases.

COMMENTARY

The premise behind the pathway approach is that different types of cases need different levels of case management and different rules-driven processes. Data and experience tell us that cases can be grouped by their characteristics and needs. Tailoring the involvement of judges and professional staff to those characteristics and needs will lead to efficiencies in time, scale, and structure. To achieve these efficiencies, it is critical that the pathway approach be implemented at the individual case level and consistently managed on a systemwide basis from the time of filing.

Implementing this right-size approach is similar to, but distinct from, differentiated case management. DCM is a longstanding case management technique that applies different rules and procedures to different cases based on established criteria. In some jurisdictions the track determination is made by the judge at the initial case management conference. Where assignment to a track is more automatic or administratively determined at the time of filing, it is usually based merely on case type or amount-in-controversy. There has been a general assumption that a

majority of cases will fall in a middle track, and it is the exceptional case that needs more or less process.

While the tracks and their definitions may be in the rules, it commonly falls upon the judges to assign cases to an appropriate track. Case automation or staff systems are rarely in place to ensure assignment and right-sized management, or to evaluate use of the tracking system. Thus, while DCM is an important concept upon which these Recommendations build, in practice it has fallen short of its potential. The right-sized case management approach recommended here embodies a more modern approach than DCM by (1) using case characteristics beyond case type and amount-in-controversy, (2) requiring case triaging at time of filing, (3) recognizing that the great majority of civil filings present uncomplicated facts and legal issues, and (4) requiring utilization of court resources at all levels, including non-judicial staff and technology, to manage cases from the time of filing until disposition.

RE: 3.2

Right-sized case management emphasizes transparent application of case triaging early and throughout the process with a focus on case characteristics all along the way. Pathway assignment **at filing** provides the opportunity for improved efficiencies because assignment does not turn on designation by the judge at a case management conference, which may not occur or be needed in every case. Entry point triage can be accomplished by non-judicial personnel, based upon the identified case characteristics and through the use of more advanced technology and training. Triage is done more effectively early in the process, with a focus on case issues and not only on case type or monetary value.

RE: 3.3

There has been much experimentation around the country with different processes for case designation upon filing, particularly for cases with simpler issues. Courts and parties invariably underutilize (and sometimes ignore) innovations that are voluntary. Hence, the Committee recommends mandatory application of a triage-to-pathway system. When all civil cases are subject to this right-sized treatment, courts can achieve maximum cost-saving and timesaving benefits.

RE: 3.4

While mandatory assignment is critical, the Committee recognizes that right sizing is dynamic. It contemplates that a case may take an off ramp to another pathway as a case unfolds and issues change. This flexibility comes from active participation of the court and litigants in assessing case needs and ensuring those needs are met.

RE: 3.5

In some jurisdictions, the availability of alternative dispute resolution (ADR) mechanisms is viewed as an invaluable tool for litigants to resolve civil cases quickly and less expensively than traditional court procedures. In others, it is viewed as an expensive barrier that impedes access to a fair resolution of the case. To the extent that ADR provides litigants with additional options for resolving cases, it can be employed on any of the pathways, but it is imperative that it not be an opportunity for additional cost and delay.

RECOMMENDATION 4

Courts should implement a Streamlined Pathway for cases that present uncomplicated facts and legal issues and require minimal judicial intervention but close court supervision.

4.1 A well-established Streamlined Pathway conserves resources by automatically calendaring core case processes. This approach should include the flexibility to allow court involvement and/or management as necessary.

4.2 At an early point in each case, the court should establish deadlines to complete key case stages including a firm trial date. The recommended time to disposition for the Streamlined Pathway is 6 to 8 months.

4.3 To keep the discovery process proportional to the needs of the case, courts should require mandatory disclosures as an early opportunity to clarify issues, with enumerated and limited discovery thereafter.

4.4 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY

Streamlined civil cases are those with a limited number of parties, routine issues related to liability and damages, few anticipated pretrial motions, limited need for discovery, few witnesses, minimal documentary evidence and anticipated trial length of one to two days. Streamlined pathway cases would likely include these case types: automobile tort, intentional tort, premises liability, tort-other, insurance coverage claims arising out of claims listed above, landlord/tenant, buyer plaintiff, seller plaintiff, consumer debt, other contract, and appeals from small claims decisions. For these simpler cases, it is critical that the process not add costs for the parties, particularly when a large percentage of cases end early in the pretrial process. Significantly, the *Landscape of Civil Litigation* informs us that 85 percent of all civil case filings fit within this category.

RE: 4.1

The Streamlined Pathway approach recognizes resource limits. Resource intensive processes like case management conferences are rarely necessary in simple cases. Instead, the court should establish by rule presumptive deadlines for the completion of key case stages and monitor compliance through a management system powered by technology. At the same time, the process should be flexible and allow court involvement, including judges, as necessary. For example, a case manager or judge can schedule a management conference to address critical issues that might crop up in an initially simple case.

RE: 4.2

Too many simple cases languish on state court dockets, without forward momentum or resolution. At or soon after filing, the court should send the parties notice of the presumptive deadlines for key case stages, including a firm trial date. The parties may always come to the court to fashion a different schedule if there is good cause. This pathway contemplates conventional fact finding by either the court or a jury, with a judgment on the record and the

ability to appeal. Because this process is intended for the vast majority of cases in the state courts, it is important that the process ensure a final judgment and right to appeal to safeguard the rights of litigants and to gain buy-in from attorneys.

RE: 4.3

Mandatory disclosures provide an important opportunity in streamlined cases to focus the parties and discovery early in the case. With robust, meaningful initial disclosures, the parties can then decide what additional discovery, if any, is necessary. The attributes of streamlined cases put them in this pathway for the very reason that the nature of the dispute is not factually complex. Thus, streamlined rules should include presumptive discovery limits, because such limits build in proportionality. Where additional information is needed to make decisions about trial or settlement, the parties can obtain additional discovery with a showing of good cause. Presumptive discovery maximums have worked well in various states, including Utah and Texas, where there are enumerated limits on deposition hours, interrogatories, requests for production, and requests for admission.

RE: 4.4

While the vast majority of cases are resolved without trial, if parties in a Streamlined Pathway case want to go to trial, the court should ensure that option is accessible. Because trial is a costly event in litigation, it is critical that trials be managed in a time-sensitive manner. Once a trial begins in a case, the trial judge should give top priority to trial matters, making presentation of evidence and juror time fit into full and consecutive days of business. A thorough pretrial conference can address outstanding motions and evidentiary issues so that time is not wasted and a verdict can be reached in one or two days.

RECOMMENDATION 5

Courts should implement a Complex Pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.

5.1 Courts should assign a single judge to complex cases for the life of the case, so they can be actively managed from filing through resolution.

5.2 The judge should hold an early case management conference, followed by continuing periodic conferences or other informal monitoring.

5.3 At an early point in each case, the judge should establish deadlines for the completion of key case stages, including a firm trial date.

5.4 At the case management conference, the judge should also require the parties to develop a detailed discovery plan that responds to the needs of the case, including mandatory disclosures, staged discovery, plans for the preservation and production of electronically stored information, identification of custodians, and search parameters.

5.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.

5.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY

The Complex Pathway provides right-sized process for those cases that are complicated in a variety of ways. Such cases may be legally complex or logistically complex, or they may involve complex evidence, numerous witnesses, and/or high interpersonal conflict. Cases in this pathway may include multi-party medical malpractice, class actions, antitrust, multi-party commercial cases, securities, environmental torts, construction defect, product liability, and mass torts. While these cases comprise a very small percentage (generally no more than 3%) of most civil dockets, they tend to utilize the highest percentage of court resources.

Some jurisdictions have developed a variety of specialized courts, such as business courts, commercial courts, and complex litigation courts. They often employ case management techniques recommended for the Complex Pathway in response to longstanding recognition of the problems complex cases can pose for effective civil case processing. While implementation of a mandatory pathway assignment system may not necessarily replace a specialized court with the Complex Pathway, courts should align their case assignment criteria for the specialized court to those for the Complex Pathway. As many business and commercial court judges have discovered, not all cases featuring business-to-business litigants or issues related to commercial transactions require intensive case management. Conversely, some cases that do not meet the assignment criteria for a business or commercial court do involve one or more indicators of complexity and should receive close individual attention.

RE: 5.1

To ensure proportionality for complex cases, a single judge should be assigned for the life of these cases. Judges can do much to prevent undue cost and delay. A one-judge-from-filing-through-resolution policy preserves judicial resources by avoiding the need for a fresh learning curve whenever a complex case returns to court for a judicial ruling. The parties are also better served if a single judge is engaged on a regular basis. During the course of the case, attorneys can build upon prior communications rather than repeat them.

RE: 5.2

Research and experience confirms the importance of having a mandatory case management conference early in the life of complex cases. Case conferences provide an ideal opportunity to narrow the issues, discuss and focus dispositive motions prior to filing, and identify and address discovery issues before they grow into disputes. Periodic communications with the court create the opportunity for settlement momentum and reassessment of pathway designation if complexities are eliminated. For the Colorado Civil Access Pilot Project, the focus on early, active, and ongoing judicial management of complex cases was essential and received more positive feedback than any other part of the project.

RE: 5.3

Cases in which the parties are held accountable for completing necessary pretrial tasks tend to resolve more quickly. The longer a case goes on, the more it costs. Effective oversight and

enforcement of deadlines by a vigilant civil case management team can significantly reduce cost and delay.

RE: 5.4

Once a discovery plan is determined, the court must continue to monitor progress over the course of discovery. Everyone involved in the litigation, and particularly the court, has a continuing responsibility to move the case forward according to established plans and proportionality principles. Litigation expense in complex lawsuits, especially discovery costs, easily can spin out of control absent a shepherding hand and guiding principles. Thus, proportionality must be a guiding standard in discovery and the entire pretrial process to ensure that the case does not result in undue cost and delay.

While proportionality is a theme that runs across all of the pathways, in the complex pathway this concept is more surgical. Given the complexities inherent in these cases, proportionality standards should be applied to rein in time and expense while still recognizing that some legal and evidentiary issues require time to sort out.

Mandatory disclosures can also play a critical role in identifying the issues in the litigation early, so that additional discovery can be tailored and proportional, although it is possible that the disclosures, like some discovery, will need to occur in phases.

RE: 5.5

Courts should utilize informal processes, such as conference calls with counsel, to encourage narrowing of the issues and concise briefing that in turn can promote more efficient and effective rulings by the court.

RE: 5.6

Judges must lead the effort to avoid unnecessary time consumption during trials. A robust pretrial conference should address outstanding motions and evidentiary issues so that the trial itself is conducted as efficiently as possible. The court and the parties should consider agreeing to time limits for trial segments. Once a trial begins, the trial judge should give top priority to trial matters, making presentation of evidence and juror time fit into full and consecutive days of business.

RECOMMENDATION 6

Courts should implement a General Pathway for cases whose characteristics do not justify assignment to either the Streamlined or Complex Pathway.

6.1 At an early point in each case, the court should establish deadlines for the completion of key case stages including a firm trial date. The recommended time to disposition for the General Pathway is 12 to 18 months.

6.2 The judge should hold an early case management conference upon request of the parties. The court and the parties must work together to move these cases forward, with the court having the ultimate responsibility to guard against cost and delay.

6.3 Courts should require mandatory disclosures and tailored additional discovery.

6.4 Courts should utilize expedited approaches to resolving discovery disputes to ensure cases in this pathway do not become more complex than they need to be.

6.5 Courts should establish informal communications with the parties regarding dispositive motions and possible settlement, so as to encourage early identification and narrowing of the issues for more effective briefing, timely court rulings, and party agreement.

6.6 Judges must manage trials in an efficient and time-sensitive manner so that trials are an affordable option for litigants who desire a decision on the merits.

COMMENTARY

Like the other pathways, the goal of the General Pathway is to determine and provide “right-sized” resources for timely disposition. The General Pathway provides the right amount of process for the cases that are not simple, but also are not complex. Thus, General Pathway cases are those cases that are principally identified by what they are not, as they do not fit into either the Streamlined Pathway or the Complex Pathway. Nevertheless, the General Pathway is not another route to “litigation as we know it.” Like the streamlined cases, discovery and motions for these cases can become disproportionate, with efforts to discover more than what is needed to support claims and defenses. The goal for this pathway is to provide right-sized process with increased judicial involvement as needed to ensure that cases progress toward efficient resolution.

As with the other case pathways, at an early point in each case courts should set a firm trial date. Proportional discovery, initial disclosures, and tailored additional discovery are also essential for keeping General Pathway cases on track.

RE: 6.1 to 6.3

The cases in the General Pathway may need more active management than streamlined cases. A judge may need to be involved from the beginning to understand unusual issues in the case, discuss the anticipated pretrial path, set initial parameters for discovery, and be available to resolve disputes as they arise. The court and the parties can then work together to move these cases forward, with the court having the ultimate responsibility to guard against cost and delay.

A court’s consistent and clear application of proportionality principles early in cases can have a leavening effect on discovery decisions made in law offices. Parties and attorneys typically make their decisions about what discovery to do next without court involvement. A steady court policy with respect to proportionality provides deliberating parties and attorneys with guidance.

RE: 6.4 to 6.5

As in the Complex Pathway, courts should utilize informal processes, such as conference calls with counsel, to encourage narrowing of the issues and concise briefing that in turn can promote more efficient and effective rulings by the court. In addition, an in-person case management conference can play a critical role in reducing cost and delay by affording the judge and parties the opportunity to have an in-depth discussion regarding the issues and case needs.

Without doubt, alternative dispute resolution (ADR) is an important development in modern civil practice. However, to avoid it becoming an unnecessary hurdle or cost escalator, its appropriateness should be considered on a case-by-case basis. That said, settlement discussions are a critical aspect of case management, and the court should ensure that there is a discussion of settlement at an appropriate time, tailored to the needs of the case.

RE: 6.6

As with the other pathways, trial judges play a crucial role in containing litigation costs and conserving juror time by making time management a high priority once a trial begins.

RECOMMENDATION 7

Courts should develop civil case management teams consisting of a responsible judge supported by appropriately trained staff.

7.1 Courts should conduct a thorough examination of their civil case business practices to determine the degree of discretion required for each management task. These tasks should be performed by persons whose experience and skills correspond with the task requirements.

7.2 Courts should delegate administrative authority to specially trained staff to make routine case management decisions.

COMMENTARY

Recommendation 1 sets forth the fundamental premise that courts are primarily responsible for the fair and prompt resolution of each case. This is not the responsibility of the judge alone. Active case management at its best is a team effort aided by technology and appropriately trained and supervised staff. The Committee rejects the proposition that a judge must manage every aspect of a case after its filing. Instead, the Committee endorses the proposition that court personnel, from court staff to judge, be utilized to act at the “top of their skill set.”

Team case management works. Utah’s implementation of team case management resulted in a 54 percent reduction in the average age of pending civil cases from 335 days to 192 days (and a 54 percent reduction for all case types over that same period) despite considerably higher caseloads. In Miami, team case management resulted in a 25 percent increase in resolved foreclosure cases compared consistently at six months, twelve months, and eighteen months during the foreclosure crisis, and the successful resolution of a 50,000 case backlog. Specialized business courts across the country use team case management with similar success. In Atlanta, business court efforts resulted in a 65 percent faster disposition time for complex contract cases and a 56 percent faster time for complex business tort cases.

RE: 7.1

Using court management teams effectively requires that the court conduct a thorough examination of civil case business practices to determine the degree of discretion required for each. Based upon that examination, courts can develop policies and practices to identify case management responsibilities appropriately assignable to professional court staff or automated processes. Matching management tasks to the skill level of the personnel allows administrators to

execute protocols and deadlines and judges to focus on matters that require judicial discretion. Evaluating what is needed and who should do it brings organization to the system and minimizes complexities and redundancies in court structure and personnel.

RE: 7.2

Delegation and automation of routine case management responsibilities will generate time for judges to make decisions that require their unique authority, expertise, and discretion.

RECOMMENDATION 8

For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case management practices.

COMMENTARY

Judicial training is not a regular practice in every jurisdiction. To improve, and in some instances reengineer, civil case management, jurisdictions should establish a comprehensive judicial training program. The Committee advocates a civil case management-training program that includes web-based training modules, regular training of new judges and sitting judges, and a system for identifying judges who could benefit from additional training.

Accumulated learning from the private sector suggests that the skill sets required for staff will change rapidly and radically over the next several years. Staff training must keep up with the impact of technology improvements and consumer expectations. For example, court staff should be trained to provide appropriate help to self-represented litigants. Related to that, litigants should be given an opportunity to perform many court transactions online. Even with well-designed websites and interfaces, users can become confused or lost while trying to complete these transactions. Staff training should include instruction on answering user questions and solving user process problems.

The understanding and cooperation of lawyers can significantly influence the effectiveness of any pilot projects, rule changes, or case management processes that court leaders launch. Judges and court administrators must partner with the bar to create CLE programs and bench/bar conferences that help practitioners understand why changes are being undertaken and what will be expected of lawyers. Bar organizations, like the judicial branch, must design and offer education programs to inform their members about important aspects of the new practices being implemented in the courts.

RECOMMENDATION 9

Courts should establish judicial assignment criteria that are objective, transparent, and mindful of a judge's experience in effective case management.

COMMENTARY

The Committee recognizes the variety of legal cultures and customs that exist across the breadth of our country. Given the case management imperatives described in these Recommendations, the Committee trusts that all court leaders will make judicial competence a high priority. Court

leaders should consider a judge's particular skill sets when assigning judges to preside over civil cases. For many years, in most jurisdictions, the sole criterion for judicial assignment was seniority and a judge's request for an assignment. The judge's experience or training were not top priorities.

To build public trust in the courts and improve case management effectiveness, it is incumbent upon court leaders to avoid politicization of the assignment process. In assigning judges to various civil case dockets, court leaders should consider a composite of factors including (1) demonstrated case management skills, (2) litigation experience, (3) previous training, (4) specialized knowledge, (5) interest, (6) reputation with respect to neutrality, and (6) professional standing within the trial bar.

RECOMMENDATION 10

Courts must take full advantage of technology to implement right-sized case management and achieve useful litigant-court interaction.

10.1 Courts must use technology to support a court-wide, teamwork approach to case management.

10.2 Courts must use technology to establish business processes that ensure forward momentum of civil cases.

10.3 To measure progress in reducing unnecessary cost and delay, courts must regularly collect and use standardized, real-time information about civil case management.

10.4 Courts should use information technology to inventory and analyze their existing civil dockets.

10.5 Courts should publish measurement data as a way to increase transparency and accountability, thereby encouraging trust and confidence in the courts.

COMMENTARY

This recommendation is fundamental to achieving effective case management. To implement right-sized case management, courts must have refined capacities to organize case data, notify interested persons of requirements and events, monitor rules compliance, expand litigant understanding, and prompt judges to take necessary actions. To meet these urgent needs, courts must fully employ information technologies to manage data and business processes. It is time for courts to catch up with the private sector. The expanding use of online case filing and electronic case management is an important beginning, but just a beginning. Enterprises as diverse as commercial air carriers, online retailers, and motor vehicle registrars have demonstrated ways to manage hundreds of thousands of transactions and communications. What stands in the way of courts following suit? If it involves lack of leadership, the Committee trusts that this Report and these Recommendations will embolden chief justices and state court administrators to fill that void.

RE: 10.1

Modern data management systems and court-oriented innovations, such as e-filing, e-scheduling, e-service, and e-courtesy, provide opportunities for personnel coordination not only within courthouses but also across entire jurisdictions.

RE: 10.2

To move cases efficiently towards resolution, case management automation should, at a minimum, (1) generate deadlines for case action based on court rules, (2) alert judges and court staff to missed deadlines, (3) provide digital data and searchable options for scheduled events, and (4) trigger appropriate compliance orders. Courts should seek to upgrade their current software to achieve that functionality and include those requirements when they acquire new software.

RE: 10.3

Experience and research tell us that one cannot manage what is unknown. Smart data collection is central to the effective administration of justice and can significantly improve decision making.

Although court administrators appreciate the importance of recordkeeping and performance measurement, few judges routinely collect or use data measurements or analytical reports. As made clear in previous Recommendations, the entire court system acting as a team must collect and use data to improve civil caseload management and reduce unnecessary costs and delay. This can be accomplished by enlisting court system actors at different levels and positions in developing the measurement program, by communicating the purpose and importance of the information to all court staff, and by appointing a responsible oversight officer to ensure accuracy and consistency.

Courts must systematically collect data on two types of measures. The first is descriptive information about the court's cases, processes, and people. The second is court performance information, dictated by defined goals and desired outcomes.

To promote comparability and analytical capacity, courts must use standardized performance measures, such as CourTools, as the presumptive measures, departing from them only where there is good reason to do so. Consistency—in terms of what data are collected, how they are collected, and when they are collected—is essential for obtaining valid measures upon which the court and its stakeholders can rely.

RE: 10.4

As mentioned above, one cannot manage what is unknown. This is true at both the macro and the micro levels. A “30,000 foot” view allows court personnel to consider the reality of their caseload when making management decisions. As the *Landscape of Civil Litigation* provided the CJI Committee a representative picture of civil caseloads nationally, each court system should gain a firm understanding of its current civil case landscape. Using technology for this purpose will increase the ability of courts to take an active, even a proactive, approach to managing for efficiency and effectiveness.

An inventory should not be a one-time effort. Courts can regularly use inventories to gauge the effectiveness of previous management efforts and “get ahead” of upcoming caseload trends.

RE: 10.5

The NCSC and the Justice at Stake consortium commissioned a national opinion survey to identify what citizens around the country think about courts and court funding. The ultimate purpose of the project, entitled *Funding Justice: Strategies and Messages for Restoring Court Funding*, was to create a messaging guide to help court leaders craft more effective communications to state policymakers and the general public about the functions and resource needs of courts. Citizen focus groups indicated that certain narratives tend to generate more positive public attitudes to courts. These include (1) courts are effective stewards of resources, (2) the courts’ core mission is delivery of fair and timely justice, and (3) courts are transparent about how their funding is spent. In light of these findings, the Committee believes that smart civil case management, demonstrated by published caseflow data, can lead to increased public trust in the courts.

RECOMMENDATION 11

Courts must devote special attention to high-volume civil dockets that are typically composed of cases involving consumer debt, landlord-tenant, and other contract claims.

11.1 Courts must implement systems to ensure that the entry of final judgments complies with basic procedural requirements for notice, standing, timeliness, and sufficiency of documentation supporting the relief sought.

11.2 Courts must ensure that litigants have access to accurate and understandable information about court processes and appropriate tools such as standardized court forms and checklists for pleadings and discovery requests.

11.3 Courts should ensure that the courtroom environment for proceedings on high-volume dockets minimizes the risk that litigants will be confused or distracted by over-crowding, excessive noise, or inadequate case calls.

11.4 Courts should, to the extent feasible, prevent opportunities for self-represented persons to become confused about the roles of the court and opposing counsel.

COMMENTARY

State court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial or tort cases. Many courts assign these cases to specialized court calendars such as landlord/tenant, consumer debt collection, mortgage foreclosure, and small claims dockets. Many of these cases exhibit similar characteristics. For example, few cases are adjudicated on the merits, and almost all of those are bench trials. Although plaintiffs are generally represented by attorneys, defendants in these cases are overwhelmingly self-represented, creating an asymmetry in legal expertise that, without effective court oversight, can easily result in unjust case outcomes. Although most cases would be assigned to the Streamlined Pathway under these Recommendations, courts should attend to signs that suggest a case might

benefit from additional court involvement. Indicators can include the raising of novel claims or defenses that merit closer scrutiny.

RE: 11.1

Recent federal investigations and agency studies have found widespread instances of judgments entered in cases in which the defendant did not receive notice of the complaint or the plaintiff failed to demonstrate standing to bring suit or adequate documentation of compliance with statutory requirements for timeliness or the basis for the relief sought. Courts have an obligation to implement practices that prevent such abuse.

RE: 11.2

This recommendation complements Recommendation 13 with respect to making court services more accessible to litigants. Self-represented litigants need access to accurate information about court processes, including trained court staff that can help them navigate the civil justice system. This information should be available electronically or in person at the courthouse, and at other sites where litigants can receive free assistance. Standardized forms should use plain English and include check-off lists for basic claim elements, potential common defenses, and the ability to assert counter-claims.

RE: 11.3

Courts often employ block calendaring on high-volume dockets in which large numbers of cases are scheduled for the same period of time. The result is often overcrowded, noisy, and potentially chaotic environments in which litigants may not hear their case when it is called or may become distracted by competing activities in the courtroom. Frequently, courts sequence cases after the initial call to benefit attorneys, resulting in long wait times for self-represented litigants. The use of electronic sign-in systems can help ensure that litigants are not mistakenly overlooked and that their cases are heard in a timely manner.

RE: 11.4

Self-represented litigants often lack understanding about the respective roles of the court and opposing counsel. They may acquiesce to opposing counsel demands because they mistakenly assume that the opposing counsel is connected to the court. As a result, judges may not obtain complete information from both sides to ensure a legally correct judgment on the facts and the law. Self-represented litigants also may not appreciate the far-reaching implications of agreeing to settle a case (e.g., dismissal, entry of judgment). To curb misunderstandings, courts should provide clear physical separation of counsel from court personnel and services, and standardized guidelines to all litigants and counsel concerning how settlement negotiations are conducted and the consequences of settlement. Before accepting settlements, judges should ascertain that both parties understand the agreement and its implications.

RECOMMENDATION 12

Courts must manage uncontested cases to assure steady, timely progress toward resolution.

12.1 To prevent uncontested cases from languishing on the docket, courts should monitor case activity and identify uncontested cases in a timely manner. Once uncontested status is confirmed, courts should prompt plaintiffs to move for dismissal or final judgment.

12.2 Final judgments must meet the same standards for due process and proof as contested cases.

COMMENTARY

Uncontested cases comprise a substantial proportion of civil caseloads. In the *Landscape of Civil Litigation in State Courts*, the NCSC was able to confirm that default judgments comprised 20 percent of dispositions, and an additional 35 percent of cases were dismissed without prejudice. Many of these cases were abandoned by the plaintiff, or the parties reached a settlement but failed to notify the court. Other studies of civil caseloads also suggest that uncontested cases comprise a substantial portion of civil cases (e.g., 45 percent of civil cases subject to the New Hampshire Proportional Discovery/ Automatic Disclosure (PAD) Rules, 84 percent of civil cases subject to Utah Rule 26). Without effective oversight, these cases can languish on court dockets indefinitely. For example, more than one-quarter of the *Landscape* cases that were dismissed without prejudice were pending at least 18 months before they were dismissed.

RE 12.1

To resolve uncontested matters promptly yet fairly requires focused court action. Case management systems should be configured to identify uncontested cases shortly after the deadline for filing an answer or appearance has elapsed. If the plaintiff fails to file a timely motion for default or summary judgment, the court should order the plaintiff to file such a motion within a specified period of time. If such a motion is not filed, the court should dismiss the case for lack of prosecution. The court should monitor compliance with the order and carry out enforcement as needed.

RE 12.2

Recent studies of consumer debt collection, mortgage foreclosure, and other cases that are frequently managed on high-volume dockets found that judgments entered in uncontested cases were often invalid. In many instances, the plaintiff failed to provide sufficient notice of the suit to the defendant. Other investigations found that plaintiffs could not prove ownership of the debt or provide accurate information about the amount owed. To prevent abuses, courts should implement rules to require or incentivize process servers to use smart technology to document service location and time. Courts should also require plaintiffs to provide an affidavit and supporting documentation of the legitimacy of the claim with the motion for default or summary judgment. Before issuing a final judgment, the court should review those materials to ensure that the plaintiff is entitled to the relief sought.

RECOMMENDATION 13

Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.

13.1 Courts must simplify court-litigant interfaces and screen out unnecessary technical complexities to the greatest extent possible.

13.2 Courts should establish Internet portals and stand-alone kiosks to facilitate litigant access to court services.

13.3 Courts should provide real-time assistance for navigating the litigation process.

13.4 Judges should promote the use of remote audio and video services for case hearings and case management meetings.

COMMENTARY

The importance of “access to substantive justice” is inherent in the mission of the CJI Committee and underpins all of these Recommendations. Recommendation 13 addresses “access” in terms of making the civil justice system less expensive and more convenient to the public.

To mitigate access problems, we must know what they are. We also need to know how the public wants us to fix them. A national poll by NCSC in 2014 found that a high percentage of responders thought courts were not doing enough to help self-represented litigants, were out of touch, and were not using technology effectively. Responders frequently cited the time required to interact with the courts, lack of available ADR, and apprehensiveness in dealing with court processes. The poll found strong support for a wide array of online services, including a capacity for citizens to ask questions online about court processes.

RE: 13.1

Courts should simplify court forms and develop online “intelligent forms” that enable litigants to create pleadings and other documents in a manner that resembles a Turbo Tax interactive dialogue. Forms should be available in languages commonly spoken in the jurisdiction. Processes associated with the forms (attaching documents, making payments, etc.) should be simplified as much as possible.

RE: 13.2

To improve citizen understanding of court services, courts should install information stations inside and outside of courthouses as well as online. To expand the availability of important court information, courts might partner with private enterprises and public service providers, such as libraries and senior centers, to install interactive, web-based, court business portals at the host locations.

RE: 13.3

Courts should create online, real-time court assistance services, such as online chat services, and 800-number help lines. Litigant assistance should also include clear signage at court facilities to guide litigants to any on-site navigator personnel. Online resolution programs also offer opportunities for remote and real-time case resolution.

RE: 13.4

Vast numbers of self-represented litigants navigate the civil justice system every year. However, travel costs and work absences associated with attending a court hearing can deter self-represented litigants from effectively pursuing or defending their legal rights. The use of remote hearings has the potential to increase access to justice for low-income individuals who have to miss work to be at the courthouse on every court date. Audio or videoconferencing can mitigate these obstacles, offering significant cost savings for litigants and generally resulting in increased access to justice through courts that “extend beyond courthouse walls.”

The growing prevalence of smart phones enables participants to join audio or videoconferences from any location. To the extent possible and appropriate, courts should expand the use of telephone communication for civil case conferences, appearances, and other straightforward case events.

If a hearing or case event presents a variety of complexities, remote communication capacities should expand to accommodate those circumstances. In such instances video conferencing may be more fitting than telephone conferencing. The visual component may facilitate reference to documents and items under discussion, foster more natural conversation among the participants, and enable the court to “read” unspoken messages. For example the video may reveal that a litigant is confused or that a party would like an opportunity to talk but is having trouble getting into the conversation.

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on the American Judicial System (“SCAJS”)

Submitted By: Wm. T. (Bill) Robinson III, Chair

1. Summary of Resolution(s).

This Resolution urges all state courts to consider the Recommendations of *Call to Action: Achieving Civil Justice for All* as appropriate guidance in their endeavors to achieve demonstrable civil justice improvements with respect to the expenditure of time and costs to resolve civil cases. The Recommendations offer guidelines and best practices for civil litigation including specific Recommendations for caseload management to achieve the efficient resolution of cases. To effectively implement reforms, the Resolution further urges all state courts to develop and implement a civil justice improvements plan to improve the delivery of civil justice.

The leading recommendation advocates that courts take definitive responsibility for managing civil cases from filing to disposition. In order for reforms to be successful, though, there must be a collaborative effort by judges and lawyers. Bar associations can play an important role in promoting the Recommendations and educating judges and lawyers about civil justice needs and their responsibility in making the Recommendations a reality. Therefore, the Resolution also urges bar associations to promote the Recommendations of *Call to Action: Achieving Civil Justice for All* and to collaborate with judges and lawyers to improve the delivery of civil justice.

The Recommendations and commentary set forth in the report to the Conference of Chief Justices (“CCJ”) by the Civil Justice Improvements Committee (“CJI”) were guided by fundamental principles, existing research and new research undertaken by the National Center for State Courts (“NCSC”) regarding the landscape of civil litigation, recent reform efforts, and lessons learned from CJI Committee members’ own experience as lawyers, judges, and administrators. The Recommendations have been strongly endorsed by the CCJ and the Conference of State Court Administrators (“COSCA”), and this Resolution seeks to support their implementation efforts.

2. Approval by Submitting Entity.

The Standing Committee on the American Judicial System approved this Resolution on October 28, 2016. The Commission on the American Jury approved co-sponsorship on December 5, 2016 by email consensus of its members. The Council of the Government and Public Sector Lawyers Division approved co-sponsorship on December 6, 2016. The Council of the Section of Litigation approved co-sponsorship on December 12, 2016.

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

Neither this resolution nor a similar resolution has been submitted to the House or Board previously other than the resolutions referred to below that have been adopted as ABA policy.

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

The *Principles for Judicial Administration* promulgated by NCSC in 2012 were adopted by the ABA in 2013 (2013 AM 10C). The *Principles for Judicial Administration* enhance the ABA *Standards Relating to Court Organization*, adopted in 1974 (as the *Standards of Judicial Administration*), and amended in 1990. Although created for different eras, those resources all provide useful guidance to state courts and would not be affected by adoption of this Resolution.

The Discovery Guidelines for State Courts (1998 AM 122) and the Civil Discovery Standards (1999 AM 108) may arguably be implicated by some of the Recommendations, but would not be affected by adoption of this Resolution. This Resolution does not adopt any new standards nor does it alter any existing ABA guidelines or standards; it merely urges state courts to consider the Recommendations of *Call to Action: Achieving Civil Justice for All* as appropriate guidance.

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 CCJ and COSCA directed NCSC “to take all available and reasonable steps to assist court leaders who desire to implement civil justice improvements.” Therefore, SCAJS will coordinate all implementation efforts with NCSC. SCAJS will explore ways to bring *Call to Action: Achieving Civil Justice for All* to the attention of bar leaders, lawyers, and judges throughout the country.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Business Law Section
Government and Public Sector Lawyers Division (Co-Sponsor)

Judicial Division
 Judicial Division Appellate Judges Conference
 Judicial Division Lawyers Conference
 Judicial Division National Conference of Specialized Court Judges
 Judicial Division National Conference of State Trial Judges
 Section of Labor and Employment Law
 Section of Litigation (Co-Sponsor)
 Senior Lawyers Division
 Solo, Small Firm and General Practice Division
 State and Local Government Law Section (Supporter)
 Tort Trial & Insurance Practice Section
 Young Lawyers Division
 Standing Committee on Bar Activities and Services
 Standing Committee on the Delivery of Legal Services
 Standing Committee on Legal Aid and Indigent Defendants
 Commission on the American Jury (Co-Sponsor)

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

William K. Weisenberg
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 wweisenberg@ohiobar.org

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges all state courts to consider the Recommendations of *Call to Action: Achieving Civil Justice for All* as appropriate guidance in their endeavors to achieve demonstrable civil justice improvements with respect to the expenditure of time and costs to resolve civil cases. It further urges all state courts to develop and implement a civil justice improvements plan to improve the delivery of civil justice. The Resolution also urges bar associations to promote the Recommendations of *Call to Action: Achieving Civil Justice for All* and to collaborate with judges and lawyers to improve the delivery of civil justice.

The development of the Recommendations and commentary were guided by fundamental principles, existing research and new research undertaken by the National Center for State Courts regarding the landscape of civil litigation, recent reform efforts, and lessons learned from the Civil Justice Improvements (“CJI”) Committee members’ own experience as lawyers, judges, and administrators. The Conference of Chief Justices and the Conference of State Court Administrators endorsed the Recommendations, and this Resolution seeks to support their implementation efforts.

2. Summary of the Issue that the Resolution Addresses

State courts and the lawyers that practice in them are well aware of the cost, delay, and unpredictability of civil litigation. The dramatic rise in self-represented litigants and strained court budgets from two severe recessions have further hampered the ability of courts to promptly and efficiently resolve cases. In response, many litigants have begun to seek solutions outside of the courts and, in some instances, to forgo legal remedies entirely. As a result, public trust and confidence in the courts have decreased. While these concerns have been raised for more than a century and continue to worsen in many respects, court leaders in some states have begun to take concrete steps toward change. The reforms are encouraging, but limited in scope.

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

Call to Action: Achieving Civil Justice for All advocates that courts take responsibility for managing civil cases from filing to disposition and provides recommendations to guide courts in their efforts. However, reforms must be a collaborative effort by judges and lawyers. Bar associations can play an important role in promoting the Recommendations and educating judges and lawyers about civil justice needs and their responsibility in making the Recommendations a reality. This Resolution addresses the underlying issue of costs, delays, and complexities undermining the civil justice system, and also promotes the Recommendations as appropriate guidance so the work of the CJI Committee is more likely to result in meaningful reforms.

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

None known at the time this Summary was prepared.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON PARALEGALS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association approves the following programs: Enterprise
2 State Community College, Legal Assisting/Paralegal Program, Enterprise, AL; Eastern Florida
3 State College, Paralegal Studies Program, Melbourne, FL; Daemen College, Paralegal Studies
4 Program, Amherst, NY; Nashville State Community College, Paralegal Studies Program,
5 Nashville, TN; and Collin College, Paralegal Studies Program, Frisco, TX.

6
7 FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal
8 education programs: University of Arkansas Fort Smith, Paralegal Studies Program, Fort Smith,
9 AR; Cerritos College, Paralegal Studies Program, Norwalk, CA; Mt. San Antonio College,
10 Paralegal/Legal Specialty Program, Walnut, CA; National University, Paralegal Studies
11 Program, Los Angeles, CA; University of LaVerne, Department of Legal Studies, LaVerne, CA;
12 Broward College, Legal Assisting Program, Pembroke Pines, FL; Seminole State College of
13 Florida, Legal Assistant/Paralegal Program, Sanford, FL; Northwestern College, Paralegal
14 Program, Chicago, IL; Tulane University, Paralegal Studies Program, Hanrahan, LA; Central
15 Piedmont Community College, Paralegal Technology Program, Charlotte, NC; University of
16 Oklahoma Law Center, Legal Assistant Education Program, Norman, OK; Greenville Technical
17 College, Paralegal Studies Program, Greenville, SC; Lee College, Legal Assistant Program,
18 Baytown, TX; Chippewa Valley Technical College, Paralegal Studies Program, Eau Claire, WI;
19 and Madison College, Paralegal Program, Madison, WI.

20
21 FURTHER RESOLVED, That the American Bar Association withdraws the approval of the
22 following paralegal education programs: Kirkwood Community College, Paralegal Studies
23 Program, Cedar Rapids, IA; Saint Mary-of-the-Woods College, Paralegal Studies Program, Saint
24 Mary-of-the-Woods, IN ; and Fortis College, Paralegal Program, Centerville, OH, at the requests
25 of the institutions.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the August 2017 Annual Meeting of the House of Delegates for the following programs: University of Alaska Anchorage, Paralegal Certificate Program, Anchorage, AK; Pima Community College, Paralegal Program, Tucson, AZ; John F. Kennedy University, Legal Studies Program, Pleasant Hill, CA; Miramar College, Legal Assistant Program, San Diego, CA; MTI College, Paralegal Studies Program, Sacramento, CA; San Francisco State University, Paralegal Studies Program, San Francisco, 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; Florida South Western State College, Paralegal Studies Program, Fort Myers, FL; Florida State College Jacksonville, Paralegal Studies Program, Jacksonville, FL; South University, Legal Studies/Paralegal Studies Program, Royal Palm Beach, FL; Athens Technical College, Paralegal Studies Program, Athens, GA; South University, Legal Studies/Paralegal Studies Program, Savannah, GA; Loyola University Chicago, Institute for Paralegal Studies, Chicago, IL; Southern Illinois University Carbondale, Paralegal Studies Program, Carbondale, 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; Herzog University, Legal Assisting/Paralegal Studies Program, Kenner, 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; 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; 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; Bucks County Community College, Paralegal Studies Program, Newtown, PA; Community College of Philadelphia, Paralegal Studies Program, Philadelphia, PA; South University, Legal Studies/Paralegal Studies Program, Columbia, SC; Brightwood College, fka Kaplan Career College, Paralegal Studies Program, Nashville, TN; Mississippi State Community College, Paralegal Studies Program, Knoxville, TN; South College, Legal Studies and Paralegal Studies Programs, Knoxville, TN; Texas State University, Legal Studies Program, San Marcos, TX; Salt Lake Community College, Paralegal Studies Program, Salt Lake City, UT; Edmonds Community College, Paralegal Program, Lynnwood, WA; Western Technical College, Paralegal Program, La Crosse, WI; and Laramie County Community College, Paralegal Studies Program, Cheyenne, WY.

REPORT

In August, 1973, the House of Delegates of the American Bar Association adopted the Guidelines for the Approval of Legal Assistant Education Programs as recommended by the Special Committee on Legal Assistants, now known as the Standing Committee on Paralegals. The Committee subsequently developed supporting evaluative criteria and procedures for seeking American Bar Association approval. Applications for approval were accepted formally beginning in the Fall of 1974.

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

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

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

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

Enterprise State Community College, Paralegal Studies Program, Enterprise, AL

Enterprise State Community College is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Applied Science Degree and a Certificate in Paralegal Studies.

Eastern Florida State College, Paralegal Studies Program, Melbourne, FL

Eastern Florida State College is a four-year public college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Arts Degree in Paralegal Studies.

Daemen College, Paralegal Studies Program, Amherst, NY

Daemen College is a four-year private college accredited by the Middle States Association of Colleges and Schools. The college offers a Bachelor of Science Degree, a Post-Baccalaureate Certificate, and an Undergraduate Certificate in Paralegal Studies.

Nashville State Community College, Paralegal Studies Program, Nashville, TN

Nashville State Community College is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Arts Degree in Paralegal Studies.

Collin College, Paralegal Studies Program, Frisco, TX

Collin College is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Arts Degree and a Certificate in Paralegal Studies

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

University of Arkansas Fort Smith, Paralegal Studies Program, Fort Smith, AR

University of Arkansas Fort Smith is a four-year university accredited by the Higher Learning Commission. The university offers an Associate of Applied Sciences Degree.

Cerritos College, Paralegal Program, Norwalk, CA

Cerritos 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.

Mt. San Antonio College, Paralegal/Legal Specialty Program, Walnut, CA

Mt. San Antonio is a two-year community college accredited by the Western Association of Schools and Colleges. The college offers an Associate of Science Degree.

National University, Paralegal Studies Program, Los Angeles, CA

National University is a four-year university accredited by the Western Association of Schools and Colleges. The university offers an Associate of Science Degree, a Bachelor of Science Degree and Certificates in Litigation, Corporate Law, and Criminal Law.

University of LaVerne, Legal Studies Program, LaVerne, CA

University of LaVerne is a four-year university accredited by the Western Association of Schools and Colleges. The university offers a Bachelor of Science Degree and a Certificate in Paralegal Studies.

Broward College, Legal Assisting Program, Pembroke Pines, FL

Broward College is a two-year college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Science Degree.

Seminole State College of Florida, Legal Assistant/Paralegal Program, Sanford, FL

Seminole State College of Florida is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Arts Degree.

Northwestern College, Paralegal Studies Program, Chicago, IL

Northwestern College is a two-year college accredited by the Higher Learning Commission. The college offers an Associate of Applied Science Degree and a Certificate in Paralegal Studies.

Tulane University, Paralegal Studies Program, Hanrahan, LA

Tulane University is a four-year university accredited by the Southern Association of Colleges and Schools. The university offers an Associate of Arts Degree, a Bachelor of Arts Degree, and a Certificate in Paralegal Studies.

Central Piedmont Community College, Paralegal Technology Program, Charlotte, NC

Central Piedmont Community College is a two-year community college accredited by the Southern Association of Colleges and Schools. The college offers an Associate of Science Degree.

University of Oklahoma Law Center, Legal Assistant Education Program, Norman, OK

University of Oklahoma Law Center is a four-year university accredited by the Higher Learning Commission. The university offers a Certificate in Paralegal Studies.

Greenville Technical College, Paralegal Studies Program, Greenville, SC

Greenville 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 an Associate of Applied Science Degree for students with a Baccalaureate Degree.

Lee College, Legal Assistant Program, Baytown, TX

Lee 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.

Chippewa Valley Technical College, Paralegal Studies Program, Eau Claire, WI

Chippewa Valley Technical College is a two-year technical College accredited by the Higher Learning Commission. The college offers an Associate of Arts Degree and a Certificate in Paralegal Studies.

Madison College, Paralegal Program, Madison, WI

Madison College is a two-year technical college accredited by the Higher Learning Commission. The college offers an Associate of Applied Science Degree and a Certificate in Paralegal Studies.

The following programs are recommended for withdrawal of ABA approval, at the request of the institutions.

Kirkwood Community College, Paralegal Studies Program, Cedar Rapids, IA

Kirkwood Community College is a two-year community college accredited by the Higher Learning Commission. The college offers an Associate of Arts and an Associate of Science Degree.

Saint Mary-of-the-Woods College, Paralegal Studies Program, Saint Mary-of-the-Woods, IN

Saint Mary-of-the-Woods College is a four-year college accredited by the Higher Learning Commission. The college offers an Associate of Arts Degree, a Bachelor of Arts Degree, and a Certificate in Paralegal Studies.

Fortis College, Paralegal Program, Centerville, OH

Fortis College is a two-year career college accredited by the Accrediting Commission of Career Schools and Colleges. The college offers an Associate of Applied Business degree in Paralegal Studies.

Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2017 Annual Meeting of the American Bar Association House of Delegates.

University of Alaska Anchorage, Paralegal Certificate Program, Anchorage, AK;

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;

MTI College, Paralegal Studies Program, Sacramento, CA;

San Francisco State University, Paralegal Studies Program, San Francisco, 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;
 Florida South Western State College, Paralegal Studies Program, Fort
 Myers, FL;

Florida State College Jacksonville, Paralegal Studies Program, Jacksonville,
 FL;

South University, Legal Studies/Paralegal Studies Program, Royal Palm Beach, FL;

Athens Technical College, Paralegal Studies Program, Athens, GA;

South University, Legal Studies/Paralegal Studies Program, Savannah, GA;

Loyola University Chicago, Institute for Paralegal Studies, Chicago, IL;

Southern Illinois University Carbondale, Paralegal Studies Program, Carbondale, 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;

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;

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;

Bucks County Community College, Paralegal Studies Program, Newtown,
 PA;

Community College of Philadelphia, Paralegal Studies Program,
 Philadelphia, PA;

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;

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;

Western Technical College, Paralegal Program, La Crosse, WI; and

Laramie County Community College, Paralegal Studies Program, Cheyenne, WY.

Respectfully submitted,
Laura Barnard, Chair
Standing Committee on Paralegals
February 2017

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Paralegals

Submitted By: Laura C. Barnard, Chair

1. Summary of Resolution(s).

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

2. Approval by Submitting Entity.

October 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?

Action is timely.

6. Status of Legislation. (If applicable.)

N/A

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

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

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

None

9. Disclosure of Interest. (If applicable.)

N/A

10. Referrals.

None

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

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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 Standing Committee on Paralegals resolve (s) that the House of Delegates grants approval to five programs, grants reapproval to fifteen programs, withdraws the approval of three programs, and extends the term of approval of forty-three programs.

2. Summary of the issue which the Resolution Addresses

The programs recommended for approval and reapproval in the enclosed report meet the Guidelines for the Approval of Paralegal Education Programs. The programs recommended for withdrawal of approval in the enclosed report have requested that approval be withdrawn.

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

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

4. Summary of Minority Views

No other positions on this resolution have been taken by other Association entities, affiliated organizations or other interested group.

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges the United States to ratify and implement
- 2 the 2013 Arms Trade Treaty.

REPORT

I. INTRODUCTION

This Resolution urges the United States (“U.S.”) to ratify the 2013 Arms Trade Treaty (“ATT”). The ATT aims to prevent and eradicate the illicit trade in conventional arms and prevent their diversion.¹ Ratification presents an opportunity for the United States (“U.S.”) to curb illicit international weapons transfers to war-torn countries, terrorist organizations, and murderous regimes—a benefit not only to international peace and security but also to U.S. interests. To date the United States and 129 other nations have signed the ATT.² If ratified by the U.S., the ATT will be a critical foreign policy tool. It creates concrete obligations and oversight mechanisms. The ATT does not constrain U.S. foreign policy, contravene the Second Amendment of the U.S. Constitution, or require many—if any—changes to U.S. weapons export law.

Failure to ratify the ATT could compromise U.S. leadership in the international operation of the ATT and jeopardize universalization of the ATT. U.S. ratification would increase pressure on nations that have not yet signed or ratified the ATT to do so. This report (i) describes the ATT in general terms and how the proposed resolution is consistent with the ABA’s mission, (ii) summarizes the treaty’s key provisions, (iii) sets forth the principal arguments against ratification, and (iv) addresses those arguments by showing how the treaty would not conflict with existing United States domestic law.

I. BACKGROUND.

The ATT, adopted by the United Nations General Assembly (“UNGA”) on April 2, 2013 by a vote of 154-3-23, opened for signature on June 3, 2013.³ On September 25, 2013, the U.S. became the 91st State to sign the ATT.⁴ To date, 91 States have ratified the treaty, which entered into force on December 24, 2014.⁵ There are no international norms comprehensively regulating the international trade in conventional arms; rendering an almost unlimited supply of weapons, munitions, military and security equipment, widely available for purchase and acquisition by oppressive regimes, terrorists, militias, and others. According to the UN Office for Disarmament Affairs, the flow of illicit arms “constitute[s] a key factor in prolonging conflict and fueling regional instability.”⁶ Arms flows hinder the peacekeeping and peace-building process, contribute to violations of international humanitarian and human rights law, and obstruct humanitarian action.⁷ The lack of enforceable common standards reinforces organized crime and terrorism with devastating effects to the development of the rule of law.

¹ G.A. Res. 64/48, art. 1, U.N. Doc. A/RES/64/48, (Dec. 2, 2009).

² *The Arms Trade Treaty*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS <http://disarmament.un.org/treaties/t/att> (last visited December 14, 2016).

³ UN OFFICE FOR DISARMAMENT AFFAIRS, *supra* note 1; G.A. Res. 68/31 ¶ 2, U.N. Doc. A/RES/68/31, (Dec. 5, 2013).

⁴ UN OFFICE FOR DISARMAMENT AFFAIRS, *supra* note 1.

⁵ *Id.*

⁶ UN OFFICE FOR DISARMAMENT AFFAIRS, THE IMPACT OF POORLY REGULATED ARMS TRANSFERS ON THE WORK OF THE UNITED NATIONS, 2 (2013) available at <http://www.un.org/disarmament/HomePage/ODAPublications/OccasionalPapers/PDF/OP23.pdf>.

⁷ See generally, *id.*

Non-governmental organizations (“NGOs”) note that every day, millions of people suffer due to the illicit arms trade.⁸ “War crimes, unlawful killings, torture and other serious human rights abuses . . .” occur as a direct result of armed violence.⁹ Moreover, the “poorly regulated arms trade impedes socio-economic development. It is estimated that armed violence costs Africa \$18 billion per year.”¹⁰ “Gunrunners continue to operate with impunity on the shady fringes of this deadly trade. And, lax or non-existent reporting obligations make it almost impossible to tell in whose hands a gun, shell, bullet, or even fighter plane, will ultimately end up, or how it got there.”¹¹ Currently national and regional “transparency mechanisms” attempt to promote restraint in the arms trade, and the UN attempted to promote transparency in the import and export of conventional arms via the UN Register of Conventional Arms (“UNROCA”). These efforts, however, have done little to curb the illicit international arms trade.

The ATT promotes the principles of the UN Charter, the Geneva Conventions of 1949, and the Universal Declaration of Human Rights. It furthers the objectives of: United Nations Disarmament Commission Guidelines for international arms transfers in the context of UNGA resolution 46/36H of 6 December 1991; the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects; the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the UN Convention against Transnational Organized Crime, and the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons; and the UNROCA.

II. THE ATT AND THE ABA’S COMMITMENT TO THE RULE OF LAW.

ABA support of the ATT furthers the ABA’s mission and commitment to Rule of Law.¹² As the national voice of the U.S. legal profession the ABA has an opportunity to clarify the ATT’s legal implications and ensure the U.S. does not fail to ratify the ATT based on misunderstood legal provisions. Additional ways in which ABA support for the ATT promotes ABA objectives are as follows:

A. Increase public understanding and respect for the rule of law, and the role of the legal profession in the U.S. and globally.

Many objections to the ATT are based on a misunderstanding of its obligations.¹³ The ABA has an opportunity to educate both the public and the Senate by clarifying that the obligations in the ATT coexist with fundamental U.S. constitutional protections. By ensuring that international obligations are properly interpreted and understood, the ABA promotes the rule of law and protects such law from political conflation.

⁸ See, e.g. *Why we need a global Arms Trade Treaty*, OXFAM INTERNATIONAL <https://www.oxfam.org/en/campaigns/why-we-need-global-arms-trade-treaty> (last visited Apr. 15, 2015); *Why do we need an Arms Trade Treaty?*, AMNESTY INTERNATIONAL (Mar. 13, 2012), <http://www.amnesty.org.au/armstrade/comments/28105>

⁹ *Human Rights and the Arms Trade*, AMNESTY CANADA <http://www.amnesty.ca/our-work/issues/human-rights-and-the-arms-trade> (last visited Apr. 15, 2015).

¹⁰ OXFAM INTERNATIONAL, *supra* note 10.

¹¹ OXFAM INTERNATIONAL, *supra* note 10.

¹² The core of the ABA’s mission is “to serve . . . the public by defending liberty and delivering justice as the national representative of the legal profession.” Goal IV of the Mission is entitled: “Advance the Rule of Law.” See ABA Mission and Goals, AMERICAN BAR ASSOCIATION http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Apr. 15, 2015).

¹³ See Section IV for a description of some of these concerns.

B. Hold governments accountable under law.

The ATT enhances government accountability, both for arms transfers contributing to crimes against humanity and other heinous crimes, as well as for non-criminal weapons transfers. By mandating State oversight, enhancing cooperation and developing dialogue, the ATT curtails illicit international weapons transfers, increases transparency, and creates binding obligations on States that prevent the fomentation of conflict.

C. Work for just laws, including human rights, and a fair legal process.

The ATT takes concrete steps to protect human rights by creating accountability, transparency, and codifying norms to prevent illicit transfers leading to human rights abuses.

D. Assure meaningful access to justice for all persons.

The ATT enhances accountability under the law and enhances access to justice for those victimized by such weapons by obligating national control systems and providing the legal framework for holding States accountable for their transfers.

III. SUMMARY OF KEY PROVISIONS.

A summary of the key provisions of the ATT's twenty-eight Articles is below.¹⁴

A. Preamble, Principles, Objective, and Purpose: Preamble and Article 1.

The Preamble and Article set forth that the object of the ATT is to “establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms” and to “prevent and eradicate the illicit trade in conventional arms and prevent their diversion” for the purpose of “contributing to international and regional peace, security and stability; reducing human suffering; [and] promoting cooperation, transparency and responsible action by States Parties¹⁵ in the international trade in conventional arms, thereby building confidence among States Parties.”¹⁶

B. Scope: Articles 2-4.

The ATT establishes obligations with respect to the international trade in “conventional arms” (e.g. battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons).¹⁷ Certain provisions of the ATT also establish obligations with respect to the export of ammunitions/munitions fired, launched, or delivered by conventional arms¹⁸ and the export of parts and components of conventional arms where the export is in a form that provides the capability to assemble the conventional arm.¹⁹ It applies to international “transfers” defined as export, import, transit, trans-shipment, and brokering.²⁰ It does not apply to international

¹⁴ This analysis is specific to only those key provisions within the ATT for the purpose of providing background.

¹⁵ States that become parties to the treaty regime are called “States Party,” plural “States Parties.”

¹⁶ *Id.*, art. 1.

¹⁷ *Id.*, art. 2(1). Article 5(3) encourages States to apply the Treaty to the broadest range of conventional arms, and to use definitions that are not narrower than those in relevant UN instruments at the time the treaty entered into force.

¹⁸ *Id.*, art. 3.

¹⁹ *Id.*, art. 4.

²⁰ *Id.*, art. 2(2).

movement of conventional arms by or on behalf of a State Party for its own use, if the arms remain under the ownership of that State Party.²¹

C. Implementation: Article 5.

To meet the object and purpose of the ATT, States Parties must establish and maintain a national control system, including a national control list, to regulate the international transfer of conventional arms, ammunition/munitions, and parts and components.²² States shall designate: (1) competent national authorities to ensure an effective and transparent national control system regulating the covered items and activities and (2) designate national points of contact to exchange information on ATT implementation.²³ Pursuant to their national laws, States are to notify and update national point(s) of contact and provide their national control lists to the ATT Secretariat.²⁴

D. Prohibitions and Export Controls: Articles 6 and 7.

i. Prohibitions.

Article 6 prohibits the international transfer of conventional arms covered under Article 2(1), and items covered under Articles 3 and 4, if the transfer would violate the State Party's relevant international obligations pursuant to UN Security Council measures acting under Chapter VII of the UN Charter, or international agreements to which it is a party.²⁵ Further, the ATT states: "A State Party shall not authorize any transfer . . . if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians, or other war crimes defined by international agreements to which it is a party."²⁶

ii. Export Risk Assessment.

Article 7 sets forth the parameters for a risk assessment that applies only to exports of conventional arms covered under Article 2(1), and items covered under Articles 3 and 4 that are not prohibited by Article 6. In these instances, each exporting State Party must assess the potential that the arms: (1) would contribute to or undermine peace and security; (2) could be used to commit or facilitate a serious violation of international humanitarian law, international human rights law, an act that would violate international conventions or protocols relating to terrorism and transnational organized crime, to which the exporting State is a party.²⁷

Additionally, exporting States Parties must also assess whether there are mitigation measures that could be taken by exporting and importing states, such as confidence-building measures or joint programmes.²⁸ If, the exporting State Party determines that there is an "overriding risk" of the "negative consequences" identified in Article 7(1), the state shall not authorize the export.²⁹

²¹ *Id.*, art. 2(3).

²² *Id.*, art. 5(2).

²³ *Id.*, arts. 5(5), 5(6).

²⁴ *Id.*, arts. 5(4), 5(6).

²⁵ *Id.*, arts. 6(1), 6(2).

²⁶ *Id.*, art. 6(3).

²⁷ *Id.*, art. 7(1).

²⁸ *Id.*, art. 7(2).

²⁹ *Id.*, art. 7(3).

Exporting States Parties must also take into account the risk of the conventional arms covered under Article 2(1), and items covered under Articles 3 and 4 being used to commit or facilitate serious acts of gender-based violence or violence against women and children.³⁰

In addition, each exporting State Party shall “take measures to ensure that export authorizations . . . are detailed and issued prior to the export” and make available appropriate information concerning the export authorization to the importing State Party or transit/trans-shipment State Party, on its request, and subject to its national laws, practices, or policies.³¹ If, after an authorization is granted, new relevant information comes to light, the exporting State Party is encouraged to reassess the authorization with the importing State Party.³²

E. Import, Transit/Trans-shipment, Brokering and Diversion: Articles 8-11.

When importing conventional arms under Article 2(1), and items covered under Articles 3 and 4, a State Party must take measures to ensure that appropriate and relevant information is provided, upon request and pursuant to its national laws, to enable the exporting State Party to assist the exporting State Party in conducting its export assessment required by Article 7.³³ This could include end use and end user documentation.³⁴ An importing State Party must also take measures that would allow it to regulate, where necessary, the import of conventional arms under Article 2(1), and items covered under Articles 3 and 4, under its jurisdiction.³⁵ States Parties “involved in the transfer of conventional arms covered under Article 2(1)” must “take measures to prevent their diversion”³⁶ and an exporting State Party must seek to prevent diversion through its national control system, by assessing the risk of diversion, and by considering the establishment of mitigation measures. Prevention measures need not be limited to these activities.³⁷ Importing, transit, trans-shipment, and exporting States Parties must cooperate with and exchange information, pursuant to their national laws, where appropriate and feasible.³⁸ If a State Party detects a diversion of conventional arms covered under Article 2(1), and items covered under Articles 3 and 4, it shall take appropriate measures pursuant to its national laws and in accordance with international law to address the diversion. States Parties may address diversions by alerting States Parties that are potentially affected by the diversion, examining diverted shipments and following up with investigation and law enforcement.³⁹ These provisions do not apply to ammunition/munitions or parts and components of conventional weapons.⁴⁰

³⁰ *Id.*, art. 7(4).

³¹ *Id.*, arts. 7(5), 7(6).

³² *Id.*, art. 7(7).

³³ *Id.*, art. 8(1). Likewise, during the export authorization process, the importing State Party (country of final destination) may request information from the exporting state concerning specific export authorizations. *Id.*, art. 8(3).

³⁴ *Id.*

³⁵ *Id.*, arts. 8(2).

³⁶ *Id.*, art. 11(1).

³⁷ *Id.*, art. 11(2).

³⁸ *Id.*, art. 11(3). The Treaty also suggests information that States Parties could share with one another to better comprehend and prevent diversion, such as information on corruption, international trafficking routes, and other information. *Id.*, art. 11(5).

³⁹ *Id.*, art. 11(4).

⁴⁰ Articles 8-11 state that they apply to conventional weapons covered in Article 2(1). Articles 3 and 4, which cover ammunitions/munitions and parts and components of conventional weapons, state only that States Parties should apply the provisions of Articles 6 and 7 to ammunitions/munitions and parts and components of conventional weapons.

F. Record keeping and National enforcement: Article 12, and 14.

States Parties are required to maintain and keep for 10 years, national records of their export authorizations or actual exports of covered conventional arms, under Article 2(1), and items covered under Articles 3 and 4.⁴¹ States Parties are also encouraged to maintain records of covered conventional arms, under Article 2(1), and items covered under Articles 3 and 4 that are transited or trans-shipped through its territory or transferred to its territory as the final destination.⁴² States Parties shall take appropriate measures to enforce national laws and regulations that implement the ATT.⁴³

G. International Reporting, Cooperation, and Assistance: Articles 13, 15-16.

States Parties must provide to the ATT Secretariat an initial report outlining national implementation measures, as well as subsequent annual reports concerning authorized or actual exports and imports of covered conventional arms, under Article 2(1), and items covered under Articles 3 and 4.⁴⁴ Additionally, States Parties are encouraged to report measures proven effective in addressing the diversion of covered conventional arms, under Article 2(1), and items covered under Articles 3 and 4.⁴⁵

The ATT requires States to cooperate with one another, consistent with their respective security interests and national laws, to effectively implement the ATT, and encourages consultations and information exchanges among States Parties, consistent with their security interests and national laws.⁴⁶ Upon mutual agreement, and consistent with national laws, States are required to “afford the widest measure of assistance” to one another in investigations and judicial proceedings in connection with the violation of national implementation measures relating to the ATT.⁴⁷ States Parties may seek assistance with implementation, including legal, legislative, capacity-building, technical, material, or financial assistance.⁴⁸ A voluntary trust fund shall also be established to support requests for assistance.⁴⁹

H. Dispute Resolution: Article 19

The ATT requires States Parties to consult and, by mutual consent, cooperate to pursue settlement of disputes regarding application or interpretation of the ATT by peaceful means using dispute resolution mechanisms such as negotiation, mediation, arbitration and judicial settlement.⁵⁰

⁴¹ *Id.*, arts. 12(1), 12(4).

⁴² *Id.*, art. 12(2). States are encouraged to record information regarding “quantity, value, model/type,” authorized transfers, actual transfers, details of states involved in the transfer, and end users. *Id.*, art. 12(3).

⁴³ *Id.*, art. 14.

⁴⁴ *Id.*, arts. 13(1), 13(3). The initial report should cover national laws, national control lists, and other regulations and administrative measures. It must be furnished within one year after the Treaty entered into force. *Id.*, art. 13(1). Both initial and annual reports will be made available by the Secretariat to States. *Id.*, arts. 13(1), 13(3). Reports may exclude commercially sensitive or national security information. *Id.*, art. 13(3).

⁴⁵ *Id.*, art. 13(2).

⁴⁶ *Id.*, art. 15(1). States are encouraged to exchange information consult with one another, pursuant to national laws and security interests. *Id.*, arts. 15(2)—(4), (6), (7).

⁴⁷ *Id.*, art. 15(5).

⁴⁸ *Id.*, art. 16(1). States may request, offer, or receive assistance on an international, regional, bilateral, or national basis. *Id.*, art. 16(2).

⁴⁹ *Id.*, art. 16(3).

⁵⁰ *Id.*, art. 19.

I. Administrative Functions and Final Provisions: Articles 17-18 and 20-28.

A Conference of States Parties will convene within one year of the ATT entering into force, and periodically thereafter.⁵¹ At the first session, States Parties will adopt rules of procedure for the Conference. The Conference shall also adopt financial rules for itself and any subsidiary bodies, and financial rules governing the Secretariat.⁵² Subsequent Conference will adopt annual budgets.⁵³ The Conference will review implementation, consider recommendations, amendments, issues of interpretation, tasks and secretariat budgets, establishment of subsidiary bodies, and will perform other functions.⁵⁴ The ATT establishes a Secretariat to assist States Parties with the effective implementation of the Treaty. The Secretariat will be responsible to States Parties for receiving, making available, and distributing reports; maintaining and making available a list of national points of contact; facilitating requests for assistance, facilitating the work of the Conference of States Parties, and other duties as decided by the Conference of States Parties.⁵⁵ The ATT allows for amendments six years after the treaty enters into force, and allows reservations only when compatible with the object and purpose of the treaty.⁵⁶ The remaining articles of the ATT cover signature, ratification, acceptance, approval or accession; entry into force; provisional application; duration and withdrawal; reservations; relationship to other agreements; depositary; and authentic texts.⁵⁷

IV. SUMMARY OF VIEWS AGAINST RATIFICATION

The United States was among the nations voting in favor of the ATT at the UNGA, and it was the ninety-first nation out of 130 to sign the treaty. Advice and consent to ratification of the ATT, under Article II, Section 2 of the U.S. Constitution, will require a vote of two-thirds of the Senate. However, the President has not yet transmitted the ATT to the Senate for advice and consent for ratification. This section describes and addresses the arguments against ratification.⁵⁸

First, opponents argue that the treaty was not negotiated in accordance with the Administration's original negotiation strategy. In October 2009, the Obama Administration expressed its support for "the negotiation of the treaty" at the UN only by "the rule of consensus decision-making."⁵⁹ Opponents maintain that the ATT failed to "achieve consensus" at the UN but was adopted by majority vote in the UNGA, (including a U.S. vote) and that this apparent "reversal" of strategy damaged U.S. diplomatic credibility.⁶⁰ This confuses the *negotiation* of the ATT with its *adoption*: the "rule of consensus decision-making" applied to how the treaty was negotiated at the UN, not how it was adopted. This objection also does not speak to the ATT's

⁵¹ *Id.*, art. 17(1).

⁵² *Id.*, art. 17(2).

⁵³ *Id.*, art. 17(3).

⁵⁴ *Id.*, art. 17(4).

⁵⁵ *Id.*, art. 18(1), (3). Prior to the first meeting of the Conference of States Parties, a provisional Secretariat is meant to be responsible for the administrative functions of the ATT, but the ATT provides no additional direction as to how, when or by whom such a provisional Secretariat will be established.

⁵⁶ *Id.*, art. 20.

⁵⁷ *Id.*, arts. 21-28.

⁵⁸ See, generally, Letter from Jerry Moran, et al., U.S. Senators, to President Barack Obama, (Oct. 15, 2013) available at http://www.moran.senate.gov/public/index.cfm/files/serve?File_id=a8df6595-2ee3-4132-8566-18f5a62e76bf. See, generally, Letter from Shelly Moore Capito, et al, U.S. Senators, to President Barack Obama (Mar. 2, 2015) available at http://www.moran.senate.gov/public/index.cfm/files/serve?File_id=2d068c0c-6382-42df-baf5-1bbc0d66773b. This section of the report discusses the arguments set forth in these letters, as they are reflective of the primary objections to the treaty.

⁵⁹ *Id.*

⁶⁰ *Id.*

substance but merely to UN procedure, and specifically to political opposition within the U.S. Senate to the President's broad Constitutional foreign affairs powers.

Second, opponents highlight that the “treaty allows amendment by a three-quarters majority vote,” such that the U.S. could be pressured to “comply in practice with amendments it was unwilling to accept.”⁶¹ This objection fails to appreciate that although amendments can be adopted by a three-quarters vote if efforts at consensus fail, they only enter into force for States Parties that deposit an instrument of acceptance *for those amendments*.⁶² If an amendment were objectionable, the U.S. could decline to deposit an instrument of acceptance and the amendment would never be binding on the U.S.

Third, opponents argue that the treaty does not recognize “lawful ownership and use of, and trade in firearms [...] much less individual self-defense, as fundamental individual rights.”⁶³ Opponents assert that the ATT will “encourage [] governments to collect the identities of individual end users of imported firearms at the national level,” thus creating a national gun registry.⁶⁴ They add that the ATT creates a national responsibility to prevent diversion of firearms, “which could,” they argue, “be used to justify the imposition of controls [...] that would pose a threat to the Second Amendment.”⁶⁵ Many of these concerns are dispelled in Section V of this report.

Fourth, opponents assert that the ATT is “ambiguous,” such that the U.S. would “be accepting commitments that are inherently unclear” and in turn the Senate “cannot effectively provide advice” concerning an ambiguous treaty, and “should never” do so.⁶⁶ The transmittal package from the President may address these elements, and Senate hearings and questions for the record may also be used to clarify any ambiguities perceived by the Senate. Moreover, to the extent that perceived ambiguities remain following Senate consideration, a State Party may clarify its understanding or perceived ambiguities by including statements in its instrument of ratification at the time it adheres to the ATT.

Fifth, opponents also argue that the “criteria at the heart of the treaty are vague and easily politicized,” and therefore the treaty “will restrict the ability of the [U.S.] to conduct [its] own foreign policy,” thus “steadily subject[ing] the [U.S.] to the influence of internationally-defined norms,” impinging on U.S. sovereignty.⁶⁷ It would “allow foreign sources of authority to impose judgment or control upon the United States”⁶⁸ They do not explain what the sources of authority are. Under this rationale, all treaties are objectionable. The ATT does not affect sovereignty differently than other treaties. Additionally, the United States is also subject to customary international law and treaty law rules, accepted as binding, that align closely with the requirements of the treaty. These treaties include the Geneva Conventions and the Genocide Convention.

⁶¹ They believe this would also circumvent the Senate's power of “advice and consent” on treaties. *Id.*

⁶² ATT, art. 20(4).

⁶³ *Supra*, note 58.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

Sixth, opponents assert that the ATT “could hinder the United States in fulfilling its strategic, legal, and moral commitments to provide arms to key allies.”⁶⁹ The ATT would likely not hinder efforts to fulfill any such commitments. If it would, this should not be a wholesale bar to ratification as it expressly provides each State Party the right to make reservations.⁷⁰ However, customary international law rules and treaty rules that are binding on the United States would still serve as a barrier to many, if not all, of the weapons transfers that are prohibited by the ATT. Many of these international law rules have been adopted as domestic law through regulations and executive action, as discussed in Section V.A.(ii)-(iii). The control procedures required by the ATT are also already enshrined in U.S. domestic law, as discussed in Section V.A(i).

V. INTERACTION BETWEEN ATT AND U.S. DOMESTIC LAW.

A. ATT and U.S. Import/Export Law.

Ratification of the ATT will not require changes to U.S. export control law.

i. National Control System.

As relates to the national control system, the U.S. already regulates the sale of weapons and munitions under the Arms Export Control Act of 1976 (“AECA”).⁷¹ AECA regulates the export of all of the munitions included in the ATT’s purview through the Directorate of Defense Trade Controls (“DDTC”) of the State Department.⁷² The U.S. Munitions List (“USML”) contained in the State Department’s International Traffic in Arms Regulations (“ITAR”) already regulates defense articles and defense services, from small-caliber non-automatic firearms to major end-items, such as vessels, ground vehicles, and aircraft, and their component parts and munitions to broader defense services and training.⁷³ In addition, the Commerce Control List (“CCL”) lists items that require an export license.⁷⁴ ATT Article 5(2) requires the establishment and maintenance of a national control system in order to implement the provisions of the Treaty. As the DDTC controls all items on the USML, a list which controls every category of conventional arms included in ATT Article 2(1),⁷⁵ U.S. law is already in compliance with that aspect of the ATT. Additionally, as the U.S. control list contains both the arms and their component parts and munitions, ATT Articles 3 and 4 are satisfied by current U.S. law. The USML already exceeds the scope of coverage mandated by the ATT, which sets a floor for what defense articles are subject to export controls.

⁶⁹ *Id.*

⁷⁰ ATT, art. 25.

⁷¹ 22 U.S.C. 2751, et seq. The statute grants the President the authority to regulate the import and export of defense articles and services. The President delegated this authority to the Secretary of State in Executive Order 11958, and later again in Executive Order 13637. The Secretary of State sets the export regulations that are then administered mainly by the Department of Commerce. The Department of Treasury continues to handle sanctions related export controls, mainly via the Office of Foreign Assets Control (OFAC).

⁷² The U.S. Munition List (USML) is contained in the International Traffic in Arms Regulations (ITAR). The ITAR is listed in the Code of Federal Regulations at 22 C.F.R. §120, et seq.

⁷³ ITAR §121.1.

⁷⁴ *Commerce Control List*, BUREAU OF INDUSTRY AND SECURITY <http://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl> (last visited Apr. 15, 2015).

⁷⁵ ATT Article 5(3) encourages application of “the provisions of this Treaty to the broadest range of conventional arms” with a specific coverage floor set by the United Nations Register of Conventional Arms, as of the time when the treaty entered into force (December 24, 2014). UN OFFICE FOR DISARMAMENT AFFAIRS, *supra* note 1. The UN Register of Conventional Arms includes seven of the main types of conventional weapons: battle tanks, armored combat vehicles, large caliber artillery systems, combat aircraft, attack helicopters, and missiles and missile launchers. Small arms are included as of 2003, but are not mandated for reporting.

If the United States ratifies the ATT, the United States will be required, pursuant to its national laws, to provide the national control list under ATT Article 5(4) to the ATT Secretariat, take measures to implement the ATT, designate appropriate authorities under ATT Article 5(5), and provide points of contact as regards implementation, required by ATT Article 5(6). As the USML is already public and updated through the Federal Register and as the State Department already has the primary responsibility for defense export controls and will likely be the point of contact, ATT Articles 5(4) through 5(6) will not introduce onerous requirements or additional bureaucracy.

ii. *Prohibited Transfers (ATT Article 6).*

Article 6 prohibits international transfers of treaty-covered arms, ammunition/munitions and component parts where the export is in a form that provides the capability to assemble the conventional arm that fall into three categories:⁷⁶ (1) transfers that would violate a State Party's obligations under measures adopted through UN Security Council acting under Chapter VII of the UN Charter; (2) transfers that would violate a State Party's relevant international obligations under international agreements to which the State is party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms, under Article 2(1), and items covered under Articles 3 and 4; (3) transfers where the State Party "has knowledge at the time of authorization" that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians, or other war crimes as defined by international agreements to which the State is a party.

The U.S. already applies sanctions passed by the UN Security Council in many circumstances against States and individuals. ITAR § 126.1(c) states that UN Security Council arms embargoes are automatically applied to defense exports for the duration of the embargo, unless a specific exception is created by the State Department. Security Council decisions create binding, mandatory international obligations on the U.S.⁷⁷ The U.S. veto power on the Security Council allows the United States to prevent adoption of any Chapter VII resolution in conflict with U.S. policy.

The second prohibition, focused on transfers that violate a State's obligations under relevant international agreements to which it the State is a party, will not require additional legislation. AECA gives broad authority to the President to control export of defense articles and services "in furtherance of world peace and the security and foreign policy of the U.S."⁷⁸ This provides the means for the State Department to execute the treaty through regulations without requiring additional Congressional action. ITAR § 126.7(a)(1) allows licenses to be disapproved or revoked when "the Department of State deems such action to be in furtherance of world peace, the national security or foreign policy of the U.S., or is otherwise advisable." The State Department already regulates export controls in accordance with the international obligations of the U.S.—and thus in accordance with U.S. foreign policy interests—the ATT should not require additional export control regulations.

⁷⁶The Treaty is not tied to USML or U.S. export controls, but U.S. export controls are already sufficient to meet the requirements of the Treaty.

⁷⁷ U.N. Charter.

⁷⁸ AECA, § 2778(a)(1).

The final prohibition against authorizing a transfer of covered arms or items that would be used in the commission of genocide, war crimes and crimes against humanity creates the only novel proscriptions. However, this should not appreciably affect U.S. law. In those cases where the Security Council has not acted to prevent these crimes, it is likely that the President would have the statutory authority to act. The President, in creating the Atrocities Prevention Board, stated: “preventing mass atrocities and genocide is a core national security interest . . . of the United States.”⁷⁹ AECA § 2778(a)(1) allows the President to regulate arms exports “in furtherance of world peace and the security and foreign policy of the United States.”⁸⁰ AECA § 2778(a)(2) requires that arms export decisions “take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation in conflict or prejudice [the development of other arms agreements or arrangements].”⁸¹ Though the DDTC has not created explicit rules for denial of export licenses based on determinations of genocide, crimes against humanity, or war crimes, Presidential Policy Directive 27 issued on January 15, 2014, states that “the United States will not authorize any transfer if it has actual knowledge at the time of authorization that the transferred arms will be used to commit: genocide; crimes against humanity; grave breaches of the Geneva Conventions of 1949; serious violations of Common Article 3 of the Geneva Conventions of 1949; attacks directed against civilian objects or civilians who are legally protected from attack or other war crimes as defined in 18 U.S.C. 2441.”⁸² If the DDTC chooses to regulate in this area, it will need to include requirements for the “knowledge” requirement of the treaty, standards for determining when genocidal acts, crimes against humanity, or war crimes have taken place.⁸³ These standards are already set by customary international law and treaty law, including the Geneva Conventions and the International Law Commission’s Articles of State Responsibility, both seen as binding in the United States.

iii. Exports Not Categorically Prohibited (ATT Article 7).

In the case of exports not prohibited under Article 6, Article 7 requires that States Parties assess the potential that exported arms or items would contribute to or undermine peace and security; and whether they could be used to commit or facilitate a serious violation of international humanitarian law, international human rights law, international conventions or protocols relating to terrorism or transnational organized crime to which the exporting State is a party.⁸⁴ If, after conducting the assessment and considering available mitigating measures, the exporting State Party determines that “there is an overriding risk” of any of the negative consequences identified above, then the State Party cannot authorize the export.

⁷⁹ Presidential Study Directive on Mass Atrocities, PSD-10, (Aug. 4, 2011) *available at* <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>. President Obama stated: “preventing mass atrocities and genocide is a core national security interest . . . of the United States.”⁷⁹

⁸⁰ 22 USC § 2753 requires that the President must find that the sale or lease of a defense article or service “will strengthen the security of the U.S. and promote world peace.”

⁸¹ AECA, § 2778(a)(2).

⁸² Presidential Policy Directive—U.S. Conventional Arms Trade Policy, PPD-27, (Jan. 15, 2014) *available at* <http://www.whitehouse.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>.

⁸³ Until they are written and applied, it is impossible to determine whether they will be sufficient to meet the U.S.’ international obligations. As a result, this is a separate issue and is not discussed in this section. U.S. law criminalizes war crimes, *see, e.g.*, 18 U.S.C. § 2441, and genocide, *see, e.g.* 18 U.S.C. § 1091, but does not criminalize crimes against humanity. A treaty is being developed by the U.S. member of the International Law Commission that would create clear rules for crimes against humanity criminalization and prosecution.

⁸⁴ ATT, art. 7.

The DDTC already considers the impact that an export will have on U.S. foreign policy and national security when evaluating any license application. In addition to the prevention of mass atrocities, the United States has undertaken to respect, promote, and implement human rights and humanitarian law obligations.⁸⁵ The United States has also joined anti-terror and anti-organized crime conventions. Given the fact that these considerations, as well as anti-terror and transnational crime considerations, already play a role in the export process,⁸⁶ it is unlikely that the United States will have to change its current export controls to satisfy the requirements of Articles 7(1)-7(3).⁸⁷ Additionally, Article 7(4) specifically requires that an exporting State take into account the risk that arms or items covered by the Treaty will be used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children. The United States has committed to ending violence against women and girls⁸⁸ U.S. policy requires that all arms transfers be consistent with our international commitments and obligations and consider the potential for misuse with respect to any proposed arms export.⁸⁹

iv. *Transit and Trans-shipment under ATT, Article 9.*

State Parties are required to “take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms, under Article 2(1), and items covered under Articles 3 and 4 through its territory in accordance with relevant international law.”⁹⁰ The United States requires issuance of temporary import permits for items that transit or trans-ship the United States. The requirements for transit or trans-shipment permits are the same as for export licenses.⁹¹ Given that the same stringent requirements for conventional arms exports apply to these “temporary imports,” it is likely that these requirements would be sufficient to meet Article 9 requirements.⁹²

v. *Additional Requirements for Exports.*

Article 7(5) requires States Parties to take measures to ensure all authorizations for exports are detailed and issued prior to the export. ITAR § 123.1(a) requires that export licenses or other authorization be obtained before the export occurs, satisfying the ATT. Exporting States Parties must provide appropriate information about the authorization upon request by importing and transit or trans-shipment States Parties.⁹³ ITAR § 126.10(d)(1)-(2) allows disclosure of information about arms exports to foreign governments “for law enforcement or regulatory purposes” or “in the context of multilateral or bilateral export regimes.” Importing and transit or trans-shipment Parties will be able to access the necessary information without more regulation.

⁸⁵ See generally Executive Order 13107, “Implementation of Human Rights Treaties” (1998) and PSD-10, *supra* note 67. See also PDD-27, *supra* note 70.

⁸⁶ See, e.g. ITAR § 127.1(d) (on terrorism-related controls).

⁸⁷ The U.S. has previously suspended exports to countries, including Eritrea, for violating the religious freedom of its people. Human Rights Watch, Eritrea 4 (Jan. 2006) available at <http://www.hrw.org/legacy/wr2k6/pdf/eritrea.pdf>.

⁸⁸ See, *Sexual and Gender-Based Violence*, U.S. Department of State <http://www.state.gov/s/gwi/programs/policy/gbv/> (last visited Apr. 15, 2015) (“The State Department is committed to ending the global pandemic of violence against women and girls.”).

⁸⁹ United States Conventional Arms Transfer Policy, PPD-27 (Jan. 15, 2014) available at <https://www.whitehouse.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>.

⁹⁰ ATT, art. 9.

⁹¹ ITAR § 123.1.

⁹² The ATF’s procedure for importation specifically excludes trans-shipment, allowing only permanent importation. For subsequent export of an imported weapon, the importer-exporter would require an export license as required under ITAR.

⁹³ ATT, art. 7(6).

Additionally, the ATT encourages, but does not require, consultations with the importing State Party and reassessment of export authorizations if it becomes aware of new, relevant information.⁹⁴ ITAR § 126.7 (a) provides a litany of reasons why authorizations may be revoked, suspended or amended. These include, among others, that the revocation “is in furtherance of world peace, the national security or the foreign policy of the United States, or is otherwise advisable.”⁹⁵

vi. *Importation Rules Under the ATT.*

The permanent importation of weapons into the United States is managed by the Department of Justice (“DOJ”) through the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”). This meets the ATT Article 8(2) requirement for each importing State Party to take measures that will allow it to regulate, where necessary, imports under its jurisdiction of conventional arms, under Article 2(1), and items covered under Articles 3 and 4 covered by the Treaty.⁹⁶

ATT Article 8(1) requires States Parties to take measures to provide appropriate and relevant information, upon request, pursuant to its national laws, to an exporting State to assist with export assessments. The ATF is able to provide import certification and delivery verification to certain governments for items on the U.S. Munitions Import List (“USMIL”),⁹⁷ pursuant to agreements between foreign governments and U.S. Customs and Border Protection provides delivery certification. The import certification serves to inform exporters that import licensing procedures have been followed and that the importer is prohibited from diverting, trans-shipping or re-exporting the imported material without government approval. The ATF permitting process requires the importer to provide “[t]he specific purpose of importation, including final recipient information if different from the importer.”⁹⁸ However, the ATF does not issue end user certificates to foreign exporters.⁹⁹ U.S. regulations could be modified—in accordance with domestic information privacy laws—to allow the ATF to provide the end use and end user information to foreign governments in the same way it provides import certification and delivery verification. While it is possible that the end user information may be either difficult to obtain or to provide, the end use information is part of the permitting procedure for importation, and could be included as part of an import certification.

The ATT also requires reporting and record-keeping.¹⁰⁰ The ATT allows reports that are identical to those provided to the UN Register of Conventional Arms,¹⁰¹ to which the U.S. already reports. Because the information is the same, there should be no need for additional rules. ATT Article 12 requires records of export authorizations to be kept of exports for ten years.

⁹⁴ ATT, art. 7(7).

⁹⁵ ITAR § 126.7(a)(1).

⁹⁶ The importation system is governed by the rules contained in 27 C.F.R. 447.

⁹⁷ The language of the USMIL mirrors that of the USML.

⁹⁸ 27 C.F.R. § 447.42(v).

⁹⁹ *Importing & Exporting*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES <https://www.atf.gov/firearms/faq/imports.html#end-user-certificate> (last visited Apr. 15, 2015).

¹⁰⁰ ATT, arts. 12, 13.

¹⁰¹ *Id.*, art. 13(3).

vii. Diversion Prevention.

Per Article 11, States Parties involved in the transfer of conventional arms under Article 2(1), and items covered under Articles 3 and 4 covered by the Treaty are required to take measures to prevent the diversion of those arms,¹⁰² and, in cases where a State Party detects a diversion, to take appropriate measures, pursuant to its national laws and in accordance with international law, to address the diversion.¹⁰³ States Parties are also required to cooperate and share information, pursuant to domestic laws, where appropriate and feasible, to mitigate the risk of diversion.¹⁰⁴ As discussed earlier in this section, the United States places stringent limitations on imports and exports, including temporary, transiting or trans-shipped arms, and provides for cooperation and information sharing. These existing regulations meet the requirements of ATT Article 11(1), (3) and (4).

To further prevent diversion, export licenses are issued only for the specific end user and end-use.¹⁰⁵ All resales, transfers, trans-shipments or dispositions that are different from what was licensed is illegal.¹⁰⁶ The United States also requires that shipping documents explicitly state the licensed end user.¹⁰⁷ Any change to the export license must be approved explicitly by the DDTC.¹⁰⁸ When the United States finds that an export license or import permit has been violated through diversion, it may revoke that license/permit and punish violators through debarment or criminal sanctions.¹⁰⁹ The United States also monitors end-use through the “Blue Lantern” program.¹¹⁰ The program ensures through random checks that licenses are followed properly. The other provisions are permissive, not mandatory, and would not require changes to U.S. law upon ratification of the treaty.

viii. Arms Brokers.

Persons who engage in brokering activities are required by AECA to register with the State Department, to obtain a license or other approval for almost all weapons transactions, and to report yearly to the DDTC on their activities. These registration and licensing requirements, laid out in Part 129 of the ITAR, comply with the ATT’s broad requirement of broker regulation under Article 10.

B. Interaction Between the ATT and the Second Amendment.

Some oppose the ATT on Second Amendment grounds. Opponents of the ATT argue that it will infringe upon Second Amendment Rights in two principal ways. First, they object to the inclusion of “small arms and light weapons” in the language of the ATT. They also argue that the treaty threatens individual firearm ownership with an invasive regulatory and recordkeeping

¹⁰² *Id.*, art. 11(1).

¹⁰³ *Id.*, art. 11(4).

¹⁰⁴ *Id.*, art. 11(3).

¹⁰⁵ ITAR § 123.9(a).

¹⁰⁶ *Id.*

¹⁰⁷ ITAR § 123.9(b).

¹⁰⁸ ITAR § 123.9(a). Specific exceptions are allowed for re-exports and retransfers in the cases of NATO or specific allies, but are fairly limited in scope. *See* ITAR § 123.9 (e).

¹⁰⁹ *See* ITAR § 127 (penalties are laid out in AECA 22 U.S.C. § 2778(c) and carry a maximum \$1,000,000 fine and/or 20 year imprisonment for each violation), 27 C.F.R. 447.61-447.63 (penalties range from 5-10 years in prison and fines of \$5,000 to \$1,000,000 plus forfeiture of the items or of the value of the items illegally imported).

¹¹⁰ *See End-Use Reports*, DIRECTORATE OF DEFENSE TRADE CONTROLS http://pmddtc.state.gov/reports/enduse_reports.html (last visited Apr. 15, 2015). End-use monitoring is mandated by 22 U.S.C. § 2785. “Blue Lantern” is the name of the end-user verification program created by the State Department.

scheme. As of the adoption of this resolution, the ATT does not infringe on Second Amendment Rights. If implementation were to interfere with Second Amendment protections, those acts of implementation or the ATT itself would be void.¹¹¹ Issues related to domestic control of firearms are outside the scope of the agreement. The ATT only applies to the export, import, transit, transshipment, and international brokering of conventional arms within its scope. The preamble of the Treaty recognizes that it is the “sovereign right and responsibility of any State to regulate and control transfers of conventional arms that take place exclusively within its territory, pursuant to its own legal or constitutional systems.” The Second Amendment does not apply to any of the issues covered by the Treaty.

i. *The Second Amendment and Small Arms and Light Weapons.*

Generally, the Second Amendment does not apply to the vast majority of weapons addressed by the ATT. In *District of Columbia v. Heller*, the Supreme Court found that the Second Amendment applies only to firearms that are “typically possessed by law-abiding citizens for lawful purposes.” Examples of weapons not protected by the Second Amendment included: “short-barreled shotguns,” “machineguns,” and automatic “M-16 rifles.”¹¹² Moreover, the Second Amendment does not apply to most of the conventional arms noted in the ATT: battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, missiles and missile launchers. While handguns would fall under the “small arms and light weapons” category of the ATT, the Treaty provisions pose no Second Amendment concerns and can be implemented under the current U.S. legal regime.

ii. *The Second Amendment and the International Trade in Small Arms*

Though the amendment protects “the right of the people to keep and bear Arms,”¹¹³ it does not protect the right to supply arms to persons who are not themselves among “the people” of the U.S. Therefore, export provisions of the treaty pose no constitutional issues.¹¹⁴ As it pertains to imports of arms, the ATT contains clear language noting, “the legitimate trade and use of certain conventional arms, inter alia, for recreational, cultural, historical, and sporting activities and lawful ownership where such ownership and use are permitted and protected by law.”¹¹⁵ Yet, even if the ATT did not contain this language, the Second Amendment would not be affected by the ATT’s import provisions.

The Second Amendment does not provide an unfettered right to purchase weapons in the international market. In *Heller*, the Court “disclaimed any adverse consequences for “laws imposing conditions and qualifications on the commercial sale of arms.”¹¹⁶ Because federal courts decisions interpret the Constitution as granting the government with broad authority to control the border, regulations addressing the flow of arms into the U.S. will be given even more deference by the courts than qualifications and conditions that relate to transfers within national boundaries.

The import provisions of the ATT are consistent with the current U.S. approach that has withstood constitutional scrutiny for decades. As mentioned, those provisions of the ATT that

¹¹¹ *White Paper on the Proposed Arms Trade Treaty and The Second Amendment*, AMERICAN BAR ASSOCIATION CENTER FOR HUMAN RIGHTS (Feb. 26, 2013) available at http://www.americanbar.org/content/dam/aba/administrative/individual_rights/aba_chr_white_paper_att_final.authcheckdam.pdf.

¹¹² *Id.* (citing *Dist. of Columbia v. Heller*, 554 U.S. 570, 621-22, 624, 627 (2008)).

¹¹³ U.S. Const. amend. II.

¹¹⁴ AMERICAN BAR ASSOCIATION, *supra* note 98.

¹¹⁵ ATT, Preamble

¹¹⁶ *Dist. of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

specifically address arms importation are found in Article 8. The United States already has legislation and a regulatory system in place to meet the Article 8 requirements. In the United States, “it is currently unlawful for any person “except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.”¹¹⁷ These entities are subject to the AECA and are regulated by the ATF. The AECA has withstood constitutional scrutiny for decades.¹¹⁸ While it has not been challenged on Second Amendment grounds, it is very likely that it would withstand such scrutiny.

iii. *Recordkeeping.*

Some opponents of the ATT argue that the Article 12 recordkeeping requirements could lead to a national gun registry. They argue that this would violate both the Second Amendment¹¹⁹ and the privacy provisions of the Firearms Owners Protection Act of 1986 (FOPA).¹²⁰ Article 12 of the ATT requires all States Parties to keep records, pursuant to their national laws and regulations, of the issuance of export authorizations or its actual exports of the conventional arms covered under Article 2(1). It encourages, but does not require, each State Party to maintain records of conventional arms that are transferred to its territory as the final destination. Article 12 also encourages, but does not require, the records to include, as appropriate: the quantity, value, model or type, authorized international transfers of conventional arms, conventional arms actually transferred, details of exporting state(s), importing state(s), transit and trans-shipment state(s), and end users.¹²¹

Pursuant to the FOPA, unless the specific firearms are suspected of being involved in a specific crime, no records of firearms transactions may be recorded once the weapons enter the domestic market. However, FOPA does not apply to import and export records. Those applying for a permit to import firearms must file with the ATF, listing details of the importer, the exporter, the item, and the purpose of the import, including final recipient if different than the importer.¹²² These records are kept by the Department of Justice should it be necessary to prosecute any U.S. person for illegal arms dealing. Similar import records are kept by the Customs Department when inspecting shipments entering the country. Since neither set of records covers weapons once they enter the domestic stream of commerce, the requirement to keep these records do not conflict with FOPA.

¹¹⁷ 18 U.S.C. 922 (2006).

¹¹⁸ See, e.g., *Chi Mak v. U.S.* 683 F.3d 1126 (9th Cir. 2012) (rejecting a First Amendment challenge); *U.S. v. Chi Tong Kuok*, 671 F.3d 931 (9th Cir. 2012) (rejecting a challenge based on the “non-delegation” doctrine); *U.S. v. Hsu*, 364 F.3d 192 (4th Cir. 2004) (rejecting a “vagueness” challenge).

¹¹⁹ Recordkeeping and gun registration is not directly a Second Amendment issue. Since *Heller*, federal courts have upheld restrictions like registration requirements, “because they do not impose a severe burden or affect the core rights – i.e., ‘defense of hearth and home’ by ‘law-abiding, responsible citizens.’” See, e.g. *U.S. v. Rene E.*, 483 F.3d 8 (1st Cir. 2009) (statutorily regulating juvenile access to handguns did not violate the constitutional right to keep and bear arms and was permissible on public safety grounds); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (limiting handgun possession in public to those who showed special need for self-protection is not inconsistent with the Second Amendment). Limits on federal registration and recordkeeping of arms are contained in various statutes, most notable the Firearms Owners Protection Act of 1986. 18 U.S.C. § 926.

¹²⁰ *Id.*

¹²¹ ATT, art. 12.

¹²² *Import Firearms, Ammunition, and Implements of War*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES <https://www.atf.gov/content/firearms/firearms-industry/firearms-how-import-firearms-ammunition-and-implements-war> (last visited Apr. 15, 2015).

C. Enforcement of the ATT.

With the object and purpose of the ATT being to create “the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms . . . [and p]revent and eradicate the illicit trade in conventional arms and prevent their diversion,”¹²³ the ATT has sufficient enforcement mechanisms that also respect the sovereignty of States Parties. To accomplish and balance both of these goals, the ATT relies on the States Parties to do the bulwark of the enforcement through self-monitoring, self-reporting, and development of national laws and systems to regulate the sale, import, export, transit and transshipment, and diversion of conventional arms. Enforcement of the treaty regime is left primarily to State Parties under Article 14, with a dispute mechanism built into Article 19 that requires consultations and allows for other dispute resolution with the mutual consent of the disputing parties.

The ATT requires that a State Party establish and maintain “a national control system, including a national control list, in order to implement the provisions of” the ATT and to provide “its national control list to the Secretariat, which shall make it available to other States Parties.”¹²⁴ Additionally, a State Party is required to take “measures necessary to implement the provisions of [the ATT] and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms.”¹²⁵ Lastly, all States Parties are required to “designate one or more national points of contact to exchange information on matters related to the implementation of this Treaty.”¹²⁶ Each of these requirements for a State Party is a necessary aspect of the foundation for enforcement of the ATT. The establishment by the State Party of a national control list which is monitored by national authorities—to ensure the regulation of the illicit international sale, import, export, and diversion of conventional arms—allows for each State Party to develop its own system of regulations consistent with their laws and traditions, while still upholding the object and purpose of the ATT.

VI. CONCLUSION.

The ABA urges United States to ratify the Arms Trade Treaty. The ATT will have little to no effect on U.S. law, including the Second Amendment, but will allow the United States to lead in international arms controls and to work to curtail the most destructive illicit arms transfers. When combined with robust enforcement of existing U.S. arms control laws, the ATT could save countless lives by establishing common global standards for how nations import, export and transfer conventional weapons.

Respectfully submitted,

Sara Sanford
Chair, Section of International Law
February 2017

¹²³ ATT, art. 1.

¹²⁴ *Id.* at art. 5(4).

¹²⁵ *Id.* at art. 5(5).

¹²⁶ *Id.* at art. 5(6).

GENERAL INFORMATION FORM

Submitting Entity: The Section of International Law

Submitted By: Sara Sanford, Chair, Section of International Law

1. Summary of Resolution(s).

The Resolution calls for the ABA to urge ratification and implementation for the 2013 Arms Trade Treaty.

The Arms Trade Treaty (“ATT”) is an opportunity for the United States (“U.S.”) to help curb illicit international weapons transfers to war-torn countries, terrorist organizations, and murderous regimes, a benefit not only to international peace and security but also to U.S. interests. If ratified by the U.S., the ATT will be a critical foreign policy tool. It creates concrete, enforceable obligations and builds cooperation and oversight mechanisms.

The ATT does not constrain U.S. foreign policy, does not impinge upon the Second Amendment of the U.S. Constitution, or require changes to U.S. weapons import/export regulations. On the other hand, failure to ratify the ATT could compromise U.S. leadership in the international operation of the Treaty and jeopardize universalization and enforcement of the Treaty.

Based on these factors, the ABA should encourage ratification by issuing the R&R, adopting a professional, impartial and well-supported stance and countering untruthful and uninformed opinions about this important treaty.

2. Approval by Submitting Entity.

The Council of the Section of International Law approved this recommendation and resolution at its Meeting on October 18, 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 addition to meeting many of the Associations mission-based goals, discussed above, this policy will also enhance existing ABA policies, including:

Arms Trading Guidelines. Support proposal to ban weapons of mass destruction in the Middle East and to regulate sales of conventional weapons in the region and urge U.S. government to engage in efforts, inside and outside of the United Nations, to establish and enforce limitations on the sale or transfer of conventional arms. 8/92

Conventional Arms Reduction in Europe. Urge agreement between the NATO and Warsaw Pact countries to reduce levels of conventional arms in Europe; support the Conventional Forces in Europe (CFE) negotiations to reduce current NATO and Warsaw Pact forces levels to parity. 2/90

Disarmament and Non-Proliferation of Nuclear Weapons. Support congressional approval of Interim Agreement on Certain Measures with respect to the Limitation of Strategic Offensive Arms of 1972 and the associated Protocol," and urge prompt agreement on further measures providing for general and complete disarmament and non-proliferation. 8/72-R-5/79

Non-Proliferation of Nuclear Weapons Treaty. Urge U .S. Government to take all possible steps to obtain extension of NPT treaty; work to satisfy NPT obligation to pursue negotiations in good faith on effective measures relating to cessation of nuclear arms race and nuclear disarmament by taking certain enumerated actions. 2/85; 8/94

Human Rights. Support U.S. promotion, through the United Nations, of human rights for all people in all countries. 8/67

Genocide Convention. Support ratification of the Convention by the Senate subject to three understanding and one declaration. 2/76

Crimes Against Humanity. Urge Congress to enact legislation to prevent and punish crimes against humanity; urge adoption of a new global convention for the prevention and punishment of crimes against humanity. (14A300) 8/14

Genocide. Endorse paragraphs 138 and 139 of the World Summit Outcome Document of the 60th session of the UN General Assembly (September 2005) concerning the Responsibility to Protect doctrine; endorse the recommendations set forth in the report, Preventing Genocide: A Blueprint for U.S. Policymakers (December 2008). (09A110) 8/09

For all of these policies, the ATT will provide meaningful international obligations that will require all States Parties to develop national arms control systems akin to the system in the United States. These systems will help prevent provision or diversion of weapons that could be used to contribute to systemic violations of human rights, crimes against humanity or genocide. While nuclear and other mass destruction weapons are not the main focus of the ATT, the regulation of transfers of these weapons, their parts and their technology will be a part of the ATT's purview, lending additional teeth to disarmament efforts in this area.

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

N/A

6. Status of Legislation. (If applicable)

The Arms Trade Treaty has not been submitted to the Senate for advice and consent prior to the President's instrument of ratification. The treaty has been signed by the United States.

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

If adopted, this policy will allow various organs of the American Bar Association to call for the submission to the Senate, for the Senate to consent to ratification, and for the President's ratification of the treaty. Through lobby days, like the yearly Human Rights Lobby Day of the International Human Rights Committee, the Committee will have the capacity to encourage elected officials to support ratification, and will be able to use the policy to dispel misconceptions about the treaty that are addressed in the attached report.

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

There are no costs associated with this R&R.

9. Disclosure of Interest. (If applicable)

Not applicable.

10. Referrals.

The R&R has been referred to the ABA's Center for Human Rights and will be actively discussed with various sections of the ABA that have an interest in the subject matter, including, but not limited to:

Section for Civil Rights and Social Justice
National Security Standing Committee
Standing Committee on Armed Services
Export Controls Committee
Air Space and Defense Committee
Task Force on Gun Violence

The ABA's Center for Human Rights voted in November 2016 to support the Resolution and Report.

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?
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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the ABA to urge ratification and implementation for the 2013 Arms Trade Treaty.

The Arms Trade Treaty (“ATT”) is an opportunity for the United States (“U.S.”) to help curb illicit international weapons transfers to war--torn countries, terrorist organizations, and murderous regimes, a benefit not only to international peace and security but also to U.S. interests. If ratified by the U.S., the ATT will be a critical foreign policy tool. It creates concrete, enforceable obligations and builds cooperation and oversight mechanisms.

The ATT does not constrain U.S. foreign policy, does not impinge upon the Second Amendment of the U.S. Constitution, or require changes to U.S. weapons import/export regulations. On the other hand, failure to ratify the ATT could compromise U.S. leadership in the international operation of the Treaty and jeopardize universalization and enforcement of the Treaty.

Based on these factors, the ABA should encourage ratification by issuing the R&R, adopting a professional, impartial and well-supported stance and countering untruthful and uninformed opinions about this important treaty.

2. Summary of the Issue that the Resolution Addresses

Arms that fuel human rights violations, genocide, war crimes and crimes against humanity are sold and shipped. Unlike the United States, many countries do not have the regulatory system or mechanisms in place to prevent weapons from being diverted into areas and conflicts where these abuses are taking place. In addition to prohibiting the sale or transfer of weapons that will be used to commit humanity’s most heinous crimes or otherwise violate international law, this treaty mandates that countries build arms control regimes like those that exist in the United States. By encouraging and facilitating cooperation and creating rules that prevent sales that will exacerbate genocide and other serious crimes, this Treaty will help to curb these sales and create a more comprehensive system of laws in other countries to prevent diversion of weapons.

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

The Arms Trade Treaty provides an opportunity for the United States to lead on the issue of arms control and to become part of a global system that prevents arms sales that will be used to commit genocide, war crimes, crimes against humanity or significant human rights violations. With the ABA’s support of this policy, the Association will be in a position to counter misinformation and misconceptions on the treaty and the associated laws.

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

The R&R addresses objections to the treaty, so those views are represented and addressed in the R&R's supporting text. Recorded objections focus on political issues surrounding the tactics that the Obama Administration used to negotiate the treaty, that the treaty can be changed to bind the United States without its consent, that the treaty will infringe upon the Second Amendment and other Constitutional rights, that the treaty is ambiguous, that it might compromise U.S. sovereignty, or that it might hinder the U.S. ability to aid its allies. These objections are dealt with in the Report.

AMERICAN BAR ASSOCIATION**ABA REPRESENTATIVES AND OBSERVERS TO THE UNITED NATIONS
RULE OF LAW INITIATIVE
NEW YORK STATE BAR ASSOCIATION****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association urges the United Nations, the United States
2 and other governments and relevant international actors to develop and implement
3 methodologies to measure and track the prevalence of sexual and gender-based violence.
4

5 FURTHER RESOLVED, That the ABA endorses international efforts to improve donor
6 coordination, transparency, and accountability with respect to assistance to victims of sexual and
7 gender-based violence including in situations of armed conflict, and specifically recommends
8 that donors require quantitative public reporting from funding recipients globally, including
9 disclosure of independent audits or evaluations showing funds expended on services to victims
10 of sexual violence and the services provided using such funds.
11

12 FURTHER RESOLVED, That the ABA recommends that international Non-Governmental
13 Organizations, donors, and multilateral agencies work with and support governments to develop
14 and adopt appropriate methodologies to create publicly accessible national databases of
15 information on assistance to victims of sexual violence, enabling stakeholders to coordinate,
16 track, and evaluate this assistance.

REPORT

I. INTRODUCTION¹

Gender-based violence remains an all-too prevalent global problem and none more so than in nations at war, where emergency medical services are needed but not readily available. A 2015 Report published by the Inter-Agency Standing Committee on improving gender-based violence interventions during armed conflict from a legal and humanitarian perspective tracks the Central African Republic, Cote d'Ivoire, Democratic Republic of the Congo [DRC], Liberia, Mali, Rwanda, Sierra Leone, South Sudan, Uganda, Bosnia, Kosovo, and Colombia.² This ABA Report delves into the legal and humanitarian framework for improving the provision of emergency humanitarian aid during armed conflict in one of these countries namely, the DRC. In a sense, the DRC presents the case as a microcosm for the larger global fight against gender-based violence during armed conflict, manifested in certain common elements namely, prolonged war, pressure placed on the country's legal and economic infrastructure, coordination among those providing support services, and funding efforts. This report thus focuses attention on the country which the UN's Special Representative on Sexual Violence in Conflict has called the "rape capital of the world".³

In the Fall of 2011, former ABA President Carolyn Lamm asked the ABA Committee of United Nations Representatives and Observers (the "UN Committee") to ascertain whether there is an effective reparations framework providing, specifically, emergency medical assistance to victims of sexual violence⁴ in the Democratic Republic of Congo ("DRC"). In 2008, the UN Special Rapporteur on Violence Against Women had published a paper concerning the rights of victims

¹ The Report in its entirety may be accessed by the following link:

http://www.americanbar.org/content/dam/aba/administrative/office_president/108revised.pdf.

² Inter-Agency Standing Committee, Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action: Reducing Risk, Promoting Resilience, and Aiding Recovery, 327 (2015), available at http://gbvguidelines.org/wp-content/uploads/2015/09/2015-IASC-Gender-based-Violence-Guidelines_lo-res.pdf (last visited 12/13/2016).

³ UN News Centre, Tackling Sexual Violence Must Include Prevention, Ending Impunity – UN Official (27 April 2010), <http://www.un.org/apps/news/story.asp?NewsID=34502#.WFhPltUrKuk> (last visited 12/19/16) (quoting Margaret Wallstrom, the UN Secretary-General's Special Representative on Sexual Violence in Conflict, after her visit to the DRC) in which she refers to DRC as the "rape capital of the world."

⁴ Sexual violence is defined as any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic or otherwise directed against a person's sexuality using coercion, by any person, regardless of their relationship to the victim, in any setting. World Health Organization (<http://www.who.com> (last visited 9/17/16)). Gender-based violence is defined as any act of gender-based violence which results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life. UN Declaration on the Elimination of Violence against Women adopted by the UN General Assembly 1993.

<http://www.un.org/documents/ga/res/48/a48r104.htm>). This Report concerns international actors in armed conflict, broadly defined herein as state and non-state actors involved in addressing, donating and eradicating sexual violence worldwide including during war and includes multilateral agencies (i.e., both governmental, non-governmental international organizations and individuals who or which work in areas involving United Nations' activities and address sexual violence). See U.N. Comm'n on Int'l Trade Law, *Partnerships between the United Nations and non-State Actors, in Particular the Private Sector: Recent Developments across the United Nations and Possible Implications for the Commission's Work*, at 1, note 2 (7 May 2004), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V04/533/40/pdf/V0453340.pdf?OpenElement> (last visited 12/13/2016).

of sexual violence to medical and related services as well as reparations in the DRC,⁵ but unfortunately since that time, the armed conflict has continued largely unabated⁶ and further detailed appraisals and data have not been made or published.

Given the paucity of fresh data on current needs, a Subcommittee of the ABA UN Committee was formed to focus specifically on the existence and implementation of programs for emergency medical services for victims of sexual violence in the DRC.

We conclude that although the UN recommended that the DRC provide the primary funding for the proposed medical assistance and reparations, because of its central role in the armed conflict, and its inability to fund, prioritize, or shoulder complete responsibility to protect and provide relief to its citizens, the DRC has not effectively implemented such programs. In addition to the lack of Government resources, political will and infrastructure, the Government has difficulty providing other basic services to large parts of the country and its citizens. With Sudanese refugees crossing the border into eastern DRC provinces because of armed conflict in their country, the magnitude of the medical crises has only heightened and been made more complex. There is also ongoing concern about corruption with respect to the distribution of funds by the DRC government.

The Committee's study of medical assistance to victims of sexual and gender-based violence (SGBV) in the DRC highlighted challenges faced globally in efforts by international donors, international organizations, governments, and NGOs to respond effectively to this scourge and in particular the need to (i) gather data on the prevalence of SGBV; (ii) marshal adequate resources to serve victims, including with emergency medical assistance; (iii) coordinate the provision of such services; and (iv) ensure transparency, accountability, and effectiveness with respect to the assistance provided. These challenges were addressed at the June 2014 Global Summit to End Sexual Violence in Conflict in London,⁷ and they are the focus of intense efforts currently in the context of implementation of the UN Sustainable Development Goals—particularly Goal 5.2 (“Eliminate all forms of violence against all women and girls in the public and private spheres,

⁵ R. Manjoo, “Promotion And Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, Including The Right To Development” – A/HRC/7/6 Add. 4 “Mission to DRC.” The Special Rapporteur's Report and Addendum recommends member state audits of the effectiveness of support systems provided by NGOs through the collection of prevalence data. *Id.* at 26. Prevalence data measures lifetime prevalence of sexual crimes and that of the past twelve months as a means of ascertaining whether such crimes are increasing or decreasing and whether the support systems for the victims of sexual violence are effective. The Addendum specifically calls on the DRC, the UN, and the international community to: permit crimes to be prosecuted in the International Criminal Court instead of military courts; eliminate corruption in the justice system; and as relevant to this Report, broaden the collection of medical data, as was collected at that time by the Provincial Synergy of one of the territories in South Kivu, in order to ensure that victims' medical, psychological, and social needs are being met.

⁶ See generally International Crisis Group, Congo: No Stability in Kivu despite Rapprochement with Rwanda, Africa Report No. 165, Nov. 16, 2010; International Crisis Group, Eastern Congo: Why Stabilization Failed, Africa Briefing No. 91, Oct. 4, 2012; International Crisis Group, Understanding Conflict in Eastern Congo: The Ruzizi Plain, Africa Report No. 206, July 23, 2013; International Crisis Group, Congo: Ending the Status Quo, Africa Briefing No. 107, Dec. 17, 2014.

⁷ See e.g., Chair's Summary, describing the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict that was launched at the Summit, and the commitments of international partners to fund initiatives related to accountability for such crimes, available at: <https://www.gov.uk/government/publications/chairs-summary-global-summit-to-end-sexual-violence-in-conflict/chairs-summary-global-summit-to-end-sexual-violence-in-conflict#accountability>.

including trafficking and sexual and other types of exploitation”), Goal 16.1 (“Significantly reduce all forms of violence and related death rates everywhere”) and Goal 16.a (“Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime”)—as the UN, member states, and international development donors and implementers seek to identify indicators for these goals, programs that will support their realization, and mechanisms to track and evaluate the effectiveness of these efforts.⁸

II. THE ARMED CONFLICT IN THE DRC

For over two decades, the DRC, the second largest country in Africa, has experienced armed conflict.⁹ Sexual violence is one of the most vicious, insidious yet salient features of the conflict in the DRC. Rape is so pervasive during armed conflict that it has been recognized and legally defined by the United Nations as a “tactic of war.”¹⁰ Given the continuing unrest in the eastern provinces, the majority of sexual violence victims are located there and continue to suffer from the violence. According to the United Nations, as of 2009, already more than 200,000 cases of sexual violence have been reported since the conflict started.¹¹ Although the prevalence of sexual violence is linked to war and conflict, members of the armed forces are not the only perpetrators of sexual violence. A 2012 study conducted in Goma found that “more than a third of the men interviewed had imposed a form of sexual violence, and more than three quarters of them express disturbing views about rape.”¹² The atrocities largely occur in four provinces: Oriental, North Kivu, South Kivu, and Maniema. Nevertheless, the few existing data are alarming. A 2010 study in the *Journal of the American Medical Association* found that 40 percent of all women and 24 percent of all men in a random sample in the eastern DRC have been victims of sexual violence.¹³ Although 67 percent of the DRC population lives in rural areas, 80 percent of medical services are concentrated in urban locations.¹⁴ Logistical constraints due to the country’s enormous size and difficult terrain, plus the lack of investment in healthcare facilities and well-trained health workers, leave the vast majority of sexual violence victims with little to no access to medical assistance, especially immediately following the sexual violence.

⁸ See generally, <https://sustainabledevelopment.un.org/sdgs>.

⁹ History of the Conflict, Eastern Congo Initiative, <http://www.easterncongo.org/about-drc/history-of-the-conflict> (last visited 6/23/15).

¹⁰ United Nations Security Council, Resolution 1820 (2008), S/Res/1820 (2008), 19 June 2008 (“... women and girls are particularly targeted by the use of sexual violence, including as a tactic of war...”).

¹¹ United Nations Population Fund (2009) *Secretary-General Calls Attention to Scourge of Sexual Violence in DRC*.

¹² Slegh, H., Barker, G., Ruratotoye, B. & Shand, T. (2012). *Gender Relations, Sexual Violence and the Effects of Conflict on Women and Men in North Kivu, Eastern Democratic Republic of Congo: Preliminary Results of the International Men and Gender Equality Survey (IMAGES)*. Sonke Gender Justice Network and Promundo-US: Cape Town, South Africa, and Washington, DC.

¹³ Johnson, K., Scott, J., Rughita, B., Kisiclewski, M., Asher, J., Ong, R., & Lawry, L. (2010). *Association of sexual violence and human rights violations with physical and mental health in territories of eastern Democratic Republic of Congo*, 304 JAMA 553-562 (2010).

¹⁴ Essanga, J.R., Lusi, G., & Bitwe, R. (2010). *Exploring the complex contributions of community based safe motherhood program to comprehensive primary health care*. Ottawa: Teasdale Corti Project.

III. INTERNATIONAL RESPONSES TO SEXUAL VIOLENCE IN THE DRC

A. Legal and Policy Framework

The international community has consistently and uniformly condemned sexual violence in the DRC. Sexual violence is defined in the main legal instruments that comprise international criminal justice from a limited definition of physical violence of a sexual nature such as rape to a current broad definition of “*attack on the sexuality of the victim that may or may not involve physical attack . . . harassment, sexual exploitation, sexual abuse, sexual assault . . . without the consent of the victim... or perceived by the victim to be of a sexual nature.*”¹⁵ The Rome Statute,¹⁶ the constitutive statute of the International Criminal court (“ICC”) which the DRC adopted in 2002, recognizes that rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization, and any other form of sexual violence of a comparable severity can constitute a crime against humanity and a war crime in international and non-international armed conflict as well as crimes against humanity. In addition to the crimes of sexual and gender-based violence listed above, persecution is included in the Rome Statute as a crime against humanity and specifically includes for the first time the recognition of gender as a basis for persecution.¹⁷ The UN is also a proponent of several relevant human rights treaties and resolutions addressing women’s rights, such as the Convention for the Elimination of All Forms of Discrimination against Women, which recognizes sexual violence as both a crime against humanity and a war crime.

In July 1999, the UN Security Council established the United Nations Mission in the DRC (MONUC), which was subsequently renamed United Nations Organization Stabilization Mission in the DRC (MONUSCO) in 2010. One of MONUC’s (MONUSCO’s) tasks is to help the DRC government “strengthen the prevention, protection, and response to sexual violence” in the country.¹⁸

The domestic law of the DRC recognizes sexual violence as a crime against humanity, and since 2006, the DRC has enacted specific legislation to combat sexual violence (also known as the Rape Law).¹⁹ Procedurally, the law mandated that judicial proceedings cannot last longer than

¹⁵ G. Ruffer, *Testimony of Sexual Violence in the Democratic Republic of Congo and the Injustice of Rape: Moral Outrage, Epistemic Injustice, and the Failures of Bearing Witness*, 15 Ore. Rev. of International Law 225 at 244 (“Ruffer”).

¹⁶ See State of the International Criminal Court (“Rome Statute”), July 1, 2002, 2187 U.N.T.S. 90, art. 7 ¶1(g) art. 8 ¶¶ 2(b)(xxii), 2(e)(vi). Notably, the Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention. Id. at art. 6, at 3.

¹⁷ Id. ¶¶ 1(h), 2(g), 3, at 4-5.

¹⁸ See *Comprehensive Strategy on Combatting Sexual Violence in DRC, Executive Summary*, MONUSCO: UNITED NATIONS ORGANIZATION STABILIZATION MISSION IN THE DRC, <http://monusco.unmissions.org/Portals/MONUC/ACTIVITIES/SEXUAL%20Violence/KeyDocuments/Comprehensive%20Strategy%Executive%20%Summary.pdf> (last visited 5/2/13). Security Council Res. 1820 ¶2 U.N. Doc.S/RES/1820 (6/19/08), 1888 ¶17, U.N. Doc.S/RES/1888 (9/30/09).

¹⁹ See Constitution de la Republique Democratique du Congo, Art. 15 (2006) (providing “The public authorities shall ensure the suppression of sexual violence. Without prejudice to international treaties and agreements, any sexual violence against any person, aimed at destabilizing, or breaking up a family and of causing the disappearance of a whole people, is categorized as a crime against humanity, punishable by law.”); Law number 06/018, modifying

three months and it prevented the use of character accusations or the victim's past actions from being used against her or him. The 2006 Rape Law has made the definitional elements and crimes included in the International Criminal Court statute part of the national law. The military law, however, did not follow the detailed ICC definition of the crime of sexual violence, so military courts had to fill the gap in the law.²⁰ At the local level, military courts have jurisdiction to hear cases of sexual violence committed by military personnel, police, civilian collaborators, and any civilian who committed the crime using a gun.²¹ As in most civil law countries, victims can join criminal proceedings as civil parties. Prosecution for non-military rapes takes place in the criminal courts with civil action for reparation being stayed until the criminal courts issue a final judgment. A victim who seeks reparations can either join the penal action or wait for a judgment to use in the action before the civil jurisdiction to claim reparations. The victim must also pay a fee to receive the judgment and, if she pursues a civil action, to file the complaint.

Given the shortage of magistrates and the difficulty for victims to access courts due to the lack of infrastructure in the eastern provinces, the DRC Constitution and domestic laws have also been revised to provide reparations to victims of domestic violence and to allow for judgments against the individual perpetrators and the State with the support of the international community.²² A key solution to expand victims' access to the DRC courts has been the use of a section of the DRC criminal procedure code that provides for the deployment of mobile courts. These have been used to facilitate adjudication of cases in remote rural areas where the justice system is not fully deployed, and to respond to mass atrocities including mass rapes, by enabling Congolese judges and lawyers to conduct the trials in the place where the alleged crimes took place. International NGOs such as ABA ROLI and Avocats Sans Frontiers facilitate deployment of mobile courts, in collaboration with UNDP, MONUSCO, and the Congolese justice sector, with funding from a variety of bilateral government donors including the Open Society Institute, USAID, the US Department of State, and the government of the Netherlands.²³

B. Methodological Issues and Challenges with Implementation

By way of further background, the 2016 UN Commission on the Status of Women specifically focused on adopting methodological approaches to data collection on the subject of SGBV with the goal of eliminating all forms of violence against all women and girls in the private and public

and completing the Congolese penal code, July 20, 2006; Law number 06/019 modifying and completing the Congolese criminal procedure code, July 20, 2006.

²⁰ Gaëlle Breton-Le Goff, *Ending Sexual Violence in the DRC*, 34 Fletcher F. of World Aff. 13, 23 (2010) ("Breton-LeGoff") cited in Ruffer, note 3 at 227.

²¹ Laws no. 04/2002 and 023/2002 (art. 111 and 112) of Nov. 18, 2002 on the Military Penal Code. Rape and torture are covered by the military penal code as crimes against humanity, which was integrated into the military Penal and Justice code, along with crimes of genocide and war crimes, through the laws of Nov. 18, 2002 and cited in Ruffer at 263.

²² The DRC civil procedure law provides for the enforcement of judgments against the State, provided the State is properly identified as a party at the beginning of a proceeding, the appropriate fees are paid, and the execution procedures are followed. Decree of March 7, 1960 - Civil Procedure Code, Title I, Chapter I - Assignments, art. 1, 8, 57, and 145; Title III Execution Procedures, art. 105 and 118, and Chapter II on Seizure, art. 120, 152, and 157. These procedures are often believed by Congolese attorneys to be too cumbersome to pursue.

²³ Ruffer at 233, citing *Analysis: New Laws Have Little Impact on Sexual Violence in DRC*, IRIN Humanitarian News and Analysis, June 7, 2011 available at: <http://www.irinnews.org/printerport.aspx?reportid=92925>.

spheres and thereby meeting Target 5.2 Sustainable Development Goal. Noting Security Council Resolutions 1325 (2000) and 2098 (2013) which call for Member states to prioritize the allocation of state funds in conflict affected areas to address,²⁴ *inter alia*, sexual violence, the UN Statistical Commission IAEG-GS called for “prevalence data” from Member states whose purpose is to: measure the magnitude of sexual violence against men, women and children; identify high risk groups; and recognize the barriers for victims seeking help. Collecting data that are comparable over the lifetime and at regular intervals was one of the 17 goals outlined in target 5.2.²⁵ Without such data, the UN opined that trend analysis (measure of magnitude of crimes over time) was not possible, and certain age groups (notably women over 50 and migrants) were omitted.

The challenge, as stated by UN representative Francesca Grum, is to improve the knowledge base, definitional standards, methods and collection policies, as well as to integrate the data with data sources, administrative records and thereby provide the services needed for victims. The UN representative’s 2016 description of the need for accountability in this area is consistent with a more general audit performed in 2013 by the European Court of Auditors covering the period 2003-2011 of 16 EU funded programs. One of these programs, the European Instrument for Democracy and Human Rights, was deployed in the field for support of victims of torture, the promotion of democracy and the rule of law, human rights and fundamental freedoms and non-state actors. Over that 2003-2011 period, \$500M Euro was spent on humanitarian aid and civil protection, concentrated mostly in the eastern part of the country.²⁶

Significantly, the DRC representative who spoke at the UN Commission for Status of Women Program on data collection confirmed the lack of that State’s application of the methodologies advocated by the UN Statistical Commission and others. Thus, rather than undertake an audit and data collection from victims using generally acceptable statistical methods from administrative agencies, judiciary, NGO providers and the like to create a data base, the DRC national data system is presently limited to and based entirely on those victims who receive services. The hope was expressed that someday the State would obtain the data on a territorial level, provincial level, and national level to help develop policy. There is also no website or electronic means for gathering such data. The DRC’s position reflects the gap between the practical reality in many countries and the international standards and approaches to data collection and analysis suggested by UNFPA, the UN Statistical Commission, UN Women, GAO, USAID, and other international stakeholders noted throughout this Report.

²⁴ See also Report of the Secretary-General “Review of the implementation of the agreed conclusions from the 57th session of the Commission on the Status of Women,” E/CN.6/2016/4.

²⁵ In Target 5.2, see E/CN.3/2011/5 “Report of Friends/Chair of UN Statistical Commission on Indicators on Violence Against Women.

²⁶ European Court of Auditors, 2013 Audit “EU Needs to Be More Demanding of Congo Authorities,” 10/1/13, http://www.eca.europa.eu/Lists/ECADocuments/SR13_09/SR13_09_EN.pdf (last visited 4/6/16). Notably, the Commission agreed with Recommendation 1(c) of the auditors “calling for improved DRC government accountability through increased support to strengthen the capacity of national oversight institutions, in particular the specialized committees of the DRC National Assembly and the supreme audit institution” at 36, 49.

1. ABA Rule of Law Initiative (ROLI)

According to the ABA ROLI 2015 Annual Report, ROLI supports 15 legal aid clinics in Eastern and Central DRC that provide services primarily to survivors of sexual and gender-based violence. It maintains a large onsite staff of eighty people who serve the DRC by providing pro bono legal aid. ROLI has been working in the DRC since 2008 and has an annual budget of US \$2-3 million. ROLI's report indicated that since 2008, it has provided legal counsel to over 18,000 survivors of sexual and gender-based violence, supported the filing of over 10,000 criminal cases, and assisted in over 1750 criminal trials that resulted in over 1225 convictions. In that connection, ROLI staff accompanies survivors throughout the judicial process. They offer psychological counseling and referrals to medical and social services. They have also conducted public and media outreach activities to increase public awareness of the problems of sexual and gender-based violence. These activities have been funded by the U.S. Department of State's Bureau of International Narcotics and Law Enforcement Affairs, USAID, the Governments of Norway and the Netherlands, and private foundations. Like most development agencies, ROLI does not publish detailed budgetary information about the amounts earmarked for each program in the DRC nor for the country as a whole.

2. U.S. Agency for International Development (USAID)

USAID is a principal source of funding for humanitarian programs in the DRC, providing \$887 million of programmatic funding to the country since 2009.²⁷ USAID primarily provides funding to other government agencies and NGOs in order to implement a wide variety of aid projects. In 2013 alone, USAID spent \$89,300,000 on health projects in the DRC. According to the USAID website, its health programs "provide a package of services approved by the DRC government that focus on improving the quality of maternal and child health services; provision of potable water; prevention, care and treatment services for malaria, tuberculosis, and HIV/AIDS; and provision, education, and access to family planning services . . . and coordinate with other donors and organizations to reduce duplication and maximize efforts to improve the overall health of the Congolese people."²⁸

However, in searching for Inspector General Reports and reviewing USAID reports, it is not possible to identify projects which specifically address the emergency needs of sexual violence victims.²⁹ It is unclear how much USAID funding is earmarked for NGOs or government entities to assist victims of sexual violence. For example, USAID is funding a project to

²⁷ ForeignAssistance.gov, *Democratic Republic of Congo*, http://www.foreignassistance.gov/web/OU.aspx?OUID=325&FY=2015&AgencyID=3&budTab=tab_Bud_Spent (Accessed October 13, 2014); USAID, *Interactive Map*, <http://map.usaid.gov/?l=regional&w=SUB%20SAHARAN%20AFRICA> (Accessed October 13, 2014).

²⁸ USAID, *Democratic Republic of Congo*, <http://www.usaid.gov/democratic-republic-of-the-congo/our-work> (accessed September 14, 2014).

²⁹ See, e.g., M. Pratt, L. Werchick "Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo, an assessment of programmatic responses to sexual violence in North Kivu, South Kivu, Maniema and Orientale Provinces," USAID/DCHA Assessment Report, Mar. 18, 2004; "Success Story: Aiding Survivors of Gender Based Violence in the DRC," USAID/Bureau for Democracy, Conflict, and Humanitarian Assistance (DCHA, Office of U.S. Foreign Disasters Assistance (OFDA), Apr. 2010; <http://www.state.gov/s/gwi/rls/other/2011/162301.htm> (last visited 11/10/14) (generally describing allocations to NGOs 2010-2011).

“overcome sexual and gender-based violence in the Eastern Congo” with a timeline from 2010 to 2014, which has so far received \$16 million³⁰ and is being implemented by IMA World Health. Although the 2014 Report of the project is very well documented regarding the numbers and percentages of types of populations reached, the types of crimes committed, and the types and numbers of victims reached and treated, it does not address the essential issues of overall data reporting and fund use in the Eastern Congo. Rather, the Annual Reports for the first four years of the project benchmark the beneficiary targets set and achieved, but do not benchmark the funds received by the implementing NGOs, their use, and the efficacy of such funding. Similarly, a 2010 USAID Report mentions the need for intervention within 72 hours following an attack, and twelve NGO Merlin-supported clinics in Kayna and Lubero territories, North Kivu Province, have been stocked with Post-Exposure Prophylaxis Kits,³¹ but again, there is no data provided for the Report or any newer data. While the Subcommittee reached out to some fourteen NGOs and related entities, and was granted interviews with five of them, USAID and most of the NGOs questioned why the ABA needed the data and would not voluntarily provide access to more specific information or comprehensive data on USAID’s programs, the funding of projects that provide medical assistance to victims of sexual violence, or those helped.

3. DRC Pooled Fund

The DRC Pooled Fund a/k/a Common Humanitarian Fund (the “Fund”) was established in 2006 to improve the humanitarian response in the DRC pursuant to the authority of the United Nations Humanitarian Coordinator.³² The Fund was created to enhance the ability of the United Nations Humanitarian Coordinator to direct funds to strategic humanitarian priorities. According to the Fund’s “Terms of Reference,” “since 2006, the United Nations has taken a coordinated approach to the delivery of humanitarian aid” in the DRC, which is reflected in an annual Humanitarian Action Plan (“HAP”). The Funding was to be used to support projects that (i) strengthen protection of civilians; (ii) reduce morbidity and mortality of affected communities, (iii) improve living conditions of the affected communities by restoring livelihoods and (iv) restore the livelihoods of affected communities on the basis of vulnerability.³³ According to its 2014 Report, the DRC Pooled Fund of \$58,975,086 was primarily financed by seven contributors: the governments of Belgium, Luxembourg, the Netherlands and Norway; the UK’s Department for International Development; Irish Aid; and the Swedish International Development Cooperation Agency.³⁴ The governments of Belgium, Netherlands, Norway, and Luxembourg had committed to donating \$6,538,913 for 2015 by July of that year. At the same time, the Belgian government had already committed to donating \$2,765,487 for 2016. As of July 2015, the Fund had received \$891 million in contributions plus interest. It should be noted that according to the 2014 Report, new contributions had dropped by 18 percent.

³⁰ A Holistic Approach to Support Survivors of SGBV in the DRC, IMA World Health, available at: <http://imaworldhealth.org/wp-content/uploads/2015/02/Ushindi2015.pdf> (last accessed July 9, 2015).

³¹ U.S. AID, DCHA, OFDA “Success Story: Aiding Survivors of Gender-Based Violence in the DRC”, Apr. 2010.

³² On December 15, 2005, the UN General Assembly issued a resolution, *Strengthening the Coordination of the Emergency Humanitarian Assistance of the United Nations* (General Assembly Res 60/124).

³³ The DRC Common Humanitarian Fund, Annual Report 2014, p. 11 available at: <https://docs.unocha.org/sites/dms/Documents/ANNUAL%20REPORT%20CHF%20DRC%202014.pdf>.

³⁴ Multi-Partner Trust Fund Office, Democratic Republic of the Congo Pooled Fund, available at: <http://mptf.undp.org/factsheet/fund/HCG10> (last accessed July 9, 2015).

According to the Fund's 2014 Consolidated Annual Financial Report ("2014 Report"), the Humanitarian Action Plan has allocated more than \$800 million to participating organizations, including several UN entities,³⁵ such as UNFPA, UNHABITAT, UNHCR, UNICEF, UNWOMEN, as well as the Institute of Medicine, World Health Organization and other large NGOs since the creation of the Fund. While funding has decreased in recent years, in 2014, the Fund disbursed \$60.5 million (down from \$75,075,373 in 2013) of disbursements to participating organizations to support 120 (up from 95 in 2013) humanitarian assistance programs in the DRC.³⁶ Of the \$60.5 million, the DRC Pooled Fund Health Cluster received \$2,736,602 (down from \$5,384,371 in 2013) for a broad range of twelve (down from 24 in 2013³⁷) health initiatives including vaccinating children and pregnant women, health care training, training to respond to epidemics, various unspecified medical treatments, birth assistance and rehabilitating and furnishing health structures. In 2013, 9,614 women received treatment for rape—but that is all the data states. It does not state how many men or children were victims. In addition, the total number of victims, those who were turned away, those raped but not treated, those who refused to come for treatment, or those who were treated for related psychological help are unknown. The 2014 Report lacks details on the amount ear-marked for victims of sexual abuse, the efficacy of treatment, and which NGOs receive such funds (i.e., clarifying when such medical treatment ranked among the priorities). One report for the pooled funds by program shows what parts of the pool were allocated to the various programs and how much was spent.³⁸ The 2014 Report noted a donor transition from emergency funding to transition and development funding, possibly as a result of "donor fatigue."³⁹ Research did not reveal any newer readily (i.e., publicly) available audits from the UN Inspector General or the UN Office of Internal Oversight/Board of Advisors ("OIOS").⁴⁰

³⁵ Office of the Coordination for Humanitarian Affairs / United Nations Development Programme, *Common Humanitarian Fund: The Democratic Republic of the Congo Annual Report 2013* 1, 15 (2014) ("CHF 2013 Report"). See also Office of the Coordination for Humanitarian Affairs / United Nations Development Programme, *Common Humanitarian Fund: The Democratic Republic of the Congo Annual Report 2014* (2015), available at <https://docs.unocha.org/sites/dms/Documents/ANNUAL%20REPORT%20CHF%20DRC%202014.pdf> ("CHF 2014 Report").

³⁶ CHF 2013 Report at 6-10; 19-20; CHF 2014 Report at 4.

³⁷ Of the 24 health-oriented projects, nine were financed in 2013 while fourteen projects were from 2012, and one was funded in 2011. Both emergency and reproductive health care were, however, reflected in total numbers, further obfuscating the data for emergency medical care.

³⁸ Annex 4, 2007 DRC Humanitarian Action Plan: Pooled Funds and CERF. [http://www.congoforum.be/updocs/Annex_4_-_2007_DRC_Humanitarian_Action_Plan_Pooled_Fund_and_CERF_Funds_allocated_by_type_of_organisation\(1\).pdf](http://www.congoforum.be/updocs/Annex_4_-_2007_DRC_Humanitarian_Action_Plan_Pooled_Fund_and_CERF_Funds_allocated_by_type_of_organisation(1).pdf) International NGOs who received funding in 2007 were: ACF, ACTED, AMI, ASF B, ASF F, ATGL, CESVI, CISP, CONCERN, COOPL, CORDAID, CRAFOD, DCS, EQUILIBRE, FHI, GOAL, GTZ-PO, HI, IFESH, IRC, LWF, MAG, MALTSER, NRC, OXFAM GB, OXFAM Q, SOLIDARITE. Distributions to National DRC included: ADEPAE, ADI-KIVU, ASRAMES, CARITAS DEV GOMA, GEAD, FAO, OCHA, UNDP, UNFPA UNHCR, UNICEF, UNOPS, WFP, WHO.

³⁹ CHF 2014 Report at 7.

⁴⁰ "Report of the Director of the Division for Oversight Services on UNFPA Internal Audit and Investigation Activities In 2013," issued by Executive Board of UN Dev. Programme, UN Population Fund and UN Office For Project Sources, dated 4/14/14, www.unfpa.org/webdav/site/global/shared/dos (last visited 11/10/14). UNFPA states that its mandate includes population issues including reproductive health and gender issues including emergency contraception and HIV-related disease. The latest 2013 Report includes, however, no public data relating to the provision of emergency medical assistance to victims of sexual violence in the DRC. Id. Moreover, the UN Internal Audit Division Office of Internal Oversight Services Manual dated March 2009 (B.4.2) states that

Each of the key funding sources described in the DRC Pooled Fund's Consolidated Annual Financial Report of 2014 has the distinct responsibility of improving donor coordination, transparency and accountability with respect to assistance to victims of sexual and gender-based violence including in situations of armed conflict. For this reason, the UN has proposed that greater and more uniform data collection be instilled within the donor community in its SDGs. Donors should be required to provide quantitative public reporting from funding recipients globally, including the disclosure of independent audits or evaluations showing funds expended on services to victims of sexual violence and services provided so that their effectiveness may be counted and gauged.

4. The World Bank

In June 2014, the World Bank approved a program in the three countries of the Great Lakes region: the DRC, Burundi and Rwanda. This program is entitled the "One Stop Center Model" for support for Survivors of Sexual Violence.

The amount earmarked for this program is a total of US \$107 million with US \$15 million for Burundi, \$15 million for Rwanda and the balance for the DRC.

The pre-screening/appraisals of service providers and suppliers have already taken place and the contract negotiations are almost completed. Ongoing appraisals will occur on a contractually defined basis to audit the respect for the criteria and the proper use of funding. However, the methodology of the appraisals and the type of audits is not public knowledge. The terms and conditions of any such appraisals and audits are designed specifically for each service provider and are specified in each individual contract. If any form contract exists, the Subcommittee was unable to procure it.

IV. CONCLUSIONS AND RECOMMENDATIONS

1. There appear to be vast amounts of monies committed to supporting the myriad needs of DRC citizens, including emergency medical funding to victims of sexual violence.
2. Despite best efforts, there is little to no publicly available information as to where the monies are going, how many victims are assisted by such spending, and how many victims seek but do not receive medical assistance. In part, this is the result of the lack of either formal or informal processes and methodologies aimed at gauging the number of victims or the effectiveness of the programs which are in place. Of those that do exist, even less is known publicly about them, except anecdotally. For example, the United Nations Officer for the

"external assessments" are only processed once every five years" by a qualified independent reviewer. There are Terms of Reference requiring the Fund to report to donors (TOR Section III(2)) and a Memorandum of Understanding Sections IV-V, but little information in the report is made public. The information provided to the public is accessible via the MDTF Office GATEWAY (<http://mdtf.undp.org/factsheet/fund/HCG10>) includes an interactive "program monitor" that tracks budgets and transfer of moneys, financial statements and reports but again, no quantifiable or descriptive report on whom or how the moneys are spent on victims of sexual violence.

Coordination of Humanitarian Affairs (OCHA) runs its “largest operation” in the DRC, but little information is available about this operation.⁴¹ Aside from reports which occasionally emanate from various stakeholders, there is no general repository of data, and, as the representative of the DRC recently stated, no immediate plans to develop such data or maintain it.

3. There is great reluctance by stakeholders to share their data, likely out of concern for the privacy of those victims helped, ethical considerations, and continued funding.

4. There should be greater accountability from the various stakeholders, both those entities which provide the funding and those which deliver medical help, to gauge whether those in need are being helped and in order to put pressure on the DRC to provide for this group of citizens. Among the many severe problems affecting those in need in the DRC, without this Accountability information, there is no way to adequately prioritize, coordinate, allocate or assess the success of the various programs.

5. As this Report demonstrates, there are many causes for the dearth of data, including substantial infrastructure deficits and privacy concerns for victims. Given the ABA’s preeminence and reputation world-wide, especially through the good works of its, it follows from this study, that this organization should continue to be at the forefront in order to ensure that an effective reparations framework and monitoring of that framework should exist so that those afflicted receive emergency medical attention in the most transparent, efficient, and expeditious manner.

Respectfully submitted,

Mark H. Alcott
February 2017

⁴¹ OCHA DRC, <http://www.unocha.org/drc/about-us/about-ocha-drc#>.

GENERAL INFORMATION FORM

Submitting Entity: ABA Representatives and Observers to the United Nations

Submitted By: Mark H. Alcott

1. Summary of Resolution(s). Urges the United Nations, the United States, and other government and relevant actors to develop and implement methodologies to: measure and track the prevalence of sexual and gender-based violence; improve donor coordination, transparency, and accountability with respect to assistance provided to victims of sexual and gender-based violence including in situations of armed conflict; and require quantitative public reporting by donors from funding recipients globally, including disclosure of independent audits or evaluations showing funds expended on services to victims of sexual violence and services provided. The Resolution also recommends that international NGOs, donor and multilateral agencies work with and support governments to develop and adopt appropriate methodologies to create publicly accessible national databases of information on assistance to victims of sexual violence, which will enable stakeholders to coordinate, track and assess this assistance.
2. Approval by Submitting Entity. ABA Representatives and Observers to the UN approved this resolution on October 26, 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? N/A
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 Committee and its co-sponsors will work with the American Bar Association's Governmental Affairs Office through ABA Day on the Hill and through statements of the ABA President and other means to encourage legislation. It is noted that the mission of the ABA Representatives and Observers to the United Nations through ABA Day at the UN and other avenues is to assist in effectuating the UN Sustainable Development Goals 5.2 and 16.1.
8. Cost to the Association. (Both direct and indirect costs) N/A
9. Disclosure of Interest. (If applicable) None

10. Referrals.

ABA Rule of Law Initiative, Co-sponsor
 New York State Bar Association, Co-sponsor
 ABA Section of International Law, Supporter

ABA Center for Human Rights
 ABA Commission on Domestic and Sexual Violence
 ABA Civil Rights and Social Justice
 ABA Commission on Women
 Idaho State Bar Association
 State Bar Association of North Dakota
 State Bar of Montana
 State Bar of Nevada
 State Bar of New Mexico
 State Bar of South Dakota
 Utah State Bar
 Wyoming State Bar
 Queens County Bar Association
 Brooklyn Bar Association
 Monroe County Bar Association
 Bar Association of Erie County
 New York County Lawyers Association
 New York City Bar Association

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

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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

To urge the United Nations, the United States and other governments and relevant international actors to develop and implement methodologies to measure and track the prevalence of sexual and gender-based violence.

To endorse international commitments to improve donor coordination, transparency, and accountability with respect to assistance to victims of sexual and gender-based violence including in situations of armed conflict, and specifically recommends that donors require quantitative public reporting from funding recipients globally, including disclosure of independent audits or evaluations showing funds expended on services to victims of sexual violence and services provided.

To recommend that international Non-Governmental Organizations, donors, and multilateral agencies work with and support governments to develop and adopt appropriate methodologies to create, publicly accessible national databases of information on assistance to victims of sexual violence, enabling stakeholders to coordinate, track, and evaluate this assistance.

2. Summary of the Issue that the Resolution Addresses

Lack of methodologies and data to ascertain and therefore address the prevalence of sexual and gender-based violence and the publication of resulting data in order to improve donor coordination and transparency.

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

It will make the ABA, as the leading and biggest organization of lawyers worldwide and at the UN to speak out domestically and internationally on the issue of accountability issues encountered with respect to international sexual violence and gender-based violence and the need for data gathering and in furtherance of the UN Sustainable Development Goals 5.2 and 16.1.

4. Summary of Minority Views

N/A. The Report was adopted unanimously by the Committee and expresses a view consistent with UN Sustainable Development Goals 5.2 and 16.1.

**AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CONTINUING LEGAL EDUCATION
COMMISSION ON LAWYER ASSISTANCE PROGRAMS
LAW PRACTICE DIVISION**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association adopts the Model Rule for Minimum Continuing
- 2 Legal Education (MCLE) and Comments dated February 2017, to replace the Model Rule for
- 3 MCLE and Comments adopted by the American Bar Association in 1988 and subsequently
- 4 amended.

American Bar Association
Model Rule for Minimum Continuing Legal Education
February 2017

Purpose

To maintain public confidence in the legal profession and the rule of law, and to promote the fair administration of justice, it is essential that lawyers be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices. In furtherance of this purpose, the ABA recommends this Model Rule for Minimum Continuing Legal Education (MCLE) and Comments, which replaces the prior Model Rule for MCLE and Comments adopted by the American Bar Association in 1988 and subsequently amended.

Contents

Section 1. Definitions.

Section 2. MCLE Commission.

Section 3. MCLE Requirements and Exemptions.

Section 4. MCLE-Qualifying Program Standards.

Section 5. Accreditation.

Section 6. Other MCLE-Qualifying Activities.

Section 1. Definitions.

(A) “Continuing Legal Education Program” or “CLE Program” or “CLE Programming” means a legal education program taught by one or more faculty members that has significant intellectual or practical content designed to increase or maintain the lawyer’s professional competence and skills as a lawyer.

(B) “Credit” or “Credit Hour” means the unit of measurement used for meeting MCLE requirements. For Credits earned through attendance at a CLE Program, a Credit Hour requires sixty minutes of programming. Jurisdictions may also choose to award a fraction of a credit for shorter programs.

(C) “Diversity and Inclusion Programming” means CLE Programming that addresses diversity and inclusion in the legal system of all persons regardless of race, ethnicity, religion, national origin, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias.

(D) “Ethics and Professionalism Programming” means CLE programming that addresses standards set by the Jurisdiction’s Rules of Professional Conduct with which a lawyer must comply to remain authorized to practice law, as well as the tenets of the legal profession by which a lawyer demonstrates civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rules of law, the courts, clients, other lawyers, witnesses, and unrepresented parties.

(E) “In-House CLE Programming” means programming provided to a select private audience by a private law firm, a corporation, or financial institution, or by a federal, state, or local governmental agency, for lawyers who are members, clients, or employees of any of those organizations.

(F) “Interdisciplinary Programming” means programming that crosses academic lines that supports competence in the practice of law.

(G) “Jurisdiction” means United States jurisdictions including the fifty states, the District of Columbia, territories, and Indian tribes.

(H) “Law Practice Programming” means programming specifically designed for lawyers on topics that deal with means and methods for enhancing the quality and efficiency of a lawyer’s service to the lawyer’s clients.

(I) “MCLE” or “Minimum Continuing Legal Education” means the ongoing training and education that a Jurisdiction requires in order for lawyers to maintain their license to practice.

(J) “Mental Health and Substance Use Disorders Programming” means CLE Programming that addresses the prevention, detection, and/or treatment of mental health disorders and/or substance use disorders, which can affect a lawyer’s ability to perform competent legal services.

(K) “Moderated Programming” means programming delivered via a format that provides attendees an opportunity to interact in real time with program faculty members or a qualified commentator who are available to offer comments and answer oral or written questions before, during, or after the program. Current delivery methods considered Moderated Programming include, but are not limited to:

- (1) “In-Person” – a live CLE Program presented in a classroom setting devoted to the program, with attendees in the same room as the faculty members.
- (2) “Satellite/Groupcast” – a live CLE Program broadcast via technology to remote locations (i.e., a classroom setting or a central viewing or listening location). Attendees participate in the program in a group setting.
- (3) “Teleseminar” – a live CLE program broadcast via telephone to remote locations (i.e., a classroom setting or a central listening location) or to individual attendee telephone lines. Attendees may participate in the program in a group setting or individually.

(4) "Video Replay" – a recorded CLE Program presented in a classroom setting devoted to the program, with attendees in the same room as a qualified commentator. Attendees participate in the program in a group setting.

(5) "Webcast/Webinar" – a live CLE Program broadcast via the internet to remote locations (*i.e.*, a classroom setting or a central viewing or listening location) or to individual attendees. Attendees may participate in the program in a group setting or individually.

(6) "Webcast/Webinar Replay" – a recorded CLE program broadcast via the internet to remote locations (*i.e.*, a classroom setting or a central viewing or listening location) or to individual attendees. A qualified commentator is available to offer comments or answer questions. Attendees may participate in the program in a group setting or individually.

(L) "New Lawyer Programming" means programming designed for newly licensed lawyers that focuses on basic skills and substantive law that is particularly relevant to lawyers as they transition from law school to the practice of law.

(M) "Non-Moderated Programming with Interactivity as a Key Component" means programming delivered via a recorded format that provides attendees a significant level of interaction with the program, faculty, or other attendees. Types of qualifying interactivity for non-moderated formats include, but are not limited to, the ability of participants to: submit questions to faculty members or a qualified commentator; participate in discussion groups or bulletin boards related to the program; or use quizzes, tests, or other learning assessment tools. Current delivery methods considered Non-Moderated Programming with Interactivity as Key Component include, but are not limited to:

(1) "Recorded On Demand Online" – a recorded CLE Program delivered through the internet to an individual attendee's computer or other electronic device with interactivity built into the program recording or delivery method.

(2) "Video or Audio File" – a recorded CLE Program delivered through a downloaded electronic file in mp3, mp4, wav, avi, or other formats with interactivity built into the program recording or delivery method.

(3) "Video or Audio Tape" – a recorded CLE Program delivered via a hard copy on tape, DVD, DVR, or other formats with interactivity built into the program recording or delivery method.

(N) "Self-Study" includes activities that are helpful to a lawyer's continuing education, but do not meet the definition of CLE Programming that qualifies for MCLE Credit. Self-Study includes, but is not limited to:

- (1) “Informal Learning” - acquiring knowledge through interaction with other lawyers, such as discussing the law and legal developments
- (2) “Non-Moderated Programming Without Interactivity” - viewing recorded CLE Programs that do not have interactivity built into the program recording or delivery method
- (3) “Text” - reading or studying content (periodicals, newsletters, blogs, journals, casebooks, textbooks, statutes, etc.)

(O) “Sponsor” means the producer of the CLE Program responsible for adherence to the standards of program content determined by the MCLE rules and regulations of the Jurisdiction. A Sponsor may be an organization, bar association, CLE provider, law firm, corporate or government legal department, or presenter.

(P) “Technology Programming” means programming designed for lawyers that provides education on safe and effective ways to use technology in one’s law practice, such as to communicate, conduct research, ensure cybersecurity, and manage a law office and legal matters. Such programming assists lawyers in satisfying Rule 1.1 of the ABA Model Rules of Professional Conduct in terms of its technology component, as noted in Comment 8 to the Rule (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]”).

Section 2. MCLE Commission.

The Jurisdiction’s Supreme Court shall establish an MCLE Commission to develop MCLE regulations and oversee the administration of MCLE.

Comments:

1. Section 2 assumes that the Jurisdiction’s highest court is its Supreme Court and that the Supreme Court is the entity empowered to create an MCLE Commission. The titles of the applicable entities may vary by Jurisdiction.

2. Supreme Courts are encouraged to consider the following when establishing an MCLE Commission: composition of the Commission; terms of service; where and how often the Commission must meet; election of officers; expenses; confidentiality; and staffing.

3. It is anticipated that MCLE Commissions will develop Jurisdiction-specific regulations (or rules) to effectuate the provisions outlined in this Model Rule, such as regulations concerning when and how lawyers must file MCLE reports, penalties for failing to comply, and appeals. Further, it is anticipated that MCLE Commissions will develop regulations concerning the accreditation process for MCLE that is provided by local, state, and national Sponsors. This Model Rule also addresses recommended accreditation standards in Sections 4 and 5.

Section 3. MCLE Requirements and Exemptions.

(A) Requirements.

- (1) All lawyers with an active license to practice law in this Jurisdiction shall be required to earn an average of fifteen MCLE credit hours per year during the reporting period established in this Jurisdiction.
- (2) As part of the required Credit Hours referenced in Section 3(A)(1), lawyers must earn Credit Hours in each of the following areas:
 - (a) Ethics and Professionalism Programming (an average of at least one Credit Hour per year);
 - (b) Mental Health and Substance Use Disorders Programming (at least one Credit Hour every three years); and
 - (c) Diversity and Inclusion Programming (at least one Credit Hour every three years).
- (3) A jurisdiction may establish regulations allowing the MCLE requirements to be satisfied, in whole or in part, by the carryover of Credit Hours from the immediate prior reporting period.

(B) Exemptions. The following lawyers may seek an exemption from this MCLE Requirement:

- (1) Lawyers with an inactive license to practice law in this Jurisdiction, including those on retired status.
- (2) Nonresident lawyers from other Jurisdictions who are temporarily admitted to practice law in this Jurisdiction under *pro hac vice* rules.
- (3) A lawyer with an active license to practice law in this Jurisdiction who maintains a principal office for the practice of law in another Jurisdiction which requires MCLE and who can demonstrate compliance with the MCLE requirements of that Jurisdiction.
- (4) Lawyers who qualify for full or partial exemptions allowed by regulation, such as exemptions for those on active military duty, those who are full-time academics who do not engage in the practice of law, those experiencing medical issues, and those serving as judges (whose continuing education is addressed by other rules).

183 **Comments:**

184 1. While many Jurisdictions have chosen to require twelve Credit Hours per year, and a minority
185 of Jurisdictions require fewer than twelve Credit Hours per year, Section 3(A)(1) recommends an
186 average of fifteen Credit Hours of CLE annually, meaning lawyers must earn fifteen Credit Hours
187 per reporting period in Jurisdictions that require annual reporting, thirty Credit Hours per
188 reporting period in Jurisdictions that require reporting every two years, and forty-five Credit
189 Hours per reporting period in Jurisdictions that require reporting every three years. In addition,
190 this Model Rule recommends sixty minutes of CLE Programming per Credit Hour, which is the
191 standard in the majority of Jurisdictions, although a minority of Jurisdictions have chosen to
192 require only fifty minutes of CLE Programming per Credit Hour.

193 2. Section 3(A)(1) does not take a position on whether lawyers should report annually, every two
194 years, or every three years, all of which are options various Jurisdictions have chosen to
195 implement, in part based on their own Jurisdiction's administrative needs. Allowing a lawyer to
196 take credits over a two-year or three-year period provides increased flexibility for the lawyer in
197 choosing when and which credits to earn, but it may also lead to procrastination and may provide
198 less incentive for a lawyer to regularly take CLE that updates his or her professional competence.

199 3. Section 3(A)(2) recognizes that Jurisdictions may choose to identify specific MCLE credits that
200 each lawyer must earn, such as those addressing particular subject areas. This Model Rule
201 recommends that every lawyer be required to take the specific credits outlined in Section
202 3(A)(2)(a), (b), and (c). While requiring specific credits may increase administrative burdens on
203 accrediting agencies, CLE Sponsors, and individual lawyers, and also requires proactive efforts to
204 ensure the availability of programs, it is believed that those burdens are outweighed by the
205 benefit of having all lawyers regularly receive education in those specific areas.
206

207 4. Many Jurisdictions currently allow CLE Programs on topics outlined in Section 3(A)(2)(b) and
208 (c) (relating to Mental Health and Substance Use Disorders Programming, and Diversity and
209 Inclusion Programming) to count toward the general CLE requirement or the Ethics and
210 Professionalism Programming requirement, rather than specifically requiring attendance at
211 those specialty programs. This Model Rule recommends stand-alone requirements for those
212 specialty programs, in order to ensure that all lawyers receive minimal training in those areas.
213 With respect to Mental Health and Substance Use Disorders Programming in particular, research
214 indicates that lawyers may hesitate to attend such programs due to potential stigma; requiring
215 all lawyers to attend such a program may greatly reduce that concern. Nonetheless, this Model
216 Rule recognizes that Jurisdictions may choose not to impose a stand-alone requirement and,
217 instead, accredit those specialty programs towards the Ethics and Professionalism Programming
218 requirement. All Jurisdictions are encouraged to promote the development of those specialty
219 programs in order to reach as many lawyers as possible. Nearly every Jurisdiction has a lawyers
220 assistance program that can offer, or assist in offering, Mental Health and Substance Use
221 Disorders Programming. In addition, numerous bar associations, including the American Bar

Association, have diversity committees that can offer, or assist in offering, Diversity and Inclusion Programming.

5. Section 3(A)(3) endorses regulations that allow lawyers to carry over MCLE credits earned in excess of the current reporting period's requirement from one reporting period to the next, which encourages lawyers to take extra MCLE credits at a time that meets their professional and learning needs without losing credit for the MCLE activity. It is anticipated that each Jurisdiction will draft carryover credit regulations that best meet the Jurisdiction's needs, taking into account factors such as the length of the reporting period, the availability of CLE Programs in the Jurisdiction, administrative considerations, and other factors.

6. Section 3(B) recognizes that Jurisdictions may choose to exempt certain lawyers from MCLE requirements. It is anticipated that regulations addressing such exemptions will identify those who are automatically exempt, those who may seek an exemption based on their particular circumstances, and the process for claiming an exemption.

7. Section 3(B)(3) provides a mechanism for lawyers licensed in more than one Jurisdiction to be exempt from MCLE requirements if the lawyer satisfies the MCLE requirements of the Jurisdiction where his or her principal office is located. A Jurisdiction may consider limiting this exemption to lawyers with principal offices in certain Jurisdictions if the Jurisdiction is concerned that the MCLE rules of other Jurisdictions vary too greatly from its own rules. A Jurisdiction may also consider limiting this exemption to require that the lawyer attend particular CLE Programs, such as a Jurisdiction-specific professionalism program, or other specific programs not required in the Jurisdiction where the lawyer's principal office is located.

Section 4. MCLE-Qualifying Program Standards.

To be approved for credit, Continuing Legal Education Programs must meet the following standards:

(A) The program must have significant intellectual or practical content and be designed for a lawyer audience. Its primary objective must be to increase the attendee's professional competence and skills as a lawyer, and to improve the quality of legal services rendered to the public.

(B) The program must pertain to a recognized legal subject or other subject matter which integrally relates to the practice of law, professionalism, diversity and inclusion issues, mental health and substance use disorders issues, civility, or the ethical obligations of lawyers. CLE

Programs that address any of the following will qualify for MCLE credit, provided the program satisfies the other accreditation requirements outlined herein:

- (1) Substantive law programming
- (2) Legal and practice-oriented skills programming
- (3) Specialty programming (see Section 3(A)(2))
- (4) New Lawyer Programming (see Section 1(L))
- (5) Law Practice Programming (see Section 1(H))
- (6) Technology Programming (see Section 1(P))
- (7) Interdisciplinary Programming (see Section 1(F))
- [(8) Attorney Well-Being Programming]

(C) The program must be delivered as Moderated Programming, or Non-Moderated Programming with Interactivity as a Key Component. The Sponsor must have a system which allows certification of attendance to be controlled by the Sponsor and which permits the Sponsor to verify the date and time of attendance.

(D) Thorough, high-quality instructional written materials which appropriately cover the subject matter must be distributed to all attendees in paper or electronic format during or prior to the program.

(E) Each program shall be presented by a faculty member or members qualified by academic or practical experience to teach the topics covered, whether they are lawyers or have other subject matter expertise.

Comments:

1. This Model Rule recommends approval of CLE programs designed for lawyers on the topics outlined in Section 4(B). This Model Rule supports allowing a lawyer to make educated choices about which programs will best meet the lawyer's educational needs, recognizing that the lawyer's needs may change over the course of his or her career. Therefore, this Model Rule does not place limits on the number of credits that can be earned through the programs identified in Section 4(B).

2. Section 4(B)(4) supports accrediting CLE Programs specifically designed for new lawyers. Many Jurisdictions require new lawyers to take one or more specific programs that focus on basic skills

and substantive law particularly relevant to new lawyers, either prior to or immediately after bar admission. Other Jurisdictions simply accredit such programs as general CLE. The catalyst for some Jurisdictions to begin offering such programs was a 1992 ABA task force report entitled: "Task Force on Law Schools and the Profession: Narrowing the Gap" (commonly known as the "MacCrate Report"), which offered numerous recommendations for preparing law students and new graduates to practice law. This Model Rule supports the creation of programs designed for new lawyers, but does not specifically require such programs, because many Jurisdiction-specific factors may influence a Jurisdiction's decision on this issue, such as the number of lawyers in the Jurisdiction, the availability of existing CLE programs, whether there are specific Sponsors available to teach such programs, similar educational programs required before licensure, and other factors.

3. Law Practice Programming, Section 4(B)(5), is programming specifically designed for lawyers on topics that deal with means and methods for enhancing the quality and efficiency of a lawyer's service to the lawyer's clients. Providing education on the operation and management of one's legal practice can help lawyers avoid mistakes that harm clients and cause law practices to fail. In some cases, Law Practice Programming may qualify as Ethics and Professionalism Programming.

4. Technology Programming, Section 4(B)(6), provides education on safe and effective ways to use technology in one's law practice, such as to communicate, conduct research, ensure cybersecurity, and manage a law office and legal matters, thereby assisting lawyers in satisfying Rule 1.1 of the ABA Model Rules of Professional Conduct in terms of its technology component, as noted in Comment 8 to the Rule ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]"). In some cases, Technology Programming may qualify as Ethics and Professionalism Programming.

5. Interdisciplinary Programming, Section 4(B)(7), provides a lawyer the opportunity to gain knowledge about a subject pertinent to his or her law practice, such as the treatment of particular physical injuries, child development, and forensic accounting.

6. In recent years, some Jurisdictions have begun accrediting programming that addresses attorney wellness or well-being topics. Some of those programs qualify for accreditation under this Model Rule's definitions of Mental Health and Substance Use Disorders Programming and Ethics and Professionalism Programming. In the future, this Model Rule may be amended to include additional programming that falls within a broader definition of Attorney Well-Being

Programming. For that reason, Section (4)(B)(8) appears in brackets and Attorney Well-Being Programming is not defined in this Model Rule.

7. If a lawyer seeks MCLE credit for attending a program that has not been specifically designed for lawyers, including but not limited to programs on the topics identified in Section 4(B), Jurisdictions may choose to consider creating regulations that would require the lawyer to explain how the program is beneficial to the lawyer's practice. The regulations could also address how to calculate Credit Hours for programs that were not designed for lawyers.

8. In-Person Moderated Programming, *see* Section 4(C) and Section 1(K)(1), requires lawyers to leave their offices and learn alongside other lawyers, which can enhance the education of all and promote collegiality. Other forms of Moderated Programming and Non-Moderated Programming with Interactivity as a Key Component, such as Section 4(C), Section 1(K) and (M), and Section 4(A)(2), allow lawyers to attend programs from any location and, in some cases, at the time of their choice. This flexibility allows lawyers to select programs most relevant to their practice, including specialized programs and programs with a national scope. Some Jurisdictions have expressed concern with approving programming that does not occur In-Person on grounds that the lawyer is less engaged. Thus, some Jurisdictions have declined to accredit or have limited the number of credits that can be earned through these other forms of programming. This Model Rule supports allowing a lawyer to make educated choices about whether attending Moderated Programming (In-Person or other) or Non-Moderated Programming with Interactivity as a Key Component will best meet the lawyer's educational needs, recognizing that the lawyer's needs may change over the course of his or her career. Therefore, this Model Rule does not place limits on the number of credits that can be earned through Moderated Programming or Non-Moderated Programming with Interactivity as a Key Component. If a Jurisdiction believes that Moderated Programming, specifically In-Person Programming, is crucial to a lawyer's education, then it is recommended that the Jurisdiction establish a minimum number of credits that must be earned through this type of programming, rather than place a cap on the number of credits that can be earned through other types of programming. A key factor in deciding whether to require In-Person Programming is the availability of programs throughout a particular Jurisdiction, which may be affected by geography, the number of CLE Sponsors, and other Jurisdiction-specific factors.

9. Currently, all Jurisdictions calculate credits exclusively based on the number of minutes a presentation lasts. Several Jurisdictions have explored offering MCLE credit for self-guided educational programs, such as those offered using a computer simulation that is completed at the lawyer's individual pace. Jurisdictions may wish to consider offering MCLE credit for such programs, especially as technology continues to advance.

10. Self-Study does not qualify for MCLE Credit. Jurisdictions have used the term "self-study" in varying ways. As defined in this Model Rule, Self-Study refers to activities that are important for a lawyer's continuing education and professional development, but which do not qualify as MCLE. Lawyers are encouraged to engage in Self-Study as a complement to earning MCLE Credits.

Section 5. Accreditation.

(A) The Jurisdiction shall establish regulations that outline the requirements and procedures by which CLE Sponsors can seek approval for an individual CLE Program. The regulations should indicate whether the Jurisdiction imposes specific requirements with respect to the following:

(1) Faculty credentials

(2) Written materials

(3) Attendance verification

(4) Interactivity

(5) Applications and supplemental information required (agenda, sample of materials, faculty credentials, etc.)

(6) Accreditation fees

(B) Any Sponsor may apply for approval of individual programs, but if the Jurisdiction determines that a Sponsor regularly provides a significant volume of CLE programs that meet the standards of approval and that the Sponsor will maintain and submit the required records, the Jurisdiction may designate, on its own or upon application from a Sponsor, such a Sponsor as an “approved provider.” The MCLE Commission may revoke approval if a Sponsor fails to comply with its regulations, requirements, or program standards.

(C) Programs offered by law firms, corporate or government legal departments, or other similar entities primarily for the education of their members or clients will be approved for credit provided that the program meets the standards for accreditation outlined in Section 4.

(D) A Jurisdiction may establish regulations allowing an individual lawyer attendee to self-apply for MCLE Credit for attending a CLE program that the Sponsor did not submit for accreditation in the Jurisdiction where the individual lawyer is licensed.

412 **Comments:**

413 1. The vast majority of Jurisdictions now require MCLE. Over the four decades during which
 414 Jurisdictions began implementing MCLE requirements, they have taken a variety of approaches
 415 to accreditation requirements and processes. This has allowed Jurisdictions to consider
 416 Jurisdiction-specific priorities and needs when drafting CLE requirements. However, this has
 417 created challenges for CLE Sponsors seeking program approval in multiple Jurisdictions. Many
 418 regional and national CLE Sponsors spend considerable time and resources to file applications in
 419 multiple Jurisdictions with differing program requirements. This increased financial and
 420 administrative burden can increase costs for CLE attendees, and it can also affect the number of
 421 programs being offered nationwide on specialized CLE and federal law topics. While differences
 422 in regulatory requirements among Jurisdictions are likely to continue, Jurisdictions are
 423 encouraged to consider ways to reduce financial and administrative burdens so that CLE Sponsors
 424 can offer programming that meets lawyers' educational needs at a reasonable price. For instance,
 425 Jurisdictions can promulgate regulations that are clear and specific, and they can streamline
 426 application processes, both of which would make it easier for Sponsors to complete applications
 427 and know with greater certainty whether programs are likely to be approved for MCLE credit. In
 428 addition, Jurisdictions may choose to reduce administrative costs to the Jurisdictions, CLE
 429 Sponsors, and individual lawyers by recognizing an accreditation decision made for a particular
 430 program by another Jurisdiction, thereby eliminating the need for the CLE Sponsor or individual
 431 lawyer to submit the program for accreditation in multiple Jurisdictions. Jurisdictions might also
 432 consider creating a regional or national accrediting agency to supplement or replace
 433 accreditation processes in individual Jurisdictions.

434 2. Many Jurisdictions outline specific requirements for CLE program faculty members, such as
 435 requiring that at least one member of the faculty be a licensed lawyer. Section 5(A)(1) does not
 436 suggest specific regulations with respect to faculty, but Section 4(B) recognizes the value of
 437 programming in Law Practice, Technology, and Interdisciplinary topics. For CLE Programs on
 438 those topics, the most qualified speaker may be a non-lawyer. Therefore, Jurisdictions are
 439 encouraged to allow non-lawyers to serve as speakers in appropriate circumstances, and
 440 Sponsors are encouraged to include lawyers in the planning and execution of programs to ensure
 441 that any subject area is discussed in a legal context.

442
 443 3. All Jurisdictions currently require that a CLE program include written materials, which enhance
 444 the program and serve as a permanent resource for attendees. Section 4(D) continues to require
 445 program materials for a program to qualify for credit. Section 5(A)(2) does not suggest specific
 446 requirements for written materials, but Jurisdictions are encouraged to provide clear guidance
 447 on the format and length of required materials, which will better enable CLE Sponsors and
 448 individual lawyers seeking credit for programs to satisfy the Jurisdiction's requirements with
 449 respect to written materials.

450
 451 4. Section 5(A)(3) recognizes that many Jurisdictions require lawyers to complete attendance
 452 sheets at In-Person CLE programs or provide proof they are attending an online program. This

Model Rule does not take a position on how Jurisdictions should verify attendance, but Jurisdictions are encouraged to weigh the benefits of particular methods of verifying attendance against the administrative cost of the various methods of tracking and reporting attendance.

5. Section 5(A)(4) acknowledges that many Jurisdictions require that attendees have an opportunity to ask the speakers questions. While this Model Rule does not offer specific regulations on this topic, this Model Rule does endorse Moderated Programming with Interactivity as a Key Component, which includes allowing lawyers to attend CLE on demand. Those Jurisdictions that wish to provide an opportunity for attendees to ask questions are encouraged to consider alternate ways of allowing speakers and attendees to communicate, such as using Webinar chat rooms or email.

6. Section (5)(A)(6) recognizes that most Jurisdictions impose fees on CLE Sponsors or individual lawyers to offset the cost of accrediting and tracking MCLE credits. The amount and type of fees vary greatly by Jurisdiction. In some cases, CLE Sponsors make decisions about where they will apply for accreditation based on the fees assessed, and may decide not to seek credit in particular Jurisdictions, such as if providing MCLE credit for a handful of attendees costs more than the tuition paid by those attendees. This can affect the availability of CLE programming to individual lawyers, especially on national and specialized topics that may not otherwise be offered in a particular Jurisdiction. Jurisdictions are encouraged to consider various fee models when determining how best to cover administrative costs.

7. For an approved provider system, *see* Section 5(B), Jurisdictions should create regulations which define the standards, application process for approved provider status, ongoing application process for program approval, reporting obligations, fees, and benefits of the status. Benefits may include reduced paperwork when applying for individual programs, reduced fees for program applications, or presumptive approval of all programs.

8. Many Jurisdictions impose specific requirements on In-House CLE Programming, which is sponsored by a private law firm, a corporation, or financial institution, or by a federal, state or local governmental agency for lawyers who are members, clients, or employees of any of the those organizations. This Model Rule recommends that Jurisdictions treat In-House Sponsors the same as other Sponsors and allow for full accreditation of programs when all other standards of Section 4 have been met.

9. Section 5(D) endorses regulations that allow an individual lawyer to self-apply for MCLE credit for attending a CLE Program that would qualify for MCLE Credit under Section 4, but which was not submitted for accreditation by the Sponsor in the Jurisdiction where the individual lawyer is licensed. This allows greater flexibility for a lawyer to select CLE programming that best meets

his or her educational needs regardless of where the program Sponsor has chosen to apply for MCLE credit. It is anticipated that each Jurisdiction will draft regulations that best meet the Jurisdiction's needs, taking into account factors such as: the standards, delivery format, and content of the program; the Sponsor's qualifications; other accreditation of the program by CLE regulators; the availability of CLE Programs in the Jurisdiction; administrative considerations, including fees; and other factors.

Section 6. Other MCLE-Qualifying Activities.

Upon written application of the lawyer engaged in the activity, MCLE credit may be earned through participation in the following:

(A) Teaching – A lawyer may earn MCLE credit for being a speaker at an accredited CLE program. In addition, lawyers who are not employed full-time by a law school may earn MCLE credit for teaching a course at an ABA-accredited law school, or teaching a law course at a university, college or community college. Jurisdictions shall create regulations which define the standards, credit calculations, and limitations of credit received for teaching or presenting activities.

(B) Writing – A lawyer may earn MCLE credit for legal writing which:

(1) is published or accepted for publication, in print or electronically, in the form of an article, chapter, book, revision or update;

(2) is written in whole or in substantial part by the applicant; and

(3) contributed substantially to the continuing legal education of the applicant and other lawyers.

Jurisdictions shall create regulations which define the standards, credit calculations, and limitations of credit received for writing activities.

[(C) Pro Bono]

[(D) Mentoring]

Comments:

1. A minority of Jurisdictions award MCLE credit for providing pro bono legal representation. This Model Rule takes no position on whether such credit should be granted, as many Jurisdiction-specific factors may influence a Jurisdiction's decision on this issue, such as the extent of free legal services existing in the Jurisdiction and pro bono requirements imposed by the Jurisdiction's ethical rules. Accordingly, this option appears in brackets in this Model Rule.

529 2. A minority of Jurisdictions award MCLE credit for participating in mentoring programs for
530 fellow lawyers. This Model Rule takes no position on whether credit should be available for that
531 activity, as many Jurisdiction-specific factors may influence a Jurisdiction's decision on this
532 issue, such as the perceived need for formal mentoring programs in the Jurisdiction and the
533 availability of organizations to administer formal mentoring programs. Accordingly, this option
534 appears in brackets in this Model Rule.

REPORT

Nearly thirty years have passed since the American Bar Association House of Delegates adopted the Model Rule for Minimum Continuing Legal Education (MCLE) and Comments (hereafter, “1988 MCLE Model Rule”) to serve as a model for a uniform standard and means of accreditation of CLE programs and providers. The CLE landscape has changed considerably in the last three decades. Technological advancements have made it possible for lawyers to learn about the law in new and exciting ways. Evolution in the practice of law and changes in society have also created opportunities for educating lawyers about new subjects. In addition, increasing numbers of lawyers are licensed in more than one Jurisdiction.¹

Although only thirty United States Jurisdictions required MCLE in 1988, forty-six states and four other Jurisdictions now do so.² While each Jurisdiction has its own MCLE rules and regulations, many requirements are consistent across Jurisdictions. As Jurisdictions continue to evaluate their MCLE requirements, they look to successes and challenges other Jurisdictions have experienced, as well as to the 1988 MCLE Model Rule. In light of the many changes that have occurred in CLE and the legal profession over the past thirty years, the time has come to adopt a new MCLE Model Rule to assist Jurisdictions in the years to come. This Model Rule retains many of the core provisions of the 1988 MCLE Model Rule, but it eliminates some detailed recommendations, such as those concerning the organization of MCLE commissions in each Jurisdiction and specific penalties for lawyers who do not satisfy MCLE requirements. This Model Rule also adds a definitions section, as well as new recommendations for specific types of programming and methods of program delivery. In addition, it has been reorganized for easier navigation.

¹ The terms “Jurisdiction” and “Sponsor” are among those defined in Section 1 of the Model Rule. Those terms are capitalized in this report.

² United States Jurisdictions include the fifty states, the District of Columbia, territories, and Indian tribes. The following forty-six states require lawyers to take MCLE: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. In addition, Guam, Mariana Islands, Puerto Rico, Virgin Islands, and some Indian tribes (e.g., Navajo Nation) require MCLE.

I. Model Rule drafting process.

Although the 1988 MCLE Model Rule was amended by the House of Delegates several times over the last three decades, the House of Delegates has not considered the document as a whole since it was adopted. In recent years, the MCLE Subcommittee of the ABA Standing Committee on Continuing Legal Education (“SCOCLE”) discussed several developments in CLE that could necessitate amendments to the 1988 MCLE Model Rule. Then, in August 2014, the House of Delegates passed Resolution 106, which specifically asked SCOCLE to consider changes to the 1988 MCLE Model Rule, including those related to law practice CLE. *See* 2014A106.

To address issues identified by the MCLE Subcommittee and by Resolution 106, SCOCLE initiated the MCLE Model Rule Review Project (hereafter, “Project”), which has undertaken a comprehensive review of the 1988 MCLE Model Rule. The Project began by seeking volunteers from within and outside the ABA to serve on working groups. Over fifty volunteers—including individual lawyers, ABA leaders, CLE regulators, CLE providers, judges, academics, law firm professional development coordinators, and state/local/specialty bar association leaders—considered a wide variety of issues related to MCLE, including: CLE delivery methods, substantive law programming, specialty programming, CLE for specific constituent groups, the impact of technology on CLE, international approaches to CLE,³ and many other topics.

Based on reports of the various working groups and larger discussions with working group members and other interested persons, the Project prepared a draft Model Rule that was circulated for comment to entities within and outside the ABA in August 2016. As a result of feedback from various entities and individuals, the draft was revised and is now being submitted to the House of Delegates for adoption.

³ The International Approaches working group looked at MCLE requirements in Canada, New Zealand, Australia, England, and Wales. In Canada, between 2009 to 2016, eight of the ten provinces and the three territories introduced a mandatory credit hours system. Although these Canadian requirements are similar to those in the U.S.A., the regulatory mechanisms have been designed to be less complex and significantly less expensive to administer. In New Zealand and four Canadian jurisdictions, a learning or study plan requirement has been introduced either in combination with or in place of a credit hours requirement. Most Australian states have a mandatory credit hours system. Very recently in England and Wales, the credit hours requirement for solicitors has been eliminated in place of a requirement that solicitors certify they are maintaining their competence to practice law. For information on these changes in England and Wales, please visit: <http://www.sra.org.uk/solicitors/cpd/solicitors.page>. Barristers in England and Wales moved to a similar requirement that became effective on January 1, 2017. *See* <https://www.barstandardsboard.org.uk/regulatory-requirements/regulatory-update-2016/bsb-regulatory-update-may-2016/changes-to-cpd/>.

II. The Purpose of MCLE.

Long before Jurisdictions began requiring CLE, Jurisdictions recognized the need for CLE.⁴ “Continuing legal education ... was originally implemented as a voluntary scheme after World War II to acclimate attorneys returning to practice after a lengthy absence in the military and to meet the needs of increased numbers in the profession.”⁵ In 1975, Minnesota and Iowa became the first states to require MCLE, in part to counteract negative publicity caused by the involvement of lawyers in the Nixon Watergate scandal.⁶

Ultimately, it is clear that the primary reasons for requiring CLE have remained the same since the first states began requiring MCLE forty years ago: ensuring lawyer competence, maintaining public confidence in the legal profession, and promoting the fair administration of justice. In recognition of those goals, this Model Rule includes the following Purpose Statement, from which all other provisions of the Model Rule flow:

To maintain public confidence in the legal profession and the rule of law, and to promote the fair administration of justice, it is essential that lawyers be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices. In furtherance of this purpose, the ABA recommends this Model Rule for Minimum Continuing Legal Education (MCLE) and Comments, which replaces the prior Model Rule for MCLE and Comments adopted by the American Bar Association in 1988 and subsequently amended.

⁴ Several important national conferences considered the role of CLE. They were known as the “Arden House” conferences and were held in 1958, 1963, and 1987. More recently, in 2009, the Association for Continuing Legal Education Administrators (ACLEA) and the American Law Institute-American Bar Association (ALI-ABA) cosponsored an event called “Critical Issues Summit, Equipping Our Lawyers: Law School Education, Continuing Legal Education, And Legal Practice in the 21st Century.”

⁵ Lisa A. Grigg, Note, “The Mandatory Continuing Legal Education (MCLE) Debate: Is It Improving Lawyer Competence or Just Busy Work?”, 12 *BYU. J. PUB. L.* 417, 418 (1998). For additional history of the development of MCLE, *see* Cheri A. Harris, MCLE: The Perils, Pitfalls, and Promise of Regulation, 40 *VAL. U. L. REV.* 359, 369 (2006); and Chris Ziegler and Justin Kuhn, “Is MCLE A Good Thing? An Inquiry Into MCLE and Attorney Discipline,” available at: https://www.clereg.org/assets/pdf/Is_MCLE_A_Good_Thing.pdf.

⁶ *See* Rocio T. Aliaga, “Framing the Debate on Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar’s Consideration of MCLE,” 8 *GEO J. LEGAL ETHICS* 1145, 1150 (1995).

III. Key themes addressed by this Model Rule.

The Project's working groups were asked to consider what works well in Jurisdictions that require MCLE and what has challenged consumers, providers, and regulators of MCLE. Several key themes emerged and are reflected in this Model Rule.

First, when it comes to regulating MCLE, there are many similarities among Jurisdictions, but no two Jurisdictions have identical rules and regulations. Given that the vast majority of Jurisdictions already have MCLE rules and regulations in place, it is unrealistic to expect that every Jurisdiction will adopt identical rules. Rather than suggest that every Jurisdiction adopt identical rules for every aspect of MCLE administration, this Model Rule focuses on the most important aspects of MCLE, including those that affect MCLE on a national level. The Model Rule states that it is anticipated that Jurisdictions will develop additional rules and regulations to address administrative decisions such as reporting deadlines, fees, attendance verification, and other issues.

Second, the continuing education needs of lawyers vary based on the lawyer's length of experience, practice setting, and area of practice. For instance, an introduction to an individual state's laws of intestacy will be helpful to a newer lawyer engaging in general practice in a single state, but of little use to a lawyer with twenty years of experience practicing products liability law in federal courts in six Jurisdictions. It is imperative that lawyers have access to high-quality CLE that most meets their educational needs. One way to achieve that goal is to allow lawyers to access CLE in person or using technology-based delivery methods such as teleconferences and webinars. This Model Rule addresses that goal by recommending that Jurisdictions allow lawyers to choose CLE offered in a variety of program delivery formats and not limit the number of credits that can be earned using a particular delivery format.

Third, it is important that lawyers continue to receive CLE on substantive legal topics—especially those areas in which the lawyer practices—because the law is ever-evolving. At the same time, it is also important that lawyers have access to CLE that addresses the management of their practices to ensure that they can properly serve and manage their clients. For these reasons, it is imperative that CLE be offered in substantive law areas, law practice, and technology. This Model Rule addresses that goal by recommending that Jurisdictions accredit substantive law programs, law practice programs, and technology programs, and further recommending that Jurisdictions not limit the number of credits that can be earned in a particular subject area.

Fourth, although this Model Rule is designed to allow lawyers to choose the CLE topics that best meet their educational needs, there are several topics that are so crucial to maintaining public confidence in the legal profession and the rule of law, and promoting the fair administration of justice, that all lawyers should be required to take CLE in those topic areas. Those areas include: (1) Ethics and Professionalism; (2) Diversity and Inclusion; and (3) Mental Health and Substance Use Disorders.

Fifth, the Model Rule recognizes that having each Jurisdiction draft its own rules and regulations over the past thirty years has allowed Jurisdictions to consider Jurisdiction-specific priorities and needs when drafting CLE requirements, but has also created challenges for CLE

Sponsors seeking program approval in multiple Jurisdictions. There are increased financial and administrative burdens associated with seeking MCLE credit in multiple Jurisdictions, which can increase costs for CLE attendees and affect the number of programs being offered nationwide on specialized CLE and federal law topics. This Model Rule suggests several strategies Jurisdictions may consider to reduce those financial and administrative burdens so that CLE Sponsors can offer programming that meets lawyers' educational needs at a reasonable price.

Sixth, with the vast majority of Jurisdictions now requiring MCLE, many law firms, government legal departments, and other legal workplaces—especially those with offices in multiple cities and states—offer in-house CLE programs that address educational topics most relevant to the legal entity. In some Jurisdictions, these programs are not granted MCLE credit. This Model Rule recommends that Jurisdictions treat in-house Sponsors of CLE programs the same as other Sponsors and allow for full accreditation of programs when all other accreditation standards have been met.

Seventh, the legal profession includes hundreds of thousands of lawyers who are licensed in more than one Jurisdiction.⁷ Some of these lawyers experience challenges meeting the requirements of each Jurisdiction in which they are licensed due to differences in requirements and the process for MCLE program approval. To reduce the administrative burdens on those lawyers, this Model Rule recommends that Jurisdictions adopt a special exemption for lawyers licensed in multiple Jurisdictions, pursuant to which a lawyer is exempt from satisfying MCLE requirements if he or she satisfies the MCLE requirements of the Jurisdiction where the lawyer's principal office is located.

IV. 2017 MCLE Model Rule: A Closer Look.

The Model Rule contains the aforementioned Purpose Statement plus six Sections, including:

- Section 1. Definitions.
- Section 2. MCLE Commission.
- Section 3. MCLE Requirements and Exemptions.
- Section 4. MCLE-Qualifying Program Standards.
- Section 5. Accreditation.
- Section 6. Other MCLE-Qualifying Activities.

⁷ Based on publicly available information, it is estimated that approximately twenty-one percent of lawyers are licensed in more than one Jurisdiction. The percentage varies greatly by Jurisdiction. For instance, nearly forty percent of lawyers licensed in New York are licensed in another Jurisdiction, but less than ten percent of lawyers in Florida are licensed in another Jurisdiction.

The discussion below highlights some of the most important provisions of those Sections.

A. Section 1. Definitions.

The Definitions section defines sixteen important terms which are then incorporated in the five sections that follow. The term “Jurisdiction,” which we use throughout this report, is defined as: “United States jurisdictions including the fifty states, the District of Columbia, territories, and Indian tribes.” The term “Sponsor” refers to “the producer of the CLE Program responsible for adherence to the standards of program content determined by the MCLE rules and regulations of the Jurisdiction” and may include “an organization, bar association, CLE provider, law firm, corporate or government legal department, or presenter.”

B. Section 2. MCLE Commission.

Section 2 and its three Comments recognize that Jurisdictions, generally acting through the Jurisdiction’s highest court, will develop MCLE regulations and oversee the administration of MCLE.

C. Section 3. MCLE Requirements and Exemptions.

Section 3(A) outlines several MCLE requirements, such as requiring lawyers with an active law license to earn an average of fifteen credit hours each year; credit hours are defined in Section 1(B) as sixty minutes. Section 3, Comment 1 recognizes that some states have chosen to require fewer than fifteen hours or to define a credit hour as less than sixty minutes. Section 3, Comment 2 acknowledges that the Model Rule does not take a position on whether lawyers should report annually, every two years, or every three years, and it includes the following observation from the 1988 MCLE Model Rule: allowing a lawyer to take credits over a two-year or three-year period provides increased flexibility for the lawyer in choosing when and which credits to earn, but it may also lead to procrastination and may provide less incentive for a lawyer to regularly take CLE that updates his or her professional competence.

Section 3(B) recommends that all lawyers be required to take three types of specialty MCLE, including: (a) Ethics and Professionalism Credits (an average of at least one Credit Hour per year); (b) Mental Health and Substance Use Disorders Credits (at least one Credit Hour every three years); and (c) Diversity and Inclusion Credits (at least one Credit Hour every three years).

Ethics and Professionalism Credits are currently required in every state and territory with MCLE. They assist in expanding the appreciation and understanding of the ethical and professional responsibilities and obligations of lawyers’ respective practices; in maintaining certain standards of ethical behavior; and in upholding and elevating the standards of honor, integrity, and courtesy in the legal profession. This Model Rule defines Ethics and Professionalism Programming as: “CLE programming that addresses standards set by the Jurisdiction’s Rules of Professional Conduct with which a lawyer must comply to remain authorized to practice law, as well as the tenets of the legal profession by which a lawyer demonstrates civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rules of law, the courts,

clients, other lawyers, witnesses, and unrepresented parties.” *See* Section 1(D). Many Jurisdictions have similar definitions and, like the Model Rule, do not separate Ethics topics from Professionalism topics, but at least one Jurisdiction requires separate credits for those topics.⁸

Mental Health and Substance Use Disorders Programming is currently accredited in most Jurisdictions, and many Jurisdictions allow such programs to count towards Ethics and Professionalism Programming requirements. Three Jurisdictions specifically require all lawyers to attend programs that focus on mental health disorders and/or substance use disorders.⁹ This Model Rule recommends that all lawyers be required to take one credit of programming every three years that focuses on the prevention, detection, and/or treatment of mental health disorders and/or substance use disorders. It is anticipated that programs may address topics including, but limited to, the prevalence and risks of mental health disorders (including depression and suicidality) and substance use disorders (including the hazardous use of alcohol, prescription drugs, and illegal drugs).

The need for required Mental Health and Substance Use Disorders Programming was underscored in early 2016 with the release of a landmark study conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs, which revealed substantial and widespread levels of problem drinking and other behavioral health problems in the U.S. legal profession.¹⁰ The study, entitled “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,” found that twenty-one percent of licensed, employed lawyers qualify as problem drinkers, twenty-eight percent struggle with some

⁸ Georgia requires lawyers to attend both Ethics programs and Professionalism programs. Georgia’s Rule 8-104, Regulation 4 offers this definition of the latter: “Professionalism refers to the intersecting values of competence, civility, integrity, and commitment to the rule of law, justice, and the public good. The general goal of the professionalism CLE requirement is to create a forum in which lawyers, judges, and legal educators can explore and reflect upon the meaning and goals of professionalism in contemporary legal practice. The professionalism CLE sessions should encourage lawyers toward conduct that preserves and strengthens the dignity, honor, and integrity of the legal profession.”

⁹ The following three states require one credit every three years of programming addressing mental health and/or substance use disorder issues: Nevada (substance abuse), North Carolina (substance abuse and debilitating mental conditions), and California (“Competence Issues,” formerly known as “Prevention, Detection and Treatment of Substance Abuse or Mental Illness”).

¹⁰ *See* Krill, Patrick R.; Johnson, Ryan; and Albert, Linda, “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,” *JOURNAL OF ADDICTION MEDICINE*, February 2016 Volume 10 Issue 1, available at: <http://journals.lww.com/journaladdictionmedicine/toc/2016/02000>. The mainstream media have also shone a light on rates of depression in the legal system. *See* <http://www.cnn.com/2014/01/19/us/lawyer-suicides/>.

level of depression, and nineteen percent demonstrate symptoms of anxiety. The study found that younger lawyers in the first ten years of practice exhibit the highest incidence of these problems. The study compared lawyers with other professionals, including doctors, and determined that lawyers experience alcohol use disorders at a far higher rate than other professional populations, as well as mental health distress that is more significant. The study also found that the most common barriers for lawyers to seek help were fear of others finding out and general concerns about confidentiality. Many organizations, including the ABA Commission on Lawyer Assistance Programs, have seen the study's findings as a call to action, which led to this Model Rule's recommendation that all lawyers take one credit of Mental Health and Substance Use Disorder Programming every three years. Section 3, Comment 4 explains: "[R]esearch indicates that lawyers may hesitate to attend such programs due to potential stigma; requiring all lawyers to attend such a program may greatly reduce that concern."¹¹

Diversity and Inclusion Programming can be used to educate lawyers about implicit bias, the needs of specific diverse populations, and ways to increase diversity in the legal profession. Currently, only three states require lawyers to take specific Diversity and Inclusion Programs, while other states allow programs on elimination of bias to qualify for Ethics and Professionalism Credits.¹² In February 2016, the ABA House of Delegates recognized the importance of requiring this programming when it adopted a resolution encouraging Jurisdictions with MCLE requirements to "include as a separate credit programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias." *See* 2016M107.¹³

¹¹ At the same time, Section 3, Comment 4 recognizes that "Jurisdictions may choose not to impose a stand-alone requirement and, instead, accredit those specialty programs towards the Ethics and Professionalism Programming requirement." In those Jurisdictions, Lawyer Assistance Programs, bar associations, and other CLE providers may wish to focus on increasing the amount of available Mental Health and Substance Use Disorder Programming, so that lawyers more frequently choose it to satisfy their Ethics and Professionalism requirement. It is extremely unlikely, however, that one hundred percent of lawyers will elect to take Mental Health and Substance Use Disorder Programming if it is not specifically required, which is why this Model Rule recommends a stand-alone requirement.

¹² California, Minnesota, and Oregon require specific Diversity and Inclusion Programming (which they refer to "elimination of bias" or "access to justice" programming), while states such as Hawaii, Kansas, Illinois, Maine, Nebraska, Washington, and West Virginia allow such programs to count towards their Ethics and Professionalism Programming requirements. This Model Rule encourages Jurisdictions to implement a stand-alone credit requirement, but Section 3, Comment 4 also recognizes that "Jurisdictions may choose not to impose a stand-alone requirement and, instead, accredit those specialty programs towards the Ethics and Professionalism Programming requirement." As with the Mental Health and Substance Use Disorder Credit, it is extremely unlikely that one hundred percent of lawyers will elect to take Diversity and Inclusion Programming if it is not specifically required, which is why this Model Rule recommends a stand-alone requirement.

¹³ The full text of ABA House of Delegates Resolution 2016M107 is available at: http://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_107.docx.

Resolution 107 did not specify the number of credits that should be required. This Model Rule recommends that all lawyers be required to take one credit every three years.

Section 3(B) recognizes that Jurisdictions may choose to provide MCLE exemptions for certain categories of lawyers, such as those on retired status. Section (3)(B)(3) recommends an exemption for lawyers licensed in multiple Jurisdictions who satisfy the MCLE requirements of the Jurisdiction where their principal office is located. This exemption is designed to reduce the administrative burden and costs to those lawyers who have already satisfied the requirements of the Jurisdiction where their principal office is located. Section 3, Comment 7 recognizes that Jurisdictions may choose to limit the exemption to lawyers with principal offices in certain Jurisdictions, or to require that the lawyer attend particular CLE Programs, such as a Jurisdiction-specific Ethics and Professionalism Program.

D. Section 4. MCLE-Qualifying Program Standards.

Section 4 outlines the types of programs that the Model Rule suggests should receive MCLE credit. It explicitly addresses seven types of programming that are defined in Section 1, such as Technology Programming. Section 4, Comment 1 emphasizes that this Model Rule supports allowing a lawyer to make educated choices about which programs will best meet the lawyer's educational needs, recognizing that the lawyer's needs may change over the course of his or her career. Therefore, this Model Rule does not place limits on the number of credits that can be earned for any particular type of program, including those outlined in Section (4)(B).

Section 4, Comment 2 explains that while the Model Rule supports the creation of programs designed for new lawyers, it does not specifically require such programs, because many Jurisdiction-specific factors may influence a Jurisdiction's decision on this issue, such as the number of lawyers in the Jurisdiction, the availability of existing CLE programs, whether there are specific Sponsors available to teach such programs, similar educational programs required before licensure, and other factors.¹⁴

¹⁴ Section 4, Comment 2 also recognizes that many of the Jurisdictions that have mandated specific CLE programming for new lawyers based the development of those programs on recommendations from a 1992 ABA task force report entitled: "Task Force on Law Schools and the Profession: Narrowing the Gap" (commonly known as the "MacCrate Report" after the late Robert MacCrate, who chaired the commission), which offered numerous recommendations for preparing law students and new graduates to practice law. New lawyer programming varies by jurisdiction. For instance, Florida, Pennsylvania, and Tennessee require new lawyers to complete basic skills courses, but Virginia requires new lawyers to take a professionalism course that focuses primarily on ethics CLE.

Section 4(B)(5) and Section 4, Comment 3 recommend that Law Practice Programming be approved for MCLE credit. That programming is defined as: “programming specifically designed for lawyers on topics that deal with means and methods for enhancing the quality and efficiency of a lawyer’s service to the lawyer’s clients.” *See* Section 1(H). This Model Rule provision builds on policy adopted by the ABA House of Delegates in August 2014. *See* 2014A106.¹⁵ Resolution 106 and this Model Rule both recognize that providing education on the management of one’s legal practice can help lawyers avoid mistakes that harm clients and cause law practices to fail. Lawyers require far more than knowledge of substantive law to set up and operate a law practice in a competent manner. In fact, at a national conference on CLE, it was noted that the percentage of cases involving lawyers’ shortcomings in personal and practice management far outweighs the percentage of cases involving lack of substantive law awareness.¹⁶ Effective client service requires lawyers to be good managers of their time and offices, skilled managers of the financial aspects of running a practice, and knowledgeable in areas that do not necessarily involve substantive law. Law Practice Programming is designed to help lawyers develop those skills.

Section 4(B)(5) and Section 4, Comment 4 recommend that Technology Programming be approved for MCLE credit. Technology Programming is defined as “programming designed for lawyers that provides education on safe and effective ways to use technology in one’s law practice, such as to communicate, conduct research, ensure cybersecurity, and manage a law office and legal matters.” *See* Section 1(P). The definition and Section 4, Comment 4 also recognize that Technology Programming “assists lawyers in satisfying Rule 1.1 of the ABA Model Rules of Professional Conduct in terms of its technology component, as noted in Comment 8 to the Rule (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology[.]”). The ABA Ethics 20/20 Commission that proposed that Comment to Rule 1.1 concluded that “in a digital age, lawyers necessarily need to understand basic features of relevant technology” and “a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use email or create an electronic document.” *See* 2012A105A.¹⁷ The Commission further noted it was important to make this duty explicit because technology is such an integral—and yet, at times invisible—aspect of contemporary law practice. One MCLE Jurisdiction not only

¹⁵ The full text of ABA House of Delegates Resolution 2014A106 is available at: http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_106.authcheckdam.pdf.

¹⁶ *See* Critical Issues Summit, *supra* note 4.

¹⁷ The text of ABA House of Delegates Resolution and Report 2012A105A and additional information on the Ethics 20/20 Commission are available at: http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html. That resolution revised then Comment 6 to Model Rule 1.1, which was renumbered as Comment 8 pursuant to Resolution and Report 2012A105C.

allows for the accreditation of these programs, but also requires lawyers to take technology-related courses.¹⁸

Section 4, Comment 6 acknowledges that some Jurisdictions have begun accrediting programming that addresses attorney wellness or well-being. While some Jurisdictions explicitly accredit attorney wellness or well-being programs, others allow accreditation under their Ethics and Professionalism or Mental Health and Substance Use Disorder programming. *See, e.g.*, Maryland, South Carolina, Tennessee, and Texas.¹⁹ Across the country, numerous bar association committees, lawyer assistance programs, and other entities have recognized attorney wellness and well-being as compelling and important issues that affect attorney professionalism, character, competence, and engagement. The National Task Force on Lawyer Well-Being is currently compiling the various approaches and research regarding attorney mental health and wellness and will be preparing a formal report in 2017 outlining its findings and recommendations.²⁰ ABA entities participating in the Task Force may, in the future, propose amendments to the MCLE Model Rule based on the Task Force's findings and recommendations.

Section 4, Comment 8 discusses In-Person Moderated Programming, *see* Section 4(C) and Section 1(K)(1), which requires lawyers to leave their offices and learn alongside other lawyers, which can enhance the education of all and promote collegiality. Other forms of Moderated Programming and Non-Moderated Programming with Interactivity as a Key Component, such as Section 4(C), Section 1(K) and (M), and Section 4(A)(2), allow lawyers to attend programs from any location and, in some cases, at the time of their choice. This flexibility allows lawyers to select

¹⁸ On September 29, 2016, Florida became the first state to require Technology CLE, effective January 1, 2017. The Florida Supreme Court amended the MCLE requirements “to change the required number of continuing legal education credit hours over a three-year period from 30 to 33, with three hours in an approved technology program.” *See* <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/3b05732accd9edd28525803e006148cf?OpenDocument>.

¹⁹ For more information, please visit: www.msba.org/committees/wellness/default.aspx (Maryland); www.scbabar.org/lawyers/sections-committees-divisions/committees/wellness-committee/ (South Carolina); cletn.com/images/Documents/Regulations2013.04.16.pdf (Tennessee); and www.texasbar.com/AM/Template.cfm?Section=Lawyers&Template=/CM/ContentDisplay.cfm&ContentID=15117 (Texas).

²⁰ The National Task Force on Lawyer Well-Being is a collection of entities within and outside the ABA that was created in August 2016. Its participating entities include: ABA Commission on Lawyer Assistance Programs; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Well-Being Committee; The National Organization of Bar Counsel; Association of Professional Responsibility Lawyers; and others.

programs most relevant to their practice, including specialized programs and programs with a national scope. Some Jurisdictions have expressed concern with approving programming that does not occur in person on grounds that the lawyer is less engaged. Thus, some Jurisdictions have declined to accredit or have limited the number of credits that can be earned through these other forms of programming. This Model Rule supports allowing a lawyer to make educated choices about whether attending Moderated Programming (In-Person or other) or Non-Moderated Programming with Interactivity as a Key Component will best meet the lawyer's educational needs, recognizing that the lawyer's needs may change over the course of his or her career. Therefore, this Model Rule does not place limits on the number of credits that can be earned through Moderated Programming or Non-Moderated Programming with Interactivity as a Key Component. If a Jurisdiction believes that Moderated Programming, specifically In-Person Programming, is crucial to a lawyer's education, then it is recommended that the Jurisdiction establish a minimum number of credits that must be earned through this type of programming, rather than place a cap on the number of credits that can be earned through other types of programming.²¹ A key factor in deciding whether to require In-Person Programming is the availability of programs throughout a particular Jurisdiction, which may be affected by geography, the number of CLE Sponsors, and other Jurisdiction-specific factors.

Section 4, Comment 9 recognizes that jurisdictions currently calculate the number of credits earned based on the number of minutes of instruction or lecture provided to attendees, but it suggests that Jurisdictions may wish to consider offering MCLE credit for self-guided educational programs, especially as technology continues to advance. Those that choose to explore other ways of calculating credit could look to the experience of other professions. For instance, Certified Professional Accountants (CPAs) may earn credit for self-paced learning programming. Calculation of credit is determined by review by a panel of pilot testers (professional level, experience, and education consistent with the intended audience of the program) and the average time of completion (representative completion time) is then used to determine credit to be received by all who complete the program.²² The regulators require additional safeguards as part of the program including review questions and other content reinforcement tools, evaluative and reinforcement feedback, and a qualified assessment such as a final examination. CPAs may also earn credit for text-based content with credit calculation based on a word-count formula, and now

²¹ Currently, several Jurisdictions limit the number of credits that may be earned through non-live programming. These include: Georgia, Indiana, Kansas, Louisiana, Mississippi, Nebraska, New Jersey, Ohio, Pennsylvania, Puerto Rico, South Carolina, Tennessee, Utah, and West Virginia. There are currently no Jurisdictions that explicitly require In-Person Programming credits; instead, they use the cap on non-live formats to effectively require In-Person Programming credits.

²² The Statement on Standards for Continuing Professional Education (CPE) Programs (2016) (Standards) is published jointly by the American Institute of Certified Public Accountants (AICPA) and the National Association of State Boards of Accountancy (NASBA) to provide a framework for the development, presentation, measurement, and reporting of CPE programs. General information on those Standards is available at: <https://www.nasbaregistry.org/the-standards>. The Standards, including a discussion of the methods of calculating credit, is available at: https://www.nasbaregistry.org/__media/Documents/Others/Statement_on_Standards_for_CPE_Programs-2016.pdf.

allow for nano-learning—short programs (minimum 10 minutes) focusing on a single learning objective.

Section 4, Comment 10 recognizes that Jurisdictions have used the term “self-study” in varying ways. As defined in this Model Rule, Self-Study refers to activities that are important for a lawyer’s continuing education and professional development, but which do not qualify as MCLE.

E. Section 5. Accreditation.

Section 5(A) recognizes the need for regulations on topics including faculty credentials, written materials, attendance verification, interactivity, applications and accreditation fees, but it does not prescribe those specific regulations, leaving that role to individual Jurisdictions.

Section 5, Comment 1 recognizes that because regulations vary among Jurisdictions—and are likely to continue to vary—Sponsors bear significant financial and administrative burdens to seek MCLE credit in multiple Jurisdictions, which can affect the number of programs being offered nationwide on specialized CLE and federal law topics. Comment 1 suggests several ways Jurisdictions can minimize those burdens, such as by promulgating regulations that are clear and specific and by streamlining the application processes, both of which would make it easier for Sponsors to complete applications and know with greater certainty whether programs are likely to be approved for MCLE credit. Section 5, Comment 1 further states that Jurisdictions may choose to reduce administration costs to the Jurisdictions, CLE Sponsors, and individual lawyers by recognizing an accreditation decision made for a particular program by another Jurisdiction, thereby eliminating the need for the CLE Sponsor or individual lawyer to submit the program for accreditation in multiple Jurisdictions. Finally, Section 5, Comment 1 recognizes that Jurisdictions might consider creating a regional or national accrediting agency to supplement or replace accreditation processes in individual Jurisdictions.

Section 5, Comments 2, 3, 4, 5, and 6 discuss suggested provisions for faculty credentials, written materials, attendance verification, interactivity, applications and accreditation fees.

Section 5(B) recognizes that Jurisdictions may choose to create an approved provider program for Sponsors who frequently present CLE in the Jurisdiction. Section 5, Comment 7 discusses the types of regulations that would need to be created and the list of possible benefits for preferred providers.

Section 5(C) and Section 5, Comment 8 recommend that in-house programs, such as those offered by law firms, corporate or government legal departments, should be approved for credit as long as the program meets the general standards for accreditation outlined in Section 4.

Section 5(D) and Section 5, Comment 9 endorse regulations that allow an individual lawyer to self-apply for MCLE credit for attending a CLE Program that would qualify for MCLE Credit under Section 4, but which was not submitted for accreditation by the Sponsor in the Jurisdiction where the individual lawyer is licensed.

F. Section 6. Other MCLE-Qualifying Activities.

Section 6(A) and (B) recommend that lawyers be allowed to earn MCLE credit for teaching and writing, and that Jurisdictions create regulations which define the standards, credit calculations, and limitations of credit received for teaching or presenting activities or writing on legal topics.

Section 6(C) and Section 6, Comment 1 recognize that a minority of Jurisdictions award MCLE credit for providing pro bono legal representation, but this Model Rule takes no position on whether such credit should be granted, as many Jurisdiction-specific factors may influence a Jurisdiction's decision on this issue, such as the extent of free legal services existing in the Jurisdiction and pro bono requirements imposed by the Jurisdiction's ethical rules.²³ For that reason, Section 6(C) appears in brackets.

Similarly, Section 6(D) and Section 6, Comment 2 recognize that a minority of Jurisdictions award MCLE credit for participating in mentoring programs for fellow lawyers, giving credits to both mentors and mentees.²⁴ This Model Rule takes no position on whether credit should be available for that activity, as many Jurisdiction-specific factors may influence a Jurisdiction's decision on this issue, such as the perceived need for formal mentoring programs in the Jurisdiction and the availability of organizations to administer formal mentoring programs. For that reason, Section 6(D) appears in brackets.

V. Conclusion.

MCLE continues to play a crucial role in maintaining public confidence in the legal profession and the rule of law and promoting the fair administration of justice. This Model Rule, which builds on four decades of experience in the Jurisdictions that have mandated MCLE, recognizes effective ways to provide lawyers with the high quality, accessible, relevant, and affordable programming that enables them to be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management

²³ Jurisdictions that currently allow lawyers to earn credit through the provision of pro bono legal services include: Arizona, Colorado, Delaware, Louisiana, Minnesota, New York, North Dakota, Ohio, Tennessee, Washington, Wisconsin, and Wyoming.

²⁴ For instance, Georgia and Ohio both offer lawyer-to-lawyer mentoring programs that allow lawyers to earn MCLE credit for participation. For more information on those programs, visit: <https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/mentoring.cfm> (Georgia) and <http://www.supremecourt.ohio.gov/AttySvcs/mentoring/> (Ohio). Other Jurisdictions which allow mentors and mentees to gain credit are: Alaska, Arizona, Colorado, Illinois, Indiana, Oregon, Texas, Utah, Washington, and Wyoming.

of their practices. The American Bar Association strongly urges all Jurisdictions—whether they currently have MCLE or not—to consider implementing the recommendations in this Model Rule to further the continuing education of lawyers throughout the United States.

Respectfully Submitted,

Micah Buchdahl, Chair
Standing Committee on Continuing Legal Education

February 2017

GENERAL INFORMATION FORM

Submitting Entities: ABA Standing Committee on Continuing Legal Education (SCOCLE)
and ABA Commission on Lawyer Assistance Programs

Submitted By: Micah Buchdahl, Chair, SCOCLE

1. Summary of Resolution.

In Fall 2014, SCOCLE began a comprehensive review of the ABA's existing Model Rule for Minimum Continuing Legal Education (MCLE), which was adopted in 1988 and has been amended several times. This Resolution and Report are the culmination of discussions with working group volunteers from bar associations, regulatory agencies, CLE providers, and others. This Model Rule, which will replace the 1988 Model Rule, contains a number of key recommendations for Jurisdictions that require MCLE, including: (1) allow lawyers to choose CLE offered in a variety of program delivery formats and do not limit the number of credits that can be earned using a particular delivery format; (2) accredit programs that address substantive law, ethics, professionalism, diversity and inclusion, mental health and substance use disorders, law practice, and technology, and do not limit the number of credits that can be earned through any particular type of program; (3) require all lawyers to take CLE that addresses ethics and professionalism; diversity and inclusion; and mental health and substance use disorders; (4) consider the adoption of strategies that reduce administrative and financial burdens on CLE Sponsors so that they can more easily offer programming that meets lawyers' educational needs at a reasonable price; (5) treat in-house Sponsors of CLE programs the same as other Sponsors and allow for full accreditation of programs when all other accreditation standards have been met; and (6) adopt a special exemption for lawyers licensed in multiple Jurisdictions, pursuant to which a lawyer is exempt from satisfying MCLE requirements if he or she satisfies the MCLE requirements of the Jurisdiction where the lawyer's principal office is located.

2. Approval by Submitting Entity.

Approved by SCOCLE on November 1, 2016. Approved by the Commission on Lawyer Assistance Programs on October 7, 2016. Approved by the Law Practice Division on December 12, 2016.

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

The ABA Model Rule for MCLE was adopted in 1988 and has been amended several times since then. This is the first time SCOCLE has proposed replacing the 1988 Model Rule with a new Model Rule for MCLE.

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

If this Resolution is adopted, the 1988 Model Rule for MCLE will be replaced with this Model Rule for MCLE. This Model Rule is consistent with two recently adopted ABA policies, both of which are referenced in the Report. First, in 2014, the House of Delegates adopted a resolution urging Jurisdictions “to approve law practice skills programs and training, including the use of technology, law practice management and client relations for mandatory continuing legal education requirements and to not restrict the maximum number of credit hours that can be earned for such programs and training.” *See* 2014A106. In 2016, the House of Delegates adopted a resolution recommending that every lawyer be required to take diversity and inclusion programming, but it did not specify the number of credits required. *See* 2016M107. This Model Rule builds on 2016M107 by recommending that each lawyer take at least one credit of diversity and inclusion programming every three years.

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.

SCOCLE will distribute the new Model Rule for MCLE to the appropriate entities in United States jurisdictions including the fifty states, the District of Columbia, territories, and Indian tribes. Those entities, including state Supreme Courts and CLE regulatory bodies, will be encouraged to adopt the provisions of the Model Rule for MCLE. The Model Rule will also be distributed to CLE providers, who will be encouraged to create CLE programs that meet the standards outlined in the Model Rule for MCLE.

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

None.

9. Disclosure of Interest.

N/A

10. Referrals.

In August 2016, a draft of the Model Rule was distributed to the entities below, a number of which had representatives in the MCLE Model Rule Review Project working groups. This Resolution and Report will be distributed to:

ABA Sections, Divisions and Forums
ABA Section Officers Conference
ABA Standing and Special Committees
American Law Institute Continuing Legal Education (ALI CLE)
Association of American Law Schools (AALS)
Association for Continuing Legal Education (ACLEA)
Conference of Chief Justices
Continuing Legal Education Regulators Association (CLEReg)
National Association of Bar Executives (NABE)
National Association of Law Placement (NALP)
National Conference of Bar Presidents (NCBP)
Professional Development Consortium (PDC)
State and Local Bar Associations

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 SUMMMARY

1. Summary of Resolution.

In 2014, SCOCLE began a comprehensive review of the ABA’s existing Model Rule for Minimum Continuing Legal Education (MCLE), which was adopted in 1988 and has been amended several times. This Resolution and Report are the culmination of discussions with working group volunteers from bar associations, regulatory agencies, CLE providers, and others. This Model Rule, which will replace the 1988 Model Rule, contains a number of key recommendations for Jurisdictions that require MCLE, including: (1) allow lawyers to choose CLE offered in a variety of program delivery formats and do not limit the number of credits that can be earned using a particular delivery format; (2) accredit programs that address substantive law, ethics, professionalism, diversity and inclusion, mental health and substance use disorders, law practice, and technology, and do not limit the number of credits that can be earned through any particular type of program; (3) require all lawyers to take CLE that addresses ethics and professionalism; diversity and inclusion; and mental health and substance use disorders; (4) consider the adoption of strategies that reduce administrative and financial burdens on CLE Sponsors so that they can more easily offer programming that best meets lawyers’ educational needs at a reasonable price; (5) treat in-house Sponsors of CLE programs the same as other Sponsors and allow for full accreditation of programs when all other accreditation standards have been met; and (6) adopt a special exemption for lawyers licensed in multiple Jurisdictions, pursuant to which a lawyer is exempt from satisfying MCLE requirements if he or she satisfies the MCLE requirements of the Jurisdiction where the lawyer’s principal office is located.

2. Summary of the issue which the Resolution addresses.

The CLE landscape has changed significantly in the three decades since the 1988 Model Rule for MCLE was approved by the House of Delegates. In 2014, the House of Delegates explicitly asked SCOCLE to review the existing Model Rule and make recommendations. *See* 2014A106 (“[SCOCLE] is encouraged to consider amendments to the ABA Model Rule for Continuing Legal Education to effectuate the purposes of this Resolution, including provisions for distance learning through technology, and such other issues as deemed appropriate by the Committee.”).

3. An explanation of how the proposed policy position will address the issue.

This Model Rule addresses many changes in CLE and includes provisions for distance learning through technology, diversity and inclusion CLE, and other provisions previously endorsed by the ABA.

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

A number of individuals have expressed concern about the complexity of MCLE regulations and requiring MCLE, especially in light of the costs to lawyers. The Model Rule continues to endorse requiring MCLE, but it also contains several provisions designed to help lawyers access reasonably priced MCLE that is most relevant to their practices, in a delivery format that best meets their educational needs.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress to enact legislation
2 deeming it unlawful for any governmental authority or any person acting on behalf of a
3 governmental authority to engage in a pattern or practice that deprives persons of their
4 constitutional right to the effective assistance of counsel; and
5

6 FURTHER RESOLVED, That the American Bar Association urges Congress to enact
7 legislation enabling the following parties to initiate and pursue civil actions to obtain
8 equitable relief for systemic violations of the constitutional right to the effective
9 assistance of counsel: the United States Department of Justice, private litigants deputized
10 to file such actions in the name of the United States, and private litigants seeking to file
11 such actions in an individual capacity or as members of a class.

REPORT

Introduction

Given continued failures by state and local governments to fully enforce the right to effective assistance of counsel, this Resolution recommends that the federal government and private individuals subject to such violations be granted the tools necessary to ensure that the Sixth Amendment's mandate is fulfilled. It proposes that Congress vest the Department of Justice with authority to file civil lawsuits challenging systemic violations of the right to counsel. Because the Department will always be severely limited by time and resources, the resolution also recommends that the Department be permitted to deputize private litigants acting on its behalf to seek equitable relief for criminal defendants whose right to counsel is being violated. Last, it urges that private litigants be empowered to file such actions in an individual or class action capacity to vindicate their Sixth Amendment rights. This Resolution aligns with the ABA's consistent recognition of the failure to fulfill the Sixth Amendment's mandate and its opinion that the constitutional guarantee of effective assistance of counsel must be strictly enforced.

Background: *Gideon's* Promise Still Broken

In the years that have passed since the Supreme Court's landmark decision *Gideon v. Wainwright*,¹ various studies have documented the obstacles criminal defendants face in attempting to secure the effective assistance of counsel.² Among other things, these studies have highlighted inadequate funding of public defense systems across the country, chronic appointment of incompetent or inexperienced lawyers, severe delays in the appointment of counsel, lack of continuity of attorney representation, a lack of training and oversight for attorneys representing criminal defendants, excessive public defender caseloads and understaffing of public defender offices, inadequate or nonexistent expert and investigative resources for defense counsel, and a lack of meaningful attorney-client contact.³

¹ 372 U.S. 335 (1963).

² See, e.g., THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50 (2009) [hereinafter JUSTICE DENIED], available at <http://www.constitutionproject.org/manage/file/139.pdf>.

³ Id. at 7–8, 50–51, 162–65; STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR. ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004) [hereinafter GIDEON'S BROKEN PROMISE], available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>; ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009) [hereinafter MINOR CRIMES, MASSIVE WASTE], available at [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf) (discussing the way in which the growth in misdemeanor crimes exacerbates the ongoing public defense crisis); Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1198 (2013); Cara H. Drinan, Commentary, *Toward a Federal Forum for Systemic Sixth Amendment Claims*, WASH. U. L. REV. (Oct. 22, 2008), <http://lawreview.wustl.edu/slip-opinions/toward-a-federal-forum-for-systemic-sixth-amendment-claims/>; see also Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683 passim (2010) (describing the unwillingness of state legislatures and courts to provide adequate resources and effectively enforce indigents' right to

Although defendants are guaranteed the right to counsel in theory, it often fails to translate into practice; this gap has worsened as state and local budgets have been forced to tighten and the provision of public defense is given low priority in the spending of such limited funds.⁴ The problems referenced above, and suggestions for guiding principles that would help to ensure effective provision of defense services to clients, have been chronicled in previous ABA reports and publications⁵—yet the Sixth Amendment’s guarantee to adequate counsel remains vastly underenforced.

Various proposals have been made in an attempt to address the public defense crisis, including calls for better training of public defenders and increased funding for public defense.⁶ Yet many of those proposals rely on state governments taking action—often an unlikely solution, given that criminal defendants have no political clout. Even if such proposals were successful, increased funding and better training alone would not solve all of the problems plaguing public defense, including the problems of insufficient independence and oversight.⁷

While litigation has often been used to seek reform at the state and local levels, it too suffers from critical limitations. State judges are often elected and thus subject to the same political pressure as their state legislative and executive counterparts.⁸ Individual defendants may raise a claim of ineffective assistance of counsel, but seeking such relief can take years, and often defendants are not entitled to legal assistance in making such challenges during habeas review.⁹ Moreover, many courts have been unwilling to entertain such claims prospectively, before a defendant has already received the ineffective assistance of counsel.¹⁰

counsel); Note, *Simplicity as Equality in Criminal Procedure*, 120 HARV. L. REV. 1585, 1595 (2007) (noting that the average public defender in a large county handles over 530 cases per year and that some public defenders handle up to 2000 cases annually); *id.* at 1595 (“[M]any states apply caps on compensation for indigent defense ranging from \$265 to \$3,500 per case.”); *see generally* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006) (providing an overview of how the funding crisis has affected public defense in many states).
⁴ JUSTICE POLICY INST. SYSTEM OVERLOAD: THE COSTS OF UNDERRESOURCING PUBLIC DEFENSE 8 (2011) (“Public defense has been historically underfunded and overburdened since *Gideon*; however, the recent economic downturn and fiscal/budget crises have made it worse.”); *see* Dylan Walsh, *On the Defensive*, *The Atlantic*, Jun. 2, 2016, *available at* <http://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/> (describing Louisiana’s refusal to adequately fund its public defense system and its aftermath).

⁵ *See, e.g.*, GIDEON’S BROKEN PROMISE, *supra* note 3; ABA Resolution 107, Adopted by ABA House of Delegates, Aug. 9, 2005.

⁶ Eve Brensike Primus, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, Issue Brief, Am. Const. Soc’y (September 2010), *available at* <http://www.acslaw.org/indigentdefense>.

⁷ Brensike Primus, *supra* note 6, at 3.

⁸ *See* AMERICAN BAR ASS’N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, *available at* http://www.abanet.org/leadership/fact_sheet.pdf; *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 467 (2009) (“[T]here is good reason to think that these judges are subject to the same pressure to be perceived as ‘tough on crime’ as politicians often are.”).

⁹ Brensike Primus, *supra* note 6, at 3.

¹⁰ *See* Lucas, *Reclaiming Equality*, *supra* note 3, at 1216.

As described below, in several cases, defendants have attempted to bring class-action lawsuits to challenge systemic public defense failures.¹¹ Although some state courts have been receptive to these claims, many have been hesitant to find such claims justiciable or to address claims regarding systemic deficiencies in performance (as compared to the constructive or actual denial of counsel).¹² The federal courts have long remained unavailable or ineffective as a forum for adjudicating such claims, for two main reasons: (1) the time required and the procedural obstacles imposed on defendants attempting to attack such failures through federal habeas review; and (2) federal courts' reliance on abstention doctrine in refusing to hear such claims.¹³

The Need for Federal Enforcement to Ensure the Right to Adequate Counsel

This Resolution suggests Congress should provide the federal government with authority to initiate and pursue lawsuits to protect against systemic violations of the Sixth Amendment for adult defendants, as it already has the authority to do in the context of juvenile defendants (see discussion of 42 U.S.C. § 14141 below). In doing so, Congress would merely be allowing the executive branch authority to ensure compliance with the Sixth Amendment, a power the federal judiciary already possesses but cannot fully implement, given procedural obstacles and the inability of pro se litigants to effectively litigate the issue on their own. Given the limited capacity and resources of the federal government, this Resolution further suggests that the Justice Department have the ability to deputize private litigants to file such actions in the name of the United States.

Current Federal Involvement in Public Defense Reform

While this Resolution proposes that the federal government play a more direct role in ensuring compliance with the Sixth Amendment, it has already assumed an important, if limited, role in public defense reform. In recent years, the Department of Justice has taken a more active stance with regard to pending public defense litigation filed by others, due in large part to the creation of the Office for Access to Justice, which was established in March 2010 to address the access-to-justice crisis in the criminal and civil justice system.¹⁴

The Department has filed a number of statements of interest in important cases regarding systemic public defense failures, including *Hurrell-Harring v. State of New York*, a class action lawsuit filed in the Supreme Court of the State of New York alleging that due to systemic failures

¹¹ Lauren Sudeall Lucas, *Unintended Consequences: The Impact of the Court's Recent Cases on Structural Ineffective Assistance of Counsel Claims*, 25 FED. SENT'G. R. 106 (2012).

¹² See Drinan, *supra* note 8; Brensike Primus, *supra* note 6, at 4 n.21 (describing limitations in New York and Michigan cases).

¹³ Under *Younger v. Harris*, 401 U.S. 37 (1971), federal courts must abstain from interfering with state court criminal proceedings. See also *Luckey v. Miller*, 976 F.2d 673, 676-79 (11th Cir. 1992) (affirming district court's dismissal, based on abstention doctrine, of a class action lawsuit challenging Georgia's public defense system). As Eve Brensike Primus has explained, federal legislation authorizing federal enforcement by DOJ would not raise the same abstention concerns and could, if needed, specify that the limited number of enforcement actions brought under such a statute be exempted from abstention. Brensike Primus, *supra* note 6, at 6, 15.

¹⁴ <https://www.justice.gov/atj>.

in four New York counties, criminal defendants had been constructively denied the right to counsel. The Department's brief was filed in September 2014,¹⁵ just weeks before a historic settlement was reached in the case.¹⁶ The Department also filed a statement of interest in August 2013 in federal court in Washington State in *Wilbur v. City of Mount Vernon*, a class action lawsuit alleging that excessive misdemeanor caseloads prevented public defenders from providing effective representation. Just months later, on December 4, 2013, the district court found a systematic deprivation of the right to assistance of counsel and issued an injunction in favor of the plaintiffs requiring the defendant cities to hire a part-time public defender supervisor tasked with monitoring and reporting on the delivery of public defense representation.¹⁷ In 2015, the Department filed a statement of interest in federal court in Georgia in *N.P. v. State of Georgia*, a class action asserting that the public defense system in the Cordele Judicial Circuit was so underfunded and poorly staffed that juveniles were routinely denied their right to legal representation.¹⁸ The case settled less than a month after the Department filed its statement.¹⁹

The Department has also filed amicus briefs in cases like *Adam Kuren, et al. v. Luzerne County, et al.*, a class action filed in the Supreme Court of Pennsylvania alleging that the public defense system in Luzerne County, Pennsylvania, is so underfunded and poorly staffed that attorneys appointed to represent adults accused of committing criminal acts serve as attorneys in name only.²⁰ The sole focus of the Department's brief was whether criminal defendants could bring a civil claim alleging a constructive denial of counsel under the Sixth Amendment to the United States Constitution. Notably, the ABA also filed an amicus brief in the Luzerne County case in support of the criminal defendants, arguing that, where excessive workloads and a lack of resources prevent defenders from providing adequate representation, the court should recognize a prospective cause of action and provide systemic relief.²¹

Most recently, the Department filed an amicus brief in *Tracy Tucker et al. v. State of Idaho, et al.*, in the Supreme Court of Idaho. The brief argues, on behalf of the United States, that criminal defendants who cannot afford an attorney may bring a prospective civil lawsuit to prevent violations of their constitutional right to counsel under the Sixth Amendment, rather than waiting to bring an ineffective assistance of counsel claim after conviction.²² The ability to bring pre-conviction claims is critical to systemic reform and yet they have been "relatively rare" and "deemed cognizable with little frequency."²³

¹⁵ https://www.justice.gov/sites/default/files/press-releases/attachments/2014/09/25/statement_of_interest.pdf.

¹⁶ <http://www.nyclu.org/node/1538>.

¹⁷ http://www.opd.wa.gov/documents/0181-2013_WilburDecision.pdf

¹⁸ https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/13/np_v_state_of_georgia_usa_statement_of_interest.pdf.

¹⁹ <https://www.justice.gov/atj/court-filings-support-access-justice>.

²⁰ <https://www.justice.gov/opa/pr/department-justice-files-amicus-brief-pennsylvania-right-counsel-case>.

²¹ https://www.americanbar.org/content/dam/aba/images/abanews/Amicus_Flora.pdf.

²² <https://www.justice.gov/opa/file/850831/download>.

²³ Lucas, *Reclaiming Equality*, *supra* note 3, at 1216 (explaining that most courts view such claims as reserved for postconviction review).

Federal Enforcement Authority in Other Contexts

The authority referenced in this Resolution is not without parallel in existing federal law. Congress has created similar enforcement actions to prevent state officials from engaging in systemic violations of civil rights, including 42 U.S.C. § 14141.

Section 14141 authorizes the Attorney General to conduct investigations and, if warranted, file civil litigation to eliminate a “pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” As a result of § 14141, DOJ is authorized to file lawsuits against state officials who systematically deny juveniles their due process rights to effective legal representation. The proposal to provide DOJ with enforcement authority to file federal enforcement actions to obtain equitable relief from systemic right-to-counsel violations is merely an extension of the type of authority DOJ now has pertaining to state juvenile court proceedings.²⁴

Similarly, the notion that private individuals might be deputized to bring civil actions on behalf of the United States government is not a novel concept. To the contrary, the government’s authority to deputize in areas where the government has a conflict or lacks the time and resources to fully enforce federal law on its own, is grounded in both practice and history. One such example is the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730, which authorizes private citizens with independent knowledge of fraud perpetrated against the government to sue and recover a portion of the claim. Other examples of deputization include the independent counsel statute²⁵, and DOJ’s use of a private attorney (David Boies) for its antitrust suit against the Microsoft Corporation. The general authority to deputize is grounded in practice and history and the DOJ would retain approval over any actions filed on its behalf.

The Importance of Federal Enforcement Authority

As discussed above, a federal enforcement mechanism is necessary to ensure that state and local governments fulfill their responsibility to provide effective legal representation to criminal defendants who cannot afford counsel. As evidenced by decades of reporting on such failures by the ABA and others, many defendants are still not receiving effective legal representation, and states and localities are not solving the problem on their own. Moreover, state courts are not always a fruitful venue for resolving such claims, given that many state judges are elected and have little political motivation to issue rulings in favor of criminal defendants that would require additional expenditures and systemic overhaul on the part of the state.

Litigants seeking redress in federal court have been unable to make much headway. Deferential standards of review imposed on federal habeas make it hard for defendants to secure relief in postconviction proceedings. Defendants attempting to file civil actions to obtain systemic relief in federal court are often stymied by procedural barriers, like abstention and standing doctrine. By

²⁴ NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 187-88 (2011).

²⁵ 28 U.S. Code Chapter 40

carving out a federal path for such lawsuits, this Resolution supports the availability of a new and untapped mechanism to ensure compliance with the Sixth Amendment. Moreover, it is apparent from the Department's current, yet limited, involvement—its filing of amicus briefs and statements of interest in right to counsel cases—and the speed with which many of those cases have been resolved after the Department's appearance in the case, that the federal government possesses unmatched clout in this area.

The Need for Private Enforcement to Ensure the Right to Adequate Counsel

While the federal government's influence and power to have an impact through litigation in federal court is tremendous, there still remains a possibility that the Department will fail to pursue such actions or will be unable to do so at the level needed to provide redress for systemic violations across the country. Thus, it is critical that private individuals, subject to such systemic violations, be able to initiate and pursue such actions, either as individuals or as part of a class.

Currently, individual defendants wishing to challenge systemic violations of their right to counsel face myriad obstacles in trying to bring such a claim in federal court. Aside from issues of abstention²⁶ and standing, many defendants encounter courts only willing to entertain claims of ineffective assistance post-conviction.²⁷ Therefore, a criminal defendant who is aware of the challenges faced by the indigent defense system to which he is subject, and whose representation will almost certainly suffer as a result, has no recourse but to wait until after conviction (and the consequences that accompany conviction) to bring such a claim. In one recent example, the Utah Attorney General filed a motion to dismiss a class-action challenge to Utah's indigent defense system, arguing "a criminal defense must first be provided before the Court can determine whether a criminal defendant received constitutionally insufficient counsel."²⁸ So, even if it is clear that, due to systemic failures or existing patterns and practices a criminal defendant will not receive adequate representation—to which he is entitled under the Sixth Amendment—he cannot seek injunctive relief to prevent that violation from occurring.

The notion that Congress should provide recourse to criminal defendants to prevent such violations before they happen is not novel: United States Representative Sean Maloney of New York and United States Senator Cory Booker of New Jersey introduced legislation this past session proposing that federal district courts be empowered by Congress to provide declaratory and injunctive relief against systemic violations of the right to counsel.²⁹

Alignment with ABA Goals and Objectives

For decades, the ABA has chronicled the failure to fulfill *Gideon*'s mandate. In 1982 in *Gideon Undone*, the Standing Committee on Legal Aid and Indigent Defendants, in conjunction with the Criminal Justice Section and General Practice Sections, and the National Legal Aid and Defender

²⁶ See *supra* note 13.

²⁷ Lucas, *Reclaiming Equality*, *supra* note 3, at 1216 & n.75 (providing numerous examples of courts deeming such claims appropriate for collateral, post-conviction review).

²⁸ Defendants' Motion to Dismiss, *Remick et al. v. State of Utah et al.*, Case 2:16-cv-00789-RJS-DBP (D. Utah filed Aug. 5, 2016).

²⁹ See S.3144 — 114th Congress (2015-2016) (Equal Justice Under Law Act of 2016).

Association, relayed witness testimony documenting, among other things: inadequate funding for public defense (only 1.5% of total criminal justice expenditures by state and local governments); excessive public defender caseloads; the failure to advise misdemeanor defendants of their right to counsel and frequent waiver by such defendants; a tendency by states to place much of the funding burden on counties; and inadequate compensation of appointed private attorneys.³⁰

Nearly two decades later, on the 40th anniversary of *Gideon*, the ABA held extensive public hearings to assess the current state of public defense.³¹ In *Gideon's Broken Promise*, an ABA report summarizing the testimony provided at those hearings, it became clear that many of the same issues remained: inadequate funding for public defense; the failure to appoint counsel in cases where a right to counsel exists; a lack of basic oversight and accountability in public defense systems, and a failure by lawyers providing public defense services to deliver competent representation.³²

In response to these findings, the ABA has attempted to define what is necessary to establish and maintain an effective public defense system. In *Providing Defense Services*, the ABA promulgated thorough standards intended to guide public defense providers in ensuring all eligible persons have quality legal representation.³³ In February 2002, the ABA approved *Ten Principles of a Public Defense Delivery System*, focused on characteristics critical to an effective public defense system, such as independence of the defense function, manageable workloads, and parity between the prosecution and the defense.³⁴ And in 2009, the ABA released a set of guidelines focused specifically on the management of excessive caseloads, a primary obstacle to the provision of effective assistance of counsel.³⁵

In 2005, the ABA passed another Resolution, recommending specific steps be taken to fulfill *Gideon's* mandate including, among other things: increased funding by state and territorial governments; establishing oversight organizations to ensure the independence and uniformity of defense services; substantial federal financial support of public defense services; and a suggestion that attorneys carrying excessive caseloads should decline to take on additional cases, consistent with their ethical obligations.³⁶

While these efforts by the ABA do much more than restate the Sixth Amendment's requirement that defendants be provided with the effective assistance of counsel, they clearly demonstrate the ABA's consistent commitment to this issue and to the notion that the federal government has an important role to play in fulfilling that requirement. And with good reason, as the provision of counsel is fundamental to ensuring so many other constitutional guarantees are met. The Resolution described herein does not encompass all that the ABA has promulgated on

³⁰ GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (1982).

³¹ GIDEON'S BROKEN PROMISE, *supra* note 3, at iv.

³² *Id.*

³³ ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (3d. ed. 1992).

³⁴ AMERICAN BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002).

³⁵ AMERICAN BAR ASS'N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009).

³⁶ ABA Resolution 107, Adopted by ABA House of Delegates on Aug. 9, 2005.

the subject; instead, it is merely an attempt to ensure systemic violations of the Sixth Amendment can be addressed effectively.

Conclusion

More than 50 years after *Gideon* was decided, its promise remains unfulfilled. For decades, the ABA has documented these failures and also promulgated detailed standards to guide attorneys in providing quality legal representation to criminal defendants and jurisdictions in structuring sound public defense systems. Yet, efforts to date have been unsuccessful, due in large part to the unwillingness of state and local governments to provide what is needed for an effective public defense system. The federal courts have not played a major role in the implementation of *Gideon*, and this Resolution aims to change that. The ABA should support legislation that would enable the Department of Justice to seek redress for systemic Sixth Amendment violations. In doing so, it should also support the Department's ability to deputize civil litigants to bring such suits, given the time and resource limitations of the Department itself and the fact that this practice has precedent in other contexts. Last, where the federal government is unwilling or unable to intervene, it should support legislation enabling private citizens to file such suits to ensure their Sixth Amendment rights remain intact.

Respectfully submitted,

Hon. Lora Livingston, Chair

Standing Committee on Legal Aid and Indigent Defendants

February 2017

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants

Submitted By: Hon. Lora Livingston, Chair

1. Summary of Resolution(s). This resolution urges Congress to enable the United States Department of Justice to ensure compliance with the Sixth Amendment right to effective assistance of counsel. Specifically, it urges Congress to (1) deem unlawful any “pattern or practice” that denies the sixth-amendment right to effective assistance of counsel; and (2) enable the DOJ, its deputies, or other private litigants to pursue civil action to obtain equitable relief where violations of that right occur.
2. Approval by Submitting Entity. This resolution was passed by the Standing Committee on Legal Aid and Indigent Defendants on October 8, 2016. Cosponsorship was approved by the Criminal Justice Section Council on November 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?
None.
5. If this is a late report, what urgency exists which requires action at this meeting of the House?
N/A
6. Status of Legislation. (If applicable)
N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This policy will enable the ABA Governmental Affairs Office to educate and lobby Congress to enact legislation that would help protect the Sixth Amendment right to the effective assistance of counsel.
8. Cost to the Association. (Both direct and indirect costs)
None.

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

10. Referrals.

At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2017 Midyear Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

Sections, Divisions

Criminal Justice
Government and Public Sector Lawyers Division
Civil Rights and Social Justice
Judicial Division
Litigation
State and Local Government Law
Young Lawyers
Center for Human Rights
Ethics and Professional Responsibility
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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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges Congress to enable the United States Department of Justice to ensure compliance with the Sixth Amendment right to effective assistance of counsel. Specifically, it urges Congress to (1) deem unlawful any “pattern or practice” that denies the Sixth Amendment right to effective assistance of counsel; and (2) enable the DOJ, its deputies, or other private litigants to pursue civil action to obtain equitable relief where violations of that right occur.

2. Summary of the Issue that the Resolution Addresses

Public defense has, for several decades, been in a state of crisis. Throughout the nation, public defense providers are inadequately funded and carry grossly excessive workloads. These attorneys, saddled with hundreds or thousands of cases per year, are frequently unable to meet their Sixth Amendment duties to effective assistance of counsel. The United States Department of Justice has authority to pursue civil actions to obtain equitable relief where violations of this right occur in the juvenile context, but that authority does not presently exist in the adult context. Given the Department’s limited time and resources, deputization and private enforcement through individual and class action lawsuits are also necessary to ensure that such violations do not occur.

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

The United States Department of Justice is better positioned than any other organization or entity in our nation to enforce the right to effective assistance of counsel. Where the federal government cannot or will not intervene, an alternative mechanism is necessary to ensure that private litigants can also seek redress for systemic Sixth Amendment violations. By enacting the legislation recommended in this resolution, Congress will greatly deter widespread violation of the Sixth Amendment.

4. Summary of Minority Views

None.

AMERICAN BAR ASSOCIATION**STANDING COMMITTEE ON DISASTER RESPONSE AND PREPAREDNESS
SECTION OF STATE AND LOCAL GOVERNMENT LAW****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial,
2 and tribal governments to adopt standards, guidance, best practices, programs, and
3 regulatory systems that make communities more resilient to loss and damage from
4 foreseeable hazards and also recognize property rights, affordable risk mitigation, the
5 interests of taxpayers, and protection of the environment.

6
7 FURTHER RESOLVED, That the American Bar Association urges lawyers and law
8 firms, federal, state, local, territorial, tribal and specialty bar associations, businesses, and
9 other professional and nonprofit organizations to advocate for and actively participate in
10 community resilience initiatives.

REPORT

I. Introduction

This resolution encourages communities to adopt standards, guidance, best practices, regulatory systems, and programs that will make communities more resilient to loss and damage from foreseeable hazards and enhance the disaster resilience of communities. These programs and standards must recognize: a) constitutional property rights, b) the affordability of such risk mitigation, c) the best interests of taxpayers, and d) protection of the environment. The Resolution is consistent with existing ABA policies and previous resolutions adopted by the House of Delegates.

Disasters continue to increase worldwide: wildfires, hurricanes, tornadoes, earthquakes, tsunamis, drought, floods, and pestilence. These realities, coupled with the recent increased attention to the idea of climate variability, resilience and sustainability, offer the legal community a unique challenge and opportunity to raise awareness about preventing disasters through actions promoted by lawyers, law firms and bar associations. ABA's leaders respond to disasters in the community. Through the Disaster Legal Services Program, the ABA's Young Lawyers Division and FEMA provide immediate temporary legal assistance to disaster survivors at no cost.

Because the ABA is assuming a leadership role in the area of community resilience, as well as disaster mitigation and response through the efforts of Standing and Special Committees, Sections, and the ABA's leadership, the ABA will be better able to communicate the core message that foreseeable hazards, threats, vulnerabilities and risks to communities are driving decision-making for emergency preparedness, and that community development, prevention, protection, mitigation, response and recovery should be done in such a way to recognize property rights, affordable risk mitigation, the interests of taxpayers, and protection of the environment.

II. Engagement of the Legal Community in Community Resilience.

This Report is a call to action to lawyers, law firms and bar associations that is designed to create greater awareness of community resilience initiatives, and engage the members of the legal profession as civic leaders, key stakeholders and representatives of the community's social and economic institutions. The Resolution urges establishment of community resilience programs that will meet human needs, support a functioning economy, and provide jobs. There are many resilience approaches; some are community resilience initiatives and a few of them are annotated in the Report's footnotes.¹

¹ *Community resilience* is the ability of a community to

- Prepare for anticipated hazards
- Adapt to changing conditions
- Withstand and recover rapidly from disruptions

What does it mean to be resilient? Resilience is the ability to prepare for anticipated threats and hazards, adapt to changing conditions, and withstand and recover rapidly from disruptive events. Resilience is not merely “bouncing back” to the prior state after a disruptive event, but having a plan in place to “bounce forward” to a better state. It means having plans in place which increase emergency preparedness that also provides the benefit of making the communities more attractive to business investment and new residents. For the legal community, resilience means maintaining the rule of law in times of major disaster.² In successful resilient communities, the community resilience champions, resilience planning teams, and key public and private sector stakeholders are directly responsible for engaging the whole community, creating the vision, and achieving the level of commitment necessary for the success of community resilience programs, and carrying the programs forward. The community’s vision for the future is based on the principles that enhance resilience in a way that is consistent with the context and functions of the community.

A robust community resilience program represents the interests of the entire community and is contingent upon the ongoing collaboration of civic leaders, key public and private sector stakeholders, and community members. It spans activities ranging from preparing for hazard events, risk mitigation and post-event recovery, and should be proactive, continuous, and integrated into other community planning. Good management practice not only calls for a community resilience champion and planning team with broad representation across the community, but also makes clear that the representation of the key social institutions within the community and, in particular, representation of the economic institutions, is a necessity for the success of the community resilience program.

The community resilience champion working with the resilience planning team should form task groups of key private sector stakeholders and subject matter experts to participate and make recommendations. The resilience planning team should charter groups of key stakeholders with responsibilities for hazards, social dimensions, and infrastructure systems, such as buildings, transportation, energy, communications, and water and wastewater.

Typically, community resilience programs comprise assigned leaders from local government who are responsible for implementing codes, statutes and community plans, and authorized to collaborate and coordinate with other entities. Business and service professionals representing the community’s social institutions and infrastructure systems should be included on resilience planning teams, as well as on chartered groups with specific responsibilities. It is important to distinguish between those representatives who should serve as members of the resilience planning team, and those who should serve as key private sector stakeholders who are recruited for working groups.³

III. Community Resilience: Make Your Community More Resilient.

Disasters continue to increase worldwide: wildfires, “Superstorm” Sandy, tornadoes, earthquakes, tsunamis, drought, floods and pestilence. These realities, coupled with the recent

² See ABA’s *Rule of Law in Times of Major Disaster*, August 2007.

³ FEMA, *Local Mitigation Planning Handbook*, March 2013, p. 2-1.

increased attention to the idea of climate variability, resilience and sustainability offer the community a unique challenge and opportunity to raise awareness about preventing disasters through actions taken by lawyers, law firms and bar associations, and other stakeholders.

Call to Action

A better understanding of disasters and resilience is much needed. The ABA is uniquely situated to assist in such an effort. To this end, the Standing Committee on Disaster Response and Preparedness and the Section of State and Local Government Law have proposed a long-term community resilience initiative involving the entire ABA. The initiative will require the advice, comment and assistance of all sections, divisions, forums, and other entities within the ABA in development, implementation, operation and improvement. The community resilience initiative necessarily cuts across multiple disciplines within the ABA, and may also involve other organizations that are essential to the communication and advocacy of a powerful message in this nation.

Communicate the Message of Resilience to the Community.

This Report focuses on the engagement of lawyers, law firms and bar associations (the “legal community”) to help their communities to address these challenges through a risk-based, pragmatic approach that takes into account community social goals, economic institutions, and participation of public and public sector stakeholders.⁴ Several members of the Standing Committee on Disaster Response and Preparedness and the State and Local Government Law Section, have begun working on the specifics of the ABA-wide initiative. In addition, members of the Standing Committee on Law and National Security recognize the significance of community resilience to the nation, and are contributing their efforts to this resolution and report. All in the ABA are encouraged to participate in these efforts.

The core message is that threats and mitigation are driving decision-making and that development must be done in such a way to protect: a) property and rights of all, b) the interests of the taxpayer, c) the occupants of areas foreseeably at risk from hazards, and d) the environment. In short, safe development has a strong legal basis, and is affordable.

Other ABA entities and bar associations should consider the opportunities created by the need to reduce disaster losses and thus create a more resilient nation by using existing resources

⁴ *Examples for how community members depend on the built environment:*

- The need for housing and health care is universal.
- Children need school buildings.
- Neighborhoods need retail districts.
- Businesses need suitable facilities, functioning supply chains, delivery networks, and a workforce that is readily available.
- Everyone needs a transportation system, electricity, fuel, water, wastewater systems, and communication/information access.

to convey this message through: a) a series of short practitioner focused, legally oriented publications; b) an updated ABA-sponsored compact disc on business continuity community resilience, continuity of operations and disaster mitigation; c) an ABA book on Community Resilience initiatives; and d) a webinar series on the book's chapters.

The ABA recognizes the vital roles played by the nation's architects, engineers, facility managers, and the building and standards communities in community resilience initiatives. Community resilience programs may include characterizing the social dimensions and built environments of a community, identifying the dependencies between social services and supporting built environments, and linking facilities and supporting infrastructure systems to desired social services. Social dimensions address the needs of individuals and social institutions, such as those representing government, business and industry, finance, health, education, community service, dispute resolution, religious and cultural beliefs, and the media.

Thus, the ABA is actively seeking the support of professional associations with interests in the built environment and infrastructure systems, and business continuity programs for the resolution on community resilience initiatives.⁵

As a nation, we are able to do a better job of preparing for and recovering from disruptive events. Better design, construction and standards will play a large part in the community resilience program in a jurisdiction. We must all work together so we change the way we develop and redevelop property so that we see much less suffering, misery, despoliation and wasted resources caused by human disregard for foreseeable natural processes.

Across the United States, communities are always working to recover from disasters. While we cannot stop natural hazards and have only a limited ability to prevent technological and human-caused hazards, governments and communities can prepare for hazards and in doing so, minimize disastrous consequences. The extent of recovery and the ultimate outcome depend on the nature and severity of the events and the community's preparedness to prevent incidents, mitigate risk, protect assets, respond in a timely and coordinated way, and recover community functions. Together, these measures determine the community's resilience.

Making a community more resilient is a long-term proposition. Communities can develop short, medium and long-term goals for resilience. All solutions that make communities more resilient have associated costs. Communities can limit the scope of the resilience initiatives, and balance resilience plans against their available resources. Proper planning identifies gaps between desired and anticipated performance, and prioritizes solutions to address gaps.

⁵ *100 Resilient Cities*. The Rockefeller Foundation is dedicated to helping cities become more resilient to physical, social and economic challenges caused by "shocks and stresses," using the following four techniques:

- Establish a fully funded Chief Resilience Officer in city government to lead the city's resilience efforts.
- Solicit expert support for development of a robust resilience strategy.
- Develop and implement resilience strategies with help from public and private service providers, and NGO sectors.
- Network with other member cities and learn from each other.

Source: Rockefeller Foundation, *100 Resilient Cities*. See www.100resilientcities.org

Prioritization and participation by all stakeholders help communities develop plans that can achieve their community resilience goals within their means.

Laws, Policies, Standards and Best Practices.

The ABA and other bar associations are uniquely positioned to help save lives and money by developing best practices and standards promoting resilience to disaster. One of the core ways the ABA and other bars can foster this resilience is helping identify the characteristics of laws and policies that tend either to augment or impair community resilience.

Practitioners and scholars agree that the laws—ordinances, statutes, constitutions, and regulations—can, and should be, a critical instrument for promoting resilience.⁶ The laws guide choices that businesses and governments make concerning investment of resources in housing, offices, or infrastructure. In times of crisis, the laws also dictate the procedures that guide community revitalization and define the range of possible options for rebuilding towns, cities, and regions. But the laws currently ‘on the books’ may not adequately encourage businesses, families, institutions, and government agencies to make choices and investments that help them avoid or minimize the human and financial costs associated with natural hazards. Laws adopted decades ago were conceived when hazard mitigation, climate variability, and sea level rise weren’t part of businesspersons, legislators, or public officials’ lexicon.⁷

This century’s major disasters confirm that disasters’ human and economic costs are mounting. From Vermont to New York to the Gulf Coast, to Iowa and the Rocky Mountain West, disasters over the last 16 years confirm that thousands of human lives and hundreds of billions in government funds, insurance payouts, and personal savings are at stake. Although each of these communities and regions has made great strides toward recovery, many encountered exactly the same hurdles regarding impediments to spending government grant funds, interruption of business, and prolonged displacement of citizens. Lawyers, in their roles as

⁶ See e.g. John R. Nolon, *Disaster Mitigation Through Land Use Strategies*, 23 Pace Envtl. L. Rev. 959, 963–64 (2006); Patricia E. Salkin, *Sustainability at the Edge: The Opportunity and Responsibility of Local Governments to Most Effectively Plan for Natural Disaster Mitigation*, 38 Envtl. L. Rep. News & Analysis 10158, 10158 (2008); Anna K. Schwab & David J. Brower, *Increasing Resilience to Natural Hazards: Obstacles and Opportunities for Local Governments Under the Disaster Mitigation Act of 2000*, 38 Envtl. L. Rep. News & Analysis 10171, 10173–74 (2008); Daniel A. Farber, Jim Chen, Robert R.M. Verchick & Lisa Grow Sun, *Disaster Law and Policy* 345-64, 369-90 (2d ed. 2010); John Travis Marshall, *Rating the Cities: Constructing a City Resilience Index for Assessing the Effects of State and Local Laws on Long-Term Recovery from Crisis and Disaster*, 90 Tulane L. Rev. 35 (2015); Disaster Resilience: A National Imperative, National Academies of Science (2016).

⁷ NOAA’s Coastal Community Resilience Index [Sempier et al 2010]

“The CRI is a tool communities can use to examine how prepared they are for storms and storm recovery. To complete the index, community leaders get together and use the tool to guide discussion about their community’s resilience to coastal hazards. It is a simple, inexpensive method to identify weaknesses a community may want to address prior to the next hazard event.”

Source: NOAA Website. See <http://www.noaa.gov/>

counsel to companies, city attorneys, local legislators, or neighborhood association leaders can play vital roles in building strong communities.

A greater level of awareness must exist in city halls, statehouses, and boardrooms that laws must be critically analyzed so that—at the very least—local, state, and federal partners can identify potential legal impediments to resilience and thus spark a continuing community dialogue about whether and how to make sure the laws are best serving their current and future needs. Lawyers are leaders, by virtue of their vocation, if not in their roles as CEOs, mayors, state officials, public servants, legislators, or in-house counsel. But lawyers, like all other leaders, are swamped with responsibilities and competing pressures. The ABA has an opportunity to help engage lawyers as community leaders to confront one of our nation's most serious public policy challenges.

Responsibility for Underserved People.

For millions of Americans who can be considered members of underserved populations, including people of color, Native Americans, low income persons and persons with disabilities, emergencies such as natural disasters and terrorist attacks present unique challenges. Such persons, who are often most severely afflicted by disasters and other emergencies, have the fewest resources available to cope and therefore recover last, if they recover at all. Many underserved individuals may also have special needs including medications, medical equipment (e.g., portable respirators) and supplies, personal care assistants, service animals, and auxiliary aids and services for daily living. It is critical to integrate the needs of this community in disaster preparedness planning.

People with disabilities and their personal support networks must make a plan to protect themselves in the event of an emergency or disaster. They are in the best position to identify their specific needs and the resources required to meet them. At the same time, emergency managers, responders, public health officials, and service and care providers must be trained to address the unique needs of persons with disabilities, and be able to evacuate them safely and quickly and ensure that shelters are accessible to individuals with a variety of disabilities.

Such efforts must involve collaborating with persons with a wide range of special needs, disabilities, disability organizations, service providers, health care agencies, and residential and vocational program operators, among others—all of whom can provide expertise and resources—is essential to successful community resilience initiatives.

Strategy Selection, Determination, Implementation and Improvement.

Determining, selecting, implementing and improving community resilience strategy can prove to be a difficult task. A number of methods have proven to be successful, including determining the community resilience plan's scope, strategy options that mitigate risk or enable an appropriate response and recovery, performing cost-benefit analysis on strategy options, selecting the appropriate strategy based on largest positive net benefits, and receiving the community's endorsement for selected strategies before implementing them.

A community resilience plan is only as good as the strategy it reflects. Thus, it is essential that the resilience champion, as well as the planning team, task groups, local, county, state and federal government agencies responsible for facilities or infrastructure systems in the region, and public and private owners and operators of buildings and infrastructure systems, as well as businesses and industry, focus early on strategy design activities, including defining the solutions, identifying the scope and recommending the strategy of the community resilience program.

Incorporate Investment Decisions into Strategy.

Strategies are investments of time and resources into the community's requirements and short-term and long-term community goals to achieve greater resilience over time. To achieve its goals, the community needs to determine, design, select, and implement community resilience strategies through use of a standard economic methodology for evaluating investment decisions aimed at enhancing the resilience capacity. Based on the community's limited resources (e.g., assets, time, people, skills, equipment, premises, etc.), proposed strategies should be evaluated as to how they meet the community's determined objectives and goals, or where there are opportunities for improvement.

Ensure Strategy Addresses the Breadth and Reach of the Resilience Plan.

Community resilience investment strategies can include mitigation, disaster preparedness, design and construction, business continuity, emergency response, and pre-event recovery planning. Communities need a complete basis to understand gaps in performance, prioritize improvements using economic evaluation techniques, and allocate resources. To achieve this basis of understanding, communities should include desired performance goals versus anticipated (actual) performance of the built environment after disruptive events (i.e., hazards), and expected recovery sequences, time, and costs in their resilience plans. The community should also evaluate how the strategies, objectives, and goals for resilience continue to meet the community's requirements, or where there are opportunities for improvement.

Mitigation/Climate Adaptation.

The House of Delegates strongly supports the goals and concept of reducing the impacts of disasters by hazard mitigation, using land use planning, building codes and insurance.

In 2009, the House adopted a series of resolutions concerning disasters. *See* 09M107A-G. Particularly pertinent to this proposal are Resolutions 107E and 107F.

In addition, in 2011, the House adopted a resolution endorsing the recommendations for An Effective National Mitigation Effort, a white paper on national mitigation prepared by the Association of the Directors of Emergency Management of the U.S. states, territories and the District of Columbia. *See* 11M114. The adoption of Resolution 114 permitted ABA to join the National Hazard Mitigation Collaborative Alliance. [For more information on the National Hazard Mitigation Collaborative Alliance, *see*: http://www.nemaweb.org/index.php?option=com_content&view=article&id=297&Itemid=43]

The House has also adopted Resolution 110 strongly supporting efforts by “...federal, state, local, tribal and territorial authorities to identify and address the special needs of vulnerable populations, including but not limited to individuals with disabilities, children, the frail, elderly, homeless persons, domestic violence victims, undocumented persons, the impoverished, and persons with language barriers, when planning for and responding to disasters.” *See* 15M110.

The Community Resilience initiatives in this Resolution will help implement these previous Resolutions of the House, help increase awareness and visibility of Hazard Mitigation and Climate Adaptation, and offer the possibility of improved services to the legal profession and the public.

IV. Conclusion.

This Resolution urges the ABA, lawyers and the legal profession to support community resilience initiatives. The Resolution recognizes and respects the important roles state and local governments, their resident business, legal and other professional and nonprofit organizations, and the general public have in this arena, with regard to making communities more resilient to loss and damage from foreseeable hazards while recognizing property rights, affordable risk mitigation, the interests of taxpayers, and protection of the environment. Further, by endorsing this resolution, the ABA, lawyers and the legal profession will become recognized stakeholders in further discussions on next steps and implementation strategies.

Respectfully submitted,

Chauntis Jenkins-Floyd, Chair
Standing Committee on Disaster Response and Preparedness

Ellen F. Rosenblum, Chair
Section of State and Local Government Law

February 2017

GENERAL INFORMATION FORM

Submitting Entity: ABA Standing Committee on Disaster Response and Preparedness
Section of State and Local Government Law

Submitted By: Chauntis Jenkins-Floyd, Chair
ABA Standing Committee on Disaster Response and Preparedness

Ellen F. Rosenblum, Chair
Section of State and Local Government Law

1. Summary of Resolution(s).

In recognition of the continuous and growing occurrence of natural and manmade disasters and the financial and human impact on communities, this Resolution urges governments, businesses, nonprofit sector, and the legal community to adopt standards, guidance, programs, and best practices, and consider regulatory systems that will make communities more resilient to loss and damage from foreseeable hazards and enhance the disaster resilience of communities, while recognizing legal, financial, and environmental interests of citizens. It further urges lawyers, and law firms, as well as federal, state, local and specialty bar associations to be active participants in and advocates for community resilience initiatives.

2. Approval by Submitting Entity.

The Resolution and Report have been approved by the Standing Committee on Disaster Response and Preparedness at the ABA's 2016 Annual Meeting. The State and Local Government Law Section approved the Resolution and Report at the Section Fall Council Meeting, November 20, 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?

The House of Delegates over the past decade has adopted several policies related to disaster response and preparedness. This Resolution is a natural extension, building upon the concepts of disaster planning. For example, policies have addressed land use and building codes (9M107E), disaster planning for needs of vulnerable populations (15M110), hazard mitigation (11M115).

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 Standing Committee on Disaster Response and Preparedness and the Section of State and Local Government Law will develop and make available to bar associations and others legal resource materials on community resilience, adaptable for use in their communities, and sponsor webinars on this topic.

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

None

9. Disclosure of Interest. (If applicable).

None.

10. Referrals.

This resolution is being provided to all ABA Sections and Divisions for support, especially those with subject matter expertise in topics related to community resilience, such as sections of Civil Rights and Social Justice, Infrastructure and Regulated Industries, Tort Trial and Insurance Practice, Young Lawyers Division, and Section of Real Property, Trust and Estate Law, and select Commissions and Committees, such as the Commission on Homelessness and Poverty and the Cybersecurity Task Force.

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

In recognition of the continuous and growing occurrence of natural and manmade disasters and the financial and human impact on communities, this Resolution urges governments, businesses, nonprofit sector, and the legal community to adopt standards, guidance, programs, and best practices, and consider regulatory systems that will make communities more resilient to loss and damage from foreseeable hazards and enhance the disaster resilience of communities. It further urges lawyers and law firms, as well as federal, state, local and specialty bar associations to be active participants in and advocates for community resilience initiatives.

2. Summary of the Issue that the Resolution Addresses

Community resilience is a growing concept adopted by the public and private sector. It addressed the ability to anticipate risk, limit impact, and bounce back rapidly following a disaster. This resolution addresses an often neglected aspect of community resilience, the key and essential role of lawyers in community resilience planning and execution, and the role of laws and regulations in supporting community resilience while taking into consideration competing legal and financial interests.

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

This proposal addresses a key, often overlooked, aspect of community resilience: the role of laws and regulations that can promote or hinder such resiliency, and of lawyers to engage in community resilience efforts, by advocating for greater bar association participation.

4. Summary of Minority Views

Aware of none.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON SPECIALIZATION
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

- 1 RESOLVED, That the American Bar Association accredits the Privacy Law program of the
- 2 International Association of Privacy Professionals of Portsmouth, New Hampshire for a five-year
- 3 term as a designated specialty certification program for lawyers.

REPORT

Background and Synopsis of the Resolutions

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

The adoption of the Standards in February, 1993, (House Resolution 1993-MY-105) followed an August, 1992, House resolution (1992-AM-128) revising Model Rule of Professional Conduct 7.4 (“Communication of Fields of Practice and Specialization”), which revision created a need for the Association to develop standards for accrediting private organizations that certify lawyers as specialists. A national accreditation mechanism administered by the Association according to uniform standards, it was believed, would be an efficient and effective means of dealing with a multiplicity of organizations that were offering, or planning to offer, certification programs. At the 1999 Annual Meeting, the House extended the initial period of accreditation approved in the Standards from three years to five.

Section 4 of the Standards requires that a certifying organization applying for accreditation by the ABA demonstrate to the ABA’s Standing Committee on Specialization its program’s compliance with several requirements that help guarantee the *bona fides* of the certification. The Standards say that accreditation “shall be granted” if the certifying organization shows that the program complies with the Standards’ detailed accreditation requirements. (Those accreditation requirements are set out as an Appendix to this Report below.)

Pursuant to those current accreditation procedures, the Standing Committee has received, and here recommends approval of, the application for accreditation of the Privacy Law program of the International Association of Privacy Professionals.

Program Description

For over a decade the International Association of Privacy Professionals (“IAPP”) has bestowed its examination-based privacy-professional credentials on professionals working in private business and government agencies. Thousands of lawyers have earned those examination-only based credentials already.

In order for lawyers to be able to publicly claim certification in a discrete, specialist area, however, most states’ legal ethics rules require not only that the certification evidence passage of an examination in the area, but also a significant period of professional practice in the specialty area.

The ABA Standards likewise demand this, requiring that any program that is given ABA-certification demand of its certification applicants demonstrated “substantial involvement” in the specialty area for a three-year period prior to certification. In order to achieve the requisite level

of demonstrated substantial involvement, lawyers seeking certification from the IAPP in Privacy Law must have devoted at least twenty-five percent of their professional time in the three years prior to certification to certain tasks essential to professional expertise in Privacy Law.

For example, for outside counsel and in-house lawyers with principally a transactional practice, IAPP demands that at least 15% of an applicant lawyer's full time practice must include preparation and review of privacy notices compliant with state, federal and international laws and regulations; contract development, negotiation, and compliance, for inclusion of privacy and security provisions; and privacy advice in compliance with state and federal laws, with at least an additional 10% of the lawyer's time devoted to related activities.

For lawyers primarily engaged in data breach response, adversarial proceedings and litigation, at least 20% of an applicant lawyer's full time practice must include internal breach investigation and evaluation, involving managing internal investigations of data breaches and evaluating risks for mitigation and policy development; litigation of data protection and data breach matters in state, federal, international, and administrative tribunals; and regulatory investigations and defense, including federal, state, or international filings of regulatory inquiries or responses to regulatory inquiries of privacy and data protection practices.

The IAPP will also administer a separate examination for applicant lawyers testing their knowledge of the rules of ethics and professional responsibility as they relate to problems and practices peculiar to the practice of privacy law, in addition to its already existing examination in the substantive area of privacy law.

Accreditation and Evaluation Procedures for the Civil Pretrial Application

In evaluating the application, the Standing Committee followed the Governing Rules it adopted on March 2, 1993, as amended from time to time since. The IAPP's application was filed with the Committee in February of 2016, along with all of the processing fees for the program.

In order to ensure that every accredited program continues to comply with ABA Standards, the Standing Committee requires that the following accompany all reaccreditation applications:

- i. Current versions of the applicant's governing documents, including articles of incorporation, bylaws, and resolutions of the governing bodies of the applicant or any parent organization, which resolutions relate to the standards, procedures, guidelines or practices of the applicant's certification programs;
- ii. Biographical summaries of members of the governing board, senior staff and members of advisory panels, certification committees, examination boards and like entities involved with the certification process, including specific information concerning the degree of involvement in the specialty area of persons who review and pass upon applications for certification;
- iii. All materials furnished to lawyers seeking certification, including application forms, booklets or pamphlets describing the certification program, peer reference forms,

rules and procedures, evaluation guides and any other information furnished to the public or the media regarding the certification process;

- iv. A copy of the recent examinations given to applicants for specialty certification, along with a description of how the exam was developed, conducted and reviewed; a description of the grading standards; and the names of persons responsible for determining pass/fail standards.

In addition, the Standards include non-discrimination provisions requiring that a program not condition the grant of certification to a lawyer on the lawyer's "[m]embership in any organization or completion of educational programs offered by any specific organization" [Section 4.04(B)]; and that a program "not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age" [Section 4.04(C)].

Accreditation Application and Examination Review Panelists

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

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

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

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

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

Respectfully submitted,

Shontrai Irving, Chair
Standing Committee on Specialization
February 2017

APPENDIX

The accreditation requirements for an Applicant program appear in Sections 4 and 5 of the ABA Standards for Specialty Certification Programs for Lawyers and are as follows:

4.01 Purpose of Organization -- The Applicant shall demonstrate that the organization is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise, and to the development and improvement of the professional competence of lawyers.

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

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

4.04 Uniform Applicability of Certification Requirements and Nondiscrimination

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

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

(C) Applicants shall not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age. This paragraph does not prohibit an Applicant from imposing reasonable experience requirements on lawyers seeking certification or re-certification.

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

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

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

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

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

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

(1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.

(2) Content of Reference Forms -- The reference forms shall inquire into the respondent's areas of practice, the respondent's familiarity with both the specialty area and with the lawyer seeking certification, and the length of time that the respondent has been practicing law and has known the applicant. The form shall inquire about the qualifications of the lawyer seeking certification in various aspects of the practice and, as appropriate, the lawyer's dealings with judges and opposing counsel.

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

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

(1) Attending programs of continuing legal education or courses offered by Association accredited law schools in the specialty area;

(2) Teaching courses or seminars in the specialty area;

(3) Participating as panelist, speaker or workshop leader at educational or professional conferences covering the specialty area; or

(4) Writing published books or articles concerning the specialty area.

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

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

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

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

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

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Standing Committee on Specialization

Submitted By: Shontrai D. Irving, Chair

1. Summary of Resolution(s).

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

2. Approval by Submitting Entity.

At its meeting on October 22, 2016, the Standing Committee on Specialization considered the application for reaccreditation and voted unanimously that it submit this resolution to the House of Delegates for consideration at the 2017 Midyear Meeting.

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

No.

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

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

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

Not Applicable.

6. Status of Legislation. (If applicable)

Not Applicable.

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

Implementation will be self-executing if the program is accredited by the House of Delegates.

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

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

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

10. Referrals.

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

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

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

Shontrai D. Irving
Chair, Standing Committee
on Specialization
Purdue University Calumet
2200 169th Street
Hammond IN 46323
Phone: 812-219-8697
Email: Shontrai.Irving@Purduecal.edu

Martin Whittaker
Staff Counsel, Standing Committee
on Specialization
321 North Clark Street
Chicago IL 60654
Phone: 312-988-5309
Email: Martin.Whittaker@Americanbar.org

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

Shontrai D. Irving
Chair, Standing Committee
on Specialization
Purdue University Calumet
2200 169th Street
Hammond IN 46323
Phone: 812-219-8697
Email: Shontrai.Irving@Purduecal.edu

EXECUTIVE SUMMARY

1. Summary of the Resolution

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

2. Summary of the Issue that the Resolution Addresses

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

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

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

4. Summary of Minority Views

No opposition has been identified.

**AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES**

RESOLUTION

1 RESOLVED, That the American Bar Association House of Delegates concurs in the action of
2 the Council of the Section of Legal Education and Admissions to the Bar in making amendments
3 dated February 2017 to the following *ABA Standards and Rules of Procedure for Approval of*
4 *Law Schools*:

- 5 1. Standard 204: Self Study
- 6 2. Standard 303(a)(1): Curriculum
- 7 3. Interpretation 303-1
- 8 4. Standard 311(d): Academic Program and Academic Calendar
- 9 5. Standard 501: Admissions
- 10 6. Rules 35, 37, 38, 39, 40, and 41: Appeals Panel

**American Bar Association
Section of Legal Education and Admissions to the Bar
Revised Standards for Approval of Law Schools
February 2017**

1. Standard 204. SELF STUDY

Before each site evaluation visit the law school shall prepare a ~~self study~~ self study comprising ~~ed of~~ (a) a completed site evaluation questionnaire, and (b) a law school self assessment that includes (1) a statement of the law school's mission and of its educational objectives in support of that mission, (e2) an assessment evaluation of the educational quality of the law school's program of legal education, including a description of the program's strengths and weaknesses, and (d3) an assessment description of the school's continuing efforts to improve the educational quality of its program, (e) an evaluation of the school's effectiveness in achieving its stated educational objectives, and (f) a description of the strengths and weaknesses of the law school's program of legal education.

Interpretation 204-1

The evaluation of the school's effectiveness and description of its strengths and weaknesses should include a statement of the availability of sufficient resources to achieve the school's mission and its educational objectives.

2. Standard 303. CURRICULUM

(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:

- (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, rules of professional conduct, and the values, and responsibilities of the legal profession and its members;

3. Interpretation 303-1

A law school may not permit a student to use a course to satisfy more than one requirement under this Standard. For example, a course that includes a writing experience used to satisfy the upper-class writing requirement [see 303(a)(2)] cannot be counted as one of the experiential courses required in Standard 303(a)(3). This does not preclude a law school from offering a course that may count either as an upper-class writing requirement [see 303(a)(2)] or as a simulation course [see 303(a)(3) and 304(a)] provided the course meets all of the requirements of both types of courses and the law school permits a student to use the course to satisfy only one requirement under this Standard.

4. Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

(d) Credit for a J.D. degree shall only be given for course work taken after the student has matriculated in a law school's J.D. program of study, except for credit that may be granted

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pursuant to Standard 505. A law school may not grant credit toward the J.D. degree for work taken in a pre-admission program.

5. Standard 501. ADMISSIONS

- (a) A law school shall ~~maintain~~ adopt, publish, and adhere to sound admission policies and practices consistent with the Standards, its mission, and the objectives of its program of legal education.
- (b) A law school shall ~~not admit an only~~ applicants who ~~does not~~ appear capable of satisfactorily completing its program of legal education and being admitted to the bar.
- (c) A law school shall not admit or readmit a student who has been disqualified previously for academic reasons without an affirmative showing that the prior disqualification does not indicate a lack of capacity to complete its program of legal education and be admitted to the bar. For every admission or readmission of a previously disqualified individual, a statement of the considerations that led to the decision shall be placed in the admittee's file.

Interpretation 501-1

Among the factors to consider in assessing compliance with this Standard are the academic and admission test credentials of the law school's entering students, the academic attrition rate of the law school's students, the bar passage rate of its graduates, and the effectiveness of the law school's academic support program. Compliance with Standard 316 is not alone sufficient to comply with the Standard.

Interpretation 501-2

Sound admissions policies and practices may include consideration of admission test scores, undergraduate course of study and grade point average, extracurricular activities, work experience, performance in other graduate or professional programs, relevant demonstrated skills, and obstacles overcome.

Interpretation 501-3

A law school having a cumulative non-transfer attrition rate above 20 percent for a class creates a rebuttable presumption that the law school is not in compliance with the Standard.

6. Rules 35, 37, 38, 39, 40, and 41: APPEALS PANEL, et al.

Rule 35: Appeals Panel

- (a) The Appeals Panel shall consist of at least ~~three~~ five persons appointed by the Chair of the Council. Members shall serve a one-year term beginning at the end of the Annual Meeting of the Section and continuing to the end of the next Annual Meeting of the Section or until replaced. Appeals Panel members ~~and alternates~~ are eligible to serve consecutive terms or non-consecutive multiple terms.

(1) ~~The Chair of the Council shall designate one member of the Appeals Panel to serve as its chair.~~

(2) ~~The Chair of the Council shall also appoint, at the same time as appointing members of the Appeals Panel and for the same term, an equal number of alternates to the Appeals Panel.~~

(b) Every member of the Appeals Panel ~~and alternate~~ shall be:

(1) A former member of the Council or Accreditation Committee; or

(2) An experienced site evaluator.

(c) Members of the Appeals Panel ~~and alternates~~ shall be:

(1) Experienced in and knowledgeable about the Standards, Interpretations, and Rules of Procedure;

(2) Trained in the Standards, Interpretations, and Rules of Procedure at a retreat or workshop or by other appropriate methods within the 3 years prior to appointment; and

(3) Subject to the Section's Conflicts of Interest Policy, as provided in IOP 139.

(d) The Appeals Panel, ~~and the group of alternates~~, shall each include:

(1) an academic;

(2) an administrator;

(3) a legal educators;

(4) a practitioners or, members of the judiciary; and

(5) a representatives of the public.

~~(d)~~(e) No more than fifty percent of the members may be persons whose primary professional employment is as a law school dean, faculty, or staff member. Public members shall have qualifications and representation consistent with the regulations of the United States Department of Education applicable to the accreditation of professional schools.

Rule 37: Membership of the Appeals Panel for the Proceeding

(a) Within 30 days of receipt of a written appeal within the scope of authority of the Appeals Panel, the Managing Director shall ~~ensure that the Appeals Panel or the Appeals Panel with alternates is authorized and available to decide the appeal.~~ appoint three members of the

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Appeals Panel to hear the particular matter and make the decision. The appointed members shall be known as the Proceeding Panel. The Managing Director shall designate one member of the Proceeding Panel as chair.

(b) ~~In the event a member of the Appeals Panel cannot participate in the appeal, the Managing Director shall appoint one of the alternates to the panel hearing the matter and making the decision, and shall ensure that the panel includes one legal educator, one judge or practitioner, and one public member. For law schools for which the Council is the institutional accreditor, the Managing Director shall appoint an academic, an administrator, and a representative of the public to serve on the Proceeding Panel. For law schools for which the Council is the programmatic accreditor, the Managing Director shall appoint a legal educator, a practitioner or member of the judiciary, and a representative of the public to serve on the Proceeding Panel.~~

(c) ~~In the event an alternate a member of the Appeals Panel cannot be appointed to participate in a decision on appeal so as to ensure that the Proceeding pPanel includes one legal educator, one judge or practitioner, and one public member meets the requirements of Rules 35 and 37, the Managing Director shall appoint to the Proceeding pPanel another person who meets those requirements.:~~

(1) ~~Wholly or substantially meets the criteria of Rule 35(b) and (c); and~~

(2) ~~Whose appointment to the panel ensures that the panel includes one legal educator, one judge or practitioner, and one public member.~~

(d) ~~In the event the Chair of the Appeals Panel is unable to participate in the appeal, the Managing Director shall appoint a Chair Pro Tempore, where possible from among the members of the Appeals Panel appointed by the Chair of the Council.~~

Rule 38: Scheduling of Appeals Panel Hearings

(a) Within 30 days of receipt of a written appeal within the scope of authority of the Appeals Panel, the Managing Director shall refer the appeal to the Appeals-Proceeding Panel. In referring the appeal, the Managing Director shall provide the ~~members of the Appeals or alternates hearing the appeal~~ Proceeding Panel with copies of:

(1) The written appeal;

(2) The decision of the Council; and

(3) The record before the Council, including any transcript of hearing.

(b) The Managing Director, in consultation with the Chair ~~or Chair Pro Tempore~~ of the Appeals Proceeding Panel, shall set the date, time, and place of the hearing.

- (1) The hearing shall be scheduled within 45 days of the Managing Director's referral of the appeal to the Appeals-Proceeding Panel.
- (2) The Managing Director shall inform the law school of the date, time, and place of the hearing at least 30 days in advance of the hearing, unless the law school agrees to the hearing on less than 30 days' notice.

Rule 39: Burdens and Evidence in Appeals Panel Proceedings

- (a) The law school appealing to the Appeals Panel has the burden of demonstrating that the Council's decision was arbitrary and capricious and not supported by the evidence on record, or inconsistent with the Rules of Procedure and that inconsistency prejudiced its decision.
- (b) The appeal shall be decided based on the record before the Committee and the Council, the decision letters of those bodies and any documents cited in those decision letters, and transcripts of hearings before the Committee and the Council. Except as provided in Rule 41(e), no new evidence shall be considered by the Appeals-Proceeding Panel.

Rule 40: Procedure in Hearings before the Appeals-Proceeding Panel

- (a) The hearing will be a closed proceeding and not open to the public.
- (b) The law school shall have a right to have representatives, including legal counsel, appear at the hearing.
- (c) The Council shall be represented at the hearing through the Chair, other members of the Council as the Chair of the Council deems appropriate, and legal representation for the Council.
- (d) The Managing Director or designee shall be present at the hearing. The Managing Director may designate additional staff to be present at the hearing.
- (e) The hearing shall be transcribed by a court reporter and a transcript of the hearing shall be provided to the Appeals-Proceeding Panel, the Council, and the law school.

Rule 41: Action by the Appeals-Proceeding Panel

- (a) Within 30 days of the hearing, the Appeals-Proceeding Panel shall provide the Council and the law school with a written statement of the Appeals-Proceeding Panel's decision and the basis for that decision.
- (b) The Appeals-Proceeding Panel, following a hearing, has the authority to:
- (1) Affirm the decision of the Council;

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- 229 (2) Reverse the decision of the Council and enter a new decision;
230
231 (3) Amend the decision of the Council; or
232
233 (4) Remand the decision of the Council for further consideration.
234
- 235 (c) The decision of the ~~Appeals-Proceeding~~ Panel shall be effective upon issuance. If the
236 ~~Appeals-Proceeding~~ Panel remands a decision for further consideration or action by the
237 Council, the ~~Appeals-Proceeding~~ Panel shall identify specific issues that the Council must
238 address.
239
- 240 (d) Decisions by the ~~Appeals-Proceeding~~ Panel under (b)(1), (2) and (3) are final and not
241 appealable.
242
- 243 (e) When the only remaining deficiency cited by the Council in support of an adverse decision
244 is a law school's failure to meet the Standards dealing with financial resources for a law
245 school, the law school may request a review of new financial information that was not part
246 of the record before the Council at the time of the adverse decision if all of the following
247 conditions are met:
248
- 249 (1) A written request for review is filed with the Office of the Managing Director
250 within 30 days after the date of the letter reporting the adverse decision of the
251 Council to the law school;
252
- 253 (2) The financial information was unavailable to the law school until after the adverse
254 decision subject to the appeal was made; and
255
- 256 (3) The financial information is significant and bears materially on the financial
257 deficiencies that were the basis of the adverse decision by the Council.
258
- 259 (f) The request to review new financial information will be considered by the Council at its
260 next meeting occurring at least 30 days after receipt of the request.
261
- 262 (g) A law school may request review of new financial information only once and a decision
263 made by the Council with respect to that review does not provide a basis for appeal.

REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence, the attached changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*¹. Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the House seeking concurrence of the House in any actions of the Council to adopt, revise, or repeal the *ABA Standards and Rules of Procedures for Approval of Law Schools*. The House may either concur with the Council's decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the House. The decision of the Council following the second referral shall be final.

The amendments were approved by the Council for Notice and Comment during its meetings held on March 11-12, 2016, and June 3-4, 2016. A public hearing was held on August 6, 2016. The Council approved the amendments at its meeting on October 20-22, 2016.

1. Standard 204. SELF STUDY

Following the changes made to Standard 204 during the comprehensive review, several law schools commented that the Standard was confusing in that some of the requests for information to be included in the self study were duplicative. The revised Standard more closely tracks the U.S. Department of Education requirement that an accrediting body require a self study comprising information regarding the educational quality of the program and efforts to improve the program. In addition to the site evaluation questionnaire, the self study would include the following: a statement of the law school's mission and of its educational objectives in support of that mission; an evaluation of the educational quality of the law school's program, including a description of the program's strengths and weaknesses; and a description of the school's continuing efforts to improve the educational quality of its program. The Interpretation referring to the availability of funds is deleted as being duplicative of the information requested in Standard 202.

2. Standard 303. CURRICULUM

Standard 301 requires that a law school maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession. The Standards provide each law school with a great deal of discretion concerning which courses to include in its curriculum to meet these goals, and the Standards do not dictate the specific content of those courses. One exception to this approach is current Standard 303(a)(1), which requires a course of at least two credit hours in professional responsibility. This revised Standard reflects the fact that professional responsibility instruction in law schools has evolved to focus on the rules of professional conduct and the values and responsibilities of the legal profession. Understanding rules of professional conduct and the values and responsibilities of the legal profession and its members is essential to meet the objectives of Standard 301. On the other hand, requiring instruction in the history, goals,

¹ "2016-2017 ABA Standards and Rules of Procedure for Approval of Law Schools," http://www.americanbar.org/groups/legal_education/resources/standards.html

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and structure of the legal profession is not as directly related to preparing students to be admitted to the bar and to become effective, ethical members of the legal profession. The revised Standard provides guidance to site teams, some of which have asked law schools to explain how their courses in professional responsibility provide information on the history of the legal profession.

3. Interpretation 303-1

The revised Interpretation makes clear that, so long as the requirements for each of the two Standards are met, an upper division writing course can be used to meet the requirement of Standard 303(a)(2) for a writing experience after the first year, or the requirements under Standard 303(a)(3) and 304(a) as a simulation course. The revision also makes it clear that such a course can be used to satisfy only one of the requirements of the Standard.

4. Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

This revision explains the interaction between Standard 311(d), which states that credit can be given only for course work taken after a student has matriculated, and Standard 505, which states the circumstances under which credit can be granted to J.D. students for prior law studies. The revised Standard clarifies the matter by confirming that matriculation refers to a student's entry into the J.D. program, and that credit for prior law study can be granted pursuant to Standard 505.

5. Standard 501. ADMISSIONS

The revised Standard includes the following changes:

1. Changing 501(a), from “maintain,” to the language found in other Standards of “adopt, publish, and adhere to.”
2. Making 501(b) a positive statement – from “a law school shall not admit...” to “a law school shall admit only....”
3. Adding the following sentence to Interpretation 501-1: Compliance with Standard 316 is not alone sufficient to comply with the Standard.

These changes clarify that a law school must adopt written admission policies that are consistent with the Standards, including the Standard regarding the admission of qualified applicants. The changes also clarify that the assessment of compliance involves all of the factors listed in Interpretation 501-1, that compliance with the Standard on bar passage is not alone sufficient to demonstrate compliance, and that the Council and Accreditation Committee need not wait for bar passage outcomes required by Standard 316 to inquire about a school's admissions practices and policies in appropriate cases.

The revisions also offer the Council a method of enforcing the Standard through an examination of the non-transfer attrition rate of a law school as a means of assessing whether the school has admitted only applicants who appear capable of satisfactorily completing its program of legal

education. A law school having non-transfer attrition above 20 percent bears the burden of demonstrating that it is in compliance with this Standard.

6. Rules 35, 37, 38, 39, 40, and 41: APPEALS PANEL

In the U.S. Department of Education's Final Staff Report on our Petition for Continued Recognition as the accreditor for programs in legal education that lead to the first professional degree in law, the Department staff concluded that the Standards and Rules of Procedure did not comply with Section 602.15(a)(3) of the recognition criteria, which requires, among other things, that the Appeals Panel have both "academic" and "administrative" personnel because the Council is an "institutional" accreditor. The revised Rules address this finding and bring the Council into compliance with that provision.

Respectfully submitted,

Gregory G. Murphy, Esq.

Billings, Montana

Chair, Council of the Section of Legal Education and Admissions to the Bar

February 2017

GENERAL INFORMATION FORM

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

Submitted By: Gregory G. Murphy, Esq., Chair

1. Summary of Resolution(s).

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2017 to the following *ABA Standards and Rules of Procedure for Approval of Law Schools*:

1. Standard 204: Self Study, regarding the requirements of a law school self assessment prior to a site evaluation visit;
2. Standard 303(a)(1): Curriculum, regarding the content of the required course in professional responsibility;
3. Interpretation 303-1, regarding upper level writing requirements and simulation courses;
4. Standard 311(d): Academic Program and Academic Calendar, regarding credit for prior law study;
5. Standard 501: Admissions, regarding written admission policies and qualifications of admitted students; and
6. Rules 35, 37, 38, 39, 40, and 41: Appeals Panel, regarding the composition of Appeals Panels.

2. Approval by Submitting Entity.

Yes. The amendments were approved by the Council for Notice and Comment during its meetings held on March 11-12, 2016, and June 3-4, 2016. A public hearing was held on August 6, 2016. The Council approved the amendments at its meeting on October 20-22, 2016.

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

Not applicable.

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; and Section Affiliated Organizations, including Access Group, Inc., American Association of Law Libraries, Association of American Law Schools, Association of Legal Writing Directors, Clinical Legal Education Association, Law School Admission Council, National Association for Law Placement, National Conference of Bar Examiners, and Society of American Law Teachers.

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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

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2017 to the following *ABA Standards and Rules of Procedure for Approval of Law Schools*:

1. Standard 204: Self Study, regarding the requirements of a law school self assessment prior to a site evaluation visit;
2. Standard 303(a)(1): Curriculum, regarding the content of the required course in professional responsibility;
3. Interpretation 303-1, regarding upper level writing requirements and simulation courses;
4. Standard 311(d): Academic Program and Academic Calendar, regarding credit for prior law study;
5. Standard 501: Admissions, regarding written admission policies and qualifications of admitted students; and
6. Rules 35, 37, 38, 39, 40, and 41: Appeals Panel, regarding the composition of Appeals Panels.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses a number of Standards and Rules in the *ABA Standards and Rules of Procedure for Approval of Law Schools*. In accordance with Internal Operating Practice 8, the Council engages in an ongoing review of the Standards.

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

The proposals amend the 2016-2017 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

4. Summary of Minority Views

The Council received one comment stating that Standard 303 should require law schools to teach the history of the profession and its role in the development of gender, race, and ethnic norms in U.S. society and its legal institutions.

The Council received one comment stating that the changes to Standard 501 are based on the flawed premise that the factors involved in law school admissions decisions can be used to predict bar examination success.

**AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association House of Delegates concurs in the action of
2 the Council of the Section of Legal Education and Admissions to the Bar in making amendments
3 dated February 2017 to Standard 316 (Bar Passage) of the *ABA Standards and Rules of*
4 *Procedure for Approval of Law Schools.*

American Bar Association
Section of Legal Education and Admissions to the Bar
Revised Standards for Approval of Law Schools
February 2017

Standard 316. BAR PASSAGE

At least 75 percent of a law school's graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.

(a) A law school's bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:

(1) That for students who graduated from the law school within the five most recently completed calendar years:

- (i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or
- (ii) In at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.

In demonstrating compliance under sections (1)(i) and (ii), the school must report bar passage results from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency.

(2) That in three or more of the five most recently completed calendar years, the school's annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA-approved law schools taking the bar examination in these same jurisdictions.

In demonstrating compliance under section (2), the school must report first-time bar passage data from as many jurisdictions as necessary to account for at least 70 percent of its graduates each year, starting with the jurisdiction in which the highest number of graduates took the bar exam and proceeding in descending order of frequency. When more than one jurisdiction is reported, the weighted average of the results in each of the reported jurisdictions shall be used to determine compliance.

(b) A school shall be out of compliance with this Standard if it is unable to demonstrate that it meets the requirements of paragraph (a)(1) or (2).

(c) A school found out of compliance under paragraph (b) and that has not been able to come into compliance within the two-year period specified in Rule 13(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending the period the law school has to demonstrate compliance by submitting evidence of:

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- 45 (1) The law school's trend in bar passage rates for both first-time and subsequent takers: a
46 clear trend of improvement will be considered in the school's favor, a declining or flat
47 trend against it.
48
- 49 (2) The length of time the law school's bar passage rates have been below the first-time and
50 ultimate rates established in paragraph A: a shorter time period will be considered in the
51 school's favor, a longer period against it.
52
- 53 (3) Actions by the law school to address bar passage, particularly the law school's academic
54 rigor and the demonstrated value and effectiveness of its academic support and bar
55 preparation programs; value-added, effective, sustained and pervasive actions to address
56 bar passage problems will be considered in the law school's favor; ineffective or only
57 marginally effective programs or limited action by the law school against it.
58
- 59 (4) Efforts by the law school to facilitate bar passage for its graduates who did not pass the
60 bar on prior attempts: effective and sustained efforts by the law school will be considered
61 in the school's favor; ineffective or limited efforts by the law school against it.
62
- 63 (5) Efforts by the law school to provide broader access to legal education while maintaining
64 academic rigor; sustained meaningful efforts will be viewed in the law school's favor
65 intermittent or limited efforts by the law school against it.
66
- 67 (6) The demonstrated likelihood that the law school's students who transfer to other ABA-
68 approved schools will pass the bar examination: transfers by students with a strong
69 likelihood of passing the bar will be considered in the school's favor, providing the law
70 school has undertaken counseling and other appropriate efforts to retain its well-
71 performing students.
72
- 73 (7) Temporary circumstances beyond the control of the law school, but which the law school
74 is addressing: for example, a natural disaster that disrupts operations or a significant
75 increase in the standard for passing the relevant bar examination(s).
76
- 77 (8) Other factors, consistent with a law school's demonstrated and sustained mission, which
78 the school considers relevant in explaining its deficient bar passage results and in
79 explaining the school's efforts to improve them.

REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence, the attached changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*¹. Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the House seeking concurrence of the House in any actions of the Council to adopt, revise, or repeal the *ABA Standards and Rules of Procedures for Approval of Law Schools*. The House may either concur with the Council's decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the House. The decision of the Council following the second referral shall be final.

The amendments were approved by the Council for Notice and Comment during its meetings held on March 11-12, 2016, and June 3-4, 2016. A public hearing was held on August 6, 2016. The Council approved the amendments at its meeting on October 20-22, 2016.

Standard 316. BAR PASSAGE

The revised Standard moves to a clear and straightforward statement of the bar passage rate required of a law school for the purposes of accreditation. It looks to an ultimate pass rate for each graduating class of a law school after a period of two years following that class's graduation. While first-time pass rate is important for consumers and is (and will continue to be) disclosed under Standard 509 (Required Disclosures), the revision provides that, for the purposes of accreditation, an ultimate pass rate within the two-year period is the more appropriate measure of whether a school is operating a sound program of legal education.

The revision makes no attempt to place a limit on the number of times that an individual may sit for a bar exam. The Standard never has. That is a matter for each state to determine as part of its lawyer licensing process. The Standard speaks only to the ultimate bar passage rate expected of a law school for accreditation purposes.

The features of the revised Standard are:

1. The requirement of an ultimate passage rate of 75 percent remains unchanged from the requirement of current Standard 316(a)(1), at least for the present time. Further work would need to be done to gather and analyze data and to gather the views of various constituencies before it would be appropriate to recommend a change to what the current Standard requires in this regard.

There is data to support the proposition that a 75 percent ultimate pass rates is appropriate and will not have an adverse impact on law schools' continuing commitment to assist in diversifying the profession. The New York Advisory Committee on the Uniform Bar Examination reviewed data regarding the cumulative passing rates, by demographic group, of

¹ "2016-2017 ABA Standards and Rules of Procedure for Approval of Law Schools," http://www.americanbar.org/groups/legal_education/resources/standards.html

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candidates who graduated from ABA-approved law schools. Specifically, the Advisory Committee looked at graduates who took the bar exam for the first time in July from 2010 to 2013 and followed each annual cohort through the immediately following February bar exam.

The cumulative passing rates after two attempts (or opportunities) were as follows:

- Asian/Pacific Islander: 88.8%
- Black/African American: 79.6%
- Caucasian/White: 93.9%
- Hispanic/Latino: 87.4%

In no year did any group have less than a 75 percent passing rate after two attempts/opportunities. The lowest was the Black/African American group with a 76.8 percent passing rate after the July 2012/February 2013 cycle.²

The recent data from New York closely matches a study done in 1998 by the Law School Admission Council (LSAC), which provided assistance in setting the original target of 75 percent when Standard 316 [formerly Interpretation 301-6] was first developed. The LSAC National Longitudinal Bar Passage Study was undertaken primarily in response to anecdotal reports suggesting that bar passage rates were so low among examinees of color that potential applicants were questioning the wisdom of investing the time and resources necessary to obtain a legal education.

While dated, the LSAC Study is the only national bar passage study that looks at the performance of minority law school graduates both in terms of first-time and eventual bar passage rates. The study included data from 93 percent of the fall 1991 entering class.

The eventual passage rates for racial and ethnic groups were: American Indian, 82.2 percent (88 of 107); Asian American, 91.9 percent (883 of 961); black, 77.6 percent (1062 of 1368); Mexican American, 88.4 percent (352 of 398); Puerto Rican, 79.7 percent (102 of 128); Hispanic, 89.0 percent (463 of 520); white, 96.7 percent (18,664 of 19,285); and other, 91.5 percent (292 of 319).

The Study also noted that among those examinees of color who eventually passed, between 94 and 97 percent passed after one or two attempts and 99 percent passed by the third attempt. Among those who failed the first time but eventually passed, nearly three-quarters passed on their second attempt.³

In light of the need to ensure that schools are adequately preparing students to become lawyers, the Council views the change as necessary to promote confidence that an ABA-approved law school will, at a minimum, be accountable for 75 percent of its graduates passing a state bar examination within two years of graduation. The Council continues to be concerned that even under the proposed changes, a law school can remain in compliance with the bar passage standard even if 25 percent of its graduates who sit for the bar exam cannot pass it during this

² Data from NYSBLE, <https://www.nycourts.gov/ip/bar-exam/Appendices/14DataFromNYSBLE.pdf>

³ “LSAC National Longitudinal Bar Passage Study,” <http://www.unc.edu/edp/pdf/NLBPS.pdf>

two-year period, a result that is all the more problematic considering the high cost of legal education and the challenging job market that law graduates currently face.

2. The period of time within which a school must show that it has achieved a 75 percent passage rate is reduced from five calendar years to two years from the date of graduation, and the option of a school to show that the classes in three out of five of those years achieved a 75 percent passage rate is eliminated. The data available to the Council showed that the number of non-passers who persist in taking the MBE drops dramatically after the second attempt, with only about five percent taking it more than twice and a negligible number attempting the exam after four attempts. The data before the Council showed that the fall-off in persistence in re-taking the bar examination does not vary substantially on the basis of gender, race, or ethnicity. The Council believes that two years is an appropriate period of time within which to require that 75 percent of graduates of each law school taking a bar exam should have passed it for purposes of accreditation. That time frame provides a period during which almost all of a school's bar outcomes for a graduating class will be determined; the ultimate pass rate for a class will not be significantly improved by allowing a longer period. The two-year period to achieve compliance with the Standard has the advantage of providing a shorter timeline for the Council and the Accreditation Committee to initiate action against a school based on concerns that the law school may be admitting students who are not capable of passing a bar exam, or is offering a program that is not sufficiently rigorous to prepare its students for the exam.

Recent findings, also from New York, suggest that it is unlikely that this change will have a significant effect on schools' overall bar passage rates that must be accounted for under the Standard. The New York data show that the average passing rate of graduates of ABA-approved law schools taking the bar exam for the first time in July over the period 2004 to 2013 was 85 percent. Including February first-time takers, the passing rate for ABA graduates is 84 percent over that same period.

3. The ability of a law school to report its ultimate pass rate based on only 70 percent of its graduates is eliminated. The revised Standard does not require a law school to account for 100 percent of its graduates. It does, however, require them to account for as many as possible and, for accreditation purposes, to demonstrate that 75 percent of the members of the class who sat for a bar exam passed it within the two-year period. Schools that cannot, after making reasonable efforts, obtain bar passage data for all of their graduates will simply be asked to explain their efforts. Schools are able to obtain employment data from almost 100 percent of their graduates and will be able to do the same with bar passage information. A goal of this effort is that statistics for all schools, including those who are able to meet the Standard after just one year, will be maintained so that uniform information regarding ultimate passage rate is available for all schools.
4. For a number of reasons, the opportunity for a school to satisfy its obligations under Standard 316 on the basis of its bar pass rate for first-time takers is eliminated. The reliance on the results in these instances for accreditation purposes, based as it is on a comparison with statewide results, has many flaws. As a starting point, the question of accreditation should be based on the performance of the graduates of a law school without comparison to the graduates of any other law school. The Standards have moved away from comparisons between law schools in

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all others areas of evaluation (expenditures, volume count, etc.) and it should do so in this area as well. The value of using a statewide average as a baseline also has been questioned since it includes the pass rate of the school being evaluated. The use of this information also is of questionable value when there is only one law school in a jurisdiction.

5. The recitation of reasons in 316(c) for which a law school may request an extension of the period within which it may come into compliance beyond the two years set out in Rule of Procedure 14(b) is felt to be unnecessary, and the revision removes them. Rule 14(b) adequately describes the process for seeking an extension and, indeed, reasons that show good cause for an extension are not set out for any other Standard. If additional guidelines are believed to be warranted, they will be provided through a Guidance Memo instead of the Standard.

The Council acknowledges that some law schools will see the requirement that information be maintained and reported for a period of two years as an unnecessary burden if they regularly achieve a bar pass rate exceeding 75 percent for first-time takers. The Council believes, however, that this type of information has been kept regularly by the schools who have had to rely on ultimate bar pass rate to meet the Standard and that it is not overly burdensome.

Finally, the Council understands that there are some concerns that it would take seven years, the length of time between sabbatical visits, for the Accreditation Committee to become aware of the failure by a school to meet this Standard. However, the interim monitoring system currently being used by the Accreditation Committee has proven very successful in tracking schools that might be experiencing difficulty meeting the Standards, and it should be equally successful with this requirement.

The Council received written comments from 23 individual or organizations, most opposing the change in the Standard. The 14 speakers at the public hearing also opposed the recommendation. The opposition to the change centered principally on the following concerns: the lack of studies on how the proposed change would affect diversity and law school curricula; the lack of data on how law schools in states with low bar passage rates would be impacted; the lack of data showing that two years is sufficient for graduates to take a bar exam (in that there is anecdotal evidence that graduates do not take the bar in consecutive administrations); and the lack of data on how the Uniform Bar Exam will affect law schools' bar passage rates.

Respectfully submitted,

Gregory G. Murphy, Esq.
Billings, Montana

Chair, Council of the Section of Legal Education and Admissions to the Bar
February 2017

GENERAL INFORMATION FORM

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

Submitted By: Gregory G. Murphy, Esq., Chair

1. Summary of Resolution(s).

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2017 to Standard 316 (Bar Passage) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

2. Approval by Submitting Entity.

Yes. The amendments were approved by the Council for Notice and Comment during its meetings held on March 11-12, 2016, and June 3-4, 2016. A public hearing was held on August 6, 2016. The Council approved the amendments at its meeting on October 20-22, 2016.

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

Not applicable.

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.

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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; and Section Affiliated Organizations, including Access Group, Inc., American Association of Law Libraries, Association of American Law Schools, Association of Legal Writing Directors, Clinical Legal Education Association, Law School Admission Council, National Association for Law Placement, National Conference of Bar Examiners, and Society of American Law Teachers.

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

Barry A. Currier, Managing Director
American Bar Association
Section of Legal Education and Admissions to the Bar
321 N. Clark St., 21st floor
Chicago, IL 60654-7598
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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.)

The Honorable Christine M. Durham
Justice
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Scott Matheson Courthouse
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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

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2017 to Standard 316 (Bar Passage) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses Standard 316 (Bar Passage) of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. In accordance with Internal Operating Practice 8, the Council engages in an ongoing review of the Standards.

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

The proposals amend the 2016-2017 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

4. Summary of Minority Views

As indicated in the Report, opposition to the change to Standard 316 centered principally on the following concerns: the lack of studies on how the proposed change would affect diversity and law school curricula; the lack of data on how law schools in states with low bar passage rates would be impacted; the lack of data that two years is sufficient for graduates to take a bar exam in that there is anecdotal evidence that graduates do not take the bar in consecutive administrations; and the lack of data on how the Uniform Bar Exam will affect law schools' bar passage rates.

AMERICAN BAR ASSOCIATION
SECTION OF INTELLECTUAL PROPERTY LAW
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association supports the adoption of the nominative fair
- 2 use doctrine as an affirmative defense to claims of trademark infringement and unfair
- 3 competition.

REPORT

This Resolution and Report concerns the test federal courts apply to determine whether reference to a trademark by someone other than the mark owner, in the context of a commentary, comparison, or criticism of the mark owner's product or service, for example, is a permissible fair use. There is currently a split in the federal circuits over which test to apply to determine whether a reference to a mark is a permissible nominative fair use. This resolution favors treating nominative fair use as an affirmative defense, because this approach would best achieve the policy goals of separating the issue of consumer confusion from the fairness of the use, by making the plaintiff prove confusion before placing any burden on defendants, and of permitting a finding of fair use even when some consumer confusion is created by the use.

Overly vigorous policing of trademark rights can chill speech. The "nominative fair use" doctrine protects those who reference the mark of another from liability when that use is to comment on the product or service. For example, it protects comparative advertising, product review, criticism, and parody. There is currently a split in the federal circuits over which test to apply to determine whether a reference to a mark is a permissible "nominative fair use." The circuit split on the proper standard is extensive, and includes the application of several different tests: (1) nominative fair use as an affirmative defense once the plaintiff has proven infringement in the form of a likelihood of confusion between the parties' marks or some other form of trademark-related unfair competition;¹ (2) a supplemented likelihood-of-confusion test, which adds fair use considerations to the traditional likelihood-of-confusion" factors; (3) a new test, that replaces the likelihood of confusion test, in which the plaintiff must show that the defendant's use was not a nominative fair use, but does not require plaintiff to prove a likelihood of confusion exists; or (4) no test, pursuant to which a court instead applies the traditional likelihood-of-confusion test without regard to special fair use considerations.

The need to protect speech is paramount. The usefulness of, and potential for reliance on, permitted nominative fair use applies to a wide range of marketplace and media participants, including competitors, commentators, consumer advocates, and critics. Therefore, the nominative fair use test adopted by the federal courts should be most consistent with preserving an individual's right to comment on or express an opinion while referring to the mark owner's goods or services without fear of sanctions. And the defense should analyze the fairness of the defendant's use without unfairly weighing the determination towards a finding of confusion. The Resolution therefore favors adoption of the nominative fair use defense as an affirmative defense to trademark infringement that need only be asserted if the plaintiff first has proven that the defendant's use of the disputed mark is likely to cause confusion. The Resolution does not advance a position on what factors are relevant to prove nominative fair use.

¹ Although likelihood-of-confusion-based causes of action such as those available under the federal Lanham Act and the Uniform Deceptive Trade Practices Act are the most commonly-used mechanisms for protecting trademark rights, the Lanham Act and the law of most states also protect the fame and distinctiveness of marks against actual or likely dilution. Reported opinions addressing the nature of the nominative fair use doctrine in the dilution context are rare, but there is no readily apparent reason why the reasons underlying the policy proposed by this resolution should not apply with equal force in that context. Unless otherwise noted, this report therefore does not distinguish between the two.

The Section of Intellectual Property Law requests the House of Delegates to approve this Resolution, which would provide the basis for either Association support of legislation to codify nominative fair use doctrine as an affirmative defense by amending the federal trademark statute, the Lanham Act, 15 U.S.C. § 1051 et seq., or an Association amicus curiae brief in the U.S. Supreme Court in *Security Univ., LLC v. Int'l Information Sys. Security Certification Consortium, Inc.*, 823 F.3d 153 (2d Cir. 2016), *petition for cert. filed*, No. 16-352 (U.S. Sept. 15, 2016), should the petition for certiorari be granted in that case or some other relevant case. If Security University's petition is 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.

A. Likelihood of Confusion and the "Polaroid" Factors

Trademarks and service marks allow consumers to identify the source of goods and services. As consumers become familiar with certain branded goods and services and the companies selling them, they come to expect consistent quality in all of their products. Trademark law generally allows individuals and companies to protect their brand, and the expectation of quality or other goodwill they have established with their customers. It accomplishes that by preventing the use of a mark likely to cause confusion over whether the goods or services of one party originate with the other party or are otherwise sponsored, licensed, or affiliated with that party. This is the test for infringement under the Lanham Act and corresponding state law. *See, e.g.*, 15 U.S.C. §§ 1114, 1125(a).

All circuits use a multifactor test to determine whether confusion is likely between two marks. The particular factors vary from circuit to circuit, but all of the tests are similar. One influential set of factors was set forth in *Polaroid Corp. v. Polarad Elec. Corp.*, 287 F.2d 492 (2d Cir. 1961). These factors, often referred to as the "Polaroid factors," generally include:

- (1) the strength of the senior user's mark; the stronger or more distinctive the senior user's mark, the more likely the confusion;
- (2) the similarity of the parties' marks;
- (3) the similarity of the parties' goods or services;
- (4) the likelihood of one party "bridging the gap" between the parties' markets;
- (5) the junior user's intent or bad faith;
- (6) evidence of actual confusion;
- (7) the sophistication of purchasers of the parties' goods; and
- (8) the quality of the junior user's products or services.

In applications of this test and those extant in other circuits, no single factor determines whether confusion is likely, and not all factors carry the same weight. *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 478 (5th Cir. 2008).

B. The Nominative Fair Use Doctrine

To preserve their rights, mark owners must monitor and police the unauthorized use of their marks by others. A plaintiff's failure to object to an infringing use might bar a later claim of

infringement under, for example, the doctrines of laches and acquiescence. Overly vigorous policing of a mark, however, may chill First Amendment-protected speech.

Although its name is of relatively recent origin, the nominative fair use doctrine has long protected the ability of defendants to use plaintiffs' marks to refer to the plaintiffs' own goods and services. (In other words, liability for infringement or unfair competition is possible only if a defendant has used a confusingly similar imitation of a plaintiff's mark to refer to the defendant's goods or services.) "Nominative use" is not a trademark use but rather a reference to a particular product for purposes of comparison, criticism, point of reference or any other such purpose." See, e.g., *New Kids on the Block v. News Am. Publ'ns, Inc.*, 971 F.2d 302, 306 (9th Cir. 1992). Without a strong nominative fair use standard that is appropriately respectful of commentary, criticism, or complaints about a given mark or brand, the successful assertion of trademark rights could violate the First Amendment, and, indeed, at least the Ninth Circuit has suggested the nominative fair use doctrine is grounded in the Amendment. See *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171 (9th Cir. 2010).

The federal Lanham Act does not expressly recognize the nominative fair use doctrine in cases of infringement; instead, the doctrine is wholly judge-made in that context. In contrast, Section 43(c)(3)(A) of the Act does recognize nominative fair use in cases in which plaintiffs seek relief against the likely dilution of the distinctiveness of their marks, but that statute styles the doctrine as an "exclusion" from liability without defining "exclusion" as either an affirmative defense, on the one hand, or something to be overcome by a plaintiff as part of its prima facie of liability. See 15 U.S.C. § 1125(c)(A). Consequently, the Act itself provides little guidance on the nature of the doctrine and its parameters.

C. A Four-Way Circuit Split

While all circuits addressing the issue agree a nominative use of another's mark is not an infringing or diluting use, there is no consensus among the circuits on whether the doctrine establishes an affirmative defense, acts to modify or replace the traditional likelihood of confusion infringement test, or even whether a nominative fair use test should apply. There is a four-way circuit split:

- (1) The Third Circuit treats nominative fair use as an affirmative defense employed only if the plaintiff has already proven a likelihood of confusion. *Century 21 Real Estate Corp. v. LendingTree Inc.*, 425 F.3d 211 (3d Cir. 2005).
- (2) The Ninth Circuit replaces the traditional likelihood-of-confusion test with a three-factor test for determining if the use is fair, and places the burden on the plaintiff to show the defendant's use was not a nominative fair use. *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1175-76, 1183 (9th Cir. 2010). The Seventh and Eleventh Circuits' tests are modeled after the Ninth Circuit's test. See *Int'l Stamp Art, Inc. v. U.S. Postal Serv.*, 456 F.3d 1270, 1277 (11th Cir. 2006) (citing Ninth Circuit test for the proposition that defendant's use of a portion of plaintiff's mark did not "implicate the source-identification function

that is the purpose of trademark”); *Ill. High Sch. Ass’n v. GTE Vantage Inc.*, 99 F.3d 244, 246 (7th Cir. 1996) (citing Ninth Circuit test in dictum).

- (3) The Second Circuit’s approach combines the traditional *Polaroid* likelihood-of-confusion factors with the nominative fair use factors used in the Third and Ninth Circuits’ tests to create an expanded list of factors. *Int’l Info. Sys., Sec. Cert. Consortium, Inc. v. Security Univ., LLC*, 823 F.3d 153, 168 (2d Cir.), *petition for cert. filed*, No. 16-352 (Sept. 15, 2016). The Fifth Circuit’s test is very similar to that employed by the Second Circuit. *Pebble Beach Co. v. Tour 18 Ltd.*, 155 F.3d 526, 547 (5th Cir. 1998) *abrogated on other grounds by TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001).
- (4) The Sixth Circuit has not adopted a nominative fair use test. *See PACCAR Inc. v. TeleScan Techs., L.L.C.*, 319 F.3d 243, 256 (6th Cir. 2003). Instead, it applies its traditional eight-factor likelihood-of-confusion test defined in *Frisch’s Restaurants, Inc. v. Elby’s Big Boy of Steubenville, Inc.*, 670 F.2d 642, 648 (6th Cir. 1982).

The First, Fourth, Eighth, Tenth, and D.C. Circuits appear undecided as to which test to apply.

D. The Supreme Court’s Prior Trademark Fair Use Analysis

The Supreme Court has addressed fair use issues three times in the trademark context.

In 1924, in *Prestonettes, Inc. v. Coty*, 264 U.S. 359 (1924), the Supreme Court faced the issue of whether a rebottled perfume bearing a disclaimer of non-affiliation naming the maker of the perfume infringed the owner’s mark. The Court held the relevant question was not whether the use of the maker’s name constitutes unfair competition but whether the maker had a right to prevent others from “making even a collateral reference to plaintiff’s mark.” *Id.* at 366-367, 369. The Court held a trademark does not “confer a right to prohibit the use of [a] word or words. It is not a copyright.” *Id.* at 369. “When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth.” *Id.* Even in 1924, the Court appeared to have recognized the doctrine of nominative fair use and that a proper analysis separates issues of confusion from the question of the appropriateness of the use.

In a case dealing with second-hand goods, the Supreme Court applied the same reasoning to affirm a decree allowing a spark plug reconditioner to use the Champion trademark on the reconditioned spark plugs, so long as the reconditioned goods were clearly marked as ‘repaired’ or ‘used.’ After considering the lower cost and inferiority expected with second-hand goods, the Court observed that under the rule of *Prestonettes*, it is “wholly permissible” for the second-hand dealer to get some advantage of the mark, so long as the mark owner is not identified with the inferior condition resulting from wear and tear of use or the reconditioning. *Id.* at 130. As in *Prestonettes*, however, the Court did not address the parties’ respective burdens.

Finally, the Supreme Court has also grappled with the affirmative defense of *descriptive* fair use as provided for in 15 U.S.C. § 1115(b)(4). Descriptive fair use enables a defendant to use the

language found in another’s trademark merely to describe its own products or services, but only in a nontrademark sense and only in good faith. In *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004), Lasting owned the trademark “Micro Colors,” while both parties used the term “microcolor” to describe the pigment they used in the permanent makeup they sold. The Court held a defendant raising the statutory affirmative defense of descriptive fair use has no burden to negate a plaintiff’s prima facie showing of likely confusion. *Id.* at 117-21. In holding the likelihood-of-confusion test for infringement is a separate and distinct inquiry from the descriptive fair use defense, the Court observed:

It is just not plausible that Congress would have used the descriptive phrase “likely to cause confusion, or to cause mistake, or to deceive” in §1114 to describe the requirement that a markholder show likelihood of consumer confusion, but would have relied on the phrase “used fairly” in §1115(b)(4) in a fit of terse drafting meant to place a defendant under a burden to negate confusion.

Id. at 118. The Court then held that the descriptive fair use defense requires the plaintiff to prove likely confusion as part of its prima facie case of infringement, and, additionally, that the defendant need only establish descriptive fair use to escape liability. Specifically, “some possibility of consumer confusion must be compatible with fair use.” *Id.* at 121.

E. By Establishing an Affirmative Defense, The Third Circuit Approach Properly Separates the Likelihood-of-Confusion Factors from the Question of Fair Use

A test that simply merges fair use considerations into the likelihood-of-confusion test is not a true fair use test. Such a merged test would likely diminish fair use considerations because two key factors for determining likelihood of confusion, the degree of similarity between the marks and the similarity of the owner’s goods or services, would often unfairly weigh the determination heavily towards a finding of confusion. In *Century 21 Real Estate Corp. v. LendingTree Inc.*, 425 F.3d 211 (3d Cir. 2005), the Third Circuit noted the degree of similarity between the marks and the strength of the owner’s mark will always lead to a finding of confusion. *Id.* at 225. Similarly, the Fourth Circuit has acknowledged not all of the likelihood-of-confusion factors are relevant in the context of nominative use because “many of the factors are either unworkable or not suited or helpful as indicators of confusion in this context.” *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153-54 (4th Cir. 2012) (internal quotation marks omitted).

A proper fair use analysis treats the likelihood-of-confusion determination separate from the question of the appropriateness of the use. Adoption of the nominative fair use defense as an affirmative defense achieves that goal. By adopting fair use as an affirmative defense, the Third Circuit’s approach best achieves the policy goals of separating the issue of consumer confusion from the fairness of the use by making the plaintiff prove confusion before placing any burden on defendants, while also permitting a finding of fair use even when some consumer confusion is created by the use.

The Third Circuit’s test treats nominative fair use as an affirmative defense employed only if the plaintiff has proven a likelihood of confusion. *Century 21 Real Estate Corp. v. LendingTree Inc.*,

425 F.3d 211 (3d Cir. 2005). The Court reasoned this approach properly places the initial burden of proving likely confusion on the plaintiff, *id.* at 221, and, for nominative fair use to truly function as a defense, it must be applicable even in cases where a plaintiff is able to show a likelihood of confusion, *id.* at 222. The approach is bifurcated; it first requires the plaintiff to prove a likelihood of confusion and then offers the defendant the opportunity to demonstrate the use is fair.

The Third Circuit's analysis is grounded in the Supreme Court's analysis found in *KP Permanent Make-Up*. In the similar context of descriptive fair use, the Court also held that confusion and fair use were separate and distinct issues and that a defendant asserting a fair use defense had no obligation to demonstrate an absence of confusion, since likely confusion was part of the plaintiff's case. 543 U.S. at 121. The Third Circuit held the Supreme Court's reasoning should apply not only in a descriptive fair use case, but in the nominative fair use context as well. *Century 21*, 425 F.3d at 221. Thus, in a nominative fair use case in the Third Circuit, a plaintiff must demonstrate a likelihood of confusion, after which the defendant may offer evidence its use was fair, even if some likelihood of confusion had resulted. The court reasoned that, because the defendant ultimately uses the plaintiff's mark the potential for confusion exists even in a true nominative sense. *Id.*

Although this Resolution does not recommend adoption of any specific set of factors to be used in the analysis, the Third Circuit has provided a good example of how such an affirmative test might be applied. In the Third Circuit, the plaintiff must first prove a likelihood of confusion exists using the traditional factors, known as the *Lapp* factors in the Third Circuit, *Id.* at 224. The Third Circuit focuses on four of the *Lapp* factors:

- (1) price of the goods and other factors indicative of the care and attention that may be expected of consumers when making a purchase;
- (2) length of time, if any, defendant has used the mark without actual confusion;
- (3) intent of defendant in using the mark; and
- (4) evidence of actual confusion.

Id. at 225-26.

The Third Circuit justified its focus on these factors on the ground "they analyze the likelihood that a consumer will be confused as to the relationship and affiliation between [the senior and junior users], the heart of the nominative fair use situation." *Id.* at 226. The court did, however, note the remaining *Lapp* factors could be relevant in certain cases:

- (1) whether the goods, though not competing, are marketed through the same channels of trade and advertised through the same media;
- (2) the extent to which the targets of the parties' sales efforts are the same;
- (3) the relationship of the goods in the mind of the consumers because of the similarity of function; and

- (4) other facts suggesting that the consuming public might expect the prior owner to manufacture a product in the defendant's market or that he is likely to expand into that market.

Id. at 224-25.

Once the trademark owner meets its burden of proving confusion, the burden shifts to the defendant to prove the affirmative defense of nominative fair use. This requires the defendant to show:

- (1) the challenged use of plaintiff's mark is necessary to describe both plaintiff's product or service and defendant's;
- (2) defendant has used only so much of plaintiff's mark as is necessary to describe plaintiff's products or services; and
- (3) the defendant's conduct or language reflects the true and accurate relationship between plaintiff and defendant's products or services.

Id. at 228. This fair use test consists of factors emphasizing the nature of the defendant's use of the disputed mark over the likelihood the use will cause confusion.

F. Treating Nominative Fair Use as an Affirmative Defense is Consistent with the Statutory Scheme of Fair Use Provided in the Lanham Act

Treating the judicially created defense of nominative fair use as an affirmative defense, rather than an alternative test or compliment to the likelihood of confusion or dilution test, fits into the statutory scheme of "fair use" in the Lanham Act.

Statutory fair use, also called "classic" or descriptive fair use, is an affirmative defense under the Lanham Act to a claim of trademark infringement if an accused infringer can prove three elements, namely that the mark was:

- (1) not used as a trademark or service mark;
- (2) used "fairly and in good faith;" and
- (3) used "only to describe" the accused infringer's goods or services.

See 15 U.S.C. § 1115(b)(4). So long as the use complies with the statute, the affirmative defense applies regardless of the strength of the mark along the distinctiveness spectrum. A defendant can prevail on statutory fair use grounds even if a plaintiff has established infringement in the form of likely confusion.

Within the context of dilution, descriptive fair use and nominative fair use are treated the same under the Lanham Act. Descriptive fair use and nominative fair use are statutorily created "exclusions" to dilution.

- (3) Exclusions The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:

(A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with—

(i) advertising or promotion that permits consumers to compare goods or services; or

(ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.

15 U.S.C. § 1125(c)(3). Treating the judicially-created doctrine of nominative fair use as an affirmative defense fits into the statutory scheme of descriptive fair use as written into the Lanham Act by Congress.

G. Conclusion

A significant split exists among the circuits on whether there should be a separate test for the nominative fair use of a challenged trademark and, if so, how courts should apply that test. Treating nominative fair use as an affirmative defense is the most reasonable approach because it strikes the right balance between protecting a plaintiff's reputation and its valuable goodwill and protecting speech in the context of product comparisons, commentary, and criticism.

Respectfully submitted,

Donna P. Suchy, Chair
Section of Intellectual Property Law
February 2017

GENERAL INFORMATION FORM

Submitting Entity: Section of Intellectual Property Law

Submitted by: Donna Suchy, Section Chair

1. Summary of Resolution

The resolution calls for the Association to adopt policy supporting recognition of the nominative fair use doctrine as an affirmative defense to allegations of trademark infringement and unfair competition. While most circuits have adopted a test taking nominative fair use into account, not all tests treat the issue of likelihood-of-confusion-based test for infringement separate from the question of whether the use was fair. Some circuits allow issues of consumer confusion to be part of the analysis. But because key factors for determining likelihood of confusion will often unfairly weigh the determination heavily towards a finding of confusion, preferred fair use analysis treats likelihood of confusion separately from the question of the appropriateness of the use.

2. Approval by Submitting Entity

The Section Council approved the resolution on Nov. 11, 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 an Association *amicus* brief, if the Supreme Court grants certiorari in *Int'l Info. Systems Sec. Cert. Consortium, Inc. v. Security Univ., LLC*, 823 F.3d 153, 168 (2d Cir. 2016) or other appropriate judicial forum in a case presenting the issues that are addressed in the policy or for the Association to request that Congress amend the applicable statute.

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, Forums, 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 and Report concerns the test federal courts apply to determine whether reference to a trademark by someone other than the mark owner, in the context of a commentary, comparison, or criticism of the mark owner's own goods or services, for example, is a permissible nominative fair use. Treating nominative fair use as an affirmative defense is the best approach for preserving an individual's right to comment on or express an opinion while referring to the mark owner's goods or services without fear of sanctions.

The resolution calls for the Association to adopt policy supporting recognition of the nominative fair use doctrine as an affirmative defense to allegations of trademark infringement and unfair competition.

2. Summary of the Issue that the Resolution Addresses

Because key factors for determining the existence of trademark infringement in the form of likely confusion will often unfairly weigh the determination heavily towards a finding of liability, to protect freedom of expression, a proper nominative fair use analysis should treat likelihood of confusion separate from the question of the appropriateness of the use. Nominative fair use should be an affirmative defense required only after the plaintiff has proven likely confusion. Nevertheless, several circuits combine the two tests, leaving the right of others to comment on marks, free from the threat of trademark infringement, in doubt.

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

The resolution addresses the circuit split, favoring the Third Circuit's approach of treating nominative fair use as an affirmative defense. The resolution will provide a basis for the Association to ask Congress to amend the applicable federal statute or submit a brief if the Supreme Court grants certiorari in *Int'l Info. Systems Sec. Cert. Consortium, Inc. v. Security Univ., LLC*, 823 F.3d 153, 168 (2d Cir. 2016) or in another appropriate case.

4. Summary of Minority Views

The Section of Intellectual Property Law is unaware of any inconsistent views among ABA entities.

Different views are reflected in the different treatments in different circuits. While all circuits addressing the issue agree the nominative use of another's mark is not an infringing or diluting use, there is a four-way circuit split as to how the nominative fair use doctrine should be applied: as an affirmative defense to infringement (the approach

avored by the resolution); as an additional factor in the traditional likelihood-of-confusion test for infringement; in a three-factor test that replaces the traditional likelihood-of-confusion test, which places the burden on the plaintiff to show the defendant's use was not a nominative fair use; or no specified application of a nominative fair use test.

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges the United States Department of
2 Justice to continue its accuracy and quality assurance efforts in the area of microscopic
3 hair analysis.

4
5 FURTHER RESOLVED, That the American Bar Association urges state, local and tribal
6 prosecutors:

- 7
8 (i) to review in a timely manner cases in which they have received notice
9 from the United States Department of Justice, or notice from their own
10 jurisdiction, of the possibility that forensic examiners provided erroneous
11 or potentially misleading statements or testimony concerning microscopic
12 hair analysis;
13
14 (ii) to consider establishing a policy, in the interest of justice, of waiving any
15 statute of limitations or procedural defense, in order to permit the
16 resolution of post-conviction claims arising from errors that undercut the
17 reliability of the conviction; and
18
19 (iii) to ask state and local forensic laboratories whether their examiners have
20 provided erroneous or potentially misleading statements or testimony
21 concerning microscopic hair analysis and, if such instances are identified,
22 to take appropriate corrective action.

23
24 FURTHER RESOLVED, That the American Bar Association urges all defense counsel
25 and criminal defense organizations to take appropriate action upon receiving notice or
26 becoming aware of any such erroneous statements or testimony given in cases in which
27 they represented a defendant at trial or on appeal. Appropriate action, consistent with
28 ABA Criminal Justice Standards for the Defense Function, Standard 4-9.4, would
29 include:
30

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31 (i) to evaluate the information, investigate if necessary, and determine what
32 potential remedies are available;

33
34 (ii) to advise and consult with the client; and
35

36 (iii) to determine what action if any to take, which might include, if prior
37 counsel is unavailable, taking steps to see that new counsel is appointed.
38

39
40 FURTHER RESOLVED, That the American Bar Association urges the United States
41 Department of Justice and appropriate state, local and tribal authorities to continue efforts
42 to identify other erroneous or misleading forensic testimony and, if discovered, to take
43 appropriate remedial steps similar to those recommended in this Resolution.

REPORT

Summary

Following a series of DNA exonerations in cases where expert testimony from Federal Bureau of Investigation (FBI) forensic examiners purporting to link, by microscopic comparison, hair taken from crime scenes to hair samples taken from particular suspects, the United States Department of Justice (DOJ) undertook a comprehensive review of cases, both state and federal, that had involved expert reports and testimony from FBI examiners on the subject of microscopic hair analysis. Recognizing the scope of the problem and the nature of the issue raised, DOJ and the FBI formed a partnership with the Innocence Project, the National Association of Criminal Defense Lawyers (NACDL) and private counsel, acting *pro bono*, to identify erroneous or potentially misleading reports and testimony in these cases and to notify state and local prosecutors, as well as defense counsel, of their findings. DOJ also agreed to provide modern DNA testing in cases that had involved flawed testimony and also agreed, in federal cases, to waive procedural defenses to post-conviction relief.

These measures commendably establish a policy of promoting conviction integrity, in partnership with the bar that is consonant with a broad range of ABA policy in the areas of criminal justice, legal ethics and forensic evidence.

The National Academy of Sciences Report

In 2005, Congress, “recognizing that significant improvements are needed in forensic science,” directed the National Academy of Sciences (NAS) to undertake a study that led to the publication, in 2009, of a wide-ranging report that, among other things, revealed flaws in the way expert testimony concerning the comparison of hairs under a microscope was being submitted in forensic reports and admitted in court.¹

The 2009 NAS Report concluded that, even though “courts have explicitly stated that microscopic hair analysis is a technique generally accepted in the scientific community,”² the technique is not supported by scientifically accepted statistics or uniform standards and that expert reporting terminology concerning the technique, therefore, is susceptible of significant “imprecision.”³ The NAS Report also noted that despite the finding of some courts concerning this technique’s general acceptance in the scientific community, “courts also have recognized that testimony linking microscopic hair analysis with particular defendants is highly unreliable.”⁴

¹ *Strengthening Forensic Science in the United States: A Path Forward* (2009) (“NAS Report”), at 155-162, available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

² NAS Report, at 161, citing *State v. West*, 877 A.2d 787 (Conn. 2005) and *Bookins v. State*, 922 A.2d 389 (Del. Supr. 2007).

³ *Id.*

⁴ *Id.*

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Early Research On Hair Comparison Testimony

In an important 2009 law review article, Brandon L. Garrett of the University of Virginia School of Law and Peter J. Neufeld, Co-Founder and Co-Director of the Innocence Project, explored the forensic science testimony of prosecution experts that was given in the trials of 137 persons who had been convicted of serious crimes and were later exonerated by post-conviction DNA testing.⁵ Professor Garrett and Mr. Neufeld identified two basic types of “invalid science testimony” as having occurred in these cases (the “misuse of empirical population data” and conclusions regarding the probative value of evidence “that were unsupported by empirical data”) and concluded that of the 65 trials that involved microscopic hair comparison analysis, 25 of these cases -- or 38% - included invalid hair comparison testimony.⁶

Three Exonerations Focus Attention On Flaws In Hair Comparison Testimony

Further bringing this issue onto the forefront of public concern, between 2009 and 2012, in three separate, widely publicized cases, Donald Gates, Kirk Odom and Santae Tribble, who had served lengthy prison sentences and who had been convicted in part on the basis of microscopic hair analysis that exceeded the limits of science, were exonerated.⁷

Collaborative Response Efforts Of The FBI, DOJ, The Innocence Project and NACDL

Throughout 2012, as the result of these circumstances, DOJ and the FBI collaborated with the Innocence Project, NACDL and private attorneys acting *pro bono* to create protocols for a joint project that quickly was hailed as an “historic breakthrough” in law enforcement’s commitment to conviction integrity.⁸ DOJ first committed to identify and review cases where a microscopic hair examination conducted by the FBI was part of the evidence in a case that resulted in a conviction and promised to make FBI resources available to facilitate reliable forensic testing on any hair samples that might still be available.⁹ The review focused on cases worked prior to 2000, when mitochondrial DNA testing on hair became routine at the FBI.¹⁰ Then, on November 9, 2012, an agreement was reached among DOJ, the FBI, the Innocence Project and

⁵ Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony & Wrongful Convictions*, 95 Va. L. Rev. 1 (2009).

⁶ *Id.*, at 47.

⁷ See the reports on these cases, published by Innocence Project and available at: <http://www.innocenceproject.org/cases/donald-eugene-gates/>, <http://www.innocenceproject.org/cases/kirk-odom/> and <http://www.innocenceproject.org/cases/santae-tribble/>.

⁸ E.g., Norman L. Reimer, *The Hair Microscopy Review Project: An Historic Breakthrough for Law Enforcement and a Daunting Challenge for the Defense Bar*, *Champion* (July, 2013), p.16, fn. 5.

⁹ Spencer S. Hsu, *Justice Department, FBI to Review Use of Forensic Evidence in Thousands of Cases*, *The Washington Post*, July 10, 2012.

¹⁰ April 20, 2015 Press Release, available at <https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review>.

NACDL:

The scientific analysis of hair evidence permits a well-trained hair examiner to offer an opinion that a known individual can either be included or excluded as a possible source of a questioned hair collected at a crime scene. Microscopic hair analysis is limited, however, in that the size of the pool of people who could be included as a possible source of a specific hair is unknown. ***An examiner report or testimony that applies probabilities to a particular inclusion of someone as a source of a hair of unknown origin cannot be scientifically supported.*** This includes testimony that offers numbers or frequencies as explicit statements of probability, or opinions regarding frequency, likelihood, or rareness implicitly suggesting probability. Such testimony exceeds the limits of science and is therefore inappropriate.

Error Type 1: The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others. This type of testimony exceeds the limits of the science.

Error Type 2: The examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association. This type of testimony exceeds the limits of the science.

Error Type 3: The examiner cites the number of cases or hair analyses worked in the lab and the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that a hair belongs to a specific individual. This type of testimony exceeds the limits of the science.¹¹

These errors have turned out to be widespread. After the first phase of review, DOJ, the FBI, the Innocence Project and NACDL reported that over 96% of the cases reviewed had turned up erroneous reports or testimony concerning the significance of microscopic hair comparisons.¹² Where this review identified potentially flawed report or testimony in a state case, DOJ did not conduct merits review but rather notified the prosecution and defense for further review. As of September 2016, DOJ had sent notice in over 1,200 cases. Many of these errors, unrecognized at the time, were found to have been used by federal and state prosecutors in cases that resulted in convictions, and the

¹¹ Press Release, dated November 9, 2012, second paragraph (“February 9, 2012 agreement”), emphasis supplied.

¹² See Federal Bureau of Investigation Press Release, “FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review” (Apr. 20, 2015), at <https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review>.

FBI thereupon notified a large number of defendants in 46 states and the District of Columbia that their convictions involved flawed expert testimony, without regard to whether those errors were material to the conviction or not.¹³

Ongoing Debate Concerning Microscopic Hair Analysis As A Forensic Discipline And DOJ's Proposed Expert Testimony For Hair Examiners.

As a result of this preliminary work on hair microscopy, there was sufficient interest in conducting a more comprehensive review of forensic disciplines that DOJ established, on April, 23, 2015 the National Commission on Forensic Science, in partnership with the National Institute of Standards and Technology.¹⁴ The Commission's goal is to review and strengthen the reliability of various forensic disciplines, enhance quality control in forensic labs and recommend protocols for evidence collection, testing, analysis and reporting by forensic science laboratories and units, to the end (among other things) of developing "proposed guidance concerning the intersection of forensic science and the courtroom."¹⁵ On March 22, 2016, the National Commission on Forensic Science recommended that the Attorney General direct all attorneys appearing on behalf of the Department of Justice "(a) to forego use of the terms 'to a reasonable degree of scientific certainty' or 'to a reasonable degree of [forensic discipline] certainty' unless directly required by judicial authority as a condition of admissibility for the witness' opinion or conclusion, and (b) to assert the legal position that such terminology is not required and is indeed misleading."¹⁶

DOJ, in consultation with the NCFS, undertook an independent forensic science discipline review (FSDR) to determine whether "testimonial overstatement" exists in "disciplines that rely heavily on human interpretation and where the degree of certainty can be difficult to quantify."¹⁷ In the course of that review, DOJ developed a draft methodology for retrospective review of testimony offered in various forensic disciplines, to ensure the consistency of expert forensic testimony with "scientific principles and just

¹³ Spencer S. Hsu, "After FBI admits overstating forensic hair matches, focus turns to cases," *The Washington Post*, April 20, 2015, available at https://www.washingtonpost.com/local/crime/after-fbi-admits-overstating-forensic-hair-matches-focus-turns-to-cases/2015/04/20/a846aca8-e766-11e4-9a6a-c1ab95a0600b_story.html

¹⁴ See *Charter*, National Commission on Forensic Science (filed with Congress April 23, 2015), available at: <https://www.justice.gov/ncfs/file/624216/download>.

¹⁵ *Id.*, ¶¶3, 4.

¹⁶ National Commission on Forensic Science, *Recommendations to the Attorney General Regarding Use of the Term "Reasonable Scientific Certainty,"* available at: <https://www.justice.gov/ncfs/file/839726/download>.

¹⁷ Remarks, Deputy U.S. Attorney General Sally Q. Yates, Annual Meeting of the American Academy of Forensic Science (Feb. 24, 2016), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-during-68th-annual-scientific>

outcomes.”¹⁸ The draft methodology was presented to the NCFS, published for public comment, and scrutinized by a DOJ-hosted statistician roundtable. DOJ also posted a written response to public comments. Finally, the DOJ also developed sets of uniform language, spanning several forensic disciplines, for prospective use by DOJ forensic examiners when drafting reports and giving testimony. DOJ presented the proposed language to the NCFS and published it for public comment.¹⁹

Finally, the President's Council of Advisors on Science and Technology (PCAST) undertook a parallel review of some forensic disciplines, at the request of President Obama, to determine what additional steps the Administration could take to “help ensure the validity of forensic evidence used in the Nation's legal system.”²⁰ PCAST issued a report in September 2016 that identified two important needs: 1) clarity about the scientific standards for the validity and reliability of forensic methods, and 2) evaluation of specific forensic methods to determine whether they have been scientifically established to be valid and reliable.²¹

State Court Issues

As a result of DOJ's initiative, there have been efforts to promote federal and state law enforcement cooperation in identifying cases in which erroneous hair comparison analysis may have played a part in convictions. On February 26, 2016, and again on June 10, 2016, FBI Director James B. Comey sent letters to all state Governors explaining that in the 1980s and 1990s FBI examiners commonly had provided erroneous expert testimony and seeking specific transcripts from prosecutors in cases where an FBI hair examiner had testified.²² Director Comey also advised the Governors that the FBI had previously offered introductory training on hair comparison to state and local labs, which could have introduced error into state and local lab work, and that the FBI has notified the labs that sent employees to this training; Director Comey encouraged the Governors to look into whether state and local lab examiners were staying within the

¹⁸ Department of Justice, *Forensic Science Discipline Review: Draft Methodology*, at 3, available at <https://www.justice.gov/ncfs/file/899731/download>

¹⁹ Department of Justice, *Proposed Language Regarding Expert Testimony and Lab Reports in Forensic Science for Public Comment*, available at <https://www.justice.gov/dag/forensic-science#prop>.

²⁰ Report to the President, President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (“PCAST Report”), at x, available at

https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_report_final.pdf.

²¹ *Id.*

²² See February 26, 2016 and June 10, 2016 letters of James B. Comey, available at <https://www.fbi.gov/file-repository/second-governor-letter-061016.pdf/view>.

bounds of science and, if they weren't, to take appropriate corrective action.²³ On April 21, 2013, the American Society of Crime Lab Directors recommended that all state and local crime labs consult with appropriate legal authorities to consider whether there may be past cases involving convictions in which it would be appropriate to evaluate the potential impact of any erroneous testimony concerning hair analysis on the conviction.²⁴

Some states have followed DOJ's lead and undertaken their own review of cases in which state crime lab analysts conducted forensic analysis of hair samples.²⁵ For example, the Texas Forensic Science Commission has created a microscopic hair comparison review panel that includes the state affiliates of IP and the NACDL, the Texas District & County Attorneys Association, and the Texas Criminal Justice Integrity Unit, an *ad hoc* committee of the Texas Court of Criminal Appeals.²⁶ The approach undertaken in Texas has avoided unduly aggravating existing laboratory backlogs by providing some funding for review and adopting an initial sub-sampling approach.²⁷ The largest District Attorney's office in Massachusetts has established a partnership with the New England Innocence Project.²⁸ Similarly, in Minnesota, the Bureau of Criminal Apprehension, which operates state forensic laboratories, is working with the state Innocence Project, the state public defender's office and the state bar association to flag cases that may involve flawed hair comparison testimony.²⁹

With respect to the decision whether to assert procedural defenses in particular cases however, DOJ's lead has not commonly been followed. For example, in *Commonwealth v. George Perrot*, Hampden Superior Court No. 85-5415, a Massachusetts Superior Court judge granted a defendant a new trial in a case where procedural waiver was hotly contested.³⁰ The judge in *Perrot* reasoned that a claim of error based on a theory of improper hair analysis testimony was not sufficiently developed at the time of Perrot's 1992 trial or any prior post-conviction motion and

²³ *Id.*

²⁴ See "Notice from ASCLD/LAB Board of Directors to Interested Parties Concerning Potential Issues With Hair Comparison Testimony," available at <http://www.ascl-dlab.org/notification-from-the-ascl-dlab-board-of-directors-to-interested-parties-concerning-potential-issues-with-hair-comparison-testimony/>.

²⁵ Amelia Maxfield, "FBI Microscopic Hair Comparison Review," *Champion* (March 2016) p. 59-60.

²⁶ Texas Forensic Science Commission, Hair Microscopy Review Panel, statement at <http://www.fsc.texas.gov/texas-hair-microscopy-case-review>.

²⁷ Texas Hair Microscopy Review: Process Flow, Texas Forensic Science Commission, <http://www.fsc.texas.gov/sites/default/files/Hair-Microscopy-Review-Process-Flow-Chart-012315.pdf>; <http://www.fsc.texas.gov/sites/default/files/Statement%20re%20Texas%20HM%20Review%20Final%20Draft%5B1%5D.pdf>.

²⁸ The Massachusetts State Police is conducting a review of cases in which hair analysis testimony was given and Middlesex District Attorney Marian T. Ryan has partnered with the New England Innocence Project ("NEIP"), as part of a Post-Conviction DNA Testing Assistance Working Group, to facilitate NEIP's consideration of cases identified by the state police review. See <http://www.wcvb.com/news/5-investigates-review-of-old-forensic-hair-cases-begins/35712380>.

²⁹ Correspondence with Kelly Mitchell, Executive Director, Robina Institute of Criminal Law and Criminal Justice (Aug. 18, 2016).

³⁰ See, e.g., <https://www.theguardian.com/us-news/2015/apr/21/fbi-jail-hair-mass-disaster-false-conviction>.

allowed the new trial motion.³¹ The state has appealed.

The Rationale For This Resolution

The Hair Microscopy Review Project “constitutes a commendable recognition by the FBI and DOJ that there is an affirmative duty to correct when events establish that the evidentiary value of a scientific opinion has exceeded the limits of science.”³² But it is only the first step in identifying and remedying tainted verdicts. The necessary next steps are urged by this resolution.

The Supreme Court, in recent years, has twice cited the 2009 Garrett and Neufeld study of vacated convictions, which found that 60% of those convictions rested in part upon “invalid forensic testimony.”³³ Although such testimony may relate to a broad range of forensic disciplines,³⁴ microscopic hair analysis stands out because the United States Department of Justice (a) has publicly acknowledged that erroneous testimony regarding hair microscopy was given by FBI examiners in well over one thousand cases and (b) has publicly committed to taking affirmative action to help rectify the errors.

This resolution is germane to the important, ongoing conversation in this country concerning public trust in our legal system. It is also an issue on which it is particularly appropriate for the ABA to speak, because of its national scope and the importance of conviction integrity to the legitimacy of our legal system.

DOJ’s approach to this problem provides an excellent example of a prosecutor’s proper response to new information concerning settled convictions, as is contemplated in the recently adopted Prosecution Function Standard 3-8.3.³⁵ Beyond this, DOJ’s willingness to partner with the bar to promote conviction integrity is an emerging “best practice” recognized by both defense and prosecution commentators; it is a collaborative approach that one prosecutor has aptly viewed as creating a “more meaningful” process in the public righting of old wrongs.³⁶

³¹ See *Commonwealth v. Perrot*, Hamden Superior Court Nos. 85-5415, etc., Findings of Fact, Rulings of Law, and Order On Defendant’s Motion for New Trial, at pp. 61-64 & 73-74, available at <https://www.documentcloud.org/documents/2710722-Judge-Kane-Perrot-Memo-and-Bail-Order.html>.

³² Reimer, *The Hair Microscopy Review Project: An Historic Breakthrough for Law Enforcement and a Daunting Challenge for the Defense Bar*, *Champion* (July 2013) at 16.

³³ *Hinton v. Alabama*, ___ U.S. ___, 131 S. Ct. 1081, 1090 (2014), quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) (citing Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 14 [2009]).

³⁴ See, e.g., Paul C. Giannelli, *Bite Mark Testimony Under Attack*, *Criminal Justice*, pp.40-42 (Summer 2016) (describing several appellate opinions criticizing expert testimony regarding bite-mark analysis as inaccurate).

³⁵ Prosecution Function Standard 3-8.3 (adopted February 9, 2015) (it is the proper function of a prosecutor to “develop policies and procedures to address such information [i.e., such as gives rise to a risk of wrongful conviction] and take actions that are consistent with the applicable law, rules, and the duty to pursue justice.”)

³⁶ See, e.g., Inger Chandler, *Conviction Integrity Review Units: Owning the Past, Changing the Future*, *Criminal Justice*, at 14-16 (Summer 2016).

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For defense counsel presently or formerly involved in these cases, this policy -- highlighting the duty to act -- is both consistent with recently adopted ABA Defense Function Standards 4.1.3(f) and 4.9.4,³⁷ and is also consistent with ABA policy highlighting the prosecutor's duty to act, such as ABA Model Rules of Professional Conduct 3(g) and (h).³⁸

Additionally, to the extent that it touches upon ABA policy with respect to expert testimony in the field of forensic evidence, this resolution is consistent with our blackletter *DNA Evidence Standard* 16-6.1,³⁹ as well as *DNA Evidence Standard* 16-5.3.⁴⁰ This resolution is also consistent with *DNA Evidence Standard* 16-3.3 and 2012 ABA Resolution 101B, which concern laboratory reports, as well as 2012 Resolution 101C, which concerns the proper presentation of expert forensic testimony.⁴¹ This resolution is furthermore consistent with ABA policy promoting liberal access to forensic re-testing.⁴² It is also consistent, more broadly, with long standing ABA policy concerning the need to prevent erroneous convictions.⁴³

This resolution builds upon, and is entirely consistent with, current ABA policy. It moreover provides concrete examples of proactive, collaborative conviction-integrity efforts by prosecutors and defenders in the context of an evolving understanding of emerging studies on forensic techniques. These efforts represent an illustrative model of the policies of Prosecution Function Standard 3-8.3 and Defense Function Standard 4-9.4 in action.

It is appropriate to commend the United States Department of Justice and appropriate also to call upon all state, local and tribal prosecution offices to join in DOJ's proactive approach to this issue. This includes urging state, local and tribal prosecution offices to consider following DOJ's lead in addressing claims of erroneous conviction like this on the merits, as opposed to raising defenses such as waiver, statutes of limitations or other procedural default. It is also appropriate to call upon defense counsel

³⁷ ABA Defense Function Standards 4.1.3(f) and 4.9.4 (adopted February 9, 2015) (concerning the continuing duty to act, even post-representation, where there is newly discovered evidence of wrongful conviction).

³⁸ ABA Model Rules of Professional Conduct 3(g), (h) (as amended February, 2008) (prosecutor's duty to disclose evidence creating a likelihood that a convicted defendant did not commit an offense of which the defendant was convicted and to investigate).

³⁹ ABA Standards for Criminal Justice, *DNA Evidence*, Standard 16-6.1, approved August, 2006 (post-conviction testing should be available "if there is credible evidence that prior test results or interpretations were unreliable").

⁴⁰ ABA Standards for Criminal Justice, *DNA Evidence*, Standard 16-5.3, approved August, 2006 ("Expert testimony should be presented to the trier of fact in a manner that accurately and fairly conveys the significance of the expert's conclusions.").

⁴¹ ABA 2012 Winter Meeting Resolution 101C, adopted February 6, 2012 (lawyers and judges should cause experts to present their testimony in a manner that accurately and fairly conveys the significance of their conclusions, including any relevant limitations of the methodology used).

⁴² ABA 2010 Annual Meeting Resolution 100I, adopted August 9-10, 2010 (concerning the need to make resources available to assure that an accused can obtain the testing or re-testing of evidence, when feasible, by qualified experts and obtain the expert assistance necessary to assure a fair trial or sentencing).

⁴³ ABA 2005 Annual Meeting Resolution 115A, adopted August 8-9, 2005 (concerning the need for government to identify and eliminate causes of erroneous convictions).

who have represented defendants in such cases to take action, even if the representation has ended, in the interest of justice. Additionally, there is a particular urgency in the need to carry this message to our state and local bar organizations because most of the prosecutions in which erroneous testimony or statements concerning microscopic hair analysis were provided are state court cases.

Respectfully submitted,

Matthew Redle
Chair, Criminal Justice Section
February 2017

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matthew Redle, Chair

1. Summary of Resolution(s). This resolution urges the United States Department of Justice continue its microscopic hair review efforts. This review has already identified many cases in which federal and state prosecutors utilized expert testimony of forensic examiners, regarding microscopic hair comparisons that exceeded the limits of science. The resolution also urges DOJ to continue to implement an array of remedial protocols intended to address the risks of erroneous convictions thereby created. This resolution also calls upon state prosecutors to commit to a timely review of all cases in which such erroneous expert testimony was used and to strongly consider a policy, in litigating motions for new trial premised upon such errors, of disavowing available defenses based upon procedural default or waiver, in order to facilitate the resolution of motions seeking a new trial that are based upon such errors on the merits. This resolution also calls upon all defense counsel who have received notice that such erroneous statements or testimony may have been given in cases in which they represented a defendant at trial or on appeal to take action, as prescribed by ABA Defense Standard 4-9.4, to evaluate the information, investigate if necessary and determine what potential remedies are available, to advise and consult with the client, and to determine what action if any to take. Finally, the resolution urges authorities in all jurisdictions—including prosecutors, state forensic entities, and bar associations—to continue efforts to identify other erroneous or misleading forensic reports or testimony and, if discovered, to take appropriate remedial steps similar to those recommended in this Resolution.
2. Approval by Submitting Entity. This resolution was approved by the Criminal Justice Council at the fall meeting in Washington, D.C., November 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? ABA Model Rules of Professional Conduct 3(g) and (h), concerning the prosecutors' duty to disclose new evidence creating a likelihood of a wrongful conviction and to investigate, is relevant. Prosecution Function Standard 3-8.3 (adopted February 9, 2015), concerning the prosecutors' duty to develop policies and procedures to address such information and take actions that are consistent with the applicable law, rules, and the duty to pursue justice, is relevant. ABA Defense Function Standard 4.1.3(f) and Standard 4.9.4 (adopted February 9, 2015), concerning defense counsel's continuing duty to act based on newly discovered evidence of wrongful conviction, is also 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. If adopted, this policy will be promoted in local, state, and federal jurisdictions.
8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. (If applicable) None.
10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Center for Human Rights
 Civil Rights and Social Justice Section
 Commission on Disability Rights
 Commission on Homelessness and Poverty
 Commission on Hispanic Legal Rights & Responsibilities
 Commission on Immigration
 Commission on Racial & Ethnic Diversity in the Profession
 Commission on the Federal Judiciary
 Government and Public Sector Lawyers
 Health Law Section
 International Law Section
 Judicial Division
 Law Practice Division
 Litigation Section
 Office of Diversity & Inclusion
 Science & Technology Law Section
 Solo, Small Firm and Government Practice Division
 Standing Committee on Legal Aid & Indigent Defense
 Young Lawyer's Division
 Youth at Risk Commission

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution recognizes the United States Department of Justice for acknowledging the many cases in which federal and state prosecutors utilized expert testimony of forensic examiners, testifying on microscopic hair comparisons, that exceeded the limits of science and for establishing an array of remedial protocols intended to address the risks of erroneous convictions thereby created.

This resolution also calls upon state prosecutors to commit to a timely review of all cases in which such erroneous expert testimony was used and to strongly consider a policy, in litigating motions for new trial premised upon such errors, of disavowing available defenses based upon procedural default or waiver, in order to facilitate the resolution of motions seeking a new trial that are based upon such errors on the merits.

This resolution also calls upon all defense counsel who have received notice that such erroneous statements or testimony may have been given in cases in which they represented a defendant at trial or on appeal to take action, as prescribed by ABA Defense Standard 4-9.4, to evaluate the information, investigate if necessary and determine what potential remedies are available, to advise and consult with the client, and to determine what action if any to take.

2. Summary of the Issue that the Resolution Addresses

Expert testimony, based on the microscopic comparison of hair samples, that purported to link evidentiary hair to hair taken from particular suspects was formerly widely accepted but is now recognized as highly unreliable. This resolution commends DOJ's proactive response to this particular circumstance. DOJ's collaboration with NACDL and the Innocence Project illustrates a commendable response to a problem that can exist when advances in research on forensic scientific evidence suggest that significant errors may have occurred in older cases. This resolution urges action by prosecutors and defense counsel to address, in particular cases, the risk of wrongful conviction that this widespread problem has generated.

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

This resolution urges action by prosecutors and defense counsel to address, in particular cases, the risk of wrongful conviction that now exists in many old cases in which erroneous and misleading expert testimony on microscopic hair comparisons was used to obtain convictions.

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

During presentation to the Criminal Justice Section Council, and later during circulation to other ABA entities, several people asked whether the resolution should be generalized to relate to a broad range of forensic disciplines. We considered, but ultimately did not adopt, that approach for three reasons:

- 1) Significant differences of opinion exist among experts and major institutions regarding the extent of individual types of forensic pattern analysis; even within the Obama Administration there are at least three distinct positions that have been staked out: DOJ, National Commission on Forensic Science (DOJ-NIST collaboration), Presidential Council of Advisors on Science & Technology.
- 2) Although the DOJ has undertaken broad efforts to define best practices for forensic analysis and testimony, it has undertaken a methodical, collaborative effort to identify flawed testimony and notify prosecutors and defense counsel only as to hair microscopy.
- 3) To the extent that similar consensus emerges regarding other disciplines, such as bitemark analysis, we believe it is covered by the final paragraph of the resolution which was added during debate by the CJS Council for that purpose.

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

1 RESOLVED, That the American Bar Association urges each federal, state, and territorial
2 prosecutor's office to adopt and implement the following internal conviction-integrity
3 policy: When the prosecutor's office supports a defendant's motion to vacate a
4 conviction based on the office's doubts about the defendant's guilt of the crime for which
5 the defendant was convicted, or about the lawfulness of the defendant's conviction, the
6 office should not condition its support for the motion on an *Alford* plea, a guilty plea, or a
7 no contest plea by the defendant to the original or any other charge. Nevertheless, the
8 office may independently pursue any charge it believes is supported by admissible
9 evidence sufficient to prove guilt beyond reasonable doubt, and may seek to resolve that
10 matter with an *Alford* plea, no contest plea, or guilty plea to that charge.

REPORT

For more than fifteen years, the American Bar Association has developed policies, rules, and standards directed at promoting the integrity of criminal convictions and remedying wrongful convictions. In 2008, the ABA adopted nine resolutions developed by the Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process.¹ That same year, the ABA amended Rule 3.8 of the Model Rule of Professional Conduct to codify prosecutors' post-conviction responsibilities to investigate significant new exculpatory evidence and to seek to remedy wrongful convictions.² More recently, the 2015 amendments to the Prosecution and Defense Function Standards³ elaborated upon the expectations for both prosecutors and defense lawyers when new questions are raised about the reliability or lawfulness of a criminal conviction.⁴ Among other things, these Standards

¹ AM. BAR ASS'N, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY*, REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (Paul C. Giannelli & Myrna S. Raeder eds., 2006), *reprinted in* 37 SW. U. L. REV. 763, 766 (2008) (explaining that the rising tide of exonerations prompted the ABA to form an Ad Hoc Innocence Committee in 2002 to propose reforms to ensure the integrity of the criminal justice system) [hereinafter *ACHIEVING JUSTICE*]. This committee passed nine resolutions, *id.* at 774, and much of the committee's work is reflected in the revised Prosecution and Defense Function Standards. The Standards for Prosecution and Defense Functions, first published in 1979, are built on the ethical obligations specific to criminal lawyers in the ABA's Model Rules of Professional Conduct. *See* AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4–1.1(b) (4th ed. 2015) [hereinafter *DEFENSE STANDARDS*], http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-TableofContents.html (“For purposes of consistency, these Standards sometimes include language taken from the Model Rules of Professional Conduct; but the Standards often address conduct or provide details beyond that governed by the Model Rules of Professional Conduct.”); AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3–1.1(b) (4th ed. 2015) [hereinafter *PROSECUTION STANDARDS*], http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents.html. The Fourth Edition of the Standard was adopted by the ABA House of Delegates in February 2015. *See* *DEFENSE STANDARDS*, *supra*, Table of Contents; *PROSECUTION STANDARDS*, *supra*, Table of Contents. For a discussion of how the standards were revised, see Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1112–18 (2011) (describing the “challenging and professionally absorbing” process of editing the Criminal Justice Standards for Prosecution and Defense Functions, which have not been revised since 1991).

² *See* MODEL RULES OF PROF'L CONDUCT [hereinafter *MODEL RULES*] R. 3.8(g)–(h) (2008).

³ *See* AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION AND DEFENSE FUNCTION (4th ed. 2015), *supra* note 1.

⁴ *See* *DEFENSE STANDARDS*, *supra* note 1, § 4–9.4. There is spirited debate about what “innocence” means as a legal concept. Some people distinguish between legal and factual innocence with the idea that those falling into the former category are exonerated based on constitutional or other rights violations while those falling into the latter category are factually innocent in that they did not commit the charged crime. *See* Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971, 975–80 (2002); *cf.* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 331 n.4 (1995) (arguing that legal, actual, and factual innocence are “three conceptually distinct determinations of innocence”); Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 (2001) (discussing “burden of proof,” factual, and legal innocence). These distinctions, however, obscure the fact that most exonerees, factually innocent or otherwise, are freed because of legal errors, as innocence is rarely recognized as a freestanding claim. *See* Lara Bazelon, *Scalia's Embarrassing Question*, SLATE (Mar. 11, 2015, 9:37 a.m.), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/innocence_is_not_cause_for_exoneration_scalia_s_embarrassing_question_is.html. In other words, the categorization is misleading in that it implies there is no overlap when the overlap is practically speaking, almost complete. As Keith Findley, the former director of the Wisconsin Innocence Project, has argued: “[T]hese distinctions are largely meaningless

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recognize that “[t]he prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.” The ABA’s work in this area has responded to, and contributed to, a growing awareness within the legal community of the depth and breadth of the problem of wrongful convictions.⁵

In response to the growing concern about the problem of wrongful convictions, some prosecutors’ offices have developed conviction integrity units and/or policies regarding the office’s post-conviction responsibilities. The thoughtful development and promulgation of such policies are consistent with the Prosecution Function Standards.⁶

The proposed resolution, directed at prosecutorial policies regarding post-conviction proceedings, aims to build upon the American Bar Association’s extensive efforts to address the problem of wrongful convictions. In particular, the proposed resolution addresses the situation when, in response to its post-conviction investigation, the prosecutor’s office develops doubts about the integrity of a criminal conviction and takes remedial action by joining in a defense motion to vacate the conviction. In general, it is highly laudable for prosecutors to pursue judicial remedies even when their serious doubts about the convicted defendant’s guilt do not necessarily amount to “clear and convincing evidence” that the defendant was wrongfully convicted.⁷ The resolution addresses the

in our system of justice . . . there is really only one functional category of ‘innocence,’ although how innocence is determined can vary depending on context.” Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1160 (2010/2011). Defense Function Standard 4–9.4 adheres to Professor Findley’s standard by requiring “some duty to act,” for ethical purposes, whenever counsel discovers factual or legal evidence pointing to a “reasonable likelihood that a . . . former client was wrongfully convicted or sentenced or [] actually innocent[.]” DEFENSE STANDARDS, *supra* note 1, § 4–9.4.

⁵ Kimberley A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 ALB. L. REV. 1415, 1415 (2011/2012) (“With over 280 post-conviction DNA exonerations through Innocence Projects in the United States alone and half a dozen Commissions of Inquiry into wrongful convictions in Canada, the public may be more aware of wrongful convictions than ever before.”); Elizabeth S. Vartkessian & Jared P. Tyler, *Legal and Social Exoneration: The Consequences of Michael Toney’s Wrongful Conviction*, 75 ALB. L. REV. 1467, 1467 (2011/2012) (“In the last twenty years increasing scholarly attention has been devoted to understanding the causes and consequences of wrongful convictions.”).

⁶ See PROSECUTION FUNCTION STANDARD 3-2.4(a): “Each prosecutor’s office should seek to develop general policies to guide the exercise of prosecutorial discretion, and standard operating procedures for the office. The objectives of such policies and procedures should be to achieve fair, efficient, and effective enforcement of the criminal law within the prosecutor’s jurisdiction.”

⁷ Rule 3.8(h) of the Model Rules of Professional Conduct requires a prosecutor to seek to remedy a wrongful conviction when the prosecutor “knows of clear and convincing evidence that [the defendant] was convicted of an offense that the defendant did not commit.” However, the “clear and convincing” standard was intended as a disciplinary floor, with the expectation that prosecutors would and do seek remedies based on serious doubts that do not necessarily amount to “clear and convincing evidence.” See Crim. Just. Sec., Am. Bar Ass’n, Report to the House of Delegates (2008), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104d.authcheckdam.pdf (accompanying proposed A.B.A. Model Rule 3.8(g) & (h); “The Rule and Comments are designed to provide clear guidance to prosecutors concerning their minimum disciplinary responsibilities, with the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum.”).

occasional practice of conditioning the office's support for a judicial remedy on a guilty plea, a no contest plea, or an *Alford* plea⁸ to the same charge or a related charge, usually in exchange for a sentence of time-served.

The prosecution's conditioning of a plea in exchange for its support for a post-conviction remedy raises a host of concerns. One is the risk that the plea will be, or appear to be, coerced by the threat of continued imprisonment based on a conviction of doubtful reliability or legality. Second is the risk that the admission of guilt to the new charge is false, and that the charge itself is unfounded. Both of these concerns arise out of the extraordinary pressure placed on the convicted defendant. The public appearance, if not the reality, will often be that the prosecution insisted on the guilty plea as a "face-saving" measure or to prevent the defendant from pursuing civil remedies because of a wrongful conviction, not because the defendant is genuinely guilty of the new charge.⁹ This is especially likely to be the case where the prosecution lacks evidence, or appears to lack evidence, on which guilt could be proven beyond a reasonable doubt.¹⁰ But even when the prosecution believes in good faith that it could secure a conviction, it should not coerce a conviction by opposing a remedy for what it recognizes to be an unreliable or unlawful conviction. Rather, the appropriate measure is to support vacating that conviction, to file the new charge, and to conduct any negotiations anew.

Besides raising serious public policy concerns, the practice is also unfair to the individual defendant. Guilty pleas, no contest pleas, and *Alford* pleas render many people ineligible for transitional housing and other services. It complicates, if not eliminates, their ability to file a claim seeking compensation under state and federal law. Even within the Innocence Movement, these wrongfully convicted individuals are not considered exonerees: The National Registry of Exonerations does not include them on its list.¹¹ This lack of recognition is psychologically harmful, putting a scarlet asterisk over their insistence that they are innocent.

⁸ An *Alford* plea is distinct from a plea of no contest. An *Alford* plea allows a defendant who "professed belief in his innocence" to plead guilty if the State has a factual basis to support the charge. *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970). By contrast, a no contest plea "is not a plea, in the strict sense of that term in the criminal law, but a formal declaration by the accused, that he will not contend with the prosecuting authority under that charge. When accepted by the court, it becomes an implied confession of guilt, and, for the purpose of the case only, equivalent to a guilty plea, but distinguishable from such a plea in that it cannot be used against the defendant as an admission in any civil suit for the same act." *Tucker v. United States*, 196 F. 260, 262 (7th Cir. 1912); see also 5 Wayne LaFave et. al., *Criminal Procedure* section 21.4(a) (2d ed. 1999).

⁹ As the Court of Appeals recognized in *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir. 1970): "It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant . . . , even where the civil case arises from the events that are also the basis for the criminal charge."

¹⁰ See PROSECUTION FUNCTION STANDARD 3-4.3(a) ("A prosecutor should seek or file criminal charges only if the prosecutor believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support a conviction beyond a reasonable doubt.").

¹¹ NAT'L REGISTRY OF EXONERATIONS, UNIV. OF MICH. LAW SCH., GLOSSARY 1, (2015), <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx>.

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

Respectfully submitted,

Matthew Redle
Chair, Criminal Justice Section
February 2017

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matthew Redle, Chair

1. Summary of Resolution(s). This resolution calls on prosecutors' offices to adopt and implement internal conviction-integrity policies when an office supports a defendant's motion to vacate a conviction based on the office's doubts about the defendant's guilt of the crime for which the defendant was convicted, or about the lawfulness of the defendant's conviction. The resolution also makes it clear that, after the conviction has been vacated, prosecutors retain the discretion to bring charges—including the charges for which the person was wrongfully convicted—if they believe that the new charge, lesser included charge, or overturned and re-filed charge can be proved beyond a reasonable doubt by admissible evidence.
2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the fall meeting in Washington, D.C., November 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?
The ABA Criminal Justice Standards – Prosecution Function, address this issue tangentially. This resolution is consistent with those standards.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
If adopted, this policy will be used in local, state, and federal jurisdictions to promote the creation of conviction integrity policies for prosecutor's offices and to guide the offices in pursuing criminal charges following the grant of a motion to vacate a conviction.
8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. (If applicable) None.

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10. Referrals.

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

Commission on Veteran's Legal Services
Legal Aid & Indigent Defense
Commission on Disability Rights
Special Committee on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Center for Human Rights
Commission on Immigration
Racial & Ethnic Diversity
Racial & Ethnic Justice
Youth at Risk
Young Lawyer's Division
Civil Rights and Social Justice
Government and Public Sector Lawyers
International Law
Federal Trial Judges
State Trial Judges
Law Practice Division
Litigation
Standing Committee on Ethics and Professional Responsibility
GP Solo
National Association of Attorney Generals
State and Local Government Section
Center for Professional Responsibility
National Association of Legal Aid and Defender Association

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls on prosecutors' offices to adopt and implement internal conviction-integrity policies when an office supports a defendant's motion to vacate a conviction based on the office's doubts about the defendant's guilt of the crime for which the defendant was convicted, or about the lawfulness of the defendant's conviction. The resolution also makes it clear that, after the conviction has been vacated, prosecutors retain the discretion to bring charges—including the charges for which the person was wrongfully convicted—if they believe that the new charge, lesser included charge, or overturned and re-filed charge can be proved beyond a reasonable doubt by admissible evidence.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses post conviction motions to vacate convictions and a prosecutor's decision to pursue the same or new charges, and the policies offices should implement in those proceedings.

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

If adopted, this policy will be used in local, state, and federal jurisdictions to promote the creation of conviction integrity policies for prosecutor's offices and to guide the offices in pursuing criminal charges following the grant of a motion to vacate a conviction.

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

None.

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

- 1 RESOLVED, That the American Bar Association urges federal, state, local, territorial
- 2 and tribal law enforcement authorities to develop and use, prior to custodial interrogation
- 3 of suspects, translations of *Miranda* warnings in as many languages and dialects as
- 4 necessary to accurately and fully inform individuals of their *Miranda* rights.

REPORT

At the ABA annual meeting in San Francisco in August 2016, the House of Delegates approved Resolution 110 which urged jurisdictions to develop *Miranda* warnings in Spanish. This resolution expands upon Resolution 110 and urges jurisdictions to develop and use warnings prior to custodial interrogation that will accurately and fully inform as many individuals as possible of their *Miranda* rights in languages and dialects they can understand when they are not fluent in English.

The reality is that *Miranda* warnings vary slightly from jurisdiction to jurisdiction throughout the United States. Since the Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966), there have been effort by the various law enforcement agencies throughout the Nation to agree on one set of words to convey the required warnings. The Supreme Court itself has determined that law enforcement agencies should be given some flexibility in the way they provide the warnings as long as the gist of the warnings is accurately conveyed. *California v. Prysock*, 451 U.S. 1301 (1981). It has clearly stated that it has never required that jurisdictions use the precise words contained in the *Miranda* opinion. *Duckworth v. Eagan*, 492 U.S. 195 (1989). After 50 years of a demonstrated inability to reach unanimity on the English version of the warnings, it seems unlikely that unanimity will be reached on a single translation of the English version of the warnings into Russian, Urdu, German or any language. Therefore, the ABA recommends that each jurisdiction take the English version of the warnings that it uses and translate that version into as many languages as are likely to be necessary to deal with suspects who are interrogated in custody and who are not fluent in English.

Many courts around the country have recognized the importance of providing information to individuals who are not fluent in English. For example, the District of Columbia adopted a District of Columbia Courts Language Access Plan (FY 2014-2015). The Introduction to the plan sets forth its goals:

Access to justice is paramount to guarantee people their rights under the law. Comprehensive, qualified language assistance enables individuals who have limited English proficiency (LEP) to have meaningful access to justice before the court as well as with respect to all other court-mandated programs and ancillary services. Pursuant to the DC Courts Strategic Plan (2013-2017), the Courts strive to promote access to justice for all persons:

Goal 2.A

The D.C. Courts will ensure access to court services for all persons.

Goal 2.A.3

Enhance assistance to the public by training court personnel on the unique needs of special populations such as the elderly, self-represented persons, and individuals with physical and mental health issues, and by providing services to meet the needs.

112C

Goal 2.B

The D.C. Courts will promote understanding of court proceedings and processes through plain language initiatives, language interpretation and translation services and other approaches.

Goal 3.A.2

Foster understanding and respect for all persons by developing and implementing an Employee Code of Conduct and trainings on cultural competency, civility, generational differences, and the value of diversity.

It is the policy of the DC Courts to provide meaningful access at no cost to LEP persons in all court proceedings³ and operations. All personnel shall provide free language assistance services to LEP individuals whom they encounter or whenever an LEP person requests language assistance services. All personnel will inform members of the public that language assistance services are available free of charge to LEP persons and that the Court will provide these services to them.”

The resolution reflects the belief that it is not sufficient to postpone dealing with language issues until individuals are brought to court. Individuals with limited English proficiency need to have a fair opportunity to exercise their rights when they are arrested. Providing Miranda warnings in a language that they can understand is essential to their being able to protect their privilege against self-incrimination.

The development of warnings in all the languages that individuals speak is likely to be a challenge. California indicates why this is so: “Over 200 languages are spoken in California. Of the state’s 37 million residents, nearly 40 percent speak a language other than English at home. Of the 40 percent, an estimated 6.7 million residents speak or understand English ‘less than very well.’” Judicial Council of California Fact Sheet (July 2014), http://www.courts.ca.gov/documents/Fact_Sheet-_Court_Interpreters.pdf

The reality is that all law enforcement agencies will have to find ways to communicate with LEP individuals. The Vera Institute of Justice explains:

The number of immigrants living within the United States is growing. Unlike in the past, however, many are settling in suburbs, small towns, and rural areas, bringing new cultures and languages to places previously unaccustomed to such cultural diversity. As a result, many law enforcement agencies around the nation are dealing with unfamiliar languages as they work to ensure public safety. Overcoming these challenges is essential. When language barriers prevent immigrants from, say, reporting a crime or describing a suspect, it becomes harder for officers to provide protection or gather evidence. And police often work in high pressure situations where communication needs to happen quickly.

Overcoming Language Barriers: Solutions for Law Enforcement, *From Vera's Director*,
https://www.lep.gov/resources/vera_translating_justice_final.pdf

Although the focus of the Resolution is assuring that *Miranda* warnings are adequately communicated to all arrestees who are interrogated, the reality is that police departments that recognize the importance of being able to communicate in languages other than English will increase the likelihood that their policing is more effective at the same time that constitutional rights are protected:

As first responders for public safety, law enforcement personnel face a special burden. Police officers cannot perform their duties well when they cannot communicate with the people they serve. When language barriers prevent individuals from reporting a crime or describing a suspect, for example, it becomes that much harder for police to gather evidence or provide protection. As one officer said, "Language discordance is our biggest challenge when serving the Hispanic community. The language barrier makes it very, very frustrating to get our work done." Language barriers can even threaten the safety of officers: being unable to communicate with an armed suspect can dangerously exacerbate a life-or-death situation.

Id. at 4.

It makes good sense for police departments to develop at the outset warnings in language other than English that correspond to the larger populations of LEP individuals in a particular community. There is good reason for jurisdictions to share translations with each other in an effort to reduce the costs of translations.

Respectfully submitted,

Matthew Redle
Chair, Criminal Justice Section
February 2017

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matthew Redle, Chair

1. Summary of Resolution(s). This resolution calls for the translation of *Miranda* warnings into in as many languages and dialects as necessary to accurately and fully inform individuals of their *Miranda* rights.
2. Approval by Submitting Entity. This resolution was passed by the Criminal Justice Council at the ABA annual meeting in San Francisco, August 6, 2016.
3. Has this or a similar resolution been submitted to the House or Board previously? No, however, a related resolution was adopted by the House of Delegates, in relation to Spanish translations only, at the annual meeting in August 2016.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? As mentioned in 3, above, this resolution goes beyond the resolution adopted in 2016 and requires translation of *Miranda* warnings into all languages, not only Spanish.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, this policy will be used in local, tribal, territorial, state, and federal jurisdictions to promote translation of *Miranda* warnings.
8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. (If applicable) None.
10. Referrals.
Center for Professional Responsibility
Civil Rights and Social Justice Section
Commission on Veteran's Legal Services

Disability Rights Commission
 Hispanic Legal Rights & Responsibilities Commission
 Commission on Homelessness and Poverty
 Center for Human Rights
 Commission on Immigration
 Racial & Ethnic Justice
 Civil Rights and Social Justice
 Government and Public Sector Lawyers
 International Law Section
 Federal Trial Judges
 GP Solo
 Judicial Division
 Law Practice Division
 Litigation Section
 National Association of Attorney Generals
 National Legal Aid and Defender Association
 Racial & Ethnic Diversity in the Profession Commission
 Standing Committee on the Federal Judiciary
 Standing Committee on Legal Aid & Indigent Defense
 State and Local Government Section
 Young Lawyer's Division
 Youth at Risk Commission

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.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls for the translation of Miranda warnings into in as many languages and dialects as necessary to accurately and fully inform individuals of their *Miranda* rights.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the need for Miranda warnings to be translated into the language the person speaks and understands best, in order to ensure that the individual understands the rights and knowingly invokes or waives them.

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

If adopted, this policy will be used in local, state, and federal jurisdictions to promote translation of *Miranda* warnings.

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

None.

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges the Food and Drug Administration
2 (“FDA”) to update its current policy requiring deferment of blood donations from men who
3 have sex with men for one year after the donor’s most recent sexual encounter with a man
4 to a deferral policy based on an individual risk assessment or other similar policy that does
5 not result in disparate treatment of men who have sex with men;

6
7 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,
8 territorial, and tribal governments to enact and adopt legally sound and medically safe
9 blood donation policies that do not result in disparate treatment of men who have sex with
10 men.

REPORT

I. Overview and Recommendation

On June 12, 2016, the United States experienced one of the largest mass shootings in history—49 people were killed and 53 wounded at Pulse, a gay nightclub in Orlando, Florida, when Omar Mateen, a 29-year-old U.S. citizen launched an attack in the name of Islamic State terrorist group. After the shooting, blood banks in the region advertised a need for donors, according to the *New York Times*.¹ In Orlando, a very large portion of those willing donors, even those with rare blood types, could not donate any blood. This is due to the Food and Drug Administration’s (“FDA”) policy that requires the deferment of blood donations from men who have sex with men (“MSM”) for one year after the donor’s most recent sexual encounter with a man (“MSM One-Year Policy”).² In the aftermath of the shooting, any man who had had sexual relations with another man in the last year—*i.e.* essentially, any gay or bisexual man—was prohibited from helping his own community during this crisis.³ The American Bar Association recognizes the importance of assistance to victims in the aftermath of terrorist attacks, mass shootings, or other disasters, including the availability of blood and non-discriminatory policies to encourage the broadest possible source of blood donors, the saving of the highest number of lives, and providing a means for the victims and community to cope with their grief.

Donating blood is one of the extremely rare and valuable positive actions that one can take to help address meaningless carnage like the Pulse nightclub massacre.⁴ The gay blood ban is a lingering negative stigma that exacerbates the pain of such public tragedies.⁵

¹ Stephen Hudack, *Blood banks at capacity, donors urged to return in coming days*, ORLANDOSENTINEL.COM (June 12, 2016), <http://www.orlandosentinel.com/news/breaking-news/os-orlando-nightclub-shooting-blood-donations-20160612-story.html>. In fact, despite hundreds if not thousands of organizations’ efforts across the nation, there was an emergency call for blood donations to address a shortage earlier this year. Red Cross, (Jan. 11, 2016), available at <http://www.redcross.org/news/press-release/Red-Cross-has-urgent-need-for-blood-and-platelet-donations>.

² FDA, *Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products*, (Dec. 2005), available at <http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/BIood/UCM446580.pdf> (referred hereinafter as “Revised Recommendations”).

³ Jesee Hellman, *Gay rep: Blood donation ban for gay men must be overturned*, THE HILL, (June 12, 2016); John Tozzi, *Why Gay Men Still Can’t Donate Blood, The Orlando massacre reignites a 30-year-old controversy*, BLOOMBERG NEWS, (June 13, 2016), available at <http://www.bloomberg.com/news/articles/2016-06-13/why-gay-men-still-can-t-donate-blood>; Vann R. Newkirk II, *The Bigotry of Gay-Blood-Donation Bans, In the wake of the shooting in Orlando, the city is in desperate need of contributions. Due to a long-standing FDA policy, LGBT people can’t participate*, (June 13, 2016), THE ATLANTIC, available at <http://www.theatlantic.com/politics/archive/2016/06/homophobia-hiv-blood-ban-orlando-shooting/486818/>.

⁴ Hudack, *Id.*, “‘We have to be here for our community. I made sure that I came down her so our friends and family can make it out okay,’ said [a member of the public] who worked at the nightclub for five years. She fought off tears thinking of the victims.”

⁵ Sam Levin, *Activists urge US to end ban on gay men donating blood after Orlando massacre* *Gay men can’t donate blood to support those suffering from terror attack, Experts and advocates hope instance will push the government to end ban*, (June 2016), THE GUARDIAN, <https://www.theguardian.com/us-news/2016/jun/14/orlando-pulse-shooting-gay-blood-ban-lgbt-rights>.

Victims are one of the primary reasons we have a criminal justice system. We protect their identities and contact information. We provide them with special services (counseling, housing, medical treatment). Many laws require restitution be paid to victims. Programs have been set up for restorative justice between victims and offenders. Following crimes and tragedies, victims require special services to cope, manage grief, and begin to heal and move on. This is even more important in the wake of terrorist attacks or mass shootings. The victims in these scenarios are not just those who lost their lives or are injured, it is the entire community. The friends, families, and neighbors of those who lost their lives are still victims.

In the aftermath of September 11, people all over the nation lined up to donate blood. It was a way for people to do something to help. To find a way to heal, to assist in the grieving process. Many articles specifically cite to donating blood as a means for victims and communities to deal with grief following such incidents, and in fact, recommend it.⁶ The criminal justice system is frequently involved in care for victims, and rightfully so. However, this interest must extend to all victims, of all races, ethnic background, religions, and sexual orientations. A victim is a victim, and requires care. The ABA responded to this by passing policies on survivor rights for same sex partners of victims and matters involving the ability of first responders to respond to mass killings.⁷

Louie, of GMHC, (an AIDS and HIV group in New York – www.gmhc.org) noted the gay community's "long history of banding together, especially in the face of tragedy." Following the most lethal mass shooting in U.S. history, he said, "some people will want to donate blood, and won't be able to." Based on current estimates of the number of MSM in the United States, there would be about 4.2 million more eligible blood donors in the U.S if the FDA were to lift the ban entirely. Thus complete removal of the FDA restrictions on MSM has the potential to help save the lives of 1.8 million people annually.

Dr. Paul Volberding, director of the AIDS Research Institute at the University of California, San Francisco, said the policy requiring gay men to stay celibate for 12 months before donating blood was "not really supported by the facts."

The FDA policy is "overly conservative," agreed Dr. Susan Buchbinder, director of the HIV research program for San Francisco General Hospital. "I don't think it's appropriate given current testing technology." She added: "I can't imagine that additional pain that people feel when they go in trying to help care for the survivors of this massacre and are unable able to donate blood because of a regulation that I don't believe is supported by the science." "The testing methods [for blood-borne diseases such as HIV] are just amazingly accurate. We don't miss infected

⁶ "Dealing with Grief after Tragedy", <http://www.news4jax.com/news/dealing-with-grief-after-tragedy>. (The shooting at Pulse nightclub in Orlando has impacted many communities, and may make people feel more vulnerable and helpless, said Marilyn Jones, a bereavement and community grief manager with Community Hospice. ... Jones said finding an outlet, like donating blood or bringing food to those waiting in line to donate blood can help with dealing with grief, but so can talking and listening.) See also <http://www.medicaldaily.com/why-donating-blood-good-your-health-246379>. Last accessed November 7, 2016.

⁷ 117 (S&LGL) Approved (142; 103) ("RESOLVED, That the American Bar Association supports increased federal funding to state, local and territorial governments, including public authorities, to enable these "first responders" to prevent terrorist attacks and increase their readiness to respond to any attacks that do occur.")

people,” Volberding told STAT. “The window from the exposure to testing positive is as short as a few days.”⁸

On June 14, 2016, Illinois Rep. Mike Quigley put out a press release that included comment from Rep. Barbara Lee and other House Democrats on the FDA’s blood donation policy for MSM. Like Lee, New York Rep. Sean Patrick Maloney called the FDA’s policy a “bigoted, backward and unscientific regulation.”⁹ California Rep. Xavier Becerra also implied science wasn’t the basis for the FDA’s policy when he said, “Science should be the basis for our policy, not sexual orientation.” Quigley, the vice chair of the Congressional LGBT Equality Caucus, also called on FDA Commissioner Robert Califf “to change the policy to be based on the risk of transfusion-transmissible infections, and not on sexual orientation.” In other words, an individual risk-based assessment.

In addition, Florida Rep. Alcee L. Hastings said, “We have the technological capabilities to screen blood donations to ensure they are safe for use, regardless of one’s sexual orientation.” According to the FDA’s own revised blood donation policy document, “The prevalence of HIV infection in male blood donors who reported that they were MSM was determined to be 0.25%, which is much lower than the estimated 11-12% HIV prevalence in the population of individuals reporting regular MSM behavior ... This indicates that considerable self-selection likely took place in individuals who presented to donate.”¹⁰

The ABA has adopted numerous policies over the years addressing LGBT¹¹ rights and discrimination, first responder and medical services following a terrorist attack, victim rights and protections, as well as policies regarding needle exchange programs. The ABA even adopted policy on care and services for the victims of hurricane Katrina. Some of these policies are set forth below, others are attached. There is a long history of the ABA House of Delegates adopting resolutions pertaining to the protection of victim rights. In 2014, the House of Delegates adopted a policy that states,

“RESOLVED, That the American Bar Association “[r]ecognizes that lesbian, gay, bisexual and transgender (LGBT) people have a human right to be free from discrimination, threats and violence based on their LGBT status and condemns all laws, regulations and rules or practices that discriminate on the basis that an individual is a LGBT person.”¹²

The ABA has also addressed the issue of HIV infections, adopting a policy that states: “RESOLVED, That in order to further scientifically based public health objectives to reduce HIV infection and other blood-borne diseases, and in support of its long-standing opposition to substance abuse, the American Bar Association supports the removal of legal barriers

⁸ <http://www.pbs.org/newshour/rundown/blood-donation-limits-for-gay-men-not-supported-by-facts-aids-experts-say/>. Last accessed November 7, 2016.

⁹ <https://quigley.house.gov/media-center/press-releases/quigley-house-members-and-lgbt-allies-push-fda-to-end-discriminatory>. Last accessed November 7, 2016.

¹⁰ <http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Blood/UCM446580.pdf> (Last accessed November 7, 2016).

¹¹ “Lesbian, Gay, Bisexual, Transgender/Transsexual, Intersexed”

¹² 2014 AM 114B

112D

to the establishment and operation of approved needle exchange programs that include a component of drug counseling and drug treatment referrals.”¹³

After the massacre and public outcry over the gay blood ban, on July 26, 2016, the FDA requested public comments to address the MSM One-Year Policy. Specifically, the statement read:

The agency wants comments supported by scientific evidence such as data from research, regarding potential blood donor deferral policy options to reduce the risk of HIV transmission, including the feasibility of moving from the existing time-based deferrals related to risk behaviors to alternate deferral options, such as the use of individual risk assessments.¹⁴

Responding to the FDA request for public comment, this resolution recognizes three demonstrable facts:

1. The percentage of gay men who transmit HIV is extremely low, and the percentage of gay men who are living with HIV is approximately 2,466,700 out of almost 22.5 million so that the MSM Policy impacts and discriminates against a potential donor pool of 19,939,660 people who are deferred but not living with HIV.
2. All blood is tested for HIV so that anyone’s donation that tests positive will not be a threat to blood recipients.
3. Other nations use individual risk assessments, and the United States can do likewise.

II. History

Academics and advocates have written extensively on the history of the MSM blood donation ban.¹⁵ This policy against blood donations from MSM has its roots in the AIDS crisis of the early 1980s when HIV/AIDS was spreading rampantly among gay men. During that time, there was a great amount of uncertainty and lack of scientific research surrounding AIDS, and health workers discovered that the underlying virus—HIV—was transmissible through blood and blood products. Thus, the transfusion of blood carrying HIV would infect the recipient of that blood. Accordingly, the FDA imposed various deferment policies throughout the 1980s and early 1990s until it settled on a lifetime deferment in 1992 (“MSM Lifetime Policy”).¹⁶

¹³ 106B (IR&R, Criminal Justice, Standing Committee on Substance Abuse, Commission on Homelessness and Poverty, Comm. On Mental & Physical Disability Law, Nat. Lesbian and Gay Law Association).

¹⁴ FDA, Request for comment by November 25, 2016: Blood Donor Deferral Policy for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products, (July 26, 2016), available at <http://www.fda.gov/ForPatients/CommentonGuidance/ucm513189.htm>.

¹⁵ See, e.g., Christopher McAdam, *An Antiquated Perspective: Lifetime Ban for MSM Blood Donations No Longer Global Norm*, 16 DEPAUL J. OF HEALTH CARE L. 21 (2014).

¹⁶ For a thorough history of the policies of deferment for blood donations from MSM prior to 2008, see Adam R. Pulver, *Gay Blood Revisionism: A Critical Analysis of Advocacy and the “Gay Blood Ban”*, 17 TUL. J. L. & SEXUALITY 107 (2008).

Since 1992, there have been extensive advancements in HIV awareness, testing, and prevention among MSM, as well as the mandatory testing of blood donations for HIV prior to transfusions. Nonetheless, the FDA maintained the 1992 MSM Lifetime Deferment Policy until December 2015. In its recent policy announcement, the FDA changed the deferment period from a lifetime ban to a deferment of one year since the MSM had his most recent sexual encounter with a man. Nonetheless, the immense progress we have witnessed in prevention, testing, and awareness has rendered even the one-year deferment period unnecessary.

In December 2015, the FDA published the “Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products” (“Revised Recommendations”).¹⁷ This announced a change from what amounted to a lifetime ban on blood donations by MSM to a one-year deferral period (“MSM One-Year Policy”) from a donor’s most recent sexual encounter with another man.

III. All Donated Blood Is Tested

All blood donated in the United States is subject to mandatory tests to detect various transmittable diseases—including HIV. One such form is nucleic acid testing (“NAT”), a molecular testing technique introduced in the late 1990s and early 2000s to reduce the risk of infections transmitted through blood transfusions.¹⁸ NAT can identify HIV in a blood sample within two weeks of the date of infection.¹⁹ Blood donations in the United States are tested by pooling together samples of blood from 6-16 donors for the same NAT. Then, if HIV is present in one of the samples, none of the samples may be used in a future transfusion and all are discarded.²⁰

The FDA asserts that including donations from MSM’s in these pools for testing increases the likelihood of contamination and poses a grave risk to the blood supply.²¹ However, the FDA also reports in its Revised Recommendations that the rate of HIV infection in MSM blood donors is only 0.25%.²² Blood collection organizations could mitigate the minute risk posed by these donations by continuing to screen potential donors and separating donations made by MSM donors from those made by individuals determined to be at a lower risk. If donations from MSM donors

¹⁷ FDA, *Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products*, (Dec. 2005), <http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Blood/UCM446580.pdf> (referred hereinafter as “Revised Recommendations”).

¹⁸ Rekha Hans & Neelam Marwaha, *Nucleic acid testing-benefits and constraints*, 8, 1, 2 (Jan-Jun 2014). ASIAN J. TRANSFUSION SCI

¹⁹ “RNA detection by NAT, using TMA in minipools of 16 (as described for HBV and HCV testing), closes the window period between infection and the detection of antibody by about 4-7 days.” American Red Cross, *Blood Testing*, AMERICANREDCROSS.COM, <http://www.redcrossblood.org/learn-about-blood/what-happens-donated-blood/blood-testing>.

²⁰ Revised Recommendations at 9.

²¹ *Id.*

²² Advisory Committee on Blood and Tissue Safety and Availability, *NHLBI Recipient Epidemiology and Donor Study-III (REDS-III)*, Noncompliance with the men who have sex with men (MSM) deferral among U.S. male blood donors, Blood Donation Rules Opinion Study (BloodDROPS), November 13, 2014, <http://webcast.nccsite.com/nih/0016/>.

were tested together, this would not increase the risk of contamination to donations from non-MSM donors. Because MSM's already make up approximately 2.6% of blood donors in the United States²³ due to non-compliance with the deferral period, and because blood collection organizations already screen potential donors using questions about sexual history, this method would not be very costly or logistically difficult to implement.

According to the Food and Drug Administration Website:

The FDA reviews and approves all test kits used to detect infectious diseases in donated blood. After donation, each unit of donated blood is required to undergo a series of tests for infectious diseases, including: Hepatitis B and C viruses; Human Immunodeficiency Virus, Types 1 and 2; Human T-Lymphotropic Virus, Types I and II; *Treponema pallidum* (Syphilis). Additionally, FDA recommends testing for the following infectious diseases: West Nile Virus and *Trypanosoma cruzi* (Chagas disease). Donated blood must be quarantined until it is tested and shown to be free of infectious agents.²⁴

The FDA has revisited its donor deferral recommendations to reduce the risk of transmitting human immunodeficiency virus (HIV) several times over the past 10 years. In 2010, the ACBSA found that the deferral policy for men who have had sex with other men (MSM) was suboptimal and it recommended that studies be conducted to better inform a potential policy change. Once the studies were completed in 2014, the FDA along with other Public Health Service agencies, including the Centers for Disease Control and Prevention, Health Resources and Services Administration, National Institutes of Health, and the Office of the Assistant Secretary for Health, assessed the results of the studies. In November 2014, these results were presented to the HHS Advisory Committee for Blood and Tissue Safety and Availability (the committee that succeeded the ACBSA), which, after considering the results, recommended that a shorter deferral period was appropriate.

Prior to the current guidance, FDA's recommendations were outlined in the April 1992 memorandum, "Revised Recommendations for the Prevention of Human Immunodeficiency Virus (HIV) Transmission by Blood and Blood Products." Based on the evidence now available, FDA has changed its recommendation from the indefinite deferral for MSM to a 12 month blood donor deferral since last MSM contact. For other behavioral deferrals such as commercial sex workers and injection drug use, insufficient data are available to support a change to the existing deferral recommendations at

²³ *Id.*

²⁴ <http://www.fda.gov/BiologicsBloodVaccines/SafetyAvailability/BloodSafety/ucm095522.htm> (Last accessed November 5, 2016).

this time.²⁵

IV. **Too Many are Unnecessarily Deferred**

In the Revised Recommendations, the FDA briefly explained the current risk of HIV infection associated with male-to-male sexual contact, as well as commercial sex work (“CSW”) and injection drug use (“IDU”).²⁶ These risks are the basis for the one-year deferral. As relevant to MSM, the FDA explained:

Among persons living with HIV in 2012, CDC estimates that 56% were MSM (including MSM who were also IDU). MSM remain at increased risk of HIV infection. In 2010, the majority of new HIV infections were attributed to male-to-male sexual contact: 63% among all adults and 78% among men, indicating that male-to-male sexual contact remains associated with high rate of HIV exposure.²⁷

While these numbers appear very high, the FDA fails to contextualize the numbers against the overall population of the United States. A review of the proportions of the total MSM population and those living with HIV is informative.

The FDA states that MSM who had male-to-male sexual contact within the last five years constitute approximately 4% of the overall population of the United States.²⁸ According to the CDC, “Gay and bisexual men accounted for an estimated 83% (29,418) of HIV diagnoses among males and 67% of all diagnoses” in 2014.²⁹ The U.S. Census Bureau estimates that the total population of the United States was 320,090,857 people on January 1, 2015.³⁰ Accordingly, the 2014 population of MSM who had had male-to-male sexual contact within the last five years was approximately 12,803,634 (rounded to the nearest one). Thus, the 29,418 HIV transmissions in the MSM community in 2014 constituted only 0.2% of the MSM population.

Additionally, the Revised Recommendations state that an estimated 10-11% of MSM are living with HIV.³¹ The total number of MSM (beyond those who have had male-to-male sexual contact within the last 5 years) is estimated to be 7% of the total population.³² Using the 320,090,857 figure above, this amounts to 22,406,360 members of the MSM community in total, so the total number of MSM who are living with HIV is estimated at 2,466,700. Accordingly, the MSM Policy impacts a potential donor pool of 19,939,660 people who are deferred but not living with HIV.

²⁵ <http://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/QuestionsaboutBlood/ucm108186.htm> (Last accessed November 5, 2016).

²⁶ *Id.* at 3-4.

²⁷ *Id.* at 4.

²⁸ *Id.*

²⁹ Centers for Disease Control and Prevention, *HIV in the United States: At a Glance*, CDC.GOV, (June 2016), <http://www.cdc.gov/hiv/statistics/overview/ata glance.html>.

³⁰ United States Census Bureau, *Census Bureau Projects U.S. and World Populations on New Year's Day*, CENSUS.GOV NEWSROOM, (Dec. 29, 2014), <https://www.census.gov/newsroom/press-releases/2014/cb14-tps90.html>.

³¹ Revised Recommendations at 6.

³² *Id.* at 4.

These simplified calculations show that the figures relied upon by the FDA appear to inflate the risk of MSM HIV transmission by failing to contextualize it. The FDA imposes a one-year deferral for MSM based on the 0.2% transmission total within the total MSM population, which directly impacts the 19,939,660 potential MSM donors who do not live with HIV.

V. Other Nations Use Individual Risk Assessments

“Argentina ended its ban on gay and bisexual men donating blood last year, and Italy has also transitioned away from a total ban on gay men, instead assessing individuals based on risk.”³³ In the case of Argentina, its Health Minister explained the change: “Health Minister Daniel Gollán said the decision was ‘scientifically and technically accurate.’”³⁴

Italy has been using individual assessments since 2001, as the following excerpt explains:

In 2001, a new decree of the Ministry of Health changed the previous provisions. A new policy was introduced based on an individual risk assessment (IRA) of candidate donors with regards to at-risk sexual behaviour. . . . The policy introduced a distinction between "risk" and "high risk" sexual behaviour to be individually assessed in each blood donor, both male and female, regardless of sexual orientation. "Risk" sexual behaviour includes: having a new sexual partner whose sexual behaviour is unknown, having ever had one occasional sexual relationship with a person whose sexual behaviour is unknown, having had casual sex with an HIV- and/or HBV- and/or HCV-infected partner. A blood donor, whether MSM or heterosexual, having engaged in any of these behaviours is deferred for 4 months from the exposing event. "High risk" behaviour is intended as a behaviour exposing the donor to a high risk of acquiring transfusion-transmissible infections and includes: usual/recurrent (occurring repeatedly) sex with more than one heterosexual or MSM partner whose sexual behaviour is unknown, receiving or exchanging sex for money, use of injecting drugs, usual/recurrent sex with a partner positive for syphilis and/or HIV and/or HBV and/or HCV. A blood donor, whether MSM or heterosexual, having engaged in any of these behaviours is permanently deferred. The physician in charge of blood donor selection is responsible for adjudicating either "risk" or "high risk" behaviour.³⁵

A study of the effects of the change demonstrated “that the implementation of the IRA policy in 2001 did not significantly affect either the incidence or prevalence of HIV infection among blood donors or the distribution of MSM and heterosexuals among HIV antibody-positive blood donors.”³⁶

VI. Conclusion

HIV is spread as a result of risky behaviors. The FDA should move away from categorizing all MSM as at-risk. After all, MSM blood from a man in a multi-year monogamous homosexual

³³ Sam Levin, *id.*

³⁴ <http://time.com/4038742/argentina-gay-blood-donation/>, quoting *Slate*.

³⁵ Barbara Suligoi, Simonetta Pupella, Vincenza Regine, Mariangela Raimando, Claudio Valati & Giuliano Grazzini *Blood Transfusion*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3729137/>

³⁶ *Id.*

marriage is less risky than a sexually active heterosexual female who engages in at-risk behaviors. Other nations—not the U.S.—are leading by example to put into place risk assessments for donors. These assessments focus on risky behaviors NOT the identity of the potential donor.³⁷ Ergo, the FDA should move to an “Assess and Test” screening system.³⁸ This new proposed system would provide that:

After assessing the donor’s personal sexual practices, a deferral may be given only for those in whom a risk of infection has been identified, such as individuals who have engaged in frequent, unprotected sex with multiple partners since their prior HIV test. For this risky group, a short period of abstinence may be appropriate to allow for reliable test results. For donors who are not high risk, the deferral should be eliminated altogether.³⁹

The FDA’s MSM One-Year Policy on blood donation has disparate and damaging effects on MSM. The Pulse Nightclub massacre evidences this harm, not only because MSM were unable to donate needed blood, but also because the MSM One-Year Policy created secondary harm to those affected by the tragedy who found themselves in a position in which they were specifically excluded from helping fellow members of their community. The MSM One-Year Policy fails to consider all pertinent alternatives that would meet the same goals.

Respectfully submitted,

Matthew Redle
Chair, Criminal Justice Section
February 2017

³⁷ Sam Levin, *id.*

³⁸ R.T. Winston Berkman, Li Zhou, *Ban the ban: A scientific and cultural analysis of the FDA’s ban on blood donations from men who have sex with men*, available at <http://medicalreview.columbia.edu/article/ban-the-ban/>.

³⁹ *Id.*

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Matthew Redle, Chair

1. Summary of Resolution(s). This resolution calls for the repeal and/or modification of the discriminatory prohibitions on blood donations by gay men and for the FDA to develop non-discriminatory but medically safe means of accepting blood donations and testing for infectious diseases.
2. Approval by Submitting Entity. This resolution was adopted by the Criminal Justice Council shortly after the fall meeting in Washington, D.C., November 11, 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 the 2014 resolution calling for the repeal of all regulations and legislation that discriminate on the basis of sexual orientation.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, this policy will be used in local, state, and federal jurisdictions to promote the development of non-discriminatory but medically safe blood donation policies.
8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. (If applicable) None.
10. Referrals.
 - AIDS Coordinating Council
 - Center for Human Rights
 - Center for Professional Responsibility
 - Civil Rights and Social Justice Section
 - Commission on Disability Rights
 - Commission on Homelessness and Poverty
 - Commission on Hispanic Legal Rights & Responsibilities
 - Commission on Immigration
 - Commission on Racial & Ethnic Diversity in the Profession
 - Commission on Sexual Orientation and Gender Identity

Commission on Veteran's Legal Services
 Federal Trial Judges
 Government and Public Sector Lawyers
 Health Law Section
 International Law Section
 Judicial Division
 Law Practice Division
 Litigation Section
 National Association of Attorney Generals
 National Association of Legal Aid and Defender Association
 Office of Diversity & Inclusion
 Science & Technology Law Section
 Solo, Small Firm and Government Practice Division
 Standing Committee on the Federal Judiciary
 Standing Committee on Legal Aid & Indigent Defense
 State and Local Government Section
 State Trial Judges
 Young Lawyers Division
 Youth at Risk Commission

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112D

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.)

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EXECUTIVE SUMMARY1. Summary of the Resolution

This resolution calls for the repeal and/or modification of the discriminatory prohibitions on blood donations by gay men and for the FDA to develop non-discriminatory but medically safe means of accepting blood donations and testing for infectious diseases.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the discriminatory impact of the current FDA blood donation regulations, and the disparate and damaging impact these policies have on victims and the victim community.

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

If adopted, this policy will be used in local, state, and federal jurisdictions to promote reformation of FDA policies to ensure that blood donation regulations are both medically safe/sound, but also implemented in a non-discriminatory fashion.

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

None.

AMERICAN BAR ASSOCIATION
SECTION OF FAMILY LAW
COMMISSION ON IMMIGRATION
SECTION OF SCIENCE & TECHNOLOGY LAW
SECTION OF HEALTH LAW
SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

1 RESOLVED, That the American Bar Association urges the United States Department of
2 State to:

3
4 1) interpret the Immigration and Nationality Act, 8 U.S.C. § 1401, to recognize
5 those children born to intended parents, even if those legally recognized parents do
6 not have a biological (genetic or gestational) relationship to the child, so long as at
7 least one of the intended parents is a U.S. citizen who is legally recognized as the
8 child's parent by the country of birth or the intended parent's state of domicile and
9 the relevant resident or physical presence requirements are met;

10
11 2) create guidelines related to the recognition of children born to intended parents
12 that will ensure the validity of the intended parent relationship and that it is
13 demonstrated prior to acquisition of citizenship;

14
15 3) recognize children born to parents who are legally bound by marriage, civil
16 unions, or other similar forms of legal partnership as not "born out of wedlock" and
17 analyze them under 8 U.S.C. § 1401 rather than 8 U.S.C. § 1409; and

18
19 4) apply these three expanded interpretations retroactively.

REPORT

Introduction & Summary

Some children of U.S. citizens conceived through assisted reproduction technologies (“ART”) and born abroad remain stateless because many forms of ART do not require the use of intended parents’ genetic material. Additionally, surrogacy is increasingly a part of ART, whereby a surrogate gestates, carries, and delivers a child for intended parents. As a result, children conceived through modern forms of ART often do not have a biological, or gestational, relationship to their legal, intended parents. The Resolution recommends that State expand the definition of child for purposes of citizenship acquisition under the INA to include those children born to intended parents, even if those legally recognized parents do not have a biological (genetic or gestational) relationship to the child. This expanded definition should be accompanied by guidelines that ensure the intended parental relationship is valid and that it is demonstrated prior to acquisition of citizenship. Currently, the analysis for how these intended U.S. citizen parents, both married and unmarried, transmit citizenship to their children conceived using ART is incomplete. Indeed, under some scenarios explained in this memorandum, a child conceived through ART may be “stateless” within the current legal interpretation utilized by the U.S. Department of State (“State”) to confer citizenship. Given rapid innovations in ART, this Resolution encourages State to expand upon its recent advances and provide additional, uniform guidance to U.S. citizen parents whose children are conceived with ART and born abroad.

Background

In January 2014, State announced that it would expand its policy related to the acquisition of citizenship for children born abroad through ART.¹ The previous policy required a U.S. citizen parent to have a genetic relationship to a child for the purpose of automatically transmitting the parent’s citizenship to a child born abroad.² Under the new policy, State now interprets the definition of child to include the child of a gestational mother even where there is no genetic relationship between the child and gestational mother. Importantly, the new policy is retroactive, allowing children born abroad to a gestational (and legal) mother, who were previously denied automatic transmission of citizenship under the prior interpretation, to reapply for citizenship.³

The expanded definition of child under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1401, when addressing the transmission of citizenship at birth to a child born abroad was a welcome change. However, due to rapid advances in ART, gaps continue to exist in State’s legal interpretation of child for the purposes of transmitting citizenship to children of U.S. citizens conceived through ART and born abroad, leaving some children stateless.

¹ Unclassified U.S. State Department Document 00010952, *available at* http://travel.state.gov/content/dam/visas/policy_updates/UNCLASSIFIED%20STATE%2000010952.pdf (last visited October 17, 2016); *see also* Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad, *available at* <http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/assisted-reproductive-technology.html> (last visited October 17, 2016).

² *Id.*

³ *Id.*

Purpose of the Resolution

Given rapid innovations in ART, this Resolution encourages State to expand upon its recent advances and provide additional, uniform guidance to U.S. citizen parents whose children are conceived with ART and born abroad. To this end, the Resolution recommends that State base its definition of child not on genetic and gestational relationship alone, but also on demonstrated “parental intent” to establish the necessary relationship to transmit or acquire U.S. citizenship. This approach is consistent not only with accepted canons of statutory interpretation, but also with interpretations of family law in many American and foreign jurisdictions confronting the parentage of children conceived through ART. Such a policy expansion by State would permit U.S. citizen parents to transmit U.S. citizenship to their children born abroad but conceived through assisted reproductive technologies when their parent-child relationship is legally recognized by the country of the child’s birth.

This Resolution and Report set forth the legal foundation for this recommended policy expansion and suggest specific policy changes to State’s current guidelines in the hope that State’s policies will keep pace with the many ways in which U.S. citizens now utilize ART to create and expand their families.

Modernizing the Treatment of U.S. Citizenship Acquisition for Children Conceived through Assisted Reproductive Technology and Born Abroad.

1. The INA Does Not Universally Require a Biological Relationship to Transmit Citizenship.

Acquisition of U.S. citizenship is statutory in nature⁴ and State is charged with the administration of all statutes related to acquisition of citizenship relating to a person born outside of the United States.⁵ The Family Affairs Manual (“FAM”) sets forth State’s interpretation of the statutes governing citizenship.

To determine whether a child born abroad acquires citizenship at birth, the requirements of the citizenship statute – generally the statute in effect at the time of the child’s birth – must be satisfied.⁶ The statutory requirements for acquisition of citizenship upon birth abroad always require that at least one parent be a U.S. citizen at the time of the child’s birth and that this parent has resided in the U.S. for a certain length of time before the child was born.⁷ Other significant factors to determine citizenship have traditionally included whether only one or both of the parents are U.S. citizens and the child’s legitimacy at birth.⁸

⁴ *Rogers v. Bellei*, 401 U.S. 815, 830 (1971) (finding that “acquisition of citizenship by being born abroad of American parents . . . [is] to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the constitution to establish an uniform rule of naturalization.”); see 7 FAM 1131.1-1.

⁵ INA §104 (codified at 8 U.S.C. § 1104); see 7 FAM 1131.1(b).

⁶ *Rogers*, 401 U.S. at 830-31; see *United States v. Ginsberg*, 243 U.S. 472, 475 (1917); 7 FAM 1131.1-2.

⁷ *Weedin v. Chin Bow*, 274 U.S. 657, 666-67 (1927); 7 FAM 1131.2; see DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 4:4 (Charles Roth et al. eds., 2013).

⁸ See Daniel Levy, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 4:4 (Charles Roth et al. eds., 2013) (outlining the factors for determining citizenship at birth to be: “(1) date of the child’s birth; (2) U.S. citizenship of one as opposed to both of the parents at the time of the child’s birth; (3) noncitizen nationality of the noncitizen parent;

- a. The INA is silent as to requiring a biological connection between a child and legally bound citizen parents.

A biological connection between legally bound parents and their child born abroad is not generally a requirement for automatic transmission of citizenship under the INA. INA § 301 – the statute prescribing how a child *not* born out of wedlock may establish citizenship at birth – is silent as to the requirement for a biological connection between the U.S. citizen parents and child. And under INA § 301, for children not born out of wedlock, the presumption of parenthood has traditionally been afforded to both mothers and fathers.⁹

Congress has generally provided more stringent requirements to pass citizenship to children born out of wedlock. A child born out of wedlock may acquire U.S. citizenship from his mother as long as she was physically present in the U.S. for one year previous the child's birth.¹⁰ However, citizenship statutes focus more closely on an unmarried father's ability to pass citizenship to a child at birth.

Under the 1952 version of the INA, unmarried fathers were required to legitimate the child under the laws of either the father's or the child's place of residence before the age of 21.¹¹ In 1986, the INA amended § 309, the statute prescribing the ways in which a child born out of wedlock may establish citizenship based on her unmarried father.¹² Among other requirements, the 1986 amendment required that a relationship be established between the father and child by clear and convincing evidence.¹³ These additional requirements¹⁴ only applied to unmarried fathers. As Justice Stevens explained in *Miller v. Albright*, requiring an unmarried citizen father to provide formal proof of paternity was “eminently reasonable” because “an unmarried father may not even know that his child exists, and the child may not know the father's identity.”¹⁵

This same requirement does not apply to U.S. citizen mothers who have children out of wedlock, and INA § 309 is silent as to requiring a biological connection between the out of wedlock mother and child.¹⁶

(4) child's legitimacy at birth; (5) length of residence of citizen parent in the U.S. prior to the birth of the child; and (6) child's compliance with conditions subsequent imposed by the law in effect at the time of the child's birth.”).

⁹ See INA § 301.

¹⁰ See INA § 309; 8 U.S.C.A. § 1409(c).

¹¹ See 7 FAM 1134.5-2.

¹² See 8 U.S.C. 1409(a) (as amended on November 14, 1986).

¹³ *Id.*

¹⁴ A child will not acquire U.S. citizenship at birth through an unmarried father unless: 1) a blood relationship is established by clear and convincing evidence; 2) the father had U.S. citizenship before the child was born; 3) the father agreed in writing to provide financially for the child (unless he is deceased); and 4) before the child turns 18 years of age the child is either a) legitimated under the law of the child's residence or domicile; or b) the father acknowledges paternity of the child in writing under oath; or c) a competent court establishes the paternity of the child. See INA § 309; 8 U.S.C.A. § 1409(c).

¹⁵ *Miller v. Albright*, 523 U.S. 420, 423 (1998).

¹⁶ See INA § 309(c).

2. Unlike the INA, State requires a biological relationship between citizen parents and a child born abroad to confer automatic citizenship.

Unlike the INA, State's FAM has historically taken a more restricted view of citizenship acquisition by requiring a biological relationship between the child and parent, whether the child was born in or out of wedlock.¹⁷ Courts, however, have deferred to the INA's broader definition of child to permit acquisition of citizenship without a biological relationship.

In *Scales v. INS*, the Ninth Circuit reviewed the case of a child not born out of wedlock to the non-citizen wife of a U.S. citizen father and held that, notwithstanding FAM's contrary position on the issue, the plain language of INA § 301 does not require a biological relationship to confer citizenship at birth.¹⁸ As a result, children who are born to the spouse (or legal partner) of a U.S. citizen acquire citizenship at birth even without a biological relationship to the citizen parent.¹⁹ In *Solis-Espinoza*, the Ninth Circuit broadened its holding in *Scales*, holding that the respondent acquired U.S. citizenship under INA § 301 because his biological father's U.S. citizen wife accepted him as her child almost immediately after his birth and raised him as her own child.²⁰

In deciding *Scales* and *Solis-Espinoza*, the Ninth Circuit rejected FAM's narrow biological relationship requirement for the acquisition of citizenship, adopting a broader approach consistent with the INA that considers the legal relationship of the parents to each other and the child.²¹ The Ninth Circuit's decisions in *Scales* and *Solis-Espinoza* also suggest that an expanded State policy that looks past a biological relationship to consider the intended relationship between citizen parents and a child conceived through ART is entirely consistent with the INA.

3. State's citizenship acquisition guidelines have not kept pace with modern forms of ART and may leave children conceived through ART and born abroad to U.S. citizens stateless.

Although recently expanded, State's current requirement that parents share a biological (genetic or gestational) connection with a child in order for the child to receive the benefit of a parent's U.S. citizenship unnecessarily limits, and introduces confusion to, modern family arrangements achievable through ART.

State has recognized that its understanding of ART set forth in FAM has not kept pace with technological, social, and legal developments.²² Indeed, it is laudable that State has considered the

¹⁷ 7 FAM 1131.4-1(a).

¹⁸ *Scales v. INS*, 232 F.3d 1159, 1164-66 (9th Cir. 2000).

¹⁹ "[INA § 301] requires only that [child] be 'born . . . of parents,' one of whom is a U.S. citizen, in order to acquire citizenship." *Id.* at 1166.

²⁰ *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1093-94 (9th Cir. 2005).

²¹ *See id.* at 1094 ("Public policy supports recognition and maintenance of a family unit. The Immigration and Nationality Act . . . was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.").

²² *See* OIG Inspection Report of Embassy New Delhi, India at 36 (indicating that "CA is aware that regulations and laws have not kept pace with technology and [State] is working with legal advisers and other agencies to update policies as appropriate").

2012 and 2013 policy recommendations submitted by the American Immigration Lawyers Association (“AILA”) regarding the modernization of U.S. citizenship acquisition policy for children born abroad through ART by expanding the meaning of child utilized by State.²³ However, it is crucial that FAM guidelines continue to adapt in light of advancing ART methods.

Several provisions of FAM related to citizen acquisition are pertinent to this discussion.²⁴ It is useful for purposes of discussion to construe these sections in the context of the modern ART techniques. The forms of ART available today are diverse. When combined with the increasingly prevalent use of surrogacy, many different genetic and gestational relationships between parent(s) and child can be imagined. The following hypothetical scenarios are illustrative:

Example 1: A heterosexual, married couple resides in Australia. The husband, a U.S. citizen, and his wife, an Australian citizen, struggle with infertility. The couple obtains donor ova and sperm for use in *in vitro* fertilization. The woman undergoes embryo transfer, achieves pregnancy, and gives birth to a child. Under current FAM guidelines, the child cannot acquire U.S. citizenship, because the child has neither a genetic, nor a gestational, relationship to the U.S. citizen parent, the father.

Example 2: A heterosexual, married couple resides in Australia. The husband and wife are both U.S. citizens. Both individuals are medically infertile and the wife has been advised by her obstetrician to not attempt pregnancy based on her prior history of an incompetent cervix that resulted in the extremely premature delivery of her child. Therefore, the couple obtains donor sperm and ova and enters into a surrogacy agreement with an Australian woman. The surrogate carries the child to term and the child is born. However, the child is unable to acquire U.S. citizenship under current FAM guidelines because the child lacks a genetic or gestational relationship to a U.S. citizen, even though *both* parents have U.S. passports and U.S. citizenship. In fact, the child may even be stateless. This will occur if Australia does not consider the child to be a national of that country because the child has no legal connection to the surrogate carrier.

Example 3:²⁵ A lesbian couple resides in Spain, where they were legally married under Spanish law. One woman is a U.S. citizen, while the other is a Spanish citizen. The U.S. citizen gave birth to the couple’s first child using anonymous donor sperm and the U.S. citizen’s own egg. This child acquired U.S. citizenship at birth. Three years later, the Spanish wife gave birth to the couple’s second child using the same anonymous donor sperm and the Spanish citizen’s own egg. Unlike her older brother, this second child is unable to acquire U.S. citizenship because she has neither a genetic, nor a gestational relationship with her U.S. citizen parent.

²³ See Letter from AILA to David Newman, Director Office of Legal Affairs, Bureau of Consular Affairs, Visa Office, United States Department of State (Dec. 20, 2012); Letter from AILA to Denise Vanison, Chief of the Office of Policy and Strategy, U.S. Citizenship and Immigration Services (Jul. 22, 2013).

²⁴ Some of the relevant provisions of FAM include: 7 FAM 1131 (basis for determination of acquisition of U.S. citizenship); 7 FAM 1441 (citizenship acquisition process); 7 FAM 1445 (application for consular report of birth abroad of a U.S. citizen); 7 FAM 1110, appendices A and E (guidance for U.S. consulates and embassies for citizenship adjudication); 7 FAM 1445.5-7 (regarding required evidence for citizenship adjudication).

²⁵ This example is adapted from a policy memo written by the Council for Global Equality, Immigration Equality, and NCLR to the U.S. Department of State entitled “A Clear and Pressing Need to Amend FAM on the Acquisition of Citizenship” (Apr. 24, 2012).

When donor embryos are utilized, the result is similarly troubling. If the Spanish spouse in the above example underwent *in vitro* fertilization with a donor embryo, then neither she nor her spouse/partner would have a genetic relationship to the resulting child and he would similarly not acquire U.S. citizenship.

Example 4: A gay male couple legally married in the United States resides in Canada, where both spouses are employed. One partner is a U.S. citizen and the other is a Canadian citizen. They wish to form a family through ART and therefore must enter into a surrogacy arrangement. The couple enters into a surrogacy arrangement with a Canadian woman and the Canadian spouse donates sperm. The surrogate carries the child to term. However, because the child does not have a genetic relationship to its U.S. citizen father, it cannot acquire U.S. citizenship at birth. Here, State's new policy poses the same particular difficulties as the old policy for gay male couples living abroad who must always use a surrogate to form a family through ART.

4. State should adopt citizenship acquisition guidelines that consider the intended relationship between parents and children.

FAM guidelines have not kept pace with increasing use of ART among U.S. citizen parents.²⁶ It is critical that State now take into account the development of medical technologies U.S. citizens utilize to begin and expand their families.²⁷

Pertinently, this recommendation is consistent with the evolution of family law in American and foreign jurisdictions examining the question of legal parentage when a child is conceived through ART.

- a. American family law has evolved to recognize the intended parents of children conceived through ART.

Many American jurisdictions now recognize the intended parents of children conceived through ART to confer parental rights and responsibilities.

In the California case *In re Marriage of Buzzanca*, a married couple used ART to conceive a child whereby neither parent shared a genetic relationship with the child.²⁸ The trial court concluded that because neither parent contributed genetic material to the child, the child “had *no* lawful parents.”²⁹ The Court of Appeal disagreed with this “extraordinary conclusion” finding instead that both the mother and father are the child’s “lawful parents given their initiating role as the intended parents in her conception and birth.”³⁰ The Court observed that its conclusion was

²⁶ Centers for Disease Control and Prevention, ASSISTED REPRODUCTIVE TECHNOLOGY (ART), *available at* <http://www.cdc.gov/art/artdata/index.html> (finding “[a]lthough the use of ART is still relatively rare as compared to the potential demand, its use has doubled over the past decade”) (last visited April 17, 2014).

²⁷ See *Carey v. Population Servs., Int’l*, 431 U.S. 678, 685 (1977) (finding “[t]he decision whether or not to beget or bear a child is at the very heart . . . of constitutionally protected choices”);

²⁸ *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1412 (1998) (explaining that the parents agreed to “to have an embryo genetically unrelated to either of them implanted in a woman – a surrogate – who would carry and give birth to the child for them”).

²⁹ *Id.* (emphasis original).

³⁰ *Id.* at 1428.

consistent with the California Supreme Court's finding that "[w]ithin the context of artificial reproductive techniques ... intentions that are voluntarily chosen, deliberate, [and] express ... ought presumptively to determine legal parenthood."³¹ "That," observed the *Buzzanca* court "is far more than can be said for a model of the law that renders a child a legal orphan."

Similarly, in the Connecticut case *Raftipol v. Ramney*, an intended father and his same-sex domestic partner (the biological father) entered into a surrogacy arrangement with a surrogate who gave birth to a child resulting from embryos they created with sperm from one father and eggs from an egg donor.³² The non-biological intended father sought to have his legal parentage recognized for purposes of obtaining a birth certificate.³³ The *Raftipol* court read the relevant state parentage law "to confer parental status on an intended parent ... irrespective of that intended parent's genetic relationship to the children."³⁴

Other state courts have similarly concluded that with advances in ART technology, parental intent and the relationship of the intended parents to each other must serve as the touchstone to determinations of legal parentage.³⁵ For example, New Hampshire's recently enacted law governing surrogacy requires the recognition of parentage in the intended parents even when donated sperm and ova are used with a gestational surrogate.³⁶ Similar statutes exist in states such as California, Connecticut, Maine and Nevada.³⁷

- b. Foreign jurisdictions have recognized the importance of recognizing intended parents in citizenship statutes.

In addition to the recognition by American jurisdictions of intended parents for the purposes of determining parental rights, foreign jurisdictions have recently confronted the question of citizenship acquisition of children born to nationals abroad. In *Minister for Immigration and Citizenship v. Vanessa McMullen*, the Federal Court of Australia determined that a child born abroad who shared no "natural or biological" relationship to her Australian parents could acquire Australian citizenship.³⁸ The court interpreted the Australian Citizen Act of 2007, which provides

³¹ *Johnson v. Calvert*, 5 Cal. 4th 84, 94 (1998) ("Within the context of artificial reproductive techniques ... intentions that are voluntarily chosen, deliberate, [and] express ... ought presumptively to determine legal parenthood.") (quotation marks omitted); see also John Lawrence Hill, *What Does It Mean to Be A "Parent"?* *The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353 (1991) ("Honoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike.").

³² *Raftipol v. Ramney*, 299 Conn. 681, 687-88 (2011).

³³ *Id.* at 688.

³⁴ *Id.* at 708.

³⁵ See e.g. *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 465-66(2006) (petitioner who had entered a valid civil union at the time of their child's birth was the intended and legal parent of her partner's child conceived through ART even though they lacked any genetic connection) (collecting cases); *In re Baby Doe*, 291 S.C. 389, 353 (1987) (holding that a husband who consented to use of ART for wife to conceive is the legal parent of the resulting child).

³⁶ S. B. § 353 (N.H. 2014).

³⁷ These statutes allow the gestational carrier arrangement to create a parent-child relationship for the intended parents: Nev. Rev. Stat. Ann. § 126.720; Conn. Gen. Stat. § 7-48a; N.H. Rev. State. § 168-B:1.

³⁸ *Minister for Immigration and Citizenship v. Vanessa McMullen*, (2010) AATA 119 (Austl.).

that a person born outside Australia is eligible to become an Australian citizen if, among other things, “a parent of the person was an Australian citizen at the time of the birth.”

In *McMullen*, the Australian court noted that the “fundamental consideration in acquiring citizenship is the strength of the connection between a person and Australia.”³⁹ Within this framework, the Court found that restricting the definition of “parent” for purposes of citizenship acquisition has little contextual support because a child “with a biological at-birth citizen parent, can have no more connection with the country than a claimant for citizenship also born outside Australia, with an at-birth citizen parent who holds out the person as his child from birth, treating the person as his child from that point on, though the genetic link is missing.”

To keep pace with advances in ART, State’s guidelines must similarly evolve to recognize the legitimacy of intended parents and permit citizenship acquisition for children born abroad to U.S. citizens who share no biological relationship to their children.

- c. Recognizing the intended parents of children conceived through ART is consistent with the uniquely intentional nature of ART.

Furthermore, citizenship acquisition requirements for children not born out of wedlock that rely on genetic relationship alone fail to recognize the context of children conceived using ART. ART is not used accidentally. Parents who utilize ART do so for the singular purpose of producing a child.⁴⁰ This intentionality stands in stark contrast to many pregnancies in the U.S., of which roughly half are unintended.⁴¹ Thus, there is a strong argument that intended parents who cannot accidentally, but rather, must purposely and affirmatively enter into a surrogacy arrangement to have a child are just as likely, if not more likely, to “develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States” than a parent who has a genetic connection with a child.⁴²

- d. FAM guidelines should similarly evolve to recognize citizenship transmission based on an “intended” parent-child relationship legally recognized by the country of birth or the intended parent’s state of domicile.

Consistent with developments in American and foreign law, this Resolution recommends that State permit U.S. citizen parents to pass citizenship to children conceived through ART and born abroad by establishing parental intent, demonstrating that their parent-child relationship is legally recognized by the country of birth or the intended parent’s state of domicile, and by expanding the scope of the term child as analyzed when determining whether citizenship may be transmitted under the INA.

³⁹ *Id.*

⁴⁰ This important distinction was recognized by the California Court of Appeals when it note that in in instance of each child born using ART, “a child is procreated because a medical procedure was initiated and consented to by intended parents.” *In re Marriage of Buzzanca*, 61 Cal. App 4th at 1413.

⁴¹ Centers for Disease Control and Prevention, *REPRODUCTIVE HEALTH*, available at <http://www.cdc.gov/Reproductivehealth/UnintendedPregnancy/> (last visited October 17, 2016).

⁴² *Nguyen v. I.N.S.*, 533 U.S. 53, 54 (2001).

First, to establish parentage, State should recognize parent-child relationships if a U.S. citizen parent is legally recognized by the country of birth or the intended parent's state of domicile and the relevant resident or physical presence requirements are met.⁴³

Second, once intended parentage is established, State should consider children born to intended parents who utilize ART under INA § 301, rather than INA § 309. Presently, State often considers a child born through ART as a child born out of wedlock under INA § 309, even when the intended parents are married. This practice should be replaced with a policy that considers children born to intended parents who are legally bound to each other and legally responsible for the child under INA § 301. State should recognize civil unions and other forms of registered partnership, including same-sex spouses or registered partners under the same INA § 301 analyses because their children are not born "out of wedlock."⁴⁴ (As State develops guidelines in this regard, State may want to consider how or whether to recognize the U.S. citizen intended parents whose parentage would otherwise be legally recognized in the country of birth if not for their same-sex relationship status which would be recognized in the U.S.)

A distinction based on genetics, or on carrying the child alone, is all but arbitrary if the child already has a legal parent or parents who are intent on raising, nurturing, and providing for the child. If the purpose of U.S. immigration law and policy is to promote family unity, an analysis based on parental intent best serves that policy.

Therefore, State should implement the following revisions to FAM and apply the changes retroactively to children born abroad to intended parents using ART:

- Find the existence of a parent-child relationship for purposes of transferring citizenship at birth when the parent-child relationship is legally recognized by the country of birth or the intended parent's state of domicile and relevant parental residence requirements have been met.
- Recognize children born to parents who are legally bound by marriage, civil unions or other similar forms of legal partnership as not "born out of wedlock" and analyze them under INA § 301 rather than INA § 309.

Adopting these recommendations ensures that U.S. citizen parents whose children are conceived through ART and born abroad will have clear guidance that is fair and in line with both modern family law and the INA.

Conclusion

Requiring a biological connection between both parents and a child to find a presumptive child-parent relationship for purposes of citizenship acquisition is out of step with judicial interpretations of the INA, advances in modern technology, and parents' constitutionally protected choices for reproduction. More importantly, the current approach for addressing citizenship of children

⁴³ Note: This is not intended to usurp or override any status of forces agreements or any rules or regulations applying to the determination of U.S. citizenship born to U.S. military personnel stationed abroad.

⁴⁴ Scott Titshaw, *A Modest Proposal To Deport the Children of Gay Citizens, & Etc.: Immigration Law, The Defense of Marriage Act and the Children of Same-Sex Couples*, 25 GEO. IMMIGR. L. J. 407, 483-84 (2011).

conceived through ART and born abroad may inappropriately leave certain children stateless, despite having one or more U.S. citizen parents. State policies and FAM guidelines should evolve to address the realities of today's modern medical technology and family law. The policy changes recommended by this Resolution will address not only current problems facing the ART/automatic citizenship context – but also offer tools to navigate the effects that emerging ART will have on future questions regarding citizenship.

Respectfully submitted,

Mary Vidas, Chair
ABA Section of Family Law
February 2017

GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Family Law

Submitted By: Mary Vidas, Chair, ABA Section of Family Law

1. Summary of Resolution(s). Requiring a biological connection between both parents and a child to find a presumptive child-parent relationship for purposes of citizenship acquisition is out of step with judicial interpretations of the Immigration and Nationality Act, advances in modern technology, and parents' constitutionally protected choices for reproduction and may inappropriately leave certain children stateless, despite having one or more U.S. citizen parents. Accordingly, the Resolution urges the United States Department of State:
 - 1) to interpret the Immigration and Nationality Act, 8 U.S.C. § 1401, to recognize those children born to intended parents, even if those legally recognized parents do not have a biological (genetic or gestational) relationship to the child, so long as at least one of the intended parents is a U.S. citizen who is legally recognized as the child's parent by the country of birth or the intended parent's state of domicile and the relevant resident or physical presence requirements are met;
 - 2) to create guidelines related to the recognition of children born to intended parents that will ensure that validity of the intended parent relationship and that it is demonstrated prior to acquisition of citizenship;
 - 3) to recognize children born to parents who are legally bound by marriage, civil unions or other similar forms of legal partnership as not "born out of wedlock" and analyze them under Immigration and Nationality Act, 8 U.S.C. § 301 rather than Immigration and Nationality Act, 8 U.S.C. § 309; and
 - 4) to apply these expanded interpretations retroactively.
2. Approval by Submitting Entity. The ABA Section of Family Law approved submission of this Resolution on October 20, 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? The ABA Model Act Governing Assisted Reproduction Technologies was approved by the ABA House of Delegates in February 2008 and established for intended parents and licensed professionals a single baseline legal standard from which to foster predictability within the Intended Parent-Licensed Professional relationship in the United States. The ABA Model Act Governing Assisted Reproduction Technology Agencies was approved by the ABA House of Delegates in February 2016 and supplemented the 2008 Model Act. Finally, the ABA House of Delegates approved Resolution 112B in February 2016, providing expertise and assistance requested by the U.S. Department of State for its use in negotiations concerning a possible Hague Convention on private international law

concerning children, including surrogacy arrangements. All of these approved resolutions are anchored by the central concept of recognizing the intended parent doctrine as a basis for establishing the legal relationship between a parent and a child conceived through ART. This doctrine is also the core principle of the Resolution presently before the House of Delegates.

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. Submission to the United States Department of State for adoption.
8. Cost to the Association. (Both direct and indirect costs). None.
9. Disclosure of Interest. (If applicable). Not Applicable.
10. Referrals. The Section of Family Law and ABA Commission on Immigration actively participated in drafting a position paper on these issues over the course of 2014 and 2015 and circulated the substantive draft documents which are the subject of this Resolution in 2016 to the following ABA entities, who were also invited to take part in a Working Group session in September 2016:

 - Business Law;
 - Commission on Sexual Orientation and Gender Identity;
 - Health Law;
 - Individual Rights and Responsibilities;
 - International Law;
 - Litigation;
 - Real Property, Trust and Estate Law;
 - Solo, Small Firm & General Practice;
 - Science and Technology Law;
 - Tort Trial & Insurance; and
 - Young Lawyers Division.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address).

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges the United States Department of State:

- 1) to interpret the Immigration and Nationality Act, 8 U.S.C. § 1401, to recognize those children born to intended parents, even if those legally recognized parents do not have a biological (genetic or gestational) relationship to the child, so long as at least one of the intended parents is a U.S. citizen who is legally recognized as the child's parent by the country of birth or the intended parent's state of domicile and the relevant resident or physical presence requirements are met;
- 2) to create guidelines related to the recognition of children born to intended parents that will ensure the validity of the intended parent relationship and that it is demonstrated prior to acquisition of citizenship;
- 3) to recognize children born to parents who are legally bound by marriage, civil unions or other similar forms of legal partnership as not "born out of wedlock" and analyze them under Immigration and Nationality Act, 8 U.S.C. § 301 rather than Immigration and Nationality Act, 8 U.S.C. § 309; and
- 4) to apply these expanded interpretations retroactively.

2. Summary of the Issue that the Resolution Addresses

Recent advancements in medical technology have enabled the global expansion of third-party assisted reproduction for both infertile couples and single individuals. Children conceived through modern forms of ART often do not have a biological, or gestational, relationship to their legal, intended parents.

In January 2014, State announced that it would expand its policy related to the acquisition of citizenship for children born abroad through ART. The previous policy required a U.S. citizen parent to have a genetic relationship to a child for the purpose of automatically transmitting the parent's citizenship to a child born abroad. Under the new policy, State now interprets the definition of child to include the child of a gestational mother even where there is no genetic relationship between the child and gestational mother. Importantly, the new policy is retroactive, allowing children born abroad to a gestational (and legal) mother, who were previously denied automatic transmission of citizenship under the prior interpretation, to reapply for citizenship.

The expanded definition of child under the Immigration and Nationality Act (“INA”) when addressing the transmission of citizenship at birth to a child born abroad is a welcome change. However, due to rapid advances in ART, the Sponsors and State are concerned that gaps continue to exist in State’s legal interpretation of child for the purposes of transmitting citizenship to children of U.S. citizens conceived through ART and born abroad, leaving some children stateless.

Some children of U.S. citizens conceived through ART and born abroad remain stateless because there are many forms of ART that do not require the use of intended parents’ genetic material. Additionally, surrogacy is increasingly a part of ART, whereby a surrogate gestates, carries, and delivers a child for intended parents. As a result, children conceived through modern forms of ART often do not have a biological, or gestational, relationship to their legal, intended parents. Currently, the analysis for how these intended U.S. citizen parents, both married and unmarried, pass citizenship to their children conceived using ART is incomplete. Indeed, under some scenarios explained in this memorandum, a child conceived through ART may be “stateless” within the current legal interpretation utilized by State to confer automatic citizenship.

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

Given rapid innovations in ART, the Sponsors encourage State to expand upon its recent advances and provide additional, uniform guidance to U.S. citizen parents whose children are conceived with ART and born abroad. To this end, the Sponsors recommend that State base its definition of child not on genetic and gestational relationship alone, but also on demonstrated “parental intent” to establish the necessary relationship to transmit or acquire U.S. citizenship. This approach is consistent not only with accepted canons of statutory interpretation, but also with interpretations of family law in many American and foreign jurisdictions confronting the parentage of children conceived through ART. Such a policy expansion by State would permit U.S. citizen parents to transmit U.S. citizenship to their children born abroad but conceived through assisted reproductive technologies when their parent-child relationship is legally recognized by the country of the child’s birth.

4. Summary of Minority Views

At the time of the writing of this Resolution with Report and summary, we are not aware of any formal reported direct opposition to the approval of this Resolution.

AMERICAN BAR ASSOCIATION
COMMISSION ON DISABILITY RIGHTS
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SECTION OF FAMILY LAW
COMMISSION ON YOUTH AT RISK
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

1 RESOLVED, That the American Bar Association urges all federal, state, territorial, and
2 tribal governments to enact legislation and implement public policy providing that
3 custody, visitation, and access shall not be denied or restricted, nor shall a child be
4 removed or parental rights be terminated, based on a parent's disability, absent a
5 showing—supported by clear and convincing evidence—that the disability is causally
6 related to a harm or an imminent risk of harm to the child that cannot be alleviated with
7 appropriate services, supports, and other reasonable modifications.

8
9 FURTHER RESOLVED, That the American Bar Association urges all federal, state,
10 territorial, and tribal governments to enact legislation and implement public policy
11 providing that a prospective parent's disability shall not be a bar to adoption or foster
12 care when the adoption or foster care placement is determined to be in the best interest of
13 the child.

REPORT

I. INTRODUCTION

The U.S. Supreme Court has long recognized that the fundamental right of parents to make decisions concerning the care, custody,¹ and control of their children is protected under the Due Process Clause of the Fourteenth Amendment.² Nevertheless, people with disabilities have been, and continue to be, denied full enjoyment of this right based on discriminatory assumptions, generalizations, biases, stereotypes or misconceptions about disabilities and the ability to parent, instead of individualized determinations supported by objective evidence. The individuals most likely to report a parent with a disability to a child welfare agency are neighbors, family members, and medical personnel, frequently based on a belief that a parent with a disability cannot be a safe parent.³ These reports start the family's dependency proceedings and often lead to termination of parental rights. Co-parents or extended family members sometimes move for custody solely on the basis of the custodial parent's disability.⁴ Social workers, officers of the court, child welfare and health care workers, adoption and foster care personnel, and other professionals are not immune from these biases.⁵ As a result, many parents with disabilities lose custody of their children, and prospective parents with disabilities are denied the right to foster or adopt children.

Many parents with disabilities are denied access to appropriate family-based services, supports, and other reasonable modifications that would provide them with a full and equal opportunity to keep or reunify with their child. This denial is often based on the presumption that, because of their disabilities, parents are unable to benefit from these services and supports. Parents with disabilities may need adaptive equipment to maintain, increase, or strengthen their parenting capabilities, such as a changing table modified to allow a wheelchair user to roll the wheelchair beneath the surface, or an alarm or prompting system to remind a parent with an intellectual disability to give a child medication.⁶ They may also need accommodations and adapted services, such as an interpreter at a parenting class for a deaf parent, or more frequent and longer parenting sessions with some work inside the family's home for a parent with a developmental disability.⁷

Twenty-six years ago, Congress enacted the Americans with Disabilities Act (ADA) "to provide a clear and comprehensive national mandate for the elimination of discrimination against

¹ Some states use the term "parental responsibility" or "parental decision-making responsibility" instead of the term "custody." This report will use the term "custody."

² See *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Smith v. Org. of Foster Families*, 431 U.S. 816 (1977); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

³ Ella Callow, Kelly Buckland, and Shannon Jones, *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J. ON C.L. & C.R. 9, 17 (Fall 2011).

⁴ *Id.* at 18.

⁵ *Id.*

⁶ *Id.* at 19.

⁷ *Id.*

individuals with disabilities.”⁸ Congress recognized “that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination.”⁹ Accordingly, Congress found that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency”¹⁰ and that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.”¹¹ Title II of the ADA prohibits a public entity from excluding persons, by reason of their disabilities, from participating in services, programs, or activities, and from denying them the benefits of these services, programs, or activities.¹²

II. NEED FOR RESOLUTION

It is estimated that in the United States there are at least 4.1 million parents with disabilities who have minor children, representing approximately 6.2 percent of the parenting population.¹³ Also, approximately 6.1 million children under the age of 18 (nearly one in 10) have a parent with a disability.¹⁴ At least 19 percent of children in foster care have a parent with a disability.¹⁵

Many parents with disabilities encounter significant discrimination in child custody litigation occurring in family, probate, and dependency courts. Although no national study has identified the total number of parents with disabilities who have been involved in the child welfare system, the National Center on Parents with Disabilities and their Families, analyzing data from 19 states, found that 12.9 percent of children removed by child welfare had a caregiver with a disability.¹⁶

Research has consistently revealed significantly heightened levels of child welfare system involvement and loss of children for this parenting population. Multiple studies have revealed that 30 to 50 percent of parents with intellectual developmental disabilities lose custody of their children.¹⁷ Also, one study found that mothers with serious mental illness are three times as

⁸ 42 U.S.C. § 12101(b)(1).

⁹ *Id.* § 12101(a)(1).

¹⁰ *Id.* § 12101(a)(7).

¹¹ *Id.* § 12101(a)(8).

¹² *Id.* § 12132.

¹³ Stephen H. Kaye, *Population Estimates and Demographics of Parents with Disabilities in the United States* (Berkeley, CA: Through the Looking Glass, 2011).

¹⁴ *Id.*

¹⁵ Elizabeth Lightfoot and Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD YOUTH SERV. REV. 22 (2016).

¹⁶ Alison Gemmill, *Summary of the 2008 National Child Abuse and Neglect Data System (NCANDS) Child File: Victims of Maltreatment and Their Caregivers’ Disabilities* (Berkeley, CA: Through the Looking Glass, 2011).

¹⁷ David McConnell et al., *Parental Cognitive Impairment and Child Maltreatment in Canada*, 35(8) CHILD ABUSE & NEGLECT 621-32 (Aug. 2011); Tim Booth, Wendy Booth, and David McConnell, *Care Proceedings and Parents with Learning Difficulties: Comparative Prevalence and Outcomes in an English and Australian Court Sample*, 10(4) CHILD FAM. SOC. WORK 353-60 (Nov. 2005); Tim Booth and Wendy Booth, *Findings from a Court Study of Care Proceedings Involving Parents with Intellectual Disabilities*, 1(3-4) J. POL’Y PRACT. INTELLECT. DISABILITY 179-81 (Sept. 2004); Gwynnyth Llewellyn, David McConnell, and Luisa Ferronato, *Prevalence and Outcomes for*

likely as those without serious mental illness to have had involvement with the child welfare system or to have children who had an out-of-home placement.¹⁸ According to several studies, as many as 70 to 80 percent of parents with a psychiatric disability have lost custody.¹⁹ The blind and deaf communities also report heightened rates of child removal and loss of parental rights.²⁰ In a study of more than 1,200 parents with predominantly physical disabilities, 12.6 percent reported experiencing discriminatory treatment related to custody litigation.²¹ Persons with disabilities who seek to become foster or adoptive parents also encounter barriers based on biases and stereotypes about their parenting abilities.²²

Removing a child from their parents, whether in the dependency or family law context, is devastating and traumatizing for all involved. In fact, a secure attachment to a sensitive, responsive, and reliable caregiver is the most significant issue for a child's development.²³ Researchers in the fields of psychology and cognitive science have documented the severe emotional and psychological damage experienced by infants and young children when they are separated from their primary caregivers.²⁴ They go through various emotional phases: first, protesting and doing everything possible to try to get back to the caregiver; next, despair due to the child's fears of not being reunited with the caregiver; and finally, detachment as the child gives up hope, with many children losing hope of ever having that security and love again.²⁵

As to long-term effects, children who are separated from caregivers have an increased risk of conduct disturbances, disruptive behavioral problems, and attention and mood disorders.²⁶ They are less able to cope with psychological trauma, self-regulate their behavior, handle social interactions, and build positive self-esteem and self-reliance.²⁷ Children who are placed in foster

Parents with Disabilities and Their Children in an Australian Court Sample, 27(3) CHILD ABUSE & NEGLECT 235-51 (Mar. 2003); Brigit Mirfin-Veitch et al., *Supporting Parents with Intellectual Disabilities*, 6 NEW ZEALAND J. DISABILITY STUD. 60-74 (1999); Maurice Feldman, Bruce Sparks, and Laurie Case, *Effectiveness of Home-Based Early Intervention on the Language Development of Children of Mothers with Mental Retardation*, 14(5) RES. DEVELOPMENTAL DISABILITIES 387-408 (Sept.-Oct. 1993).

¹⁸ Jung Min Park, Phyllis Solomon, and David S. Mandel, *Involvement in the Child Welfare System Among Mothers with Serious Mental Illness*, 57(4) PSYCHIATRIC SERV. 493, 496 (2006).

¹⁹ Loran B. Kundra and Leslie B. Alexander, *Termination of Parental Rights Proceedings: Legal Considerations and Practical Strategies for Parents with Psychiatric Disabilities and the Practitioners Who Serve Them*, 33(2) PSYCHIATRIC REHAB. J. 144-45 (Fall 2009).

²⁰ Elizabeth Lightfoot, Katharine Hill, and Traci LaLiberte, *The Inclusion of Disability as a Condition for Termination of Parental Rights*, 34 CHILD ABUSE & NEGLECT 927, 928 (2010).

²¹ Linda Toms Barker and Vida Maralani, *Final Report: Challenges and Strategies of Disabled Parents: Findings from a National Survey of Parents with Disabilities* (Berkeley, CA: Through the Looking Glass, 1997), available at http://www.lookingglass.org/store/product_info.php?manufacturers_id=10&products_id=33.

²² Elizabeth Bartholet, *What's Wrong with Adoption Law?* 4 INT'L J. OF CHILDREN'S RIGHTS 265-66 (1996), available at <http://www.law.harvard.edu/faculty/bartholet/pdfs/wrong.pdf>.

²³ See generally *Handbook of Attachment: Theory, Research, and Clinical Applications* (Jude Cassidy and Philip R. Shaver eds., 1999).

²⁴ *Id.*

²⁵ John Bowlby, *A Secure Base: Parent-Child Attachment and Healthy Human Development* 32 (1988).

²⁶ L. Alan Sroufe et al., *Relationships, Development, and Psychopathology*, in HANDBOOK OF DEVELOPMENTAL PSYCHOPATHOLOGY 75, 80 (Arnold J. Sameroff, Michael Lewis, and Suzanne M. Miller eds., 2d ed., Kluwer Academic/Plenum Publishers 2000).

²⁷ Douglas F. Goldsmith, David Oppenheim, and Hanine Wanlass, *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 JUV. & FAM. CT. J. 1, 2 (2004).

care are two times more likely to die of abuse, two to four times more likely to be sexually abused, and three times more likely to be physically abused than children not placed in foster care.²⁸

In 2012, the National Council on Disability (NCD) published a comprehensive report, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, detailing the “persistent, systemic, and pervasive discrimination” against parents and prospective parents with disabilities within the child welfare and family law systems.²⁹ Four years later, NCD and the Christopher & Dana Reeve Foundation jointly published *Parenting with a Disability: Know Your Rights Toolkit* to protect both parents and prospective parents with disabilities from discrimination by providing them with information about their legal rights with respect to custody, visitation,³⁰ access,³¹ adoption, family law, and the child welfare system.³²

The release of *Rocking the Cradle* marked the first time the federal government focused attention on parents with disabilities and their children, and it set in motion a surge of activity by federal agencies to address issues facing these families. In January 2015, the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Justice (DOJ) issued a joint letter of findings following an investigation of the Massachusetts Department of Children and Families’ (DCF) handling of a case involving a 21-year-old mother with an intellectual disability.³³

The agencies found that DCF violated Title II and Section 504 by: (1) acting based on assumptions about the mother’s ability to care for her daughter, instead of conducting an individualized assessment of the mother’s needs; (2) failing to provide the mother with supports and services in support of reunification; (3) refusing to recognize her continued engagement and progress; and (4) failing to develop and implement appropriate policies and practices concerning the agency’s legal obligations vis-à-vis disability civil rights laws. Title II of the ADA³⁴ and Section 504 of the Rehabilitation Act³⁵ seek to ensure parents with disabilities are free from discrimination in the provision of services, programs, and activities of child welfare agencies. This includes a prohibition on making child custody decisions on the basis of generalized

²⁸ Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 131, 150 (2003).

²⁹ NATIONAL COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* 2 (Sept. 27, 2012), *available at* <http://www.ncd.gov/publications/2012/Sep272012>.

³⁰ Some states use the term “parenting time” instead of the term “visitation.” This report will use the term “visitation.” Parenting time issues include what the regular parenting time schedule should be for the children. This means day-to-day visitations schedules, pick-up and drop-off arrangements, as well as holiday and vacation schedules.

³¹ Note that a right of access is much broader than a right of visitation. Rights of access may encompass the right to open communication with the child by means of Skype, Facetime, telephone, emails, letters, and physical visitation.

³² NATIONAL COUNCIL ON DISABILITY & CHRISTOPHER & DANA REEVE FOUNDATION, *PARENTING WITH A DISABILITY: KNOW YOUR RIGHTS TOOLKIT* (May 5, 2016), *available at* http://www.ncd.gov/sites/default/files/Documents/Final%20508_Parenting%20Toolkit_Plain%20Language_0.pdf.

³³ LETTER FROM U.S. DEP’T. OF JUSTICE, CIVIL RIGHTS DIVISION & U.S. DEP’T OF HEALTH & HUMAN SERV., OFFICE FOR CIVIL RIGHTS, TO INTERIM COMM’R ERIN DEVENEY, MASS. DEP’T OF CHILDREN & FAMILIES (Jan. 29, 2015), *available at* http://www.ada.gov/ma_docf_lof.pdf.

³⁴ 42 U.S.C. § 12131 *et seq.*

³⁵ 29 U.S.C. § 794.

assumptions about disability, relegating parents with disabilities to lesser services and opportunities, imposing overprotective or unnecessarily restrictive rules, and failing to reasonably modify policies, practices, and procedures.³⁶

Seven months later, in August 2015, HHS and DOJ issued joint technical assistance to state and local child welfare agencies and courts “to help ensure that parents and prospective parents with disabilities are not discriminatorily deprived of custody of their children, or denied the opportunity to adopt or serve as foster parents, because of stereotypes and unfounded assumptions about persons with disabilities, which we have seen in our complaints.”³⁷ The assistance was developed in response to the rising number of disability discrimination complaints from parents with disabilities who have had their children taken away, their visitation and access rights restricted, or who have been denied reasonable accommodations, as well as from prospective parents with disabilities who have not been given equal opportunities to become foster or adoptive parents.

In December 2015, HHS’ Office for Civil Rights (OCR) entered into a settlement agreement with the Georgia Department of Human Services’ (DHS) Division of Family and Children Services (DFCS) following OCR’s investigation of a complaint alleging that DFCS discriminated against the complainant by denying her application to become a Foster-Adopt parent based on her disabilities.³⁸ OCR determined that DHS violated Title II and Section 504 by: improperly using disability as a criterion to make placement decisions, instead of making an individualized assessment of the complainant’s ability to be a Foster-Adopt parent; treating her differently on the basis of disability in determining whether she could adequately parent; affording her different opportunities on the basis of disability; failing to consider whether supportive services offered to other foster parents would have addressed the agency’s concerns and allowed the complainant to participate in the program; and failing to make reasonable modifications to its policies, practices, and procedures. As part of the settlement, DHS and DFCS agreed, among other things, to: designate a qualified staff person for each DFCS region to serve as the ADA/Section 504 Coordinator; submit to OCR for its review and approval a foster care policy that includes language regarding reasonable modifications for qualified individuals with disabilities who request a reasonable accommodation/modification; and submit to OCR standard operating procedures for documenting and assessing DFCS foster care and adoption program applicants and participants with disabilities.³⁹

³⁶ See 42 U.S.C. § 12101(a)(5).

³⁷ U.S. DEP’T OF HEALTH & HUMAN SERV., OFFICE FOR CIVIL RIGHTS, ADMIN. FOR CHILDREN & FAMILIES & U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV. DISABILITY RIGHTS SECTION, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT (Aug. 10, 2015), *available at* http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf.

³⁸ U.S. DEP’T OF HEALTH AND HUMAN SERV., OFFICE FOR CIVIL RIGHTS, ADMIN. FOR CHILDREN & FAMILIES & GEORGIA DEP’T OF HUMAN SERV., DIVISION OF FAMILY & CHILDREN SERV., SETTLEMENT AGREEMENT, OCR TRANSACTION NO. 09-102792 (Dec. 15, 2015), *available at* <http://www.hhs.gov/sites/default/files/dfcs-revised-settlement-agreement.pdf>.

³⁹ U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES OFFICE FOR CIVIL RIGHTS & STATE OF GEORGIA DEPARTMENT OF HUMAN SERVICES, SETTLEMENT AGREEMENT, OCR TRANSACTION NO. 09-102792 (Dec. 15, 2015), *available at* <http://www.hhs.gov/sites/default/files/dfcs-revised-settlement-agreement.pdf>.

III. ABA POLICY

The American Bar Association (ABA) has an extensive record of opposing discrimination in the context of family and child welfare law, wholly irrespective of an individual's parenting abilities and the well-being of the child. In August 1995, the ABA adopted policy supporting the enactment of legislation and implementation of public policy that would ensure that child custody or visitation is not denied or restricted on the basis of a parent's sexual orientation.⁴⁰ In February 1999, the ABA supported "the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child."⁴¹ The ABA adopted a policy in August 2003 supporting state laws and court decisions permitting second-parent adoptions by same-sex and other unmarried couples when such adoptions are in the best interest of the child.⁴² In February 2006, the ABA "opposed legislation and policies that prohibit, limit, or restrict placement into foster care of any child on the basis of the sexual orientation of the proposed foster parent when such foster care placement is otherwise appropriate under the applicable law of the state, territory, or tribe."⁴³

Addressing racial disparities in the child welfare system, the ABA adopted a policy in 2008 urging:

State, local, territorial and tribal child welfare agencies, dependency courts and judges, and children's and parents' advocates to help racial and ethnic minority families readily access needed services and to help ensure that removal of children from their homes is based on objective child safety criteria so that all families in the child welfare system are treated fairly and equitably.⁴⁴

The proposed resolution would build upon this record by protecting parents and prospective parents from unlawful discrimination on the basis of disability in child welfare, family law, adoption, and foster care proceedings, and safeguarding the best interest of the child. Rather than relying on stereotypical assumptions about disabilities, this recommendation requires use of a nondiscriminatory, evidence-based standard to evaluate parental fitness and best interest of the child. Specifically, in order for a disability to constitute a reason for denial or restriction of custody, visitation or access, removal of the child, or termination of parental rights, there must be a showing—supported by clear and convincing evidence—that the disability is causally related to an alleged significant harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications.

A clear and convincing evidence standard is appropriate in dependency and family law cases.

⁴⁰ ABA Resolution 95A107.

⁴¹ ABA Resolution 99M109(b), http://www.americanbar.org/content/dam/aba/directories/policy/1999_my_109b.authcheckdam.pdf.

⁴² ABA Resolution 03A112, http://www.americanbar.org/content/dam/aba/directories/policy/2003_am_112.authcheckdam.pdf.

⁴³ ABA Resolution 06M102, http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_102.authcheckdam.pdf.

⁴⁴ ABA Resolution 08A107, http://www.americanbar.org/content/dam/aba/directories/policy/2008_am_107.authcheckdam.pdf.

The standard of proof in cases involving individual rights, whether criminal or civil, “reflects the value society places on individual liberty.”⁴⁵ The U.S. Supreme Court has mandated a clear and convincing evidence standard when the individual interests at stake in a state proceeding are both “particularly important” and “more substantial than mere loss of money.”⁴⁶ As previously discussed, the fundamental liberty interest of parents to make decisions concerning the care, custody, and control of their children is protected by the Fourteenth Amendment. Removals of children, whether in the family law or dependency context, threaten parents with a significant deprivation of liberty, and have a devastating and traumatizing effect on parents and children.

The U.S. Supreme Court has ruled that the clear and convincing standard—not the preponderance of the evidence standard—applies in parental rights termination proceedings.⁴⁷ The state’s *parens patriae* interest favors preservation, not severance of natural familial bonds.⁴⁸ Because the possible injury to the parent is significantly greater than any possible harm to the state, the parent should not be asked to share equally with society the risk of error.⁴⁹

IV. THE LAW AND ITS APPLICATION

A. Child Welfare and Public Adoptions

(i) State Law

Child welfare agencies are systems of “services designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families to care for their children successfully.”⁵⁰ The states are primarily responsible for the system, despite federal funding, and cases in these systems are governed by state law. However, these laws must not run afoul of constitutional and federal laws. The freedom to parent without interference from the state is protected by the Fourteenth Amendment.⁵¹ This right is balanced against the right of the state to protect its children from harm.⁵²

When a state child welfare agency believes that a child is abused or neglected, it may seek to take custody of the child. A dependency court can grant the request, remove the child, order the agency to find appropriate placements, provide reunification services, and ultimately terminate parental rights. In termination of parental rights proceedings, most states require a court to find: (1) by preponderance of the evidence, that reunification efforts were reasonable; (2) by clear and

⁴⁵ *Addington v. Texas*, 441 U.S. 418, 425 (1979).

⁴⁶ *Id.* at 424.

⁴⁷ *Santosky v. Kramer*, 455 U.S. 745 (1982).

⁴⁸ *Id.* at 766-67.

⁴⁹ *Id.* at 768.

⁵⁰ CHILD WELFARE INFORMATION GATEWAY, FACTSHEET: HOW THE CHILD WELFARE SYSTEM WORKS (2013), <http://www.childwelfare.gov/pubs/factsheets/cpswork.cfm>.

⁵¹ *Santosky*, 455 U.S. at 753; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977).

⁵² *Reno v. Flores*, 507 U.S. 292, 303 (1993); *Santosky*, 455 U.S. at 766 (observing that the state has an “urgent interest in the welfare of the child”) (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (internal quotations omitted)); *Prince v. Mass.*, 321 U.S. 158, 166 (1944).

convincing evidence, that the parent is unfit;⁵³ and (3) that severing the parent-child relationship is in the child's best interest. Each state is responsible for establishing its own statutory grounds for termination, and these vary by state. Remarkably, roughly two-thirds of dependency statutes (35 states and the District of Columbia) include disability—mostly intellectual/developmental and psychiatric—as a factor for terminating parental rights if the state perceives the disability renders the parent unable to care for the child.⁵⁴

⁵³ *Santosky*, 455 U.S. 745.

⁵⁴ See ALA. CODE 1975 § 12-15-319(a)(2) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); ALASKA STAT. ANN. § 47.10.011(11) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); ARK. CODE ANN. § 9-27-341(b)(3)(B)(vii)(c) (2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); ARIZ. REV. STAT. § 8-533 (b)(3) (2014); CAL. WELF. & INST. CODE § 300(b)(1) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); COLO. REV. STAT. § 19-3-604(b)(I) (2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); 13 DEL. CODE § 1103(a)(3) (2009) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); D.C. CODE § 16-2353(b)(2) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); GA. CODE ANN. §§ 15-11-310, 15-11-26(9) (2014) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); HAW. REV. STAT. § 571-61(b)(1)(F) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); 750 ILL. COMP. STAT. ANN. 50/1(D)(p) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); IOWA CODE ANN. § 232.116(1)(k)2, (2)(a) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); KAN. STAT. ANN. ART. 22, § 38-2269(b)(1) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); KY. REV. STAT. § 625.090(3)(A) (2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); MD. CODE ANN., FAM. LAW § 5-323(d)(2)(iii) (2009) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); MASS. GEN. LAWS ANN. 210 § 3(c)(xii) (2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); MISS. CODE ANN. § 93-15-121(a), (b) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); MO. REV. STAT. § 211.447(5)(2)(A), (10) (2014) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); MONT. CODE ANN. § 41-3-609(2)(a) (2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); NEB. REV. STAT. § 43-292(5) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); NEV. REV. STAT. ANN. § 128.106(1)(a) (2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); N.H. REV. STAT. ANN. § 170-C:5(IV) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); N.J. STAT. ANN. §§ 9:2-19, 9:2-13(e) (2013) (Intellectual/Developmental Disability); N.M. STAT. ANN. §§ 32A-4-28(B)(2), 32A-4-2(F)(4) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); N.Y. SOC. SERV. § 384-b 4(c) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); N.C. GEN. STAT. § 7B-1111(A)(6) (2013) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); N.D. CENT. CODE § 27-20-44(1)(b) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); OHIO. REV. STAT. ANN. § 2151.414(E)(2) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); OKLA. STAT. ANN. § 1-4-904(B)(13) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); OR. REV. STAT. § 419B.504(1) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); S.C. CODE ANN. § 63-7-2570(6) (2014) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability & Physical Disability); TENN. CODE ANN. § 36-1-113(g)(8)(A) (2016) (Intellectual/Developmental Disability); TEX. FAM. CODE § 161.003(a)(1) (2015) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); VA. ANN. CODE § 16.1-283(B)(2)(a) (2012) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); WASH. REV. CODE § 13.34.180(1)(e)(ii) (2013) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability); WIS. STAT. ANN. § 48.415(3) (2016) (Mental Illness/Emotional Disability & Intellectual/Developmental Disability). See also ELIZABETH LIGHTFOOT, SHARYN DEZELAR, AND ANDREA BRUBAKER, THE INCLUSION OF PARENTAL DISABILITY IN STATE TERMINATION OF PARENTAL RIGHTS STATUTES: A STATE OF THE STATES (UNIVERSITY OF MINNESOTA, SCHOOL OF SOCIAL WORK, CENTER FOR ADVANCED STUDIES IN CHILD WELFARE, 2015) <http://caschw.umn.edu/portfolio-items/disability-map/> (providing a state-by-state analysis of state dependency statutes and the inclusion of parental disability).

Child welfare statutes in seven states⁵⁵ allow child welfare agencies to bypass reasonable efforts to provide family support services to parents with disabilities—designed to prevent out-of-home placement of the child or to enable the child’s safe return to the home (also called reunification services). This occurs when the parent’s mental illness, mental deficiency, mental or emotional condition, intellectual disability, or developmental disability renders him or her incapable of utilizing the services, or of caring for the child without placing him or her at substantial risk of physical or emotional injury, even if appropriate and available services were provided for twelve months.⁵⁶

(ii) *Federal Law — ADA & Section 504*

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.”⁵⁷ Title II applies to the services, programs, and activities of all state and local governments, including child welfare agencies and court systems.⁵⁸ The “services, programs, and activities” include, but are not limited to, investigations, witness interviews, assessments, provision of in-home services, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, reunification services, and family court proceedings.⁵⁹ “Services, programs, and activities” also extend to child welfare and custody hearings, as well as to proceedings to terminate parental rights.⁶⁰ Private entities involved in the child welfare system may also be independently covered by Title III of the ADA, which prohibits any public accommodation from discriminating against people with disabilities by denying access to goods and services.⁶¹ “Adoption agency” is included in the list of public accommodations.⁶²

Section 504 of the Rehabilitation Act provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of any entity that receives Federal financial assistance, or be subjected to discrimination by such entity.”⁶³ Federal financial assistance includes assistance provided to child welfare agencies and the courts.⁶⁴

Individualized treatment and full and equal opportunity are fundamental to both Title II and Section 504. Persons with disabilities must be treated on a case-by-case basis consistent with

⁵⁵ ALA. CODE § 12-15-312(c)(1)(e) (2016); ALASKA STAT. § 47.10.086(c)(5) (2015); ARIZ. REV. STAT. § 8-846(D)(1)(b) (2016); CAL. WELF. & INST. CODE § 361.5(a), (b)(2) (2016); KY. REV. STAT. § 610.127(6) (2016); S.C. CODE ANN. § 63-7-1640(C)(7) (2016); UTAH CODE ANN. § 78A-6-312(20), (21)(a) (2016).

⁵⁶ Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 135, 168 (2008).

⁵⁷ 42 U.S.C. § 12132.

⁵⁸ *Id.* § 12131(1)(A), (B).

⁵⁹ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF JUSTICE, *supra* note 37.

⁶⁰ *Id.*

⁶¹ 42 U.S.C. §§ 12181-189.

⁶² *Id.* § 12181(7)(K).

⁶³ 29 U.S.C. § 794(a).

⁶⁴ *See, e.g.*, 28 C.F.R. § 42.105; 45 C.F.R. § 84.5.

facts and objective evidence, and not on the basis of generalizations or stereotypes.⁶⁵ In their joint technical assistance, HHS and DOJ state that prohibited treatment would include removing a child from a parent with a disability based on the stereotypical belief—unsupported by an individual assessment—that people with disabilities are incapable of safely parenting their children, and denying a person with a disability the opportunity to become a foster or adoptive parent based on stereotypical beliefs about how the disability may affect the individual’s ability to parent.⁶⁶

- Reasonable Modification

Under Title II and Section 504, child welfare agencies and courts must make reasonable modifications to policies, practices, and procedures to accommodate the individual needs of a qualified person with a disability, unless doing so would result in a fundamental alteration to the nature of the service, program, or activity.⁶⁷ For instance, a child welfare agency that holds a parenting skills class once a week may need to modify the training to allow more frequent, longer, or more meaningful trainings for a parent who requires individualized assistance in learning new skills because of his or her disability.⁶⁸

- Auxiliary Aids & Services

Both child welfare agencies and courts are required to provide appropriate auxiliary aids and services, such as qualified sign language interpreters, assistive listening devices and systems, captioning, and large print or Braille materials, where necessary to ensure that individuals with disabilities can communicate as effectively as those without disabilities.⁶⁹ For example, a qualified sign language interpreter may be necessary for home visits or assessments, while real-time captioning may be appropriate for family team meetings or in court.⁷⁰ Child welfare agencies and courts must give primary consideration to the auxiliary aid or service requested by the person.⁷¹ If provision of the requested aid or service would result in a fundamental alteration in the nature of the service, program, or activity or in undue financial and administrative burdens, aids or services that do not result in any alteration or burdens must be provided to the maximum extent possible.⁷²

⁶⁵ See, e.g., 28 C.F.R. § 35.130(b); see also 28 C.F.R. pt. 35, App. B (explaining in the 1991 Section-by-Section guidance to the Title II regulation that, “[t]aken together, the provisions [in 28 C.F.R. § 35.130(b)] are intended to prohibit exclusion . . . of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not presumptions as to what a class of individuals with disabilities can or cannot do.”); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 285 (1987).

⁶⁶ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF JUSTICE, *supra* note 37.

⁶⁷ See 45 C.F.R. §§ 84.12(a), 84.22(a) & (f), 84.52(d); 28 C.F.R. § 35.130(b)(7).

⁶⁸ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF JUSTICE, *supra* note 37.

⁶⁹ 28 C.F.R. § 35.160; 45 C.F.R. § 84.52(d).

⁷⁰ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF JUSTICE, *supra* note 37.

⁷¹ 28 C.F.R. § 35.160(b)(2).

⁷² *Id.*

- Equal Opportunity

Persons with disabilities must be afforded an opportunity to benefit from and participate in child welfare programs, services, and activities that is equal to the opportunity afforded to individuals without disabilities.⁷³ This may require providing auxiliary aids and services or making reasonable modifications to policies, practices, and procedures in child welfare proceedings. Child welfare agencies may be required under Title II and Section 504 to arrange for available services from outside sources, such as social service agencies and disability organizations, as a reasonable modification so long as doing so would not constitute a fundamental alteration.⁷⁴ In situations where providing the same services and resources to an individual with a disability that are provided to individuals without disabilities does not provide an equal opportunity to the individual with a disability, Title II and Section 504 may require agencies to provide additional, individually tailored services.⁷⁵ For instance, in parental trainings agencies may need to incorporate visual modeling or other individualized techniques for persons with disabilities.⁷⁶

- Direct Threat to Safety & Health

Child welfare agencies have an obligation to ensure the health and safety of children. Neither the ADA nor Section 504 cover individuals with disabilities who pose a direct threat to the health or safety of others.⁷⁷ Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.⁷⁸ In some cases, a parent or prospective parent with a disability may pose a significant risk to the health or safety of the child.⁷⁹ In making this determination, child welfare agencies and courts must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.⁸⁰

Despite these federal protections, state dependency courts have overwhelmingly resisted ADA defenses in termination of parental rights proceedings.⁸¹ Hence, “[t]he case law concerning the ADA and parental rights has overwhelmingly favored states and rejected the claims of parents with disabilities.”⁸² Some courts have refused to apply the ADA, based on the finding that termination of parental rights proceedings are not a “service, program, or activity” within the

⁷³ See 28 C.F.R. § 35.130(b)(1)(ii)–(iv), (vii), (b)(7); 45 C.F.R. § 84.4(b)(1)(ii)–(iii); see also 28 C.F.R. § 42.503(b)(1)(ii), (iii).

⁷⁴ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES & U.S. DEPARTMENT OF JUSTICE, *supra* note 37.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 28 C.F.R. § 35.139; see *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

⁷⁸ *Id.*

⁷⁹ 28 C.F.R. § 35.139(a)–(b); *Arline*, 480 U.S. at 287.

⁸⁰ 28 C.F.R. § 35.139(b); *Arline*, 273 U.S. at 288.

⁸¹ See ROCKING THE CRADLE, *supra* note 29, at 93–94 (comprehensively reviewing court decisions).

⁸² *Id.* at 93.

meaning of the ADA.⁸³ Other courts have found that the ADA does not apply in these cases because the court's jurisdiction is limited to interpreting the state child welfare law (i.e., determining the best interest of the child or reasonable efforts) rather than conducting "an open-ended inquiry into how the parents might respond to alternative services and why those services have not been provided."⁸⁴ Lastly, several courts have determined that the ADA provides no defense to termination of parental rights proceedings because Title II requires only affirmative action on the part of the injured party rather than defenses against a legal action by a public entity.⁸⁵

In October 2006, a certiorari petition was filed in the U.S. Supreme Court seeking review of a Rhode Island court's decision that a termination of parental rights proceeding "does not constitute the sort of service, program or activity that would be governed by the dictates of the ADA."⁸⁶ Unfortunately, the petition was denied, and to date the U.S. Supreme Court has declined to rule on the applications of the ADA in these cases.

However, ADA claims have been successful when rooted in the parent's claim of inadequate services by a child welfare agency.⁸⁷ An agency that does not make reasonable modifications for a parent with a disability fails to fulfill its duty to make reasonable efforts towards reunification.⁸⁸ Such a failure delays initiation of termination of parental rights proceedings and allows the parent additional time to complete the case plan.⁸⁹ For instance, the Michigan Court of Appeals vacated a circuit court's order terminating the parental rights of a mother with cognitive disabilities to her two minor children, and remanded for reconsideration following the provision of necessary accommodated services.⁹⁰ The Department of Health and Human Services' case plan did not include reasonable accommodations to provide the mother with a meaningful opportunity to benefit. Absent accommodations, the court found that the child welfare agency failed in its statutory duty to make reasonable efforts to reunify the family unit.

⁸³ See, e.g., *In re Adoption of Gregory*, 747 N.E.2d 120, 125 (Mass. 2001); *In re Terry*, No. 214617, 2000 WL 244425, at *5 (Mich. Ct. App. Feb. 29, 2000); *In re Antony B.*, 54 A.2d 893, 899 (Conn. App. Ct. 1999); *In re B.K.F.*, 704 So. 2d 314, 317 (La. Ct. App. 1997); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997).

⁸⁴ *In re B.S.*, 693 A.2d at 721. See also *In re Torrance P.*, 522 N.W.2d 243, 244-45 (Wis. Ct. App. 1994) (duty to make diligent effort to provide court-ordered services is defined by dependency statute and not ADA; ADA does not increase those responsibilities or dictate how they must be discharged); *In re Maryia R.*, 1997 WL 178082, at *5 (Conn. Super. Ct. Apr. 1, 1997) (although father's developmental disability must be considered in determining reasonableness of county's efforts, neither his disability nor ADA changes inquiry or burden of proof).

⁸⁵ See, e.g., *In re Doe*, 60 P.3d 285, 293 (Haw. 2002); *In re Rodriguez*, No. 98CA007073, 1999 WL 568115, at *8 (Ohio Ct. App. Aug. 4, 1999).

⁸⁶ *Irving N. v. R.I. Dep't of Children, Youth & Families*, 900 A.2d 1202 (R.I. 2006), cert. denied, 127 S. Ct. 1372 (2007).

⁸⁷ Joshua B. Kay, "Representing Parents with Disabilities, in *Representing Parents in Child Welfare Cases: Advice and Guidance for Family Defenders* 259 (Martin Guggenheim and Vivek S. Sankaran eds., Chicago: ABA Publishing, 2015). See Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL L. REV. 1415, 1473-74 (1995).

⁸⁸ *Id.*

⁸⁹ *Id.* at 263.

⁹⁰ *In re Hicks/Brown*, No. 328870, 2016 WL 1650104 (Mich. Ct. App. Apr. 26, 2016).

(iii) *Adoption and Safe Families Act (ASFA)*

Pursuant to the Adoption and Safe Families Act of 1997 (ASFA),⁹¹ states must provide preventive services before terminating parental rights.⁹² When designing a case plan, caseworkers should adapt a “functional” perspective to identify the parent’s skills and deficits and to tailor services.⁹³ The agency must make reasonable efforts to provide high quality, individualized case services that fit the parent’s needs and abilities.⁹⁴ There are limited circumstances where an agency is not required to make reasonable efforts, including “aggravating circumstances” such as chronic abuse, sexual abuse, or causing serious bodily injury to the child, or if the parent has committed murder, voluntary manslaughter, or felony assault of a sibling of the child, or if a parent’s rights to a sibling have been terminated.⁹⁵ The proposed resolution is consistent with the ASFA in that it recognizes and does not limit the right of the state to protect children from neglect and abuse.

B. Custody and Visitation/Access

When parents are unable to reach a custody or visitation agreement, family law courts are left to decide. Family law cases are governed by individual state statutes relying on the “best interest of the child” standard. The ultimate goal is to meet the child’s physical, emotional, intellectual, and basic health and safety needs. Most states have developed their own factors to determine which custody arrangement is in the best interest of the child. Typical factors include: (1) which parent best meets the physical, emotional, and intellectual needs of the child and will preserve his or her health and safety; (2) what the child wants (if the child is mature and has a preference); (3) who has been the primary caretaker; (4) which parent is more likely to promote the child’s contact or relationship with the other parent; (5) whether there is any history of domestic violence or substance abuse; (6) whether there is evidence that either parent has lied to the court; and (7) what the duration and quality of the current custody arrangement is.⁹⁶ Particularly noteworthy, all states allow—and a number mandate—consideration of a parent’s physical and mental health.

To date, only a handful of state statutes expressly prohibit denial of custody or visitation solely on the basis of a parent’s disability. For example, Idaho law provides that where the court finds a parent’s disability to be relevant to a custody award, the court must “make specific findings concerning the disability and what effect, if any, the court finds the disability has on the best interest of the child.”⁹⁷ Particularly noteworthy, the court must advise a parent with a disability that he or she has “the right to provide evidence and information regarding the manner in which

⁹¹ PUB. L. NO. 105–89, 111 STAT. 2115 (1997).

⁹² 42 U.S.C. § 671(a)(15)(A) & (B).

⁹³ Kay, *supra* note 87, at 256; 45 C.F.R. § 1355.34(c)(5)(vi).

⁹⁴ *Id.*

⁹⁵ 42 U.S.C. § 671(a)(15)(D)(i)–(ii).

⁹⁶ See, e.g., CAL. FAM. CODE § 3011 (2013); CONN. GEN. STAT. ANN. § 46b *et seq.* (2016); FLA. STAT. ANN. § 61.13(2)(c) (2016); MINN. STAT. § 518.17 (2015); N.Y. DOM. REL. LAW § 70 (2016) (as interpreted in *Miller v. Pipia*, 297 A.D.2d 362, 364–65 (N.Y. App. Div. 2002) and *Eschbach v. Eschbach*, 436 N.E.2d 1260 (N.Y. 1982)); OKLA. STAT. tit. 43, § 112 (2016); TEX. FAM. CODE § 153.002 (2015).

⁹⁷ IDAHO STAT. § 32-717(5) (2016).

the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child.” Further, parental fitness evaluations must “take into account the use of adaptive equipment and supportive services for parents with disabilities” and “be conducted by, or with the assistance of, a person who has expertise concerning such equipment and services.”⁹⁸

Maryland law provides that in custody or visitation proceedings, a party’s disability is relevant only to the extent that the court finds, based on evidence in the record, that the disability affects the best interest of the child.⁹⁹ The party alleging that the disability affects the best interest of the child bears the burden of proof.¹⁰⁰ If the burden of proof is met, the party who has a disability has the opportunity to prove that supportive parenting services would prevent a finding that the disability affects the best interest of the child.¹⁰¹ If a court finds that the party’s disability affects the best interest of the child and therefore denies or limits custody or visitation, it must specifically state in writing the basis for the finding¹⁰² and why the provision of supportive parenting services is not a reasonable accommodation to prevent the finding.¹⁰³

Oregon law provides that the court may not consider a party’s disability in determining custody unless it finds that behaviors or limitations related to the party’s disability are endangering or will likely endanger the health, safety, or welfare of the child.¹⁰⁴ In Tennessee, “[t]he disability of a parent seeking custody shall not create a presumption for or against awarding custody to such a party but may be a factor to be considered by the court.”¹⁰⁵

V. CONCLUSION

The proposed recommendation would build upon the handful of state laws and the federal policies that shift the focus from a parent or prospective parent’s disability to a parent’s behavior or conduct. It would do so by requiring a showing, by clear and convincing evidence, of a causal nexus between the disability and a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services and supports and other reasonable modifications. This would raise consciousness to and remedy the unspoken presumption that a parent with a disability is not a fit parent, or has the burden to prove fitness that parents without disabilities are not required to meet.

Twenty-six years after the enactment of the ADA, it is time to ensure that individuals with disabilities and their children have a right to live free from discriminatory state actions that can result in traumatic separations of parents and their children. The ADA generation, who have grown up assuming a right to live in the world,¹⁰⁶ have new expectations: that they will be able

⁹⁸ *Id.* § 32-717(2).

⁹⁹ MD. CODE ANN., FAM. LAW § 9-107(b)(1) (2016).

¹⁰⁰ *Id.* § 9-107(b)(2).

¹⁰¹ *Id.* § 9-107(b)(3).

¹⁰² *Id.* § 9-107(b)(4)(i).

¹⁰³ *Id.* § 9-107(b)(4)(ii).

¹⁰⁴ OR. REV. STAT. § 107.137(3) (2016).

¹⁰⁵ TENN. CODE ANN. § 36-106(e).

¹⁰⁶ Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966).

to exercise their fundamental right to make decisions concerning the care, custody, and control of their children subject to the same legal limitations and interventions on the same grounds as all other American citizens. While nothing in this proposal will limit the right of the state to protect abused or neglected children, it will help ensure that decision-making is driven by child-centered devotion to their well-being and the law, not the disability biases or assumptions of another era.

Respectfully submitted,

Robert T. Gonzales, Chair
Commission on Disability Rights
February 2017

GENERAL INFORMATION FORM

Submitting Entity: Commission on Disability Rights

Submitted By: Robert T. Gonzales, Chair, Commission on Disability Rights

1. Summary of Resolution(s).

This resolution urges federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that custody, visitation, and access shall not be denied or restricted, nor shall a child be removed or parental rights terminated, based on a parent's disability, absent a showing—supported by clear and convincing evidence—that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications. This resolution further urges all federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that a prospective parent's disability shall not be a bar to adoption or foster care when the adoption or foster care placement is determined to be in the best interest of the child.

2. Approval by Submitting Entity.

The Commission on Disability Rights approved the resolution by vote on November 15, 2016.

3. Has this or a similar resolution been submitted to the House or Board previously? Yes: ABA Resolution 95A107; ABA Resolution 99M109(b); ABA Resolution 03A112; ABA Resolution 06M102; ABA Resolution 08A107.

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

In August 1995, the ABA adopted policy supporting the enactment of legislation and implementation of public policy that would ensure that child custody or visitation is not denied or restricted on the basis of a parent's sexual orientation. (ABA Resolution 95A107). In February 1999, the ABA supported "the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child." (ABA Resolution 99M109(b)). The ABA adopted a policy in August 2003 supporting state laws and court decisions permitting second-parent adoptions by same-sex and other unmarried couples when such adoptions are in the best interest of the child. (ABA Resolution 03A112). In February 2006, the ABA "opposed legislation and policies that prohibit, limit, or restrict placement into foster care of any child on the basis of the sexual orientation of the proposed foster parent when such foster care placement is otherwise appropriate under the applicable law of the state, territory, or tribe." (ABA Resolution 06M102). Finally, addressing racial disparities in the child welfare system, the ABA adopted a policy in 2008 urging:

State, local, territorial and tribal child welfare agencies, dependency courts and judges, and children's and parents' advocates to help racial and ethnic minority families readily access needed services and to help ensure that removal of children from their homes is based on objective child safety criteria so that all families in the child welfare system are treated fairly and equitably. (ABA Resolution 08A107).

Although these policies would not be affected by adoption of this resolution, the ABA's policies of non-discrimination in family law and child welfare cases based on sexual orientation, race, and ethnicity would be expanded to include disability.

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)
Only a handful of state statutes, including Idaho, Maryland, Oregon, and Tennessee, expressly prohibit denial of custody or visitation solely on the basis of a parent's disability. There is currently no pending legislation.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
Adoption of this policy will enable the Association to urge federal, state, territorial, and tribal governments to enact legislation and implement public policy that prohibits discrimination against parents and prospective parents in family law and child welfare cases based solely on their disability status.
8. Cost to the Association. (Both direct and indirect costs)
None
9. Disclosure of Interest. (If applicable)
N/A
10. Referrals.
Section of Family Law
Section of Civil Rights and Social Justice
Judicial Division
Solo, Small Firm and General Practice Division
Young Lawyers Division
Commission on Youth at Risk
Center on Children and the 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

This resolution urges federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that custody, visitation, and access shall not be denied or restricted, nor shall a child be removed or parental rights terminated, based on a parent's disability, absent a showing—supported by clear and convincing evidence—that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications. This resolution further urges all federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that a prospective parent's disability shall not be a bar to adoption or foster care when the adoption or foster care placement is determined to be in the best interest of the child.

2. Summary of the Issue that the Resolution Addresses

This resolution responds to the rising number of disability discrimination complaints from parents with disabilities who have had their children taken away, their visitation and access rights restricted, or have been denied reasonable accommodations, as well as from prospective parents with disabilities who have not been given equal opportunities to become foster or adoptive parents.

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

This resolution will address the issue by calling on governments to enact legislation and implement public policy that protects parents and prospective parents with disabilities from discrimination and requires objective, evidence-based determinations in family law and child welfare cases.

4. Summary of Minority Views

At this time, we are unaware of any opposition.

AMERICAN BAR ASSOCIATION
CENTER FOR HUMAN RIGHTS
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges governments and relevant
2 organizations to implement the recommendations set forth in the policy brief, *Allies*
3 *Against Atrocities: The Imperative for Transatlantic Cooperation to Prevent and Stop*
4 *Mass Killings* (May 2016).

REPORT

In August 2009 the ABA House of Delegates adopted policy endorsing the “responsibility to protect” doctrine, which holds that the international community has a responsibility to protect civilians from mass atrocities where their governments are unable or unwilling to do so; as well as comprehensive recommendations set forth in the report, *Preventing Genocide: A Blueprint for U.S. Policymakers* (December 2008). The report was issued by the Genocide Prevention Task Force, which had been convened by the U.S. Holocaust Memorial Museum and other organizations to offer recommendations to the then-incoming presidential administration.¹

Upon the ABA’s endorsement of the report, the ABA Center for Human Rights established an Atrocity Prevention and Response Project to help implement the recommendations. Those efforts have included co-organizing and co-sponsoring, with the Holocaust Museum, an international conference on atrocity prevention, in Paris, France, in 2011; participation in various other conferences and research projects; establishment of a separate International Criminal Court (ICC) Project within the Center, to implement longstanding ABA policy urging accountability for atrocity crimes; and, within the ICC Project, forming a Crimes Against Humanity Working Group to help fortify U.S. law on that topic.

After more than five years’ experience analyzing and implementing the Genocide Prevention Task Force recommendations by governments and civil society groups, in May 2016 the recommendations were followed up with the policy brief, *Allies Against Atrocities: The Imperative for Transatlantic Cooperation to Prevent and Stop Mass Killings* (hereafter *Allies Policy Brief*), authored by Lee Feinstein, dean of Indiana University’s School of Global and International Studies and former U.S. Ambassador to Poland, and Tod Lindberg, research fellow at Stanford University’s Hoover Institution.² The *Allies Policy Brief* identifies lessons learned since the Genocide Prevention Task Force report was issued, and offers further recommendations on issues of core concern in atrocity prevention and response. The Center for Human Rights seeks to update ABA policy accordingly to ensure the Association’s further efforts in this vital field of human rights law and policy reflect current insights, experience, and expertise.

The balance of this report draws heavily from the text of the *Allies Policy Brief*, which provides a concise summation of developments in the field to date and the rationales for the offered recommendations, which are included below.

Background

A generation after the genocides in Rwanda and Bosnia, many of the world powers that apologized for their lack of an early and effective response to genocide during the 1990s have yet to organize themselves sufficiently to act early and effectively to prevent or stop mass atrocities.

¹ See Report with Recommendation 110, *adopted* August 2009.

² The policy brief is not formally related to the Genocide Prevention Task Force report or its members. Mr. Lindberg was, however, an author of that report as well.

As responses to past atrocity crimes show, averting and halting atrocities requires a coordinated and sustained effort by local, regional, and international actors. A multilateral response is necessary, one that the transatlantic region has a critical role to play in shaping and leading. The governments of the transatlantic community already devote significant resources and political capital to the prevention and amelioration of crises and conflicts, as well as to the pursuit of international development agendas. Without better cooperation among themselves and their like-minded cousins, efforts to address mass atrocities will continue to be reactive, slow, and devastating to human life and potential.

Each transatlantic country should be involved in these efforts, bringing its unique capacities to the table. The United States has a particularly important role to play in encouraging greater transatlantic cooperation amongst states on this issue.

President Obama's declaration in 2011 that the prevention of genocide and atrocity crimes is "a core national security interest and a core moral responsibility of the United States" was laudable. He broke new ground and put the United States at the forefront of institutionalizing atrocity prevention efforts at the domestic level. His administration established an ambitiously named Atrocities Prevention Board (APB) aimed at coordinating early warning and action throughout the U.S. government. The APB has established patterns of cooperation within the U.S. government over a period of five years, convening on a monthly basis representatives of 11 different government agencies that previously did not prioritize atrocity prevention. This structure has proven bureaucratically resilient and as effective as could be expected in its early years.

With its emphasis on upstream prevention rather than crisis response, the APB has proven itself ill-equipped to prevent atrocities in countries, such as Syria, that have already gone over the brink. The magnitude of the crisis in Syria and its ramifications for the security of the region push it outside of the APB's scope. However, when evaluated as an instrument to focus interagency attention on at-risk countries that have not typically been at the top of the agenda, the APB has created both a focal point consisting of various supportive actors within government and a capacity to push for new prevention efforts. The APB's successes are difficult to measure, but preventive efforts in Burundi and Kenya, including peace messaging, youth engagement, and preventive diplomacy, stand out as having directed greater resources to these countries at high risk of violence that has had a deterrent impact in the short term, even if their long-term impact remains to be seen. Despite the advances by the U.S. government, transatlantic cooperation is fundamental to preventing atrocities. The United States cannot advance this agenda on its own.

Since the genocides in Rwanda and Srebrenica, states have worked together can avert and halt atrocities. The United Kingdom intervened in Sierra Leone to prevent atrocities, the United States aided in halting Charles Taylor's atrocities in Liberia, and France has led efforts in Mali and Cote d'Ivoire. U.S. partners and allies tend to focus their efforts under a variety of rubrics: atrocity prevention, the responsibility to protect, countering violent extremism, conflict prevention, stabilization, civilian protection, human rights, and human security, among others.

The labels given these efforts are less important than their outcomes — bringing much needed attention to the risk of atrocities and spurring action. Some of the responses in countries at risk of atrocities have proven controversial. For example, the United States, the United Kingdom, and

France — backed by the endorsement of the Organization of Islamic States and the UN Security Council — acted swiftly to stop the threat by the Qaddafi regime in Libya to eliminate its opponents “like rats.” Yet, that “model” intervention and the initial impulse to respond to a credible threat of mass killing were not met by the equally essential resolve to stay the course and rebuild.

The Way Forward

There is growing recognition within the transatlantic community that the failure to prevent and halt atrocities is a first-tier security challenge, amply demonstrated by six years of global lassitude and indifference to crimes against humanity and spreading war in Syria. The crisis that began in 2011 with the decision of the Assad regime to open fire on peaceful protesters demanding political reform has resulted in the death of 250,000 people and in the largest displacement crisis since World War II, with millions of civilians fleeing to neighboring Middle Eastern countries and to Europe. The subsequent civil war also has destabilized the region, contributing to the rise of the self-proclaimed Islamic State and its record of perpetrating atrocities, culminating with the recent declaration by U.S. Secretary of State John Kerry that its targeting of religious minorities constitutes genocide. The crisis in Syria began, in short, with atrocities and has consistently demanded more engagement and response by the international community, particularly the transatlantic powers.

Meanwhile, international acceptance of the cornerstone concept of atrocity prevention, the responsibility to protect, is at a crossroads. When the current Secretary-General of the United Nations, Ban Ki-moon, entered office, he placed at the center of his agenda the principle that mass atrocities occurring in one country are the concern of all countries. Yet, as the administrations of a new Secretary-General and a new U.S. president become established in 2017, it is unclear whether atrocity prevention will remain a priority. This shift calls into question whether the atrocity prevention agenda will maintain strong political support. Exacerbating such challenges, Russia is seeking to reinterpret the concept as a pretext for intervention in its sovereign next-door neighbor, Ukraine. Russia and China also seem increasingly willing to use their veto power as permanent members of the United Nations Security Council to block effective action to halt atrocities and ensure accountability for perpetrators.

Given this increasingly difficult political landscape, it is tempting to see the adoption by the UN General Assembly of the “responsibility to protect” doctrine in 2005 as the high-water mark in international efforts to establish a new principle that conditions a state’s sovereign rights on its capacity and willingness to protect citizens within its own borders against mass atrocities. However, the international community has made important strides since 2005. To continue on this trajectory, the United States and its Atlantic partners must affirm their willingness to act in their own capacity to prevent atrocities and to work together to develop coordinated strategies, policies, and processes to that end. The transatlantic imperative now is to find practical ways to work together, despite differences in perspective, and to put the emphasis more squarely on preventing atrocities before they have occurred than on crisis response once atrocities have begun.

These governments must work together to identify countries and populations at risk. They must undertake a full inventory of the resources at their disposal to defuse atrocity risks. And they must

be prepared to act in concert at the earliest opportunity. Difficult decisions inevitably lie ahead. Political will is the essential element in any international effort sufficient to prevent mass atrocities.

The absence of political will, however, is reinforced by the absence of international capacity. When there is a will, there is a way. But, when the way forward is not apparent, the chance of generating political will in the face of opposition is lower; the absence of capacity feeds the disinclination to act. The following recommendations are therefore offered as a way forward.

Recommendations for Enhancing Transatlantic Cooperation

1. DEVISE AND IMPLEMENT COORDINATED TRANSATLANTIC ATROCITY PREVENTION EFFORTS

The U.S. and its transatlantic partners should affirm that the prevention of genocide and atrocities is a core national and collective security interest and a core moral responsibility. Governments and international institutions must devise internal processes coordinating atrocity prevention efforts and work with one another to internationalize strategies, policies, and processes. Early preventive action is essential, saving lives at considerably less cost than intervening to halt ongoing atrocities. In assessing risks when atrocities have already broken out, however, the United States and its transatlantic partners must recognize the danger of inaction. Future and ongoing NATO and US-EU summits are an appropriate place to affirm the importance of atrocity prevention for the transatlantic community; some discussion of not just future threats to those alliances but also future opportunities for prevention should be made a standing agenda item at those summits.

2. INTERNATIONALIZE ATROCITY PREVENTION EFFORTS

In the U.S. context, the Atrocities Prevention Board (APB) is an important step forward. A future administration may wish to reevaluate what goals the APB can realistically achieve and what resources it requires to be effective, but it should preserve the basic infrastructure, which has served to create expertise and patterns of cooperation that are critical to effectiveness within the U.S. government. The APB should regularly meet and work with its transatlantic counterparts. The APB should convene a special meeting to take stock of efforts to date to internationalize atrocity prevention and plan concrete, actionable next steps. U.S.-E.U. summits should include meetings between officials concerned with preventing atrocities.

3. IMPROVE FINANCIAL SANCTIONS

The United States should launch an international initiative to target perpetrators and enablers of atrocities with crippling economic sanctions. In the United States, a specific executive order authorizing sanctions for crimes against humanity, which would correspond with other such executive orders, for counter-narcotics and counterterrorism activities, would provide the U.S. Treasury Department with an important tool — one employed effectively in recent years to bring Tehran to the nuclear negotiating table. The State Department Office of the Coordinator for Sanctions Policy should address atrocity prevention as a core part of its mandate. The

United States government should convene an international conference of its transatlantic partners and their like-minded and capable cousins to coordinate efforts to punish enablers of crimes against humanity and mass killings.

4. DEVELOP AN INTERNATIONAL LEGAL FRAMEWORK ADEQUATE TO THE CHALLENGE OF ATROCITY PREVENTION

After the Bosnia war, the mainstream view of European and U.S. law deemed the Kosovo intervention to be legitimate but not legal, due to the absence of a UN Security Council Resolution and a cramped understanding of what constituted self-defense. This remains the mainstream view today, even when exigent circumstances exist and even when it is clear that the United Nations Security Council will not reach agreement to authorize action, either under Article VI or Article VII of the UN Charter. Over the past quarter century, however, a pattern of practice has developed that can provide the basis for action that is both legitimate and credible under international law. The time has come to move beyond a framework that presents the alternatives as doing nothing or acting illegally. The transatlantic community should take the lead in convening experts in international law and legal policy to develop a more effective framework. As a preliminary step, the United States and its transatlantic partners, as well as UN and international officials, should ready international prevention efforts as if the UN Security Council will give its approval to action. This will serve both to build pressure on the Security Council and to ready capacity to take steps outside a Security Council mandate if necessary.

5. PRIORITIZE CIVILIAN PROTECTION IN MILITARY RESPONSES INCLUDING PEACEKEEPING

Effective peacekeeping capacity is central to all efforts to reduce the risk of atrocities in conflict. The protection of civilians is now included as a matter of course in peacekeeping doctrine and training. Reforming peacekeeping missions to equip them to better protect civilians and prevent atrocities has been an important priority for the U.S. government and its transatlantic partners. In 2015, the Obama administration hosted the Leaders' Summit on UN Peacekeeping — which drew many militarily capable European partners — to address the critical gaps in peacekeeping, including the lack of rapid deployment capacity, and to get commitments from states to increase their police and troop contributions. The United States and its transatlantic partners must build on such recent efforts by continuing to explore effective ways to contribute to peacekeeping operations, whether by increasing direct participation or in funding, capacity building, and training. NATO must also recognize the priority of protection of civilians and take steps toward developing appropriate doctrine and training. NATO should build toward a military training exercise that includes a large-scale component of protection of civilians from mass atrocities.

Respectfully submitted,

Hon. Bernice B. Donald, Chair
ABA Center for Human Rights
February 2017

GENERAL INFORMATION FORM

Submitting Entity: Center for Human Rights

Submitted By: Hon. Bernice B. Donald, Chair

1. Summary of Resolution(s).

RESOLVED, That the American Bar Association urges governments and relevant organizations to implement the recommendations set forth in the policy brief, Allies Against Atrocities: The Imperative for Transatlantic Cooperation to Prevent and Stop Mass Killings (May 2016).

The resolution updates current ABA policy to reflect important developments in this vital field of human rights law and policy.

2. Approval by Submitting Entity.

The Board of the Center for Human Rights approved the submittal of this report with resolution on November 16, 2016.

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

The Center for Human Rights submitted a similar, more expansive resolution at the 2009 Annual Meeting (110, approved); the current resolution builds on the 2009 resolution.

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

Numerous policies on international criminal justice, adopted over many decades, are affected favorably by adoption of this resolution. As noted above, the August 2009 resolution is most directly relevant and would be augmented by 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)

There is no known relevant legislation on this issue.

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

This resolution would be implemented as part of the Center's ongoing Atrocity Prevention and Accountability Project established to implement the August 2009 resolution.

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

No direct or indirect costs to the Association will result from adoption of the resolution.

9. Disclosure of Interest. (If applicable)

No known interests are implicated by the resolution.

10. Referrals.

The resolution has been referred to the Sections of International Law, Criminal Justice, Civil Rights and Social Justice, and the Rule of Law Initiative for their support.

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

Michael Pates, Director, ABA Center for Human Rights, 1050 Connecticut Ave., NW, Fourth Floor, Washington, DC; 202-662-1025; michael.pates@americanbar.org

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

Hon. Bernice B. Donald, Chair, ABA Center for Human Rights, United States Court of Appeals for the Sixth Circuit, 540 Potter Stewart U.S. Courthouse, 100 E. Fifth Street, Cincinnati, Ohio 45202-3988; (513) 564-7000; Bernice_Donald@ca6.uscourts.gov.

EXECUTIVE SUMMARY

1. Summary of the Resolution

RESOLVED, That the American Bar Association urges governments and relevant organizations to implement the recommendations set forth in the policy brief, *Allies Against Atrocities: The Imperative for Transatlantic Cooperation to Prevent and Stop Mass Killings* (May 2016).

The resolution updates current ABA policy to reflect important developments in this vital field of human rights law and policy.

2. Summary of the Issue that the Resolution Addresses

The resolution builds on current ABA policy addressing prevention of and responses to mass atrocity crimes – genocide, war crimes, crimes against humanity, and ethnic cleansing. The legal dimensions of atrocity prevention and response are key factors in decisions taken whether – and, if so – how to undertake such efforts.

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

The resolution updates existing ABA policy with expert insights gleaned since that policy's adoption in August 2009. In particular, the policy brief to be endorsed pursuant to the resolution recommends developing an international legal framework adequate to the challenge of atrocity prevention.

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

No internal or external minority views or opposition have been identified thus far.

**AMERICAN BAR ASSOCIATION
HEALTH LAW SECTION
REPORT TO THE HOUSE OF DELEGATES**

RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress to amend Section 1862(a)(1)
2 of the Social Security Act (42 U.S.C. 1395y) to broaden the scope of Medicare coverage by
3 allowing for coverage for items and services that are reasonable and necessary: (a) for the
4 diagnosis, prognosis or treatment of current or future conditions, illnesses, or injuries; or (b) to
5 improve the functioning of a malformed or impaired body member or function; or (c) to
6 mitigate against the future onset or severity of any prognosticated illness, injury or condition.

7
8 FURTHER RESOLVED, That the American Bar Association urges Congress to define
9 “prognosis” as the forecasting of the likelihood of or probable course of any current or future
10 illness, injury or condition.

REPORT

Background

Historically, most medical treatments have been designed for the average (already sick) patient and, as a result of this approach, the success of a single treatment can vary. Precision medicine is an innovative approach to medical treatment that takes into account individual differences in people's genes, environments, and lifestyles. The promise of precision medicine is delivering the right treatments, at the right time, to the right person. It provides medical professionals the resources they need to target the specific treatments of the illnesses that patients may encounter. Most importantly, it can and will be able to reasonably predict an individual's propensity for developing future conditions that may be prevented or mitigated with current or future treatments.

This approach to healthcare will likely lead to increased efficiency for providers and improved results for patients. Many diagnostic tests and targeted therapies are already available for patient use, and in fact, some of these tests and therapies have already been approved for payment by the federal Medicare program which requires medical necessity and reasonableness. By amending Section 1862(a)(1) of the Social Security Act (42 U.S.C. § 1395y), more predictive and precise medical interventions will be reimbursable, and thus accessible. A healthier population benefits everyone, including payers.

I. Current State of Precision Medicine and its Benefits

The National Institutes of Health (NIH) defines precision medicine as "an emerging approach for disease treatment and prevention that takes into account individual variability in genes, environment, and lifestyle for each person."¹ Precision medicine enables providers and researchers to predict more accurately which illnesses will occur and what treatment and prevention strategies will work in different groups of people. It is in contrast to a "one-size-fits-all" approach, in which disease treatment and prevention strategies are developed for the average person, with little, if any, consideration for the genetic differences between individuals.

Although the term "precision medicine" is relatively new, the concept has been a part of healthcare for many years. For example, a person who needs a blood transfusion is not given blood from a randomly selected donor; instead, the donor's blood type is matched to the recipient to reduce the risk of complications. Although examples can be found in several areas of medicine, the role of precision medicine in day-to-day healthcare is relatively limited – in part because today's reimbursement models, generally, restrict its potential.

Precision medicine depends on an intimate understanding of how human genes and the proteins they encode function. For example, certain genes normally produce proteins that contribute to an individual's well-being. But an abnormal gene can result in a protein that causes a specific disease. Certain therapeutics—often called "actionable therapies"—are available for use against abnormal gene and protein development, a type of "variant," in genomics terms. While

¹ National Institutes of Health, "About the Precision Medicine Initiative Cohort Program," found at: <https://www.nih.gov/precision-medicine-initiative-cohort-program>.

more and more is being learned with respect to identifying problematic genes, currently there are a limited number of proven actionable therapies. So a gap exists between the available knowledge and actionable therapies. This gap highlights the importance of changing reimbursement methodologies to encourage innovation and invention in both genetic testing and, importantly, the corresponding actionable therapies.

While precision medicine offers the potential for life-saving advances in the diagnosis and treatment of a wide variety of medical conditions, such as Alzheimer's, diabetes, and congestive heart failure, one of the areas of greatest potential is in the prevention and treatment of cancer. For some cancer patients, precision medicine will lead to less, but more effective, treatment.² An example is the recent report on the medical test, OncotypeDx.³ The report found that this test provides molecular information that enables 16% of early-stage breast cancer patients to skip chemotherapy. This and other kinds of precision testing of tumors, which enhance understanding of the genetic profile of a patient's cancer, hold the promise of enhancing effective treatment strategies.

A recent article on the status of, and challenges to, the development of precision medicine illustrates the difference that new genomic diagnostic techniques can make. The article cites a man diagnosed with leukemia who had not responded well to standard chemotherapy. But after a routine genomic profile test, his physicians were able to predict that his leukemia might be sensitive to a specific pill. This prediction proved to be accurate, allowing the patient to undergo successful chemotherapy and a bone marrow transplant.⁴ Unfortunately, lack of reimbursement continues to impede access to promising treatments.

The potential of precision medicine is recognized at the highest levels of government. In his 2015 State of the Union address, President Obama launched the Precision Medicine Initiative (PMI), a bold new research effort to revolutionize health care and the treatment of disease. The President stated, "I want the country that eliminated polio and mapped the human genome to lead a new era of medicine – one that delivers the right treatment at the right time." This initiative would help to "give all of us access to personalized information we need to keep ourselves and our families healthier."⁵

Subsequently, on February 26, 2015, Sylvia M. Burwell, Secretary, U.S. Department of Health and Human Services (Department), made the following statement on the President's FY 2016 Budget before the Committee on Energy and Commerce, Subcommittee on Health:

Advancing Precision Medicine. The FY 2016 Budget includes \$215 million for the Precision Medicine Initiative, a new cross-Department effort focused on developing treatments, diagnostics, and prevention strategies tailored to the genetic characteristics of individual patients. This effort includes \$200 million for the NIH to launch a national research cohort of a million or more Americans who volunteer

² Schattner, Elaine, *Precision Medicine Will (Eventually) Lower Cancer Care Costs*, FORBES, Oct. 1, 2015, found at: <http://www.forbes.com/sites/elaineschattner/2015/10/01/precision-medicine-will-eventually-lower-cancer-care-costs/#67470da05cfd>.

³ *Prospective Validation of a 21-Gene Expression Assay in Breast Cancer*, The New England Journal of Medicine, November 19, 2015, summary found at: <http://www.nejm.org/doi/full/10.1056/NEJMoa1510764>.

⁴ Meg Bryant, *Precision medicine: so close, yet so far away*, HEALTHCARE DIVE (Feb. 25, 2016), <http://www.healthcaredive.com/news/precision-medicine-so-close-yet-so-far-away/414471/>.

⁵ 2015 Presidential State of the Union Address – January 20, 2015.

to share their information, including genetic, clinical and other data to improve research, as well as to invest in expanding current cancer genomics research, and initiating new studies on how a tumor's DNA can *inform prognosis and treatment choices* [emphasis added].

The Department will also modernize the regulatory framework to aid the development and use of molecular diagnostics, and develop technology and define standards to enable the exchange of data, while ensuring that appropriate privacy protections are in place.

With the support of Congress, this funding would allow the Department to scale up the initial successes we have seen to date and bring us closer to curing the chronic and terminal diseases that impact millions of Americans across the country.⁶

The PMI Cohort Program intends to extend precision medicine to all diseases by building a national research cohort of one million or more U.S. participants. Many factors have converged to make now the right time to begin a program of this scale and scope — Americans are extremely engaged in improving their health and participating in health research, electronic health records have been widely adopted, genomic analysis costs have dropped significantly, data science has become increasingly sophisticated, and health technologies have become mobile.⁷ These goals are being realized. Most recently, the NIH and ONC announced the program “Sync for Science,” which enables patients to donate their medical data to the PMI and improve the sharing of data between researchers.

Further, the use of precision medicine in the prevention and treatment of cancer, for example, is high on the list of priorities of the federal government. During this 2016 State of the Union Address, the President called on Vice President Biden to lead a new, national “moonshot” initiative to eliminate cancer. This was shortly followed by an announcement of a \$1 billion initiative to jumpstart this program.⁸ The “moonshot” will work to accelerate research efforts and break down barriers to progress by enhancing data access, and facilitating collaborations with researchers, doctors, philanthropies, patients and patient advocates, and biotechnology and pharmaceutical companies. A particular goal of the “moonshot” is to attain a greater understanding of the genetic changes that occur within the cancer cell, and in surrounding and immune cells responding to the cancer, which will advance both immunotherapy and targeted drug therapy and help lead to an increased ability to enhance patient response to therapy.⁹

A change in the potential reimbursement available for precision medicine furthers this laudable goal. Specifically, invention and innovation follow what Medicare reimburses. Consequently, to the extent that prognostic tests and their resulting interventions become reimbursable, the likelihood of achieving the “moonshot” increases.

⁶ HHS FY2016 Budget in Brief, found at: <http://www.hhs.gov/about/budget/fy2016/budget-in-brief/index.html>.

⁷ National Institute of Health, “About the Precision Medicine Initiative Cohort Program,” found at: <https://www.nih.gov/precision-medicine-initiative-cohort-program>.

⁸ Fact Sheet: Investing in the National Cancer Moonshot, White House, Office of the Press Secretary, Feb. 1, 2016, <https://www.whitehouse.gov/the-press-office/2016/02/01/fact-sheet-investing-national-cancer-moonshot>.

⁹ *Id.*

II. Proposal

As discussed, our proposal would change the definition of Medicare’s “medical necessity” to include reasonable and necessary prognostic tests and actionable interventions before illness manifests. It is our hope that this change would also spill over to the commercial market. Whether a commercial insurance plan covers genetic testing and resulting interventions depends on several factors - but the most important is the strength of evidence supporting a test’s analytical and clinical validity, and clinical utility.¹⁰ A major limiting factor, however, is the lack of industry standardization. Specifically, while a particular commercial insurer may be willing to invest in genetic testing and mitigating actionable therapies across its insured population to reduce the likelihood of future diseases, it may be reluctant to do so unless other insurers in the industry also act. A move by CMS to amend the definition of medical necessity to include such interventions would be instructive to commercial insurers. This is why a change in Medicare’s definition of medical necessity is critical. As the government’s role in healthcare continues to grow, the lines between public payors and private payors have blurred. More and more private payors base their coverage and reimbursement rates for services on what CMS defines as reimbursable under Medicare. Consequently, if Medicare adopts reimbursement methodologies that pay for prognostic tests and actionable therapies, we anticipate that commercial insurers will follow. At this time, however, we are not proposing a direct change or mandate on commercial insurers.

The general definition of medical necessity can be found in 42 U.S.C. § 1395y(a)(1) of the Social Security Act. This language is 50 years old and states: “no payment may be made under part A or part B for any expenses incurred for items or services which ... are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.”¹¹ Our proposal would revise this definition to incorporate key components of precision medicine – specifically the concept of testing for future illnesses (using genomic medicine) and interventions to “prevent or mitigate” against those prognosticated illnesses or injuries. Importantly, the revised definition would retain the “reasonable and necessary” concepts that CMS would be able to expand upon during rule making. The proposed new definition follows:

PROPOSED AMENDMENT TO SECTION 1862(a)(1)

EXCLUSIONS FROM COVERAGE AND MEDICARE AS SECONDARY PAYER

Sec. 1862. [42 U.S.C. 1395y] (a) Notwithstanding any other provision of this title, no payment may be made under part A or part B for any expenses incurred for items or services—

(1)(A) which, except for items and services described in a succeeding subparagraph or additional preventive services (as

¹⁰ *Precision Medicine, Part Three: Cost and Time No Longer Barriers to Sequencing*, Individualized Medicine Blog, Mayo Clinic, found at: <http://individualizedmedicineblog.mayoclinic.org/discussion/precision-medicine-part-three-cost-and-time-no-longer-barriers-to-sequencing/>.

¹¹ 42 U.S.C. § 1395y(a)(1).

described in section 1395x(ddd)(1) of this title), are not reasonable and necessary for the diagnosis, prognosis or treatment of current or future conditions, illnesses or injuries or to improve the functioning of a malformed or impaired body member or function or to prevent or mitigate against the future onset or severity of any prognosticated illness, injury or condition. For purposes of this Section, “prognosis” means the forecasting of the likelihood of or probable course of any current or future illness, injury or condition.

(B) ...

The potential benefits of precision medicine are just beginning. It is our hope that this change will spur further progress in this exciting new medical technology.

Respectfully submitted,

C. Joyce Hall, Chair
ABA Health Law Section
February 2017

GENERAL INFORMATION FORM

Submitting Entity: ABA Health Law Section

Submitted By: C. Joyce Hall, Chair, ABA Health Law Section

1. Summary of Resolution.

The purpose of this Resolution is to expand Medicare's definition of medically necessary services to include aspects of precision medicine – specifically interventions that could mitigate medical issues which are genetically indicated, but not yet expressed.

2. Approval by Submitting Entity. The ABA Health Law Section approved submission of this Resolution on November 16, 2016.

3. Has this or a similar resolution been submitted to the House or Board previously? Not to our knowledge.

4. What existing American Bar Association policies are relevant to this Resolution and how would they be affected by its adoption? None that we are aware of.

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). None that we are aware of.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Submission to various members of the United States Congress involved in health care policy matters.

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

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

10. Referrals. Commission on Law and Aging, Senior Lawyers Division and the Section of Science and Technology 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

At a time of unprecedented scientific and medical breakthroughs, precision medicine has the capability to accurately diagnose human diseases, predict individual susceptibility to disease based on genetic, environmental, and lifestyle factors, detect the onset of disease at early stages, pre-empt its progression, target treatments, and increase the overall efficiency and effectiveness of the health care system. This progress has brought us major treatment advances that will improve patient outcomes, with the greatest impact being felt by those facing serious and life-threatening conditions and unmet medical needs.

The emergence of precision medicine is eliciting growing excitement and optimism among patients, providers, and policymakers as a new wave of targeted therapies emerges that demonstrate the potential to improve patient outcomes and health care delivery. Current federal regulations restrict reimbursement to only those treatments and procedures that are “medically necessary.” Because the existing definition of “medical necessity” focuses solely on those who are already sick, it excludes treatments (both existing and those in development) that could mitigate medical issues which are genetically indicated, but not yet expressed. In short, precision medicine allows, for the first time, the potential to accurately predict illnesses before they occur. And when cost effective interventions are possible, these treatments should be covered and reimbursable for Medicare payment purposes in order to ensure patient access.

With this Resolution, the American Bar Association will urge Congress to adopt a new definition of Medicare coverage to specifically include procedures reasonable and necessary for the prognosis or treatment of future conditions, illnesses, or injuries. The American Bar Association will further urge Congress to define “prognosis” as the forecasting of the likelihood of or probable course of any current or future illness, injury or condition.

2. Summary of the Issue that the Resolution Addresses

Because Medicare’s current definition of what is medically necessary (and thus, reimbursable) excludes interventions that could mitigate medical issues which are genetically indicated but not yet expressed, this Resolution will urge Congress to adopt a broader statutory definition.

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

In this Resolution, the American Bar Association will support a change in the Social Security Act’s definition of what is medically necessary and thus reimbursable to include aspects of precision medicine - specifically interventions that could mitigate medical issues which are genetically indicated, but not yet expressed.

4. **Summary of Minority Views**

While we have not performed an exhaustive search of possible minority views, we suspect that such views would focus on the potential increases in costs for covering the discussed precision medicine interventions, etc. For this reason the proposed text also includes the caveat “reasonable and necessary” as to what will be considered medically necessary.

**AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association approves the Uniform Family Law
- 2 Arbitration Act, promulgated by the National Conference of Commissioners on Uniform
- 3 State Laws, as an appropriate Act for those states desiring to adopt the specific
- 4 substantive law suggested therein.

REPORT

UNIFORM FAMILY LAW ARBITRATION ACT

Summary

The Uniform Family Law Arbitration Act (UFLAA) creates a statutory scheme for the arbitration of family law disputes. Arbitration is a private process that parties may use to resolve a dispute rather than going to court. During an arbitration, a neutral third party, the arbitrator, hears arguments from the parties, evaluates evidence, and makes a decision on their dispute. Although arbitration has long been used in the commercial context, it has recently begun to gain popularity in the family law sphere.

Under the UFLAA, a “family law dispute” is a contested issue arising under the state’s family or domestic relations law. Family law disputes typically include disagreements about marital property, spousal support, child custody, and child support.

Under the Act, an arbitrator may not:

- grant a divorce;
- terminate parental rights;
- grant an adoption or guardianship of a child or incapacitated person; or
- determine the status of a child in need of protection.

The Act sets out arbitration procedures chronologically, from defining an arbitration agreement to providing standards for vacating a confirmed award. Many of the provisions of the UFLAA will be familiar to arbitrators and practitioners in the dispute resolution field. This is because the UFLAA is based in part on the Uniform Arbitration Act (1955) and Revised Uniform Arbitration Act (2000). The UFLAA’s provisions for arbitrator disclosure, award, appeals, and arbitrator immunity, among others, are drawn substantially from these earlier uniform acts.

Since family law disputes are different from traditional commercial disputes, however, the UFLAA contains some key provisions that do not appear in the Uniform Arbitration Act or Revised Uniform Arbitration Act. Many of these differences have to do with protecting vulnerable individuals during the arbitration process, such as children and victims of domestic violence. For instance, unless waived by the parties, the UFLAA requires arbitrators to be trained in detecting domestic violence and child abuse before arbitrating a family law dispute. If the arbitrator detects abuse, the arbitrator must stay the arbitration and refer the dispute to court. Likewise, if a party is subject to a protection order, the dispute will be referred to court for resolution.

Importantly, the UFLAA requires close judicial review of arbitration awards determining child-related issues. While an award regarding property or spousal support is subject to limited judicial review, a child-related award may not be confirmed by a court unless the court finds that the award complies with applicable law and is in the best interests of the child. Also, de novo review of child-related awards is a bracketed alternative that a state can choose to enact. In

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addition, some states may want to exclude child-related disputes from arbitration altogether, and the Act provides an opt-out alternative for that purpose.

Another unique provision of the UFLAA relates to agreements to arbitrate a dispute that may arise in the future (often referred to as “pre-dispute agreements”). Pre-dispute agreements are generally permissible under the UFLAA, in accordance with the UAA and the RUAA. If parties agree to arbitrate a future child-related dispute, however, then the parties must affirm the agreement to arbitrate at the time of the dispute before proceeding to arbitration.

After the court confirms an award, a party may request a modification under state law governing post-decree modifications. If the parties agree, modification actions can be resolved by arbitration.

The UFLAA is an overlay statute meant to work together with the state’s existing choice-of-law rules and contractual arbitration law. It provides a comprehensive, clear framework for the arbitration of family law disputes.

The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Family Law Arbitration Act is available [here](http://www.uniformlaws.org/shared/docs/family%20law%20arbitration/UFLAA_Final_Act_2016.pdf).
[[http://www.uniformlaws.org/shared/docs/family law arbitration/UFLAA_Final Act_2016.pdf](http://www.uniformlaws.org/shared/docs/family%20law%20arbitration/UFLAA_Final_Act_2016.pdf)]

Respectfully submitted,

Richard T. Cassidy, President
National Conference of Commissioners
On Uniform State Laws
February 2017

GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Family Law Arbitration Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2016 Annual Meeting.

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

No.

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

Endorsing the Uniform Family Law Arbitration Act reinforces the Association's policy of supporting legislation and programs that utilize systems of alternative dispute resolution (ABA Policy 97M112). Under the UFLAA, arbitration of family law matters is entirely voluntary, which comports with the Association's policy against mandatory arbitration programs (ABA Policy 94A10F). Significantly, the UFLAA also contains protections for children and victims of domestic violence. For example, under the UFLAA, if domestic violence is detected between the parties, the arbitrator will stay the arbitration and refer the parties to court. These protections are similar to an Association policy recommending an opt-out in court-mandated mediation programs when one party has perpetrated domestic violence on the other party (ABA Policy 00A109B).

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Family Law Arbitration Act has not yet been enacted in any state legislature.

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

The National Conference will present the Act to state legislatures for consideration and enactment.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee's work can be found [here](#).

The ABA Advisor to the Uniform Family Law Arbitration Act was Phyllis G. Bossin.

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 SUMMARY1. Summary of the Resolution

That the American Bar Association approves the Uniform Family Law Arbitration Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2016 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

States' laws vary when it comes to arbitrating family law matters such as spousal support, division of property, child custody, and child support. The Uniform Family Law Arbitration Act standardizes the arbitration of family law. It is based in part on the Revised Uniform Arbitration Act, though it departs from the RUAA in areas in which family law arbitration differs from commercial arbitration, such as: standards for arbitration of child custody and child support; arbitrator qualifications and powers; protections for victims of domestic violence. This Act is intended to create a comprehensive family law arbitration system for the states.

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

Approval of the Uniform Family Law Arbitration Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

None known.

AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association approves the Uniform Wage
- 2 Garnishment Act, promulgated by the National Conference of Commissioners on
- 3 Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific
- 4 substantive law suggested therein.

REPORT**UNIFORM WAGE GARNISHMENT ACT***Summary*

The Uniform Wage Garnishment Act (UWGA) provides a standard process for wage garnishment to collect debt after a creditor obtains a judgment. Current state laws vary widely and are often outdated, imposing significant burdens on courts and unnecessary costs on creditors, employers, and employees. Sometimes they also fail to provide adequate notice to employees of their rights and obligations. The UWGA creates a standard system for wage garnishments that is largely removed from the courts, operates efficiently thereby reducing costs, and provides employees with a plain-language notification of their rights and obligations as well as providing them with other protections.

The UWGA applies only to what is sometimes called a “debt garnishment,” meaning a garnishment by a creditor with a money judgment. It does not apply to other procedures that are sometimes called “garnishments” but are known collectively under the UWGA as “ordered deductions.” Examples of ordered deductions are procedures to collect under a support order; an order of a bankruptcy court; or a debt owed for a federal, state, city, or local tax.

As under current law, a garnishment action commences in court with the filing of a complaint or motion (the procedure differs from state to state) which is served on the employer using the normal rules of civil procedure. That is the last time the court will be involved unless an employee, employer, or creditor seeks its protection. The employer’s answer is made directly to the creditor and amounts deducted from the employee’s earnings are remitted directly to the creditor.

The complaint or motion must provide sufficient information to permit the employer to readily identify the employee, designate an agent with whom the employer must communicate, specify the total amount to be deducted over time, and specify how deducted funds are to be remitted to the creditor. The employer’s answer must indicate whether the named debtor is in fact an employee and must designate an agent with whom the creditor must communicate.

Under current law, a garnishment action may proceed in any jurisdiction in which the employer can be served. The UWGA gives the employee better access to the court by generally requiring that it be located in the jurisdiction where the employee works. The UWGA also extends protection to a cadre of individuals who are classified as independent contractors but who are virtually indistinguishable from employees. It also requires that anyone whose earnings are to be garnished be given a plain-language notification that explains garnishment and provides other helpful information about how to deal with the situation. Wage deductions cannot begin until the first regular payday that occurs 30 or more days after the notification is sent. The act also creates a procedure that encourages creditors to stop wrongful garnishments promptly and return any funds wrongfully garnished.

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The UWGA protects creditors by permitting a single garnishment to remain in place until the entire amount owed on the judgment is paid, and it resolves multiple-garnishment issues by requiring creditors to share equally in available funds. The act also promotes efficiency by permitting the creditor and employer to agree to modern payment methods and by permitting an employer that has more than one employee being garnished by the same creditor to send a single, combined payment to the creditor.

The Act provides appropriate penalties for employers that fail to follow required procedures and for creditors that engage in bad-faith conduct. Although most garnishments will proceed entirely outside the court system, creditors, employers, and employees may request a hearing at any time to determine any issue arising under the Act.

The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Wage Garnishment Act is available [here](http://www.uniformlaws.org/shared/docs/wage_garnishment/UWGA_Final_Act.pdf).
[http://www.uniformlaws.org/shared/docs/wage_garnishment/UWGA_Final_Act.pdf]

Respectfully submitted,

Richard T. Cassidy, President
National Conference of Commissioners
On Uniform State Laws
February 2017

GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Wage Garnishment Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2016 Annual Meeting.

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

No.

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

None.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Wage Garnishment Act has not yet been enacted in any state legislature.

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

The National Conference will present the Act to state legislatures for consideration and enactment.

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

None.

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9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee's work can be found here.

The ABA Advisor for the Uniform Wage Garnishment Act was Garth Jacobson.

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 SUMMARY1. Summary of the Resolution

That the American Bar Association approves the Uniform Wage Garnishment Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2016 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

Currently, every state has a different wage garnishment law and process. This means that employers who do business across multiple states must know and abide by a different, and often complex, law for each jurisdiction. If employers make processing errors calculating garnishments, they may face civil penalties. The Uniform Wage Garnishment Act seeks to simplify and clarify wage garnishments for employers, creditors, and consumers by standardizing how the wage garnishment process works and offering plain-language notice and garnishment calculation forms.

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

Approval of the Uniform Wage Garnishment Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

None known.

**AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association approves the Uniform Employee and
- 2 Student Online Privacy Protection Act, promulgated by the National Conference of
- 3 Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to
- 4 adopt the specific substantive law contained in the act.

REPORT

UNIFORM EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT

Summary

Today, most individuals have online accounts of some type. These include social media accounts, bank accounts, and email accounts, among others. Generally, when someone asks for access to the login information for, or non-public content of, a personal online account, an individual is free to say “no.” But that is less true in the employment and educational contexts. Employers may have the power to coerce access to personal online accounts of individuals who are, or seek to become, their employees. Similarly, educational institutions may have coercive power over those who are, or seek to become, their students. When an employer or educational institution asks for the login information for, or non-public content of, an employee’s or student’s online account, that person may find it difficult to refuse. In recent years, there have been a number of reports of incidents where employers and educational institutions have demanded, and received, such access.

The Uniform Employee and Student Online Privacy Protection Act (UESOPPA) provides a uniform model for states to adopt. Its principal goal is to enable employees and students to make choices about whether, and when, to provide employers and educational institutions with access to their personal online accounts. To this end, the act prohibits employers and public and private post-secondary educational institutions from requiring, coercing, or requesting that employees or students provide them with access to the login information for, or non-public content of, these accounts. It further prohibits employers and educational institutions from requiring or coercing an employee or student to add them to the list of those given access to the account (to “friend” them, in common parlance), though it does not prohibit them from *requesting* to be added.

UESOPPA is divided into 10 sections. Section 1 is the short title. Section 2 defines important terms used in the act. Section 3 delineates protections for employee protected personal online accounts and creates exceptions to these protections. Section 4 delineates protections for student protected personal online accounts and creates exceptions to these protections.

Section 3 and Section 4 are both divided into four subsections: subsection (a), which prohibits an employer (or educational institution) from taking certain actions that would compromise the privacy of an employee’s (or student’s) protected personal online account; subsection (b), which creates exceptions to these prohibitions; subsection (c), which provides additional protections for employee (or student) content if an employer (or educational institution) accesses employee (or student) content for a purpose specified in subsection (b)(3); and subsection (d), which provides additional protections when an employer (or educational institution), by virtue of lawful system monitoring technology, gains access to login information for an employee’s (or student’s) protected personal online account. Section 5 provides remedies for violations of the act, including a private right of action. The remainder of the act contains standard provisions generally included by the Uniform Law Commission.

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The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Employee and Student Online Privacy Protection Act is available [here](http://www.uniformlaws.org/shared/docs/social_media_privacy/ESOPPA_Final_Act_2016.pdf). [http://www.uniformlaws.org/shared/docs/social_media_privacy/ESOPPA_Final_Act_2016.pdf]

Respectfully submitted,

Richard T. Cassidy
President
National Conference of Commissioners
on Uniform State Laws
February 2017

GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Employee and Student Online Privacy Protection Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity. The National Conference of Commissioners on

Uniform State Laws granted final approval to the Act at its July 2016 Annual Meeting

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

No.

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

No known existing Association policies relevant to this Resolution that would be affected.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Employee and Student Online Privacy Protection Act has not yet been enacted in any jurisdiction.

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

The National Conference of Commissioners on Uniform State Laws will present the Act to state legislatures for consideration and enactment.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals. Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project and those that expressed interest were provided with tentative drafts. The Drafting Committee's work can be found here.

The ABA Advisor for the Uniform Employee and Student Online Privacy Protection Act was Frank H. Langrock.

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

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(678) 446-0305 (cell)
lkarsai@uniformlaws.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.)

Richard T. Cassidy, NCCUSL President
Rich Cassidy Law
100 Main St., P.O. Box 1124
Burlington, VT 05401-1124
(802) 864-8144 (office)
rcassidy@uniformlaws.org

EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Uniform Employee and Student Online Privacy Protection Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law contained in the act

2. Summary of the Issue that the Resolution Addresses

The growing use of social media has implications in both employment and educational contexts. Indeed, employers and educational institutions now sometimes ask current and/or prospective employees and students to grant the employer or school access to social media or other name and password protected accounts. The Uniform Employee and Student Online Privacy Protection Act addresses both employers' access to employees or prospective employees' social media and other online accounts accessed via username and password or other credentials of authentication as well as post-secondary educational institutions' access to students' or prospective students' similar online accounts.

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

Approval of the Uniform Employee and Student Online Privacy Protection Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

The Uniform Employee and Student Online Privacy Protection Act is based on sound public policy that in many instances will provide stronger privacy protections than what is currently provided in existing state laws. However, some privacy advocates would have preferred different policy choices and may be dissatisfied with the final result. There is no known opposition within the American Bar Association.

**AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association approves the Revised Uniform
- 2 Unclaimed Property Act, promulgated by the National Conference of Commissioners on
- 3 Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific
- 4 substantive law suggested therein.

REPORT

REVISED UNIFORM UNCLAIMED PROPERTY ACT

Summary

The Uniform Law Commission first approved a uniform act on unclaimed property in 1954 – the Uniform Disposition of Unclaimed Property Act. Since then, the act has been revised in 1966, 1981 (then renamed the Uniform Unclaimed Property Act), and 1995. The unclaimed property laws of most states are based in whole or in part on one of the multiple versions of the Uniform Act.

After nearly 20 years, the ULC has once again revised the act, approving the Revised Uniform Unclaimed Property Act (RUUPA) in 2016. The Revised Act provides necessary updates that keep up with technological innovation and recognizes new forms of property not included in prior versions of the Act.

Like its predecessors, the Revised Act provides rules for determining when property is actually abandoned, and when it is, for determining which state gets it.

The most common types of unclaimed property are bank accounts and bank deposits, life insurance proceeds, trust and fiduciary accounts, securities, wages, amounts owed in business to business and consumer transactions, class action proceeds, money orders and travelers checks.

The key parties involved in the distribution and processing of unclaimed property are the apparent owner, holder, and administrator. The apparent owner is the person whose name appears on the records of a holder as the owner of property held, issued, or owing by the holder. The holder is the person obligated to hold for the account of, or to deliver or pay to, the owner property that is subject to the RUUPA. If the property is “abandoned” under the Act, then the holder must report the property to the administrator, the state official responsible for administering the RUUPA.

Article 2 of RUUPA establishes rules to determine if property is abandoned. Under the Act, property is presumed abandoned if it is unclaimed by its apparent owner after a specified period of time (the dormancy period). The length of the dormancy period depends on the type of property. RUUPA establishes dormancy periods for some types of property that were not covered in previous versions of the Act, including health savings accounts, custodial accounts for minors, stored-value cards, and more. RUUPA also clarifies that property is not presumed abandoned if the apparent owner shows an interest in the property during the dormancy period designated in the Act.

Article 3 establishes three priority rules to determine which state may take custody of property that is presumed abandoned. The first-priority rule grants custody to the state of the last-known address of the apparent owner, according to the holder’s records. The second-priority rule grants custody to the state of corporate domicile of the holder, if there is no record of the address of the apparent owner, or the address is in a state that does not permit the custodial taking of the

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property. The third-priority rule permits a state administrator to take custody of the property if (1) the transaction involving the property occurred in the state; (2) the holder is domiciled in a state that does not permit the custodial taking of the property; and (3) the last-known address of the apparent owner or other person entitled to the property is unknown or in a state that does not permit the custodial taking of the property.

Under Articles 4 and 5, the holder of property presumed abandoned must send a notice to the apparent owner about the property and must file a report with the administrator about the property.

Articles 6 and 7 describe how the administrator may take custody of unclaimed property and how it may sell it. Except for securities, the RUUPA allows the administrator to sell the property three years after receipt, but it is not required to do so. Securities may be sold three or more years after the administrator receives the security and gives the apparent owner notice. The administrator is prohibited from selling military medals or decorations awarded for military service. Instead, the administrator may deliver them to military veterans' organizations or governmental entities.

Article 8 directs the administrator to deposit all funds received under the Act into the general fund of the state. Article 8 also requires the administrator to maintain records of the property.

Article 9 addresses various scenarios in which the administrator of one state would need to pay or deliver unclaimed property to another state, either because there is a superior claim to the property by the other state or the property is subject to the right of another state to take custody.

Article 10 explains how an administrator may request property reports and how an administrator may examine records to determine if a person has complied with the Act. Article 11 gives holders the right to seek review of determinations made by the administrator about their liability to deliver property or payment to the state. Article 12 imposes a penalty on a holder that fails to report, pay, or deliver property within the time required by the Act. Civil penalties may also apply if the holder enters into a contract to evade an obligation under the Act.

Article 13 of the RUUPA governs the enforceability of an agreement between an apparent owner and a "finder" to locate and recover property. The Act requires a signed record between the parties to designate the finder as an agent of the owner. Article 14 explains what information is considered confidential under the Act. The Article describes when confidential information may be disclosed under the Act, and the steps that an administrator must take in the event of a security breach.

The Revised Uniform Unclaimed Property Act makes a number of improvements to earlier versions of the uniform act in order to keep up with technological changes and new forms of property.

The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Revised Uniform Unclaimed Property Act is available [here](http://www.uniformlaws.org/shared/docs/unclaimed%20property/RUUPA_Final%20Act_2016.pdf).
[[http://www.uniformlaws.org/shared/docs/unclaimed property/RUUPA_Final Act_2016.pdf](http://www.uniformlaws.org/shared/docs/unclaimed%20property/RUUPA_Final%20Act_2016.pdf)]

Respectfully submitted,

Richard T. Cassidy, President
National Conference of Commissioners
On Uniform State Laws
February 2017

GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Revised Uniform Unclaimed Property Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2016 Annual Meeting.

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

No.

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

The ABA previously approved a resolution to support the 1995 version of the Uniform Unclaimed Property Act.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Revised Uniform Unclaimed Property Act has not yet been enacted in any state legislature.

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

The National Conference will present the Act to state legislatures for consideration and enactment.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee's work can be found [here](#).

The ABA Advisor for the Revised Uniform Unclaimed Property Act was Ethan D. Millar.

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

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lkarsai@uniformlaws.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.)

Richard T. Cassidy, NCCUSL President
Rich Cassidy Law
100 Main St., P.O. Box 1124
Burlington, VT 05401-1124
(802) 864-8144 (office)
rcassidy@uniformlaws.org

EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Revised Uniform Unclaimed Property Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2016 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The National Conference of Commissioners on Uniform State Laws first drafted uniform state legislation on unclaimed property in 1954. Since then, revisions have been promulgated in 1981 and again in 1995. Many technological developments in recent years as well as new types of potential unclaimed property, such as gift cards, are not addressed in the most current uniform act. The Revised Uniform Unclaimed Property Act updates provisions on numerous issues, including escheat of gift cards and other stored-value cards, life insurance benefits, securities, dormancy periods, and use of contract auditors.

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

Approval of the Revised Uniform Unclaimed Property Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

A variety of views were expressed during the drafting process, and compromises were reached. Express opposition to the Revised Uniform Unclaimed Property Act is unknown at this time.

AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association approves the Uniform Unsworn
- 2 Domestic Declarations Act, promulgated by the National Conference of Commissioners
- 3 on Uniform State Laws, as an appropriate Act for those states desiring to adopt the
- 4 specific substantive law suggested therein.

REPORT**UNIFORM UNSWORN DOMESTIC DECLARATIONS ACT***Summary*

The Uniform Unsworn Domestic Declarations Act (UUDDA) allows the use of unsworn declarations made under penalty of perjury in state court proceedings. Under the Act, the declarant must be physically located within the boundaries of the United States while making the declaration.

If the state's law either requires or allows use of a sworn declaration, an unsworn declaration made under the Act's rules has the same effect as a sworn declaration.

The UUDDA does not apply to:

- A deposition;
- An oath of office;
- An oath required to be given before a specified official other than a notary public;
- A declaration to be recorded under the state's real estate law; or
- An oath required by the state's law relating to self-proved wills.

Under the UUDDA, an unsworn declaration must be in substantially the following form:

I declare under penalty of perjury under the law of [insert name of the enacting state] that the foregoing is true and correct.

Signed on the ____ day of _____, _____, at _____.
(month) (year) (city or other location, and state)

(printed name)

(signature)

The UUDDA builds upon the Unsworn Foreign Declarations Act (UUFDA), which covers unsworn declarations made outside the boundaries of the United States. States that have enacted the UUFDA should enact the Uniform Unsworn Domestic Declarations Act; states that have not enacted the UUFDA should enact the Uniform Unsworn Declarations Act.

The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Unsworn Domestic Declarations Act is available [here](http://www.uniformlaws.org/shared/docs/unsworn%20domestic%20declarations/UUDDA_Final_Act_2016.pdf).
[http://www.uniformlaws.org/shared/docs/unsworn domestic declarations/UUDDA_Final Act_2016.pdf]

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Respectfully submitted,

Richard T. Cassidy, President
National Conference of Commissioners
On Uniform State Laws
February 2017

GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Unsworn Domestic Declarations Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2016 Annual Meeting.

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

No.

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

The ABA previously approved a resolution to support the related act, the Uniform Unsworn Foreign Declarations Act.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Unsworn Domestic Declarations Act has not yet been enacted in any state legislature.

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

The National Conference will present the Act to state legislatures for consideration and enactment.

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

None.

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9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee's work can be found here.

The ABA Advisor for the Uniform Unsworn Declarations Act was Richard W. Morefield.

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

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111 North Wabash Ave., Suite 1010
Chicago, IL 60602
(312) 450-6604 (office)
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lkarsai@uniformlaws.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.)

Richard T. Cassidy, NCCUSL President
Rich Cassidy Law
100 Main St., P.O. Box 1124
Burlington, VT 05401-1124
(802) 864-8144 (office)
rcassidy@uniformlaws.org

EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Uniform Unsworn Domestic Declarations Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2016 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The purpose of the Uniform Unsworn Domestic Declarations Act is to permit the use of unsworn declarations made under penalty of perjury in state courts. Under the Act, unsworn declarations may be used in lieu of affidavits, verifications, or other sworn court filings if they were made under penalty of perjury and use substantially similar language to the model form provided. The Act builds upon the Uniform Unsworn Foreign Declarations Act (UUFDA), which covers unsworn declarations made outside the United States. States that have the UUFDA should enact the Uniform Unsworn Domestic Declarations Act; states that have not enacted UUFDA should enact the Uniform Unsworn Declarations Act.

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

Approval of the Uniform Unsworn Domestic Declarations Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

None known.

**AMERICAN BAR ASSOCIATION
NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association approves the Uniform Unsworn
- 2 Declarations Act, promulgated by the National Conference of Commissioners on
- 3 Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific
- 4 substantive law suggested therein.

REPORT**UNIFORM UNSWORN DECLARATIONS ACT***Summary*

The Uniform Unsworn Declarations Act (UUDA) allows the use of unsworn declarations made under penalty of perjury in state court proceedings. Under the Act, the declarant may be physically located within or outside the boundaries of the United States while making the declaration.

If the state's law either requires or allows use of a sworn declaration, an unsworn declaration made under the Act's rules has the same effect as a sworn declaration.

The UUDA does not apply to:

- A deposition;
- An oath of office;
- An oath required to be given before a specified official other than a notary public;
- A declaration to be recorded under the state's real estate law; or
- An oath required by the state's law relating to self-proved wills.

Under the UUDA, an unsworn declaration must be in substantially the following form:

I declare under penalty of perjury under the law of [insert name of the enacting state] that the foregoing is true and correct.

Signed on the ____ day of _____, _____, at _____.
(month) (year) (city or other location, and state or country)

(printed name)

(signature)

The UUDA builds upon the Uniform Unsworn Foreign Declarations Act (UUFDA), which covers unsworn declarations made outside the boundaries of the United States. States that have enacted the UUFDA should enact the Uniform Unsworn Domestic Declarations Act; states that have not enacted the UUFDA should enact the Uniform Unsworn Declarations Act.

The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Unsworn Declarations Act is available [here](http://www.uniformlaws.org/shared/docs/unsworn_declarations/UUDA_Final_Act_2016.pdf).
[\[http://www.uniformlaws.org/shared/docs/unsworn_declarations/UUDA_Final_Act_2016.pdf\]](http://www.uniformlaws.org/shared/docs/unsworn_declarations/UUDA_Final_Act_2016.pdf)

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Respectfully submitted,

Richard T. Cassidy, President
National Conference of Commissioners
On Uniform State Laws
February 2017

GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Liza Karsai, Executive Director

1. Summary of Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Unsworn Declarations Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2016 Annual Meeting.

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

No.

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

The ABA previously approved a resolution to support the related act, the Uniform Unsworn Foreign Declarations Act.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Unsworn Declarations Act has not yet been enacted in any state legislature.

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

The National Conference will present the Act to state legislatures for consideration and enactment.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee's work can be found here.

The ABA Advisor for the Uniform Unsworn Declarations Act was Richard W. Morefield.

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

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lkarsai@uniformlaws.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.)

Richard T. Cassidy, NCCUSL President
Rich Cassidy Law
100 Main St., P.O. Box 1124
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(802) 864-8144 (office)
rcassidy@uniformlaws.org

EXECUTIVE SUMMARY

1. Summary of the Resolution

That the American Bar Association approves the Uniform Unsworn Declarations Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2016 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the Issue that the Resolution Addresses

The purpose of the Uniform Unsworn Declarations Act is to permit the use of unsworn declarations made under penalty of perjury in state courts. Under the Act, unsworn declarations may be used in lieu of affidavits, verifications, or other sworn court filings if they were made under penalty of perjury and use substantially similar language to the model form provided. The Act builds upon the Uniform Unsworn Foreign Declarations Act (UUFDA), which covers unsworn declarations made outside the United States. States that have the UUFDA should enact the Uniform Unsworn Domestic Declarations Act; states that have not enacted UUFDA should enact the Uniform Unsworn Declarations Act.

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

Approval of the Uniform Unsworn Declarations Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

None known.

AMERICAN BAR ASSOCIATION
COMMISSION ON VETERANS LEGAL SERVICES
STANDING COMMITTEE ON LEGAL ASSISTANCE FOR MILITARY PERSONNEL
COMMISSION ON HOMELESSNESS AND POVERTY

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges lawmakers at federal, state, and local
2 levels to work with the legal profession to collaborate in the identification and removal of legal
3 barriers to veterans' access to due and necessary assistance, including housing, education,
4 employment, treatment, benefits, and services, particularly those provided by the Department of
5 Veterans Affairs; and
6

7 FURTHER RESOLVED, That efforts to increase access to justice for veterans contemplate and
8 include, where appropriate, veterans' caregivers, especially on those matters for which the
9 caregiver acts on behalf of the veteran.

REPORT

Since 1918, the American Bar Association has supported protecting the rights of those who answer the call of duty. Through World Wars I and II up through the present, the ABA has helped shape the legal landscape as it applies to veterans and the administration of their due benefits. Several recent ABA policy positions are cited in the General Information form accompanying this report and others are under study within the ABA. Despite this history and the ABA's success in identifying visible legal threats, there remain policy gaps that prevent the ABA from speaking to unanticipated novel challenges or to support new progress, even when the basis for doing so may be identical to the basis for existing policy. This policy resolution seeks to remedy these gaps and to focus the attention of the legal profession, as well as law and policy makers, on those matters for which lawyers play a unique role and have the largest impact.

Supporting veterans in this way is not merely an effort to be patriotic. The rule of law, itself, and the integrity of the justice system depend on the success of those who sacrificed to defend our borders, our citizens, and U.S. allies and partners. The legal profession owes veterans more than our gratitude. The ABA Veterans Legal Services Initiative was founded, in large part, to address this obligation and to help ensure the best possible legal outcomes for veterans. Accordingly, this resolution seeks to address two significant obstacles for veteran access to justice.

As a preliminary note, for the purposes of this resolution, a "veteran" is any person who performed military service. This very broad inclusive definition does not match that of the federal and some state governments, e.g., 38 U.S.C. 101(2) defines veteran for federal programs as "a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable." The ABA holds a more inclusive view for two reasons. First, despite legislative intent and more than 30 years of practice in including persons with "Other Than Honorable" (OTH) discharges in homeless programs, the Department of Veterans Affairs has more recently interpreted OTH to be equivalent to "dishonorable" for the purposes of its definition, thereby excluding as many as 9,000 veterans from shelter programs. Legislative efforts are underway to dictate that veterans with an OTH discharge be eligible for such programs. Second, there are many legal services programs around the country serving different veteran populations. Some veterans who had received a dishonorable discharge may be able, through a legal services program, to have their discharge upgraded to OTH. There are also efforts underway within the VA to authorize a review of the character of one's discharge, rather than simply accept a discharge determination as dispositive of what assistance the veteran may be eligible into the future. Accordingly, the ABA means to be inclusive of existing legal services programs supporting veterans, including these. Absent subsequent express policy to the contrary, however, the ABA does not take the view that government benefits and services for veterans be expanded to all who served in the military.

CLAUSE ONE: ELIMINATING LEGAL BARRIERS

RESOLVED, That the American Bar Association urges lawmakers at federal, state, and local levels to work with the legal profession to collaborate in the identification and removal of systemic legal barriers to veterans' access to due and necessary assistance, including housing,

education, employment, treatment, benefits, and services, particularly those provided by the Department of Veterans Affairs

This intensified focus on veterans is needed as military service can ironically produce consequences that prevent military and veteran families from accessing state and federal rights or benefits that their service helps guarantee. This can be for a range of reasons, including laws written without the unique circumstances of military life and service in mind; a failure to recognize special protections that already exist to account for these circumstances; and the presence of obstacles or consequences that flow from service, including mental or physical injury, and even the character of a person's discharge from the military. Any obstacle to veterans accessing their rights and benefits can quickly destabilize the health and security of that individual and his or her family.

The legal profession should work, therefore, to prevent these obstacles through education and advocacy; intervene on the service member's or veteran's behalf to prevent or mitigate harm; and to restore veterans suffering adverse circumstances due to these barriers, especially when denials concern critical and life-sustaining services. These efforts are most effective when working, where reasonably possible, with the state and federal Departments of Veterans Affairs, local service providers, and counsel who are both expert and experienced.

To further understand how legal issues impact returning service members and create issues for veterans, consider the following story:

Tim served three tours of duty -- one in Iraq and two in Afghanistan. He is a decorated veteran whose personal life first began to unravel while he was deployed. Facing a divorce, custody battle, and suffering from undiagnosed post-traumatic stress disorder, (PTSD) Tim was unable to keep a job and meet his financial obligations. When he finally sought legal help, Tim was bounced from one well-meaning information or referral system to another, each one having strict guidelines on whom they could help and for what kinds of matters. Tim made several appointments with different legal offices, leaving some issues, such as his out-of-state custody matter, unresolved until a lawyer in the other state could be found. Despite his best efforts, the complexity of his family law, financial and health issues left him stressed, overwhelmed and hopeless. Tim's self-medication of his PTSD with alcohol eventually spiraled out of control until he was living on the streets where his PTSD-related temper soon landed him in jail. The impact of Tim's crisis also affected his family, who struggled to live without a father, husband, and son.

This story is a composite example of how unresolved legal difficulties can escalate and destabilize a veteran's life. As this story portrays, many legal issues for veterans can actually arise during active duty service. While service members and veterans fall under separate laws administered and enforced by separate agencies, treating the person means understanding and appreciating the continuum between the two. Unresolved legal matters for service members can detract from mission accomplishment or render the person non-deployable. During and after transition to civilian life, leaving these same matters unresolved can operate to separate the veteran from benefits and destabilize his or her home and job security. While hypothetical, Tim's story represents fairly common challenges faced by veterans and service members every day. Through a coordinated effort to strengthen and increase access to existing legal assistance

opportunities, and by developing a national awareness and engagement, Tim and others like him can have better, happier outcomes.

The vital importance of the connection between access to timely legal services and improved outcomes and transitions to civilian life cannot be overstated. Untreated or unresolved problems tend to only worsen over time until a breaking point occurs -- often at rock bottom. Yet, lawyers and other service providers empowered with the right network can break these cycles, tackle the complex legal and logistical crises, and resolve problems holistically.

Since 9/11, there has been strong interest and growing support from community organizations engaged in assisting veterans. This national dynamic is noted in the recent white paper "After the Sea of Goodwill" issued by General Martin E. Dempsey, the former Chairman of the Joint Chiefs of Staff. The white paper highlights how our communities have responded to support the needs of returning service members, veterans and their families, and elevates the need for improved national strategy across the public and private sectors. A successful national strategy requires a holistic approach characterized by cooperation, collaboration and integration of services that meet veteran, service member and family needs. The paper also notes that the overall patchwork of community support is insufficient, unconnected and declining as needs continue.

"In fact, recent empirical evidence suggests the sea of goodwill has already begun to wane. The need remains, however for substantive long-term efforts to assist veterans and their family members as they transition out of uniform and reintegrate into their civilian communities."

This waning popularity message can be heard on Capitol Hill, with lawmakers expressing that enough "surge funding" has been provided to lift veterans out of poverty and that funding levels for veteran support programs should return to maintenance levels despite the 40,000 veterans who are experiencing homelessness and new ones added each day including women, some with children. As we reintegrate more than 2 million service members from post-9/11 military operations, and bring U.S. ground forces to their lowest level since before World War II, we face significant gaps in our capacity to support reintegration from military to civilian life. Without some interconnected response -- monitored and coordinated on a national level -- these men and women will continue to struggle to have their legal needs resolved, leaving them vulnerable to escalating problems that put their families, income and health at risk, not to mention the ability for those in transition to successfully reintegrate back into civilian life.

So what kinds of legal issues are we talking about? One major challenge for the legal community has been that veterans who have a civil legal issue, may also have a criminal matter as well. Or if someone comes in for assistance with a disability claim, it may also represent her sole source of income and any delay in a response can jeopardize her health or home. Lawyers serving veterans should be sufficiently versed across criminal, civil and administrative practice areas to identify issues and/or have a network in place to make appropriate referrals for matters they do not personally handle. If the lawyer is not prepared in this way, the veteran may ultimately be no better off for the limited, specialized support received. Civil legal aid funding streams often prohibit the use of funds for criminal defense, but a plan should be in place for a Veteran to get help with such matters. Even in Congress, however, the separation of civil and criminal legal

matters is changing, with some new congressional programs authorizing funds to be available for both, in support of the veteran's success, because some issues come hand-in-hand. Let us look at the key issues service members and veterans face.

Veteran Homelessness

In its most recent survey of homeless veterans and their healthcare providers (The Community Homelessness Assessment Local Education Networking Groups (CHALENG) Survey), the VA revealed that veteran homelessness is often triggered by an unaddressed legal problem. The survey reported that five of the top ten needs of homeless male veterans and four of the top ten unmet needs of female veterans were specific to legal issues. For example, housing eviction and foreclosure, assistance with a child support matter, quashing outstanding warrants and fines, having stale offenses expunged from one's record, and even helping to replace a veteran's lost photo identification literally can make the difference between that person living under a bridge and living in a home with a job and supportive services. Other unmet needs of homeless veterans, including military discharge status upgrades, guardianships, and credit issues, can also benefit from the assistance of a lawyer. With each veteran able to return to home life and contributing to his or her community, society benefits from the wealth of skills and character common to the men and women who served. Through legal support working in tandem with housing, employment and other service providers, the number of homeless veterans has been cut in half since 2010, to just under 40,000 today. This is still a shamefully high number, but we are starting to understand what works. Accordingly, at the request of the VA General Counsel, the ABA Commission on Homelessness and Poverty launched the Homeless Veteran Justice Initiative, which has been a catalyst to capture and support best practices and programs around the country. Among other things, the Initiative supports Veteran Treatment Courts, Homeless Court at Stand Down (projects that bring the judges and their courts to the homeless veteran community), and projects like the one described under Child Support below.

Incarceration and Criminal Misbehavior

No one knows the precise number of veterans already in prison, but the most recent estimates by the Department of Justice Bureau of Justice Statistics (BJS) suggests that the number is just over 180,000, or 8% of the total prison population, most of whom are men from the Vietnam Era. This is a drop from prior years and eras, and while the reasons are not clear, veterans behind bars do not tend to fit stereotypes of those in confinement. For example, the BJS study also revealed that three quarters of veterans behind bars received an honorable or general discharge, and past studies by the Department showed veterans were better educated, and possess other factors that cut against stereotypes of who populates our jails and prisons. Incarcerated veterans are more likely than non-veterans to be first-time offenders, yet on average receive longer sentences than non-veterans (among property and public-order offenders, veterans' sentences averaged nearly two years longer than non-veterans). Those running the court systems know there are more veterans coming into courts, and jails that are already at capacity. There are evidence-based efforts underway to reverse these trends.

Some of the offenses that land veterans in jail are violent crimes, with which there is a correlation to veterans who saw combat and may be suffering from PTSD. These veterans

struggle against anger and emotional outbursts, which can also be hallmarks for traumatic brain injury. In fact, new research has confirmed that these veterans in particular are more than twice as likely as other veterans to be arrested for criminal misbehavior. The study, published in the *Journal of Consulting and Clinical Psychology*, for the first time draws a direct correlation between combat PTSD, the anger it can cause, and criminal misbehavior. Several studies conclude that between 30% to 40% of the approximately 1.6 million veterans of Iraq and Afghanistan will "face serious mental health injuries" like PTSD and problems from traumatic brain injuries. Experts in the field report both those conditions are linked to anti-social and criminal behavior. These conditions can be treated successfully, however, and violence prevented. Yet, criminal convictions due to this service-connected conduct can be the very thing that separates a veteran from needed treatment.

Consumer Fraud and Identify Theft

Veterans are frequently targeted by predatory lenders and are more vulnerable to financial problems than the rest of the population. This is especially true for those returning from active duty.

Congress, the Department of Defense, Federal Trade Commission (FTC), and Consumer Financial Protection Bureau, among others, have documented and warned of abusive, usurious, and predatory financial schemes targeting veterans and service members for their guaranteed paychecks, benefits, and pensions. Examples include fraudulent or abusive loan products and terms resulting in interest and fees equaling 400-900% of the original loan; education "mills" designed only to drain veteran education benefits, and identity theft.

The FTC reports that identity theft complaints from active U.S. military and veterans are twice the number reported by the general U.S. population. In fact, 30 percent of active military and veterans place identity theft as their No. 1 complaint, compared with 14 percent of the general U.S. population. The non-profit Privacy Rights Clearinghouse reports that since 2005, nearly 700 government and military data breaches have occurred, with 45 million veterans and active-duty military personnel ID records compromised. Identity theft can result in severe amounts of illicit debt, ruined credit, and can make it virtually impossible to obtain personal loans, mortgages or even jobs. Lawyers can help restore a person's identity and reputation, clear fraudulent debts and discharge others, enforce state and federal protections, and return a veteran's life to normal.

Child Support

In examining the greatest legal challenges homeless veterans face, the Department of Veterans Affairs, joined by service providers on every level, identified child support at the top of the list. For homeless veterans, arrearages often result in a substantial portion of their benefits going to help satisfy the outstanding obligation rather than treatment for the veteran. Often, these arrearages are not sought by the other parent but were the silent and automatic consequence of the other parent seeking welfare support when the veteran may have gone "off the grid." With so much of their benefits apportioned to satisfy these debts, however, the veteran most often chooses to go back to a more familiar life on the streets at which point no one is receiving assistance and families are kept apart. At the request of the Department of Veterans Affairs and

the Office of Child Support Enforcement at the Department of Health and Human Services, the ABA joined in a new partnership launched in nine cities to address the problem. The project connects all stakeholders to ensure the obligations are addressed, such as payments tied to actual income, thus preserving the veteran's treatment and services. The successful partnership is cited as Strategic Initiative #1 in "Opening Doors," the Administration's plan to end homelessness, and it is expected to go national. Lawyers and judges working with homeless veterans and those at-risk of homelessness should be aware of these issues and contemplate how or by whom such matters might be addressed.

Veteran Benefits

Benefits for veterans include disability compensation, pension programs, free or low-cost medical care, education assistance, survivor benefits, and PTSD support. When access to these benefits is denied, legal assistance may be needed for a resolution. Over the past decade, the country also saw the gradual but alarming rise in the number of backlogged disability claims to over 800,000, even as the VA processed over 1 million claims each year. The backlog means that these veterans were waiting a minimum of 125 days for a response to their benefits claims, more than 40,000 of which were two years or older. The unavailability of this income, especially for a veteran with service-connected injury, can cause major complications to health and home stability. At the request of the White House Counsel, the ABA met with officials from the Veterans Benefits Administration and the Office of the General Counsel over several months to explore whether the legal profession could play a larger role in helping to clear the claims backlog and assist veterans who did not benefit from representation of a lawyer or a veteran service organization. The meetings led to the establishment of a unique pro bono initiative based on the ABA's successful Military Pro Bono Project. This initiative, the Veterans Claims Assistance Network (VCAN), saw cooperation between the VA and the ABA in addressing claims filed in three U.S. cities to connect unrepresented veterans with free legal assistance. The pilot was a success, and the lessons learned have opened doors for other legal assistance providers to work more effectively with the VA. Both the ABA and the VA look forward to the continuation of VCAN in the near future, because as the backlog of original claims has fallen dramatically, the backlog of claims now waiting a determination on appeal has topped 400,000. Benefits claims are highly specialized matters and require a great familiarity with the VA process and regulations. Those seeking to represent a veteran must first become accredited by the VA. These considerations are sometimes an obstacle to a lawyer assisting a veteran in these matters, but they are frequently central to the best interests of the veteran client. Lawyers seeking to represent veterans should consider seeking VA accreditation, for which required CLE training is available, including at no cost by some providers. It also helps if the lawyer establishes a relationship with an attorney more experienced in claims and related matters, or even a veteran service organization that provides such services.

Reintegration

Legal issues can add complications and delay or prevent reintegration into civilian life. Additional issues face veterans as they transition from their military careers into their communities. A substantial number of legal problems today's veterans face initially arose during active duty. In addition to responding to legal crises, lawyers help prevent them. Today, lawyers

work with service members to begin creating, compiling and correcting medical and personnel records that will help prevent legal crises in years to come.

Employment

With the drawdown of troops, many veterans are given 30 to 60 days' notice to leave the military and start a new life. The emotional, physical, and behavioral challenges for veterans are unique and amidst any personal tumult, the veteran must now also navigate the job market. It can be difficult for veterans to translate their military background or technical training into civilian jobs that require comparable expertise, and for Guard and Reserve, they often return to find their previous jobs and businesses gone in violation of their rights. According to the Department of Labor Veterans' Employment and Training Services program that enforces such rights, nearly two-thirds of claims to enforce those rights are erroneous or deficient in how they claim the violation. Lawyers can help veterans write valid claims to enforce their rights.

Substance Use Disorders and Depression

A Department of Veteran Affairs study on reintegration problems and treatment suggests that mental disorders and symptoms, including PTSD, substance use disorders, and depression, are high among service members within the first year of returning from deployment. These men and women are disproportionately vulnerable to arrest or convictions for offenses arising from their service or efforts to self-medicate. Justice involvement often separates them from the very benefits they will need to return to self-sufficiency. Lawyers understand this, and working with the VA's Veteran Justice Outreach coordinators, often through Veteran Treatment Courts, help veterans connect to necessary treatment and services.

Interstate Issues

Often, even exceptional lawyers are limited in what they can do for veterans who have legal matters arising in other states. Foreclosures, child custody disputes or support, and other matters arising in a different state leave some lawyers without options, and lawyer referral networks in other states provide no assurances as to the expertise of services provided or experience in working with veterans. Without a reliable means for referral to another state, lawyers are left to cold calling, depending on their personal networks or the bar's relationship to another jurisdiction for successful resolution. An additional barrier exists for veterans in need of representation through a legal aid program or pro bono program, most of which have residency requirements as one of their eligibility criteria. While referrals between legal aid programs in different states are technically possible, the veteran must meet eligibility and priority guidelines for both programs in order to be considered for representation. To address these challenges, the ABA is leading a national effort to improve connectivity among state networks of legal service providers to ensure that referrals to lawyers in other jurisdictions are seamless and to appropriately experienced providers. The ABA also provides national opportunities for pro bono that include motivated substance experts in every jurisdiction. Much more needs to be done to expand the reach of these projects, and most importantly, to help strengthen and expand state and local networks.

The Legal Community Response

As one can see, the types of legal issues and initiatives are substantial, and they cut across civil, criminal and administrative practice. These matters can seem complex to a lawyer, but not nearly as overwhelming as they are to a veteran in need. Many lawyers, especially legal aid attorneys working with low-income persons, have been working in these trenches for decades, as have many law firms and state or national organizations focused on facilitating pro bono legal services for veterans on special matters. The demand, however, required more in the form of education, training and direct services.

Accordingly, to address the demand, and the cross-section of legal issues presented, the bench and bar have responded over the past decade with an inspirational array of new and innovative projects. These included pro bono programs and consultation clinics held by law firms, as well as state and local bar associations. Some of these programs are even being held at a VA Medical Center or a local Starbucks. Law school clinical programs have grown dramatically, raising awareness and competency in a new generation of practitioners. These programs, along with civil legal aid and corporate in-house counsel, forged impressive private-public collaboration with state or local government to provide the needed legal support.

We have also seen the rise of initiatives that introduce new and ground-breaking ways of delivering legal services to tackle especially the more entrenched legal problems and other historical obstacles. These approaches include the introduction of the medical legal partnership model, bringing doctors and lawyers together in direct support of client patients. Also, we have seen new and expanded incubator programs to bring legal services where they were not already available to veterans and others. Young lawyers have travelled their states and throughout the country to provide support for certain legal matters or benefits claims, and others travelled to the veterans in rural communities, connected to subject matter expert lawyers back in the city via Skype.

Over the last several years, the VA General Counsel created a new position, the Veteran Justice Outreach Coordinator (VJOs), which is a position dedicated to interface with the justice system from the VA in support of justice-involved veterans. These VJOs have proven invaluable, particularly with the rise of Veteran Treatment Courts, which are courts specifically designed to support veterans, holding them firmly accountable for their offenses while also keeping them connected to the services and treatment they need. These courts, now numbering in the hundreds, experience extremely low recidivism rates by veterans who participate, and they have helped the legal community better understand the importance of veteran mentors and cultural competency.

We have also seen the rise of unparalleled resources in support of military and veteran families, such as Stateside Legal, an impressive portal of resources run by Pine Tree Legal Assistance in Maine, and funded in large part by the Legal Services Corporation. The ABA, in an effort to facilitate education with legal services for military families, founded ABA Homefront, which provides information about service members' rights and how someone visiting who may be unable to afford a lawyer can contact one in their community at no cost to them.

There are many more examples of initiatives around the country supporting veterans. These programs are undertaken by the widest array of providers, including private lawyers, government lawyers, law schools, bar associations, judges, LSC-funded and non-LSC funded legal aid, public defenders, prosecutors, attorneys general, law students, veteran service organizations, and more. The challenge is that each sector of the legal community has either tended to work with providers like them, or only in their local communities, unaware of the work going on nationally, including programs that might serve as models and best practices for other jurisdictions.

The ABA has provided a forum for ABA entities committed to serving veterans in various ways, as well as bar associations and other projects, to share what they are doing to avoid duplication, promote collaboration, and to learn from one another. That forum is the Coordinating Committee on Veterans Benefits and Services (CCVBS). The CCVBS does not make policy or operate like other entities – its purpose is to facilitate coordination. Through the CCVBS and then at the request of an outside organization, the ABA has hosted stakeholder meetings to evaluate the legal landscape and to recommend what is needed most. Among other things, stakeholders have requested greater national leadership from an organization that is inclusive and representative of all, such as the ABA.

The ABA Presidential Veterans Legal Services Initiative

In August 2016, ABA President Linda Klein established the Veteran Legal Services Initiative (VLSI). The purpose of the VLSI is to serve as a national lead in the (1) creation of centralized legal resources, (2) development of needed policy, and (3) support for the delivery of legal services.

It is through these efforts, namely to ensure that the rights of military service members and veterans are protected, and not lessened, by their service; that barriers are lifted when veterans try to access housing, education, employment, benefits, and services; and that legal support programs contemplate and include, where appropriate, caregivers and survivors who carry perhaps the greatest burdens without easily identified legal help.

Let us now revisit Tim’s story from earlier, showing the difference lawyers engaged in removing legal barriers can make possible. In this version

Tim calls the new National Military & Veterans Legal Network established by the ABA, and the person who answers the call verifies that Tim is a veteran, thanks him for his service, and assures him that the information he gives during the call will be kept in the strictest confidence. She explains that she will not be representing him, but will seek to identify the right program and attorney close to him who can help. She listens to his story, asks him questions to search for possible additional legal issues that he may not be aware of, and enters Tim’s information on a hotline intake form that conforms to standards consistent with providers nationwide. She politely asks questions designed to screen for latent issues like PTSD and makes a follow up note for the attorney file. She also offers guidance provided by the VA on where veterans who may have PTSD can go for help. Based on his information, she looks at law school clinics, legal aid programs, pro bono military programs, and private lawyers who are a part of the network.

Working with legal services in and near Tim's community, she identifies an experienced family attorney and an estate law attorney who can help. She also identifies a lawyer for the out-of-state custody order and provides Tim with a list of information he should pull together for his conversations with the lawyers. She explains to Tim that she will provide the information to the lawyers. Later, when the lawyers have both reviewed the file and agreed to represent Tim, she links them together and provides them with the names of lawyers willing to advise them on certain specialized legal matters Tim is facing. With the support and advice he's given, Tim's life stabilizes. He has a financial plan he can follow because he is also now receiving treatment for his PTSD and it seems to be working. He has reconnected with his children and is an actively involved father. Things are not perfect, but they are improving, and Tim feels empowered and supported -- and never pays a dime for legal services -- all because the legal profession acted to create an environment and a system to break the cycles that were undermining his treatment, recovery, and success.

CLAUSE TWO: VETERANS' CAREGIVERS

FURTHER RESOLVED, That efforts to increase access to justice for veterans contemplate and include, where appropriate, veterans' caregivers, especially on those matters for which the caregiver acts on behalf of the veteran.

Many veterans over the past century have returned home disabled in some way by service-connected injuries. They do not qualify for full-time care by the VA, and so someone -- often but not always a spouse, parent or child -- becomes the veteran's full-time caregiver. These caregivers often sacrifice their own freedom and well-being to care for those to whom our nation owes its debt. Their roles vary with the severity of the physical or psychological injuries the veteran has sustained, and many must not only become educated in working with the VA, Social Security, Department of Education, but must also handle all of the finances. Their vigil can be 24 hours a day, seven days a week. Spouse caregivers also have often left the workplace to be home full-time, living on very modest assistance. This means that even small aberrations in their financial affairs can cause substantial and cyclical credit problems for them both, very possibly threatening housing stability.

While these men and women have been silent for decades, a recent study by RAND Corporation revealed that there are 5.5 million veteran caregivers, with just one quarter supporting veterans from the post-9/11 era. This means that 80% of veteran caregivers are supporting a veteran who, in addition to service connected injury, is also going through the natural stages of aging, which the caregiver might be experiencing as well.

Caregivers explain that they need support largely with trust and estate matters, making sure that if they were to die, the veteran would still be cared for. There have thankfully been efforts including among the Military Officers Association of America, Public Counsel, and the ABA to provide legal support for caregivers, but connecting with the caregivers in a time of need can be a challenge, especially if they are not aware of the service already.

Working on behalf of veteran caregivers through its “Hidden Heroes” campaign, the Elizabeth Dole Foundation has identified an agenda of legal matters requiring attention. Similarly, other organizations, including organizations like National Military Family Association and Tragedy Assistance Program for Survivors, which renders aid to those who learn their loved one has fallen in the line of duty, support caregivers and manage a national peer network, connecting caregivers to one another for moral and other support. Particularly with regard to survivors, there can be complex legal problems and decisions to be made in the midst of mourning. Left on their own, these caregivers may rely on one another for advice, rather than needed legal counsel. Accordingly, we have seen the Military Spouse JD Network, an association of lawyers who are military spouses, provide a pro bono legal network in support of these survivors that literally spans the country and many parts of the world. Lawyers seeking to support caregivers and survivors must be prepared to take extra measures to make their services available through existing support networks.

These men and women – caregivers and survivors – shoulder immense burdens that many presume are borne by the VA. In reality, caregivers are not eligible for many pro bono programs serving the veteran community, even when they are calling on behalf of an incapacitated veteran over whom they have 100% legal and financial responsibility. Some are surprised to learn that survivors, or “Gold Star” family members, are neither considered to be military families nor veterans’ families. There is a limited line of support immediately following the death of the service member, but legal problems, especially latent ones, can linger much longer. Like caregivers, these survivors are not eligible for many laudable programs the legal community provides due to funding and eligibility restrictions. Sometimes, for example, a caregiver calls for assistance because his or her spouse has become violent, and some projects consider the representation to be a conflict of interest to their veteran-centric mission (but they still make an appropriate referral to those who can represent the caregiver). The ABA supports the inclusion of caregivers and survivors in pro bono and other free legal assistance programs, where appropriate and feasible.

Respectfully submitted,

Dwight L. Smith and Nanette M. DeRenzi, Co-Chairs
ABA Veterans Legal Services Initiative Commission
February 2017

GENERAL INFORMATION FORM

Submitting Entity: Veterans Legal Services Initiative Commission

Submitted By: Dwight L. Smith and Nanette M. DeRenzi, Commission Co-Chairs

1. Summary of Resolution(s).

Urging the legal profession and lawmakers at each level to identify long-standing, entrenched legal barriers for veterans in accessing their housing, education, employment, treatment, other services, or benefits. The resolution also urges, where appropriate, that legal services programs supporting veterans include veterans' caregivers as eligible clients, particularly when they are acting on behalf of the veteran.

2. Approval by Submitting Entity. The ABA Veterans Legal Services Commission approved its resolution on November 16, 2016.

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

No proposal has been submitted on this specific subject matter, but the ABA has considered, and adopted, a range of policies supporting Veterans' legal rights, legal standing, and the administration of supportive services. ABA policies of a technical nature, ABA policy supporting updates and technical revisions to a law, are not listed below. Most of the policies below specifically address matters that arise after the transition to civilian life is complete. These include the following:

- 93M106B, to urge for centralized judicial review of discharge decisions that materially affect a service member's rights
- 97A10A, to oppose legislation and other changes to military personnel discharge decisionmaking pending hearings and thorough review of the system for correction of military records
- 00A116B, urging expansion of jurisdiction for the U.S. Court of Appeals for the Federal Circuit to include determinations on questions of law made by the U.S. Court of Appeals for Veterans Claims
- 03M102, urging greater authority for the U.S. Court of Appeals for Veterans Claims receives and presides on certain matters and merit selection of independent judges for the Board of Veterans Appeals
- 05M8A, urging repeal of statutory prohibition on veterans being able to pay and attorney to assist them with their initial federal benefits claims
- 08M108, to support legislation that increases the availability of, and access to, legal services for Veterans to assist them in seeking their due federal benefits
- 09M114, to support increased and improved enforcement mechanisms for the Servicemember Civil Relief Act, including powers for the U.S. Attorney General and the availability of attorneys' fees for prevailing clients

- 10M105A, urging new approaches to the civil and criminal justice needs of veterans, and guidelines in the establishment of Veterans Treatment Courts
 - 11AM120, proposing improvements to the coverage and enforcement of the Uniformed Services Employment and Re-employment Rights Act.
 - 2003, 2006, and 2007 policies supporting the creation and operation of Homeless Courts, which have since been instrumental in establishing Homeless Courts at Stand Down events, nationally
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution reinforces, and is fully consistent with the policies listed in answer to Number 3, above. This policy resolution would amplify, not change, those existing policies and promote continuity of core principles behind them all.
 5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
 6. Status of Legislation. (If applicable) While the subject matter of this resolution is of interest to Congress and state legislatures, the resolution also addresses matters that can be resolved by the legal profession and the judiciary absent new law. Several bills are introduced each year to strengthen veterans' legal protections, or as in the case of H.R. 6046, the Homeless Veteran Legal Services Act, they propose to allow the Department of Veterans Affairs to formally engage in strategic partnerships to deliver legal services for homeless veterans. While the resolution would authorize the ABA to speak to a wide range of bills, both for and against, there is no legislation seeking to implement this resolution's recommendations.
 7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Implementation is being undertaken by the Veterans Legal Services Initiative referenced in the Report, as well as other military- and veteran-focused ABA entities, most notably the Standing Committee on Legal Assistance for Military Personnel, Coordinating Committee on Veterans Benefits and Services, Commission on Homelessness and Poverty, and the Center for Pro Bono. This policy will also allow the ABA to advocate and to respond to requests for technical assistance from Congress and the Administration to promote improved outcomes for veterans who face long-standing and difficult to resolve legal obstacles. There is otherwise no intent to enact specific language into law.
 8. Cost to the Association. (Both direct and indirect costs) Adoption of the Resolution implicates no cost to the Association
 9. Disclosure of Interest. (If applicable) N/A

10. Referrals. Input and support is being sought from relevant ABA entities involved with military- and veteran-related legal issues and the direct support of the VLSI. The resolution will otherwise include the broadest possible circulation, expected to include all ABA policy-making entities.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Dwight L. Smith
1636 S. Cincinnati Avenue
Tulsa, OK 74119-4418
Tel: (918) 585-1446
Email: dls@dlstulsalaw.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.)

Nanette M. DeRenzi
1401 K Street N.W. Suite 900
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EXECUTIVE SUMMARY

1. Summary of the Resolution

Urging the legal profession and lawmakers at each level to identify long-standing, entrenched legal barriers for veterans in accessing their housing, education, employment, treatment, other services, or benefits. The resolution also urges, where appropriate, that legal services programs supporting veterans include veterans' caregivers as eligible clients, particularly when they are acting on behalf of the veteran.

2. Summary of the Issue that the Resolution Addresses

Effective protection of the rights and access to benefits for Veterans and their caregivers through support from the legal community to address chronic barriers that Veterans regularly confront and that can be eliminated with the assistance of a lawyer.

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

The proposed policy position raises awareness of the importance of addressing the issues described in the Report, and the Report describes the supportive resources and programs implemented by the ABA and other bar associations and providers that can assist jurisdictions in carrying out the proposed policy position. The policy resolution also identifies the key areas where lawyers make a unique, substantial difference, in serving Veterans.

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

No minority views or opposition have been identified.

This resolution with report was received after the November 16 filing deadline. Pursuant to §45.5 of the House Rules of Procedure, this late resolution will be considered by the House of Delegates if the Committee on Rules and Calendar recommends a waiver of the time requirement and the recommendation is approved by a two-thirds vote of the delegates voting.

AMERICAN BAR ASSOCIATION

YOUNG LAWYERS DIVISION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges state, territorial, and tribal legislatures to
- 2 review their laws and engage stakeholders to ensure that legal prohibitions on the luring or enticing
- 3 of a minor for sexual acts explicitly address the use of the internet and other electronic means of
- 4 communication.

REPORT

The Evolving Threat to Children by Online Predators

As the internet and other technological innovations have proliferated, they have provoked fear that children will be exposed to, and become the victims of, predators through the internet and other means of electronic communication. Indeed, 95% of teenagers aged 12–17 are online¹ and 80% of those teens are active on social media. Electronic communications afford child predators a major new means of access to minors, which must be addressed.²

Although child sexual assault cases have declined overall in recent years,³ internet-based sex crimes are apparently on the rise. The incidence of internet-based sexual offenses in the United States is difficult to estimate because there is no national system for integrating information about such offenders; however, estimates indicate that arrests for internet sex crimes have tripled from 2000 to 2009.⁴ Although a minority of sex crimes involve strangers, adults can and do use the internet and electronic communications to meet and seduce underage adolescents and even children, leading to sexual encounters that they are unable to consent to by law.⁵ Offenders often use promises of love and romance to seduce adolescents.⁶ These conversations start out innocently and often occur with someone the minor knows in person.⁷ Over time, as predators cultivate trust, they often introduce sexual images and themes with the goal of inducing sexual contact, a process known as “grooming.”⁸

Studies have shown that in most grooming cases, the perpetrator and victim are using such means to communicate.⁹ When grooming leads to sexual relationships, the data show, repeated sexual encounters typically result.¹⁰

Existing 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

¹ Lenhart et al, *Teens, Kindness and Cruelty On Social Network Sites: How American Teens Navigate the New World of Digital Citizenship*, Pew Research Center, Nov. 9, 2011, available at <http://www.pewinternet.org/2011/11/09/teens-kindness-and-cruelty-on-social-network-sites/>.

² *Id.*

³ Mitchell, et al., Trends in Unwanted Sexual Solicitations: Findings From the Youth Internet Safety Studies, Crimes Against Children Research Center, at 9 (Feb. 2014), available at <http://www.unh.edu/ccrc/pdf/Sexual%20Solicitation%201%20of%204%20YISS%20Bulletins%20Feb%202014.pdf>.

⁴ Michael Seto, *Internet Facilitated Sexual Offending*, Sex Offender Management Assessment and Planning Initiative, at 1 (July 2015), available at <http://www.smart.gov/pdfs/InternetFacilitatedSexualOffending.pdf>.

⁵ Wolak et al., “Online ‘Predators’” and Their Victims, *American Psychologist*, 112, Feb. – Mar. 2008, available at <http://www.apa.org/pubs/journals/releases/amp-632111.pdf>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

convicted of a crime.¹¹ 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.

Similar to federal law, many states criminalize the enticement or luring of a minor for sexually exploitative purposes. A 2014 study conducted by the National Conference of State Legislatures indicated that all 50 states have some law that criminalizes luring or enticing a minor for sexual acts.¹² However, the study also revealed that the District of Columbia and six states (Maine, Massachusetts, South Carolina, New York, Pennsylvania, and Wyoming) do not have a law that explicitly addresses communications via the internet or other electronic means.¹³

Further, few states specifically outlaw the use of grooming tactics to lure children into sexual activity. Indeed, only two states that have statutes that explicitly prohibit grooming. Those states are Arkansas¹⁴ and Illinois.¹⁵

Why Review Existing Laws' Adequacy?

Seven states lack statutes that address the internet and electronic communications. This creates a potential impediment to timely and effective law enforcement action.

Law enforcement officials from around the country recognize the threat cyber predators pose to children. For instance, Detective Senior Sergeant Sean Bell, Officer-in-Charge of the Online Child Exploitation Squad in Washington State, has publicly confirmed that “predators know how to find” personal information that young people post in chat rooms and social media platforms. The threat, according to Detective Bell, is real—he reported one instance where a predator groomed a Washington child, flew to Washington from out of state, and was caught climbing into the child’s bedroom.

In Oklahoma, District 26 District Attorney’s Office Investigator acknowledged that “we were behind the 8-ball on this internet predator [situation]” after discovering a case of a 14-year-old girl was found to be meeting a 26-year-old at a local motel. She met the older man in a chat room. The threat in Oklahoma is real—in 2015, nearly 1,000 instances of child exploitation were reported, and in each case the initial contact involved the use of computers, apps, chat rooms, or social media.

Moreover, as outlined previously, only two states have criminal statutes that specifically address grooming. This leaves the potential that law enforcement will be unable to investigate as predators develop trusting, sexually themed relationships with vulnerable children and adolescents, rendering it too late to effectively intervene by the time sexual contact occurs.

¹¹ 18 U.S.C. §2422.

¹² Nat’l Conf. of State Legislatures, “State Laws: Electronic Solicitation or Luring of Children” (Jan. 5, 2015), <http://www.ncsl.org/research/telecommunications-and-information-technology/electronic-solicitation-or-luring-of-children-sta.aspx>

¹³ *Id.* See also Appendix, *supra*.

¹⁴ A.C.A. § 5-27-307 (enacted 2010).

¹⁵ 720 ILCS 5-11-25 (enacted 2012).

A haunting example is the case of a 13-year-old girl who was abducted and murdered in Virginia by an 18-year-old Virginia Tech student, David Eisenhauer. The girl had been bullied on social media and at school, and turned to social media outlets such as Facebook, Instagram, and Kik to chat with others and develop relationships. The predator in this case made the young girl feel pretty and special, which helped establish a deep bond, particularly after her treatment at school. One day, the girl snuck out of her bedroom in the middle of the night—shoving a nightstand against her door and leaving with a water bottle—only to be brutally murdered by the predator later in the night.

Likewise, in the United Kingdom, a fourteen-year-old fell victim to Lewis Daynes, who used online gaming to create a false relationship and lure him into a situation that ultimately resulted in his heinous death. Daynes—pretending to be a 17-year-old computer engineer running a successful company—groomed the victim for months. The predator’s efforts included couriering a phone to the boy after his parents took away his gaming and online equipment. One day, the predator paid for Breck to take a taxi to his house. There, Breck was murdered. The predator later pled guilty to murder with sexual and sadistic motivation. Importantly, Breck’s mother attempted to seek police intervention, but they could do nothing, as there was no law that prohibited the conduct at issue.

In both of these cases, a grooming statute—such as those already enacted in Arkansas or Illinois—that encompasses conduct and communications intended to bring about an in-person meeting, would have been useful to law enforcement. Although two federal appeals courts have taken the rare step of granting overbreadth challenges to laws relating to sexually themed communications with minors, both laws were substantially broader than the Arkansas and Illinois grooming statutes.

In *Powell’s Books, Inc. v. Kroger*, the Ninth Circuit invalidated as overbroad an Oregon 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.”¹⁶ Likewise, 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.”¹⁷ In both cases, the courts expressed concern that the statutes—which merely criminalized transmission of depictions of sexual conduct to minors—would unduly burden protected speech. Unlike these statutes, a grooming-specific statute would be narrowly tailored to communications demonstrably intended to bring about sexual contact with a minor.

Nevertheless, this Resolution does not specifically endorse either Illinois or Arkansas approach and does not propose any specific model statutory language. Rather, this Resolution encourages governmental entities to review their existing laws to determine whether they are sufficient to reach electronic communications that endanger children. For reference, this Report includes a 50-state survey of relevant laws in the United States, which may serve as guidance when undertaking an analysis of existing laws.

¹⁶ 622 F3d 1202 (9th Cir. 2010).

¹⁷ *American Booksellers Fdn. v. Dean*, 42 F.3d 96 (2d Cir. 2003).

Conclusion

We respectfully urge legislatures to review their child protection laws to ensure that they effectively protect children and teenagers against new threats posed by the internet and other electronic communications. While prosecutors can and do already use existing laws to prosecute internet and other electronic-communication-based crimes against children, they face potential statutory obstacles to pursuit of 21st-century criminal conduct. Accordingly, prudence counsels a review of existing laws with the input of law enforcement, prosecutors, and other stakeholders to ensure those laws' adequacy to protect children.

Respectfully submitted,

Anna M. Romanskaya, Chair
ABA Young Lawyers Division
February 2017

APPENDIX**50-State Survey of Grooming and Child Solicitation Statutes**

Arkansas	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Ark. Code § 5-27-307(b)	<p>Sexual Grooming of a Child.</p> <p>(b) A person commits sexually grooming a child if he or she knowingly disseminates to a child thirteen (13) years of age or younger with or without consideration a visual or print medium depicting sexually explicit conduct with the purpose to entice, induce, or groom the child thirteen (13) years of age or younger to engage in the following with a person:</p> <p>(1) Sexual intercourse;</p> <p>(2) Sexually explicit conduct; or</p> <p>(3) Deviate sexual activity.</p>

Alabama	
Does this state's statute explicitly address electronic forms of solicitation? Yes,	
Ala. Code 13A-6-122	<p>Electronic Solicitation of a Child.</p> <p>In addition to the provisions of Section 13A-6-69, a person who, knowingly, with the intent to commit an unlawful sex act, entices, induces, persuades, seduces, prevails, advises, coerces, lures, or orders, or attempts to entice, induce, persuade, seduce, prevail, advise, coerce, lure, or order, by means of a computer, on-line service, Internet service, Internet bulletin board service, weblog, cellular phone, video game system, personal data assistant, telephone, facsimile machine, camera, universal serial bus drive, writable compact disc, magnetic storage device, floppy disk, or any other electronic communication or storage device, a child who is at least three years younger than the defendant, or another person believed by the defendant to be a child at least three years younger than the defendant to meet with the defendant or any other person for the purpose of engaging in sexual intercourse, sodomy, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his or her benefit or for the benefit of another, is guilty of electronic solicitation of a child.</p>

Alaska	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Alaska Stat. 11.41.452	<p>Online Enticement of a Minor.</p> <p>(a) A person commits the crime of online enticement of a minor if the person, being 18 years of age or older, knowingly uses a computer to communicate with another person to entice, solicit, or encourage the person to engage in an act described in AS <u>11.41.455(a)(1)</u> - (7) and</p>

	<p>(1) the other person is a child under 16 years of age; or</p> <p>(2) the person believes that the other person is a child under 16 years of age.</p>
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Arizona	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Ariz. 13-3554	<p>Luring a Minor for Sexual Exploitation.</p> <p>(a) A person commits the crime of online enticement of a minor if the person, being 18 years of age or older, knowingly uses a computer to communicate with another person to entice, solicit, or encourage the person to engage in an act described in AS <u>11.41.455</u>(a)(1) - (7) and</p> <p>(1) the other person is a child under 16 years of age; or</p> <p>(2) the person believes that the other person is a child under 16 years of age.</p>

California	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Cal. Penal Code 288.3	<p>Contact of Minor with Intent to Commit Sexual Offenses.</p> <p>(a) Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section 207, 209, 261, 264.1, 273a, 286, 288, 288a, 288.2, 289, 311.1, 311.2, 311.4 or 311.11 involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense.</p> <p>(b) As used in this section, "contacts or communicates with" shall include direct and indirect contact or communication that may be achieved personally or by use of an agent or agency, any print medium, any postal service, a common carrier or communication common carrier, any electronic communications system, or any telecommunications, wire, computer, or radio communications device or system.</p>

Colorado	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Colorado Rev. Statute 18-3-405.4	<p>Internet sexual exploitation of a child.</p> <p>(1) A person commits internet sexual exploitation of a child if a person, who is at least four years older than a child who is under fifteen years of age, knowingly importunes, invites, or entices the child through communication via a computer network or system to:</p> <p>(a) Expose or touch the child's own or another person's intimate parts while communicating via computer network or system; or</p>

Colorado Rev. Statute 18-3-306	<p>(b) Observe the person's intimate parts while communicating with the person via computer network or system.</p> <p>Internet luring of a child.</p> <p>(1) A person commits internet luring of a child if the person knowingly communicates a statement over a computer or computer network to a child under fifteen years of age, describing explicit sexual conduct as defined in sexual 18-6-403(2)(e), and in connection with the communication, make a statement persuading or inviting the child to meet the person for any purpose, and the person is more than four years older than the child.</p>
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Connecticut	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Conn. General Statutes 53a-90a	<p>Enticing a Minor.</p> <p>(a) A person is guilty of enticing a minor when such person uses an interactive computer service to knowingly persuade, induce, entice or coerce any person under sixteen years of age to engage in prostitution or sexual activity for which the actor may be charged with a criminal offense. For purposes of this section, "interactive computer service" means any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institution.</p>
Delaware	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Del. Code Ann. Title 11, 1112A	<p>Sexual solicitation of a child.</p> <p>(a) A person is guilty of sexual solicitation of a child if the person, being 18 years of age or older, intentionally or knowingly:</p> <p>(1) Solicits, requests, commands, importunes or otherwise attempts to cause any child to engage in a prohibited sexual act; or</p> <p>(2) Uses a computer, cellular telephone or other electronic device to communicate with another person, including a child, to solicit, request, command, importune, entice, encourage or otherwise attempt to cause a child to engage in a prohibited sexual act.</p>
District of Columbia	
Does this state's statute explicitly address electronic forms of solicitation? No.	
D.C. Code Ann. 22-3010	<p>Enticing a child or minor.</p> <p>(a) Whoever, being at least 4 years older than a child or being in a significant relationship with a minor, (1) takes that child or minor to any place for the purpose of committing any offense set forth in §§ 223002- to 223006- and §§ 223008- to 223009.02-, or (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice,</p>

	<p>allure, convince, or persuade a child or minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 223571.01-, or both.</p> <p>(b) Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact, or (2) to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 223571.01-, or both.</p>
Florida	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
847.0135 Fla. Stat.	<p>(3) CERTAIN USES OF COMPUTER SERVICES OR DEVICES PROHIBITED.</p> <p>Any person who knowingly uses a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to:</p> <p>(a) Seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child; or</p> <p>(b) Solicit, lure, or entice, or attempt to solicit, lure, or entice a parent, legal guardian, or custodian of a child or a person believed to be a parent, legal guardian, or custodian of a child to consent to the participation of such child in any act described in chapter 794, chapter 800, or chapter 827, or to otherwise engage in any sexual conduct, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Any person who, in violating this subsection, misrepresents his or her age, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Each separate use of a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission wherein an offense described in this section is committed may be charged as a separate offense.</p>
Georgia	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Ga. Code 16-12-100.2	<p>Computer or electronic pornography and child exploitation prevention.</p> <p>(d) (1) It shall be unlawful for any person intentionally or willfully to utilize a computer wireless service or Internet service, including, but not limited to, a local bulletin board service, Internet chat room, e-mail, instant messaging service, or other electronic device, to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child,</p>

	another person believed by such person to be a child, any person having custody or control of a child, or another person believed by such person to have custody or control of a child to commit any illegal act by, with, or against a child as described in Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; or Code Section 16-6-8, relating to the offense of public indecency, or to engage in any conduct that by its nature is an unlawful sexual offense against a child.
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Hawaii	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
HI Rev. Stat. 707-756	<p>Electronic enticement of a child in the first degree.</p> <p>1) Any person who, using a computer or any other electronic device:</p> <p>(a) Intentionally or knowingly communicates:</p> <p>(i) With a minor known by the person to be under the age of eighteen years;</p> <p>(ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or</p> <p>(iii) With another person who represents that person to be under the age of eighteen years;</p> <p>(b) With the intent to promote or facilitate the commission of a felony:</p> <p>(i) That is a murder in the first or second degree;</p> <p>(ii) That is a class A felony; or</p> <p>(iii) That is another covered offense as defined in section 846E-1,</p>
HI Rev. Stat. 707-757	<p>agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and</p> <p>(c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time,</p> <p>is guilty of electronic enticement of a child in the first degree.</p>
HI Rev. Stat. 708-893	<p>Electronic enticement of a child in the second degree.</p> <p>(1) Any person who, using a computer or any other electronic device:</p> <p>(a) Intentionally or knowingly communicates:</p> <p>(i) With a minor known by the person to be under the age of eighteen years;</p> <p>(ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or</p> <p>(iii) With another person who represents that person to be under the age of eighteen years;</p>

	<p>(b) With the intent to promote or facilitate the commission of a felony, agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and</p> <p>(c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time;</p> <p>is guilty of electronic enticement of a child in the second degree.</p> <p>Use of a computer in the commission of a separate crime.</p> <p>(1) A person commits the offense of use of a computer in the commission of a separate crime if the person:</p> <p>(a) Intentionally uses a computer to obtain control over the property of the victim to commit theft in the first or second degree; or</p> <p>(b) Knowingly uses a computer to identify, select, solicit, persuade, coerce, entice, induce, procure, pursue, surveil, contact, harass, annoy, or alarm the victim or intended victim of the following offenses:</p> <p>(i) Section 707-726, relating to custodial interference in the first degree;</p> <p>(ii) Section 707-727, relating to custodial interference in the second degree;</p> <p>(iii) Section 707-731, relating to sexual assault in the second degree;</p> <p>(iv) Section 707-732, relating to sexual assault in the third degree;</p> <p>(v) Section 707-733, relating to sexual assault in the fourth degree;</p> <p>(vi) Section 707-751, relating to promoting child abuse in the second degree;</p> <p>(vii) Section 711-1106, relating to harassment;</p> <p>(viii) Section 711-1106.5, relating to harassment by stalking; or</p> <p>(ix) Section 712-1215, relating to promoting pornography for minors.</p>
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Idaho	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Idaho Code 18-1509A	<p>Enticing a child through the use of the internet or other communication device.</p> <p>(1) A person aged eighteen (18) years or older shall be guilty of a felony if such person knowingly uses the internet or any device that provides transmission of messages, signals, facsimiles, video images or other communication to solicit, seduce, lure, persuade or entice by words or actions, or both, a person under the age of sixteen (16) years or a person the defendant believes to be under the age of sixteen (16) years to engage in any sexual act with or against the person where such act would be a violation of chapter 15, 61 or 66, <u>title 18</u>, Idaho Code.</p>

Illinois	
Does this state's statute explicitly address electronic forms of solicitation? No.	
720 ILCS 5/11-25	<p>Grooming.</p> <p>a) A person commits grooming when he or she knowingly uses a computer on-line service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child, a child's guardian, or another person believed by the person to be a child or a child's guardian, to commit any sex offense as defined in Section 2 of the Sex Offender Registration Act, to distribute photographs depicting the sex organs of the child, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child.</p>

Indiana	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
IC 35-42-4-6	<p>Child Solicitation.</p> <p>(a) As used in this section, "solicit" means to command, authorize, urge, incite, request, or advise an individual: (1) in person; (2) by telephone or wireless device; (3) in writing; (4) by using a computer network (as defined in IC 35-43-2-3(a)); (5) by advertisement of any kind; or (6) by any other means; to perform an act described in subsection (b) or (c).</p> <p>(b) A person eighteen (18) years of age or older who knowingly or intentionally solicits a child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age, to engage in sexual intercourse, other sexual conduct (as defined in IC 35-31.5-2-221.5), or any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person, commits child solicitation, Level 5 felony. However, the offense is a Level 4 felony if the person solicits the child or individual the person believes to be a child under fourteen (14) years of age to engage in sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221/5) and: (1) commits the offense by using a computer network (as defined in IC 35-43-2-3(a)) and travels to meet the child or individual the person believes to be a child; or (2) has a previous unrelated conviction for committing an offense under this section.</p> <p>(c) A person at least twenty-one (21) years of age who knowingly or intentionally solicits a child at least fourteen (14) years of age but less than sixteen (16) years of age, or an individual the person believes to be a child at least fourteen (14) years of age by less than sixteen (16) years of age, to engage in sexual intercourse, other sexual conduct (as defined in IC 35-31.5-2-221.5), or any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person, commits child solicitation, a Level 5 felony. However, the offense is a Level 4 felony if the person solicits the child or individual the person believes to</p>

	be a child at least fourteen (14) but less than sixteen (16) years of age to engage in sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5), and: (1) commits the offense by using a computer network (as defined in IC 35-43-2-3(a)) and travels to meet the child or individual the person believes to be a child; or (2) has previous unrelated conviction for committing an offense under this section.
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Iowa	
Does this state's statute explicitly address electronic forms of solicitation? No.	
Iowa 710.10	<p>Enticing away a minor.</p> <ol style="list-style-type: none"> 1. A person commits a class "C" felony when, without authority and with the intent to commit sexual abuse or sexual exploitation upon a minor under the age of thirteen, the person entices away the minor under the age of thirteen, or entices away a person reasonably believed to be under the age of thirteen. 2. A person commits a class "D" felony when, without authority and with the intent to commit an illegal act upon a minor under the age of sixteen, the person entices away a minor under the age of sixteen, or entices away a person reasonably believed to be under the age of sixteen. 3. A person commits an aggravated misdemeanor when, without authority and with the intent to commit an illegal act upon a minor under the age of sixteen, the person attempts to entice away a minor under the age of sixteen, or attempts to entice away a person reasonably believed to be under the age of sixteen.

Kansas	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Kansas Stat. 21-3523	<p>Electronic solicitation.</p> <p>(a) Electronic solicitation is, by means of communication conducted through the telephone, internet, or by other electronic means:</p> <ol style="list-style-type: none"> (1) Enticing or soliciting a person whom the offender believes to be a child 14 or more years of age but less than 16 years of age to commit or submit to an unlawful sexual act; or (2) enticing or soliciting a person whom the offender believes to be a child under the age of 14 to commit or submit to an unlawful sexual act. <p>(b) Electronic solicitation as described in subsection (a)(1) is a severity level 3 person felony. Electronic solicitation as described in subsection (a)(2) is a severity level 1 person felony.</p> <p>(c) For the purposes of this section, "communication conducted through the internet or by other electronic means" includes but is not limited to e-mail, chatroom chats and text messaging.</p>

Kentucky	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Kentucky Rev. Stat. 510.155	<p>Unlawful use of electronic means to induce a minor to engage in sexual activities.</p> <p>(1) It shall be unlawful for any person to knowingly use a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is a wanton or reckless in that belief, for any activity in violation of KRS 510.040, 510.050, 510.060, 510.070, 510.080, 510.090, 510.100 where the offense involves commercial sexual activity, or 530.064(1)(a), or KRS Chapter 531.</p>

Louisiana	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
La. Rev. Stat. 14:81.3	<p>A. Computer-aided solicitation of a minor is committed when a person seventeen years of age or older knowingly contacts or communicates, through the use of electronic textual communication, with a person who has not yet attained the age of seventeen where there is an age difference of greater than two years, or a person reasonably believed to have not yet attained the age of seventeen and reasonably believed to be at least two years younger, for the purpose of or with the intent to persuade, induce entice, or coerce the person to engage or participate in sexual conduct or a crime of violence as defined by R.S. 14:2(b), or with the intent to engage or participate in sexual conduct in the presence of the person who has not yet attained the age of seventeen, or person reasonably believed to have not yet attained the age of seventeen. It shall also be a violation of the provision of this Section when the contact or communication is initially made through the use of electronic textual communication and subsequent communication is made through the use of any other form of communication.</p>

Maine	
Does this state's statute explicitly address electronic forms of solicitation? No.	
ME Rev. Stat. Ann. Tit. 17-A, 259-A	<p>Solicitation of a child to commit a prohibited act.</p> <p>1. A person is guilty of soliciting a child to commit a prohibited act if:</p> <p>A. The actor, with the intent to engage in a prohibited act with the other person, knowingly solicits directly or indirectly that person by any means to engage in a prohibited act and the actor:</p> <p>(1) Is at least 16 years of age;</p> <p>(2) Knows or believes that the other person is less than 14 years of age; and</p> <p>(3) Is at least 3 years older than the age expressed by the other person.</p>

	<p>Violation of this paragraph is a Class D crime; or [2011, c. 597, §3 (NEW).]</p> <p>B. The actor, with the intent to engage in a prohibited act with the other person, knowingly solicits directly or indirectly that person by any means to engage in a prohibited act and the actor:</p> <p>(1) Is at least 16 years of age;</p> <p>(2) Knows or believes that the other person is less than 12 years of age; and</p> <p>(3) Is at least 3 years older than the age expressed by the other person.</p>
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Maryland	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Maryland Stat. 3-324	<p>Sexual solicitation of minor.</p> <p>(a) "Solicit" defined.- In this section, "solicit" means to command, authorize, urge, entice, request, or advise a person by any means, including:</p> <p>(1) in person;</p> <p>(2) through an agent or agency;</p> <p>(3) over the telephone;</p> <p>(4) through any print medium;</p> <p>(5) by mail;</p> <p>(6) by computer or Internet; or</p> <p>(7) by any other electronic means.</p> <p>(b) Prohibited.- A person may not, with the intent to commit a violation of § 3-304, § 3-306, or § 3-307 of this subtitle or § 11-304, § 11-305, or § 11-306 of this article, knowingly solicit a minor, or a law enforcement officer posing as a minor, to engage in activities that would be unlawful for the person to engage in under § 3-304, § 3-306, or § 3-307 of this subtitle or § 11-304, § 11-305, or § 11-306 of this article.</p>

Massachusetts	
Does this state's statute explicitly address electronic forms of solicitation? No.	
Mass. Ann. Laws ch. 265 sec. 26C	<p>Enticement of Children.</p> <p>(a) As used in this section, the term "entice" shall mean to lure, induce, persuade, tempt, incite, solicit, coax or invite.</p> <p>(b) Anyone who entices a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain within any vehicle, dwelling, building, or other outdoor space with the intent that he or another person will violate section 13B, 13B1/2, 13B3/4, 13F, 13H, 22, 22A, 22B, 22C, 23, 23A, 23B, 24 or 24B of chapter 265, section 4A, 16, 28, 29, 29A, 29B, 29C, 35A, 53 or 53A of chapter 272, or any offense that has as an element the use or attempted use of force, shall be punished by imprisonment in the state prison for not more than 5</p>

	years, or in the house of correction for not more than 21/2 years, or by both imprisonment and a fine of not more than \$5,000.
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Michigan	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Michigan Stat. 750.145a	Accosting, enticing or soliciting child for immoral purpose. A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$4,000.00, or both.
Michigan Stat. 750.145d	Use of internet or computer system; prohibited conduct; violation. (1) A person shall not use the internet or a computer, computer program, computer network, or computer system to communicate with any person for the purpose of doing any of the following: (a) Committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under section 145a, 145c, 157c, 349, 350, 520b, 520c, 520d, 520e, or 520g, or section 5 of 1978 PA 33, MCL 722.675, in which the victim or intended victim is a minor or is believed by that person to be a minor.

Minnesota	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Minn. Stat. 609.352	Solicitation of Children to Engage in Sexual Conduct. Subdivision 1. Definitions. As used in this section: (a) "child" means a person 15 years of age or younger; (b) "sexual conduct" means sexual contact of the individual's primary genital area, sexual penetration as defined in section 609.341, or sexual performance as defined in section 617.246; and (c) "solicit" means commanding, entreating, or attempting to persuade a specific person in person, by telephone, by letter, or by computerized or other electronic means.

	<p>Subd. 2.Prohibited act.</p> <p>A person 18 years of age or older who solicits a child or someone the person reasonably believes is a child to engage in sexual conduct with intent to engage in sexual conduct is guilty of a felony and may be sentenced as provided in subdivision 4.</p> <p>Subd. 2a.Electronic solicitation of children.</p> <p>A person 18 years of age or older who uses the Internet, a computer, computer program, computer network, computer system, an electronic communications system, or a telecommunications, wire, or radio communications system, or other electronic device capable of electronic data storage or transmission to commit any of the following acts, with the intent to arouse the sexual desire of any person, is guilty of a felony and may be sentenced as provided in subdivision 4:</p> <p>(1) soliciting a child or someone the person reasonably believes is a child to engage in sexual conduct;</p> <p>(2) engaging in communication with a child or someone the person reasonably believes is a child, relating to or describing sexual conduct; or</p> <p>(3) distributing any material, language, or communication, including a photographic or video image, that relates to or describes sexual conduct to a child or someone the person reasonably believes is a child.</p>
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Mississippi	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Miss. Code Ann. 97-5-27	<p>Dissemination of sexually oriented material to persons under eighteen years of age; Use of computer for purpose of luring or inducing persons under eighteen to engage in sexual contact.</p> <p>(3)(a) A person is guilty of computer luring when:</p> <p>(i) Knowing the character and content of any communication of sexually oriented material, he intentionally uses any computer communication system allowing the input, output, examination or transfer of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person under the age of eighteen (18); and</p> <p>(ii) By means of such communication he importunes, invites or induces a person under the age of eighteen (18) years to engage in sexual intercourse, deviant sexual intercourse or sexual contact with him, or to engage in a sexual performance, obscene sexual performance or sexual conduct for his benefit.</p>

Missouri	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Mo. Rev. Stat. 566.151	Enticement of a child. 1. A person at least twenty-one years of age or older commits the crime of enticement of a child if that person persuades, solicits, coaxes, entices, or lures whether by words, actions or through communication via the internet or any electronic communication, any person who is less than fifteen years of age for the purpose of engaging in sexual conduct.

Montana	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Montana Stat. 45-5-625	Sexual abuse of children. (1) A person commits the offense of sexual abuse of children if the person: (1)(c) knowingly, by any means of communication, including electronic communication, persuades, entices, counsels, or procures a child under 16 years of age or a person the offender believes to be a child under 16 years of age to engage in sexual conduct, actual or simulated; (5)(a) "Electronic communication" means a sign, signal, writing, image, sound, data, or intelligence of any nature transmitted or created in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.

Nebraska	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Nebraska Stat. 28-320.02	Sexual assault; use of electronic communication device; prohibited acts; penalties. (1) No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of an electronic communication device as that term is defined in section 28-833, to engage in an act which would be in violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28.320.

Nevada	
Does this state's statute explicitly address electronic forms of solicitation? No.	
NRS 201.560	Definitions; exceptions; penalties. 1. Except as otherwise provided in subsection 3, a person commits the crime of luring a child if the person knowingly contacts or communicates with or attempts to contact or communicate with: (a) A child who is less than 16 years of age and who is at least 5 years younger than the person with the intent to persuade, lure or transport the child away from the child's home or from any location known to the

	<p>child's parent or guardian or other person legally responsible for the child to a place other than where the child is located, for any purpose:</p> <p>(1) Without the express consent of the parent or guardian or other person legally responsible for the child; and</p> <p>(2) With the intent to avoid the consent of the parent or guardian or other person legally responsible for the child; or</p> <p>(b) Another person whom he or she believes to be a child who is less than 16 years of age and at least 5 years younger than he or she is, regardless of the actual age of that other person, with the intent to solicit, persuade or lure the person to engage in sexual conduct.</p> <p>4. A person who violates or attempts to violate the provisions of this section through the use of a computer, system or network:</p> <p>(a) With the intent to engage in sexual conduct with the child, person believed to be a child or person with mental illness or to cause the child, person believed to be a child or person with mental illness to engage in sexual conduct, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years and may be further punished by a fine of not more than \$10,000;</p>
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New Hampshire	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
New Hampshire Stat. 649-B:4	<p>Certain Uses of Computer Service Prohibited.</p> <p>I. No person shall knowingly utilize a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to commit any of the following:</p> <p>(a) Any offense under RSA 632-A, relative to sexual assault and related offenses.</p> <p>(b) Indecent exposure and lewdness under RSA 645:1.</p> <p>(c) Endangering a child as defined in RSA 639:3, III.</p>

New Jersey	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
New Jersey Stat. 2C:13-6	<p>Luring, Enticing Child, Attempts.</p> <p>[1]. Luring, enticing child by various means, attempts; crime of second degree; subsequent offense, mandatory imprisonment.</p> <p>A person commits a crime of the second degree if he attempts, via electronic or any other means, to lure or entice a child or one who he reasonably believes to be a child into a motor vehicle, structure or isolated area, or to meet or appear at any other place, with a purpose to commit a criminal offense with or against the child.</p> <p>"Child" as used in this act means a person less than 18 years old.</p>

	<p>"Electronic means" as used in this section includes, but is not limited to, the Internet, which shall have the meaning set forth in N.J.S.2C:24-4.</p> <p>"Structure" as used in this act means any building, room, ship, vessel or airplane and also means any place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present.</p>
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New Mexico	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
New Mexico Stat. 30-37-3.2	<p>Child solicitation by electronic communication device.</p> <p>30-37-3.2. Child solicitation by electronic communication device.</p> <p>A. Child solicitation by electronic communication device consists of a person knowingly and intentionally soliciting a child under sixteen years of age, by means of an electronic communication device, to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least four years older than the child.</p> <p>B. Whoever commits child solicitation by electronic communication device is guilty of a:</p> <p>(1) fourth degree felony if the child is at least thirteen but under sixteen years of age; or</p> <p>(2) third degree felony if the child is under thirteen years of age.</p> <p>C. Whoever commits child solicitation by electronic communication device and also appears for, attends or is present at a meeting that the person arranged pursuant to the solicitation is guilty of a:</p> <p>(1) third degree felony if the child is at least thirteen but under sixteen years of age; or</p> <p>(2) second degree felony if the child is under thirteen years of age.</p> <p>D. In a prosecution for child solicitation by electronic communication device, it is not a defense that the intended victim of the defendant was a peace officer posing as a child under sixteen years of age.</p> <p>E. For purposes of determining jurisdiction, child solicitation by electronic communication device is committed in this state if an electronic communication device transmission either originates or is received in this state.</p> <p>F. As used in this section, "electronic communication device" means a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment or any other device that can produce an electronically generated image, message or signal.</p>

New York	
Does this state's statute explicitly address electronic forms of solicitation? No.	
New York Penal Code 120.70	<p>1. A person is guilty of luring a child when he or she lures a child into a motor vehicle, aircraft, watercraft, isolated area, building, or part thereof,</p>

	for the purpose of committing against such child any of the following offenses: an offense as defined in section 70.02 of this chapter, an offense as defined in section 125.25 or 125.27 of this chapter; a felony offense that is a violation of article one hundred thirty of this chapter an offense as defined in section 135.25 of this chapter; an offense as defined 230.30, 230.33, or 230.34 of this chapter; an offense a defined in section 255.25, 255.26, 255.27 of this chapter.
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North Carolina	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
North Carolina Stat. 14-202.3	<p>Solicitation of child by computer or certain other electronic devices to commit an unlawful sex act.</p> <p>(a) Offense. - A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer or any other device capable of electronic data storage or transmission, a child who is less than 16 years of age and at least five years younger than the defendant, or a person the defendant believes to be a child who is less than 16 years of age and who the defendant believes to be at least five years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act. Consent is not a defense to a charge under this section.</p>

North Dakota	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
North Dakota Stat. 12/1-20-05.1	<p>1. An adult is guilty of luring minors by computer or other electronic means when:</p> <p>a. The adult knows the character and content of a communication that, in whole or in part, implicitly or explicitly discusses or depicts actual or simulated nudity, sexual acts, sexual contact, sadomasochistic abuse, or other sexual performances and uses any computer communication system or other electronic means that allows the input, output, examination, or transfer of data or programs from one computer or electronic device to another to initiate or engage in such communication with a person the adult believes to be a minor; and</p> <p>b. By means of that communication the adult importunes, invites, or induces a person the adult believes to be a minor to engage in sexual acts or to have sexual contact with the adult, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for the adult's benefit, satisfaction, lust, passions, or sexual desires.</p>

Ohio	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Ohio 2907.01	<p>Importuning.</p> <p>(C) No person shall solicit another by means of a telecommunications device, as defined in section <u>2913.01</u> of the Revised Code, to engage in sexual activity with the offender when the offender is eighteen years of age or older and either of the following applies:</p> <p>(1) The other person is less than thirteen years of age, and the offender knows that the other person is less than thirteen years of age or is reckless in that regard.</p> <p>(2) The other person is a law enforcement officer posing as a person who is less than thirteen years of age, and the offender believes that the other person is less than thirteen years of age or is reckless in that regard.</p> <p>(D) No person shall solicit another by means of a telecommunications device, as defined in section <u>2913.01</u> of the Revised Code, to engage in sexual activity with the offender when the offender is eighteen years of age or older and either of the following applies:</p> <p>(1) The other person is thirteen years of age or older but less than sixteen years of age, the offender knows that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the other person.</p> <p>(2) The other person is a law enforcement officer posing as a person who is thirteen years of age or older but less than sixteen years of age, the offender believes that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the age the law enforcement officer assumes in posing as the person who is thirteen years of age or older but less than sixteen years of age.</p>

Oklahoma	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
21 OK Stat. 21-1040.13a	<p>Facilitating, encouraging, offering, or soliciting sexual conduct or engaging in sexual communication with a minor or person believed to be a minor.</p> <p>A. It is unlawful for any person to facilitate, encourage, offer or solicit sexual conduct with a minor, or other individual the person believes to be a minor, by use of any technology, or to engage in any communication for sexual or prurient interest with any minor, or other individual the person believes to be a minor, by use of any technology. For purposes of this subsection, "by use of any technology" means the use of any telephone or cell phone, computer disk (CD), digital video disk (DVD), recording or sound device, CD-ROM, VHS, computer, computer network or system, Internet or World Wide Web address including any blog site or personal web address, e-mail address, Internet Protocol address (IP), text messaging or paging device, any video, audio,</p>

	photographic or camera device of any computer, computer network or system, cell phone, any other electrical, electronic, computer or mechanical device, or any other device capable of any transmission of any written or text message, audio or sound message, photographic, video, movie, digital or computer-generated image, or any other communication of any kind by use of an electronic device.
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Oregon	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
ORS 163.432	Online sexual corruption of a child in the second degree. (1) A person commits the crime of online sexual corruption of a child in the second degree if the person is 18 years of age or older and: (a) For the purpose of arousing or gratifying sexual desire of the person or another person, knowingly uses an online communication to solicit a child to engage in sexual contact or sexually explicit conduct; and (b) Offers or agrees to physically meet with the child.
ORS 163.433	Online sexual corruption of a child in the first degree. (1) A person commits the crime of online sexual corruption of a child in the first degree if the person violated ORS 163.432 and intentionally takes a substantial step towards physically meeting with or encountering the child.

Pennsylvania	
Does this state's statute explicitly address electronic forms of solicitation? No.	
Penn. Stat. 6318	Unlawful contact with minor. (a) Offense defined. --A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth: (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses). (2) Open lewdness as defined in section 5901 (relating to open lewdness). (3) Prostitution as defined in section 5902 (relating to prostitution and related offenses). (4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances). (5) Sexual abuse of children as defined in section 6312 (relating to sexual abuse of children).

	(6) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).
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Rhode Island	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Rhode Island Stat. 11-37-8.8	<p>Indecent solicitation of a child.</p> <p>(a) A person is guilty of indecent solicitation of a child if he or she knowingly solicits another person under eighteen (18) years of age or one whom he or she believes is a person under eighteen (18) years of age for the purpose of engaging in an act of prostitution or in any act in violation of chapter 9, 34, or 37 of this title.</p> <p>(b) As used in this section, the word "solicit" or "solicitation" means to command, authorize, urge, incite, request, or advise another to perform an act by any means including, but not limited to, in person, over the phone, in writing, by computer, through the Internet, or by advertisement of any kind.</p>

South Carolina	
Does this state's statute explicitly address electronic forms of solicitation? No.	
S.C. Code Ann. 16-15-342	<p>Criminal solicitation of a minor; defenses; penalties.</p> <p>(A) A person eighteen years of age or older commits the offense of criminal solicitation of a minor if he knowingly contacts or communications with, or attempts to contact or communicate with, a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60, or with the intent to perform a sexual activity in the presence of a the person under the age of eighteen, or persons reasonably believed to be under the age of eighteen.</p>

South Dakota	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
South Dakota Stat. 22-24A-5	<p>Solicitation of a minor- Felony-Assessment.</p> <p>A person is guilty of solicitation of a minor if the person eighteen years of age or older:</p> <p>(1) Solicits a minor, or someone the person reasonably believes is a minor, to engage in a prohibited sexual act; or</p> <p>(2) Knowingly compiles or transmits by means of a computer; or prints, publishes or reproduces by other computerized means; or buys, sells, receives, exchanges or disseminates, any notice, statement or advertisement of any minor's name, telephone number, place of residence,</p>

<p>South Dakota Stat. 22-24A-4</p>	<p>physical characteristics or other descriptive or identifying information for the purpose of soliciting a minor or someone the person reasonably believes is a minor to engage in a prohibited sexual act.</p> <p>The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense under this section does not constitute a defense to a prosecution under this section.</p> <p>Consent to performing a prohibited sexual act by a minor or a minor's parent, guardian, or custodian, or mistake as to the minor's age is not a defense to a charge of violating this section.</p> <p>Minor and solicit defined.</p> <p>Terms used in § 22-24A-5 mean:</p> <ol style="list-style-type: none"> (1) "Minor," a person fifteen years of age or younger; and (2) "Solicit," to seduce, lure, entice or persuade, or attempt to seduce, lure, entice or persuade a specific person by telephone, in person, by letter, by using a computer or any other electronic means.
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Tennessee	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Tenn. Stat. 39-13-528	<p>Offense of solicitation of a minor.</p> <p>(a) It is an offense for a person eighteen (18) years of age or older, by means of oral, written or electronic communication, electronic mail or Internet services, directly or through another, to intentionally command, request, hire, persuade, invite or attempt to induce a person whom the person making the solicitation knows, or should know, is less than eighteen (18) years of age, or solicits a law enforcement officer posing as a minor, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age, to engage in conduct that, if completed, would constitute a violation by the soliciting adult of one (1) or more of the following offenses:</p> <ul style="list-style-type: none"> (1) Rape of a child, pursuant to § 39-13-522; (2) Aggravated rape, pursuant to § 39-13-502; (3) Rape, pursuant to § 39-13-503; (4) Aggravated sexual battery, pursuant to § 39-13-504; (5) Sexual battery by an authority figure, pursuant to § 39-13-527; (6) Sexual battery, pursuant to § 39-13-505; (7) Statutory rape, pursuant to § 39-13-506; (8) Especially aggravated sexual exploitation of a minor, pursuant to § 39-17-1005; (9) Sexual activity involving a minor, pursuant to § 39-13-529; (10) Trafficking for commercial sex acts, pursuant to § 39-13-309; (11) Patronizing prostitution, pursuant to § 39-13-514; (12) Promoting prostitution, pursuant to § 39-13-515; or
Tenn. Stat. 39-13-528	

	<p>(13) Aggravated sexual exploitation of a minor, pursuant to § 39-17-1004.</p> <p>Offense of soliciting sexual exploitation of a minor- Exploitation of a minor by electronic means.</p> <p>(a) It is an offense for a person eighteen (18) years of age or older, by means of oral, written or electronic communication, electronic mail or Internet service, including webcam communications, directly or through another, to intentionally command, hire, persuade, induce or cause a minor to engage in simulated sexual activity that is patently offensive or in sexual activity, where such simulated sexual activity or sexual activity is observed by that person or by another.</p> <p>(b) It is unlawful for any person eighteen (18) years of age or older, directly or by means of electronic communication, electronic mail or Internet service, including webcam communications, to intentionally:</p> <p>(1) Engage in simulated sexual activity that is patently offensive or in sexual activity for the purpose of having the minor view the simulated sexual activity or sexual activity, including circumstances where the minor is in the presence of the person, or where the minor views such activity via electronic communication, including electronic mail, Internet service and webcam communications;</p> <p>(2) Display to a minor, or expose a minor to, any material containing simulated sexual activity that is patently offensive or sexual activity if the purpose of the display can reasonably be construed as being for the sexual arousal or gratification of the minor or the person displaying the material; or</p> <p>(3) Display to a law enforcement officer posing as a minor, and whom the person making the display reasonably believes to be less than eighteen (18) years of age, any material containing simulated sexual activity that is patently offensive or sexual activity, if the purpose of the display can reasonably be construed as being for the sexual arousal or gratification of the intended minor or the person displaying the material.</p>
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Texas	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Texas Stat. 33.021	<p>Online Solicitation of a Minor.</p> <p>(a) In this section:</p> <p>(1) "Minor" means:</p> <p>(A) an individual who represents himself or herself to be younger than 17 years of age; or</p> <p>(B) an individual whom the actor believes to be younger than 17 years of age.</p> <p>(2) "Sexual contact," "sexual intercourse," and "deviate sexual intercourse" have the meanings assigned by Section <u>21.01</u>.</p>

	<p>(3) "Sexually explicit" means any communication, language, or material, including a photographic or video image, that relates to or describes sexual conduct, as defined by Section 43.25.</p> <p>(b) A person who is 17 years of age or older commits an offense if, with the intent to arouse or gratify the sexual desire of any person, the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, intentionally:</p> <ol style="list-style-type: none"> (1) communicates in a sexually explicit manner with a minor; or (2) distributes sexually explicit material to a minor. <p>(c) A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.</p>
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Utah	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Utah 76-4-401	<p>Enticing a minor.</p> <p>(1 As used in this section:</p> <p>) (a) "Minor" means a person who is under the age of 18.</p> <p>(b "Text messaging" means a communication in the form of</p> <p>) electronic text or one or more electronic images sent by the actor from a telephone, computer, or other electronic communication device to another person's telephone, computer, or other electronic communication device by addressing the communication to the person's telephone number or other electronic communication access code or number.</p> <p>(2</p> <p>) (a) A person commits enticement of a minor when the person knowingly uses the Internet or text messaging to solicit, seduce, lure, or entice a minor, or to attempt to solicit, seduce, lure, or entice a minor, or another person that the actor believes to be a minor, to engage in any sexual activity which is a violation of state criminal law.</p> <p>(b A person commits enticement of a minor when the person</p> <p>) knowingly uses the Internet or text messaging to:</p> <p>(i) initiate contact with a minor or a person the actor believes to be a minor; and</p>

	<p>(ii) subsequently to the action under Subsection (2)(b)(i), by any</p> <p>) electronic or written means, solicits, seduces, lures, or entices, or attempts to solicit, seduce, lure, or entice the minor or a person the actor believes to be the minor to engage in any sexual activity which is a violation of state criminal law.</p>
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Vermont	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Vermont Stat. 2828	<p>Luring a child.</p> <p>(a) No person shall knowingly solicit, lure, or entice, or to attempt to solicit, lure, or entice, a child under the age of 16 or another person believed by the person to be a child under the age of 16, to engage in a sexual act as defined in section 3251 of this title or engage in lewd and lascivious conduct as defined in section 2602 of this title.</p> <p>(b) This section applies to solicitation, luring, or enticement by any means, including in person, through written or telephonic correspondence or electronic communication.</p> <p>(c) This section shall not apply if the person is less than 19 years old, the child is at least 15 years old, and the conduct is consensual.</p>

Virginia	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Virginia Stat. 18.2-374.3	<p>Use of communications systems to facilitate certain offenses involving children.</p> <p>A. As used in subsections C, D, and E, "use a communications system" means making personal contact or direct contact through any agent or agency, any print medium, the United States mail, any common carrier or communication common carrier, any electronic communications system, the Internet, or any telecommunications, wire, computer network, or radio communications system.</p> <p>B. It is unlawful for any person to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § <u>18.2-370</u> or <u>18.2-374.1</u>. A violation of this subsection is a Class 6 felony.</p> <p>C. It is unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child younger than 15 years of age to knowingly and intentionally:</p> <p>1. Expose his sexual or genital parts to any child to whom he is not legally married or propose that any such child expose his sexual or genital parts to such person;</p>

	<p>2. Propose that any such child feel or fondle his own sexual or genital parts or the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child;</p> <p>3. Propose to such child the performance of an act of sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or any act constituting an offense under § <u>18.2-361</u>; or</p> <p>4. Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any purposes set forth in the preceding subdivisions.</p>
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Washington	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
RCW 9.68a.090	<p>Communication with minor for immoral purposes- Penalties.</p> <p>(1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.</p> <p>(2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter <u>9A.20</u> RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter <u>9.68A</u>, 9A.44, or <u>9A.64</u> RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes, including the purchase or sale of commercial sex acts and sex trafficking, through the sending of an electronic communication.</p> <p>(3) For the purposes of this section, "electronic communication" has the same meaning as defined in RCW <u>9.61.260</u>.</p>

West Virginia	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
West Virginia Stat. 61-3C-14b	<p>Soliciting, etc. a minor via computer; penalty.</p> <p>Any person over the age of eighteen, who knowingly uses a computer to solicit, entice, seduce or lure, or attempt to solicit, entice, seduce or lure, a minor known or believed to be at least four years younger than the person using the computer or a person he or she believes to be such a minor, to commit any illegal act proscribed by the provisions of article eight, eight-b, eight-c or eight-d of this chapter, or any felony offense under section four hundred one, article four, chapter sixty-a of this code, is guilty of a felony and, upon conviction thereof, shall be fined not more than five thousand dollars or imprisoned in a state correctional facility not less than two nor more than ten years, or both.</p>

Wisconsin	
Does this state's statute explicitly address electronic forms of solicitation? Yes.	
Wisconsin Stat. 948.075	Use of a computer to facilitate a child sex crime. (1) Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of s.948.02(1) or (2) is guilty of a Class C felony.

Wyoming	
Does this state's statute explicitly address electronic forms of solicitation? No.	
WY Stat. 6-2-318	Soliciting to engage in illicit sexual relations; penalty. Except under circumstances constituting sexual assault in the first, second or third degree as defined by W.S. 6-2-302 through 6-2-304, or sexual abuse of a minor in the first, second, third or fourth degree as defined by W.S. 6-2-314 through 6-2-317, anyone who has reached the age of majority and who solicits, procures or knowingly encourages anyone less than the age of fourteen (14) years, or a person purported to be less than the age of fourteen (14) years, to engage in sexual intrusion as defined in W.S. 6-2-301 is guilty of a felony, and upon conviction shall be imprisoned for a term of not more than five (5) years.

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Young Lawyers Division

Submitted By: Anna M. Romanskaya, Chair, ABA Young Lawyers Division

1. Summary of Resolution(s). The resolution urges legislatures across the country to review their child protection laws to ensure that legal prohibitions on the luring or enticing of a minor for sexual acts include the use of the internet and other electronic means of communication.
2. Approval by Submitting Entity. This resolution was approved by Assembly ABA Young Lawyers Division on February 6, 2016.
3. Has this or a similar resolution been submitted to the House or Board previously? Yes. The Young Lawyers Division brought a similar resolution (111A) to the House at the 2016 Annual Meeting. During that Meeting, the Criminal Justice Section expressed some concerns with the resolution which were not able to be addressed by the time the resolution was scheduled to be debated in the House. As such, the Young Lawyers Division decided to withdraw the resolution from consideration until such time as it could work with the Criminal Justice Section to amend the resolution. The Young Lawyers Division and the Criminal Justice Section have been diligently working to amend the resolution over the past few months. The Criminal Justice Section Council recently voted to support the amended resolution.
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?
As indicated in response to Question 3, the Young Lawyers Division brought a similar resolution (111A) to the House at the 2016 Annual Meeting but decided to withdraw it from consideration after learning about certain areas of concern expressed by the Criminal Justice Section and realizing that they could not be adequately addressed during the Meeting. The entities worked tirelessly to amend the revised resolution. The timing of the proposed resolution is ripe and we should act now. Anything that has the potential effect of increasing protections for our children against internet predators should not be delayed.
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 is to lobby and encourage legislatures across the country to review their child protection laws and enact statutes (if necessary) to ensure that legal prohibitions on the luring or enticing of a minor for sexual acts include the use of the internet and other electronic means of communication.

8. Cost to the Association. (Both direct and indirect costs) There are no known costs to the Association.

9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

10. Referrals.

The Criminal Justice Section has agreed to be a supporter of this resolution (November 14, 2016).

The Young Lawyers Division will disseminate this resolution to all interested ABA entities, including the Section of State and Local Government Law, Commission on Youth at Risk, and Section of Family Law, among others.

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution urges legislatures across the country to review their child protection laws to ensure that legal prohibitions on the luring or enticing of a minor for sexual acts include the use of the internet and other electronic means of communication.

2. Summary of the Issue that the Resolution Addresses.

The Resolution urges legislatures to review their child protection laws to ensure that they effectively protect children and teenagers against new threats posed by the internet and other electronic communications. While prosecutors can and do already use existing laws to prosecute internet and other electronic-communication-based crimes against children, they face potential statutory obstacles to pursuit of 21st-century criminal conduct. Accordingly, prudence counsels a review of existing laws with the input of law enforcement, prosecutors, and other stakeholders to ensure those laws' adequacy to protect children.

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

The Resolution would address the issue by urging legislatures to ensure that legal prohibitions on the luring or enticing of a minor for sexual acts address the use of the internet and other electronic means of communication. If legislatures do so, it may provide prosecutors with a new tool to prosecute child sexual predators before any sexual exploitation actually takes place.

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

No minority views or opposition have been identified.

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