NO RESOLUTION PRESENTED HEREIN REPRESENTS THE POLICY OF THE ASSOCIATION UNTIL IT SHALL HAVE BEEN APPROVED BY THE HOUSE OF DELEGATES. INFORMATIONAL REPORTS, COMMENTS AND SUPPORTING DATA ARE NOT APPROVED BY THE HOUSE IN ITS VOTING AND REPRESENT ONLY THE VIEWS OF THE SECTION OR COMMITTEE-submitting them.
## RESOLUTIONS WITH REPORTS TO THE HOUSE OF DElegates

### San Francisco Marriott Marquis Hotel

**Yerba Buena Ballroom - Lower B2 Level**

**San Francisco, California**

**August 12-13, 2019**

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### RESOLUTIONS WITH REPORTS

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**Resolutions with Reports numbered 15A-15C, 109A through 200, 400A and 400B can be found in this book. Proposals to amend the Association’s Constitution, Bylaws and House Rules of Procedure are numbered 11-1 through 11-9 and also can be found in this book. Any additional Resolutions with Reports submitted by state or local bar associations will be numbered in the “15” series. Late Resolutions with Reports will be numbered in the “300” series. These reports will be distributed at the opening session of the House of Delegates meeting. Informational Reports can be found on the ABA’s website at [http://www.americanbar.org/groups/leadership/house_of_delegates/2019-annual-meeting.html](http://www.americanbar.org/groups/leadership/house_of_delegates/2019-annual-meeting.html) (click on Informational Reports).**

*This report will be sent electronically prior to the opening session of the House of Delegates meeting.*
<table>
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<td>Index to Reports</td>
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All sessions of the House of Delegates meeting will be held on Monday, August 12 and Tuesday, August 13, 2019, in the Yerba Buena Ballroom, Lower B2 Level, at the Marriott Marquis Hotel, in San Francisco, California. It is anticipated that the first session of the House meeting will begin at 9:00 a.m. on Monday morning and will recess at approximately 5:30 p.m. On Tuesday morning, the meeting will reconvene, and will adjourn no later than 1:00 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, August 12. 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 locating reports received by the May 7, 2019 filing deadline. Resolutions with Reports numbered 10A-10C, 100A through 200, 400A and 400B appear in this book. Proposals to amend the Association’s Constitution, Bylaws and House Rules of Procedure are numbered 11-1 through 11-9 and also appear in this book. Informational Reports can be found on the ABA’s website at https://www.americanbar.org/groups/leadership/house_of_delegates/2019-annual-meeting/ (click on Informational Reports).

Any late Resolutions with Reports, those received after May 7, 2019, 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 present and voting. Late Resolutions with Reports will be posted to the ABA website prior to the opening session of the House, along with any additional Resolutions with Reports submitted by state or local bar associations.

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

Invocation

1. Report of the Committee on Credentials and Admissions
   Eileen M. Letts, Illinois
   Approval of the Roster

2. Report of the Committee on Rules and Calendar
   Christina Plum, Wisconsin
   Approval of the Final Calendar

3. Report of the Secretary
   Mary L. Smith, Illinois
   Approval of the Summary of Action

4. Statement by the Chair of the House of Delegates
   William R. Bay, Missouri

5. Statement by the President
   Robert M. Carlson, Montana

6. Statement by the Treasurer
   Michelle A. Behnke, Wisconsin

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

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

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

10. Presentation of Resolutions with Reports of Sections, Committees and Other
    Entities
    100A-200 Resolutions with Reports
    300 Late Resolutions with Reports
    400A-B Resolutions with Reports on Archiving

ADJOURNMENT
### OFFICERS

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### BOARD OF GOVERNORS

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<td>Patricia Lee Refo, Phoenix, AZ</td>
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<td>Stephen N. Zack, Miami, FL</td>
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<th>COMMITTEES OF THE HOUSE OF DELEGATES</th>
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<td>CREDENTIALS AND ADMISSIONS</td>
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<td>CHAIR: Eileen M. Letts, Chicago, IL</td>
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<td>VICE-CHAIR: Robert N. Weiner, Washington, DC</td>
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<td>MEMBERS: Stephen E. Chappelear, Columbus, OH</td>
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<td>Amy L. Meyerson, Weston, CT</td>
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<td>DRAFTING POLICIES AND PROCEDURES</td>
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<td>CHAIR: Charles J. Vigil, Albuquerque, NM</td>
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<td>VICE-CHAIR: Bonnie E. Fought, Hillsborough, CA</td>
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<td>MEMBERS: Dana M. Hrelic, Hatford, CT</td>
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<td>Stefan Palys, Phoenix, AZ</td>
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- Miosotti H. Tenecora, Boston, MA
The report of the President will be presented at the time of the Annual Meeting of the House of Delegates.
To permit the presentation of current financial data, the written report of the Treasurer will be distributed at the time of the Annual Meeting of the House of Delegates.
This report highlights American Bar Association activities from December 11, 2018 to May 28, 2019.

**Introduction**

In May, the American Bar Association launched historic new efforts to grow our membership and revenues into the future. Our initiative builds on three years of research, collaboration, and planning between the Association’s volunteer leaders and staff to redefine and enhance the value of becoming and staying an ABA member.

Our new membership program provides tangible benefits to legal professionals at every stage of their careers. We’ve made ABA membership more affordable and simplified our dues rates. We’re providing members a comprehensive CLE library with hundreds of programs at no additional cost. Every member of the Association will also have access to Law Practice Division, GP Solo, and Center for Professional Responsibility materials as a part of their basic membership dues.

Another key component of our new membership effort directs curated content to members based on their interests and areas of practice. The English writer John Stuart Mill once observed, “There is no ‘one-size-fits-all’ way to build an audience.” To be successful in our membership efforts, we must provide lawyers with relevant and custom content valuable to them. In the past, the ABA has overwhelmed members with generic emails and materials unrelated to their interests. In the future, the information we push to our members will be useful to their professional development.

Over the past year, the ABA established a five-member digital content team, with more than 40 years of combined digital media experience. The team is promoting the high-quality content created by our entities through more a personalized, curated content experience for ABA members. This strategy utilizes a variety of tactics across such principles of a modern content operation as editorial, governance, planning, talent and structure, and audience development. Their plans are on schedule and under budget.

The digital content strategy is anchored by specific market research. The ABA has a vast inventory of substantive content that is of significant value to legal professionals throughout their careers. Through content curation, we will greatly enhance our value proposition through more effective planning, packaging, publishing, and tracking of the substantive content produced by the ABA and our members.
Drawing upon more than 1,000 publications, periodicals, and newsletters produced each year, the digital content team is cataloguing a select library on a piece-by-piece basis using 48 areas of interest to ABA members. By matching interests to members, we can deliver more personalized content over time through such channels as email, our website, and social media.

Powerful software tools will also help us deliver more personalized content to members. We have implemented a cloud-based calendar and editorial management tool that supports integrated planning efforts across ABA content-producing units including the entities, media relations, the ABA Journal, and ABA CLE. This will enable us to better coordinate publishing operations and engage strategically to the evolving conversations of thought leaders in the legal sector.

We have implemented an all-in-one social media management tool that allows us to listen, engage, and publish to our main social media accounts, while extracting data analytics to respond more effectively to legal conversations online. Since implementing this approach to social media in April, our engagement score has nearly doubled across the metrics we track on Facebook, Twitter, LinkedIn, and Instagram.

Another part of our part of digital content efforts involves a refined paywall. The ABA is moving a significant amount of information behind a paywall to protect the value of membership. As time goes on, more and more ABA and entity content on the ABA website will be restricted to members only.

We launched a digital publication for young lawyers that aggregates content from across the ABA to focus on personal life, professional life, public service, and student loans and finances. The member-restricted site launched April 30 on americanbar.org with dozens of stories live onsite, along with an archive of more than 100 stories drawn from the entities and the ABA Journal. Another outreach to younger lawyers came in May when the digital content team traveled to the Young Lawyers Division (YLD) spring meeting in Washington, D.C. Stories based on activities at the meeting will be delivered throughout the summer.

Thanks to our new digital content strategy, we are improving our engagement with legal professionals as we project a more contemporary image for the ABA. Through more focused and specialized outreach, we anticipate our efforts to grow membership and revenues in the years ahead will be very successful.

Membership Operations

Following the House of Delegates’ and Board of Governors’ overwhelming support for the new membership experience at the 2018 Annual Meeting, we shifted our focus to its implementation. To make certain it was executed in a timely and efficient manner, an implementation group of more than 100 staff members and hundreds of volunteer leaders was organized into four principle workstreams that operated in tandem and close collaboration. The areas were: Membership Operations; Content; Marketing Operations;
and Go-To-Market Strategy. More than 20 secondary groups were also established. The teams worked the details on all aspects of the new model, from establishment of anniversary billing to the curated content described above.

The implementation team also focused on how we would effectively market our expanded range of benefits to lawyers. We hired a leading marketing firm with more than 40 years of experience working with law firms to provide guidance on how best to promote and convey the value of membership in the ABA. A key part of our enhanced marketing efforts is to revitalize the ABA’s visual brand in the legal marketplace. One way we’ve achieved this is through a new, contemporary-looking ABA logo. The new logo, launched on May 1, evokes a forward vision while staying true to the Association’s core values and goals. It will also send a signal to lawyers the ABA is a changing organization that seeks modern and dynamic solutions to the challenges facing the legal community.

While aggressive and effective marketing is a major focus in our push to publicize our new member experience, it’s also important for us to spread the word personally to our colleagues within the legal profession. Case-in-point: I recently had the opportunity to speak to a nonprofit group in Chicago. One of the attendees was a younger attorney who had been an ABA member only for one year as a new bar admittee. She left the Association because she questioned its worth. After hearing my description of the new ABA value proposition, she asked for more information...and she is now a dues-paying member of the Association. Of course, our goal is to retain her as a member in the decades ahead.

Staff has been heavily engaged testing the website and other systems as invoices are sent for FY 2020 dues. Some online issues have been reported and almost all were quickly resolved. As in the past, renewal notices are launched in stages to control website traffic and ensure staff availability in the Service Center.

Since the beginning of this fiscal year on September 1, the Service Center has received 95,321 calls, which is 53 percent higher than the 62,432 calls received by this time last year. Over the same time frame, the Service Center also processed 48,313 emails, an increase of 63 percent from the prior year. The higher volume is due largely to ongoing performance issues with the new website, in addition to last fall’s confirmation hearing of now-Justice Kavanaugh.

Under the ABA Member Advantage program, Hertz rentals by ABA members increased by 23 percent February and March (the most recent reporting available). Bank of America royalties increased by 18 percent between February and March; one of the more popular new items is the “3-2-1” cash back credit card benefit, which allows cardholders to select a different maximum cash back category each month. Mercedes sales increased by 29 percent from February to March. We are preparing a new marketing initiative for late spring and summer featuring the new Mercedes A-Class model. Brooks Brothers sales jumped by 99 percent between February and March due to strong sales during the annual March one-day sale.
Our Design staff is helping the sections, divisions, and forums adapt to new branding rules. A logo has been created for each of the ABA entities. Staff also devised a brochure, postcard, and buck slip for the sections to use for marketing.

ABA Website

The ABA’s new website was officially launched on October 9, 2018. Our website is extraordinarily complex, and unfortunately, we had to work through many significant problems with the site. Every issue raised is treated as a priority to resolve. Significant progress has been made to correct the issues and improve the functionality of the site. Our goal is for every user of the site to have a trouble-free experience, and we will continue to work for that. A staff working group regularly examines ways to enhance the look, feel, and functionality of the website.

In preparation for the May 1 launch of our new membership experience, many updates were made to americanbar.org. ABA IT has worked diligently to correct issues related to the login process for the site. The new ABA logo was added throughout the web to signal our new, forward-looking vision. A new metered paywall was instituted to track article views for ABA members visiting content in entity sites in which they are not currently members. An ABA member is now able to view five paywalled articles per month before being asked to join the group for more content. This allows our members to sample content from the variety of resources available.

Our efforts to clean up content on the website are ongoing. In addition to regular quality assurance work, additional resources have been added to address missing metadata, which contributes to poor search results. Improving search results has been a priority and more improvements are being implemented in the near term.

Our Digital Engagement team has also improved the website’s product and event setup process. Improper setup causes problems with website registrations and purchases; the new process helps staff resolve many issues prior to publishing content on the website and to quickly resolve issues that are later discovered.

Legal Education

On April 19, the Section of Legal Education and Admissions to the Bar released data detailing bar passage rates and employment figures for ABA-approved law schools. The Section’s information showed that 89.57 percent of law graduates in 2016 who sat for a bar exam within two years of graduating passed a bar exam. That success rate is substantially the same as the outcome for those who graduated in 2015, where the ultimate pass rate was 88.49 percent. 2016 bar pass data also reveals that 97 percent of all graduates had sat for a bar exam within two years of graduation and that schools were able to track results on 98.5 percent of graduates. First-time takers in 2018 achieved a 74.82 percent pass rate, which compares to a 77.34 percent pass rate for 2017. Spreadsheets are available on the section’s webpage under Legal Education Statistics, which report these outcomes on a school-by-school basis and in more detail.

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On April 29, the Section also released an update on employment figures for recent law graduates. It showed the employment market for law graduates has stabilized since 2012-13 and has been showing incremental improvement. For the class of 2018, the aggregated school data shows that 77.8 percent of the 2018 graduates of the 200 law schools enrolling students and approved by the ABA to offer the J.D. degree were employed in full-time long-term Bar Passage Required or "J.D. Advantage" jobs roughly 10 months after graduation. This continues the positive trends of recent years; 65.7 percent of the class of 2013 graduates reported similar full-time long-term jobs.

However, the higher percentage of employed students resulted from both a modest increase in jobs and an approximately 2 percent decrease in the size of the graduating class. The actual number of full-time long-term Bar Passage Required or J.D. Advantage jobs increased by 714 (2.72 percent) over the previous year, going from 26,293 in 2017 to 27,007 in 2018.

ABA-approved law schools are required to post their Standard 509 Information Reports on their websites annually by December 15. The Section of Legal Education’s website provides access to that information for all law schools, including downloadable spreadsheets of aggregate data that the law schools report. This data covers matters of interest to potential law students and others engaged in legal education, including admissions and enrollments; tuition and living costs; financial aid; curricular information; faculty demographics; and other areas. The data can be easily searched and sorted, allowing for school-by-school comparisons and analysis and should be useful to prospective law students, pre-law advisors, media outlets and others who study and write about legal education.

Law schools reported that 38,390 students began studies in the Fall 2018 1L class (including the preceding winter/spring/summer terms for schools with multiple start dates). This is an increase of 1,070 students (2.9 percent) from the 2017 reporting cycle. Eighty-one schools reported smaller 1L classes for this admissions cycle and 122 schools reported an increase or no change in their new 1L classes compared to 2017.

Consistent with House Rule 45.9 and ABA Rules of Procedure for Approval of Law Schools, Rule 52(c), the Council of the Section of Legal Education and Admissions to the Bar at its May meeting approved the changes to the law school accreditation process standard on bar passage outcomes (Standard 316) that the House had considered and rejected at the 2017 and 2019 Midyear Meetings. It will be first applied to law schools in the spring of 2020, following law schools’ filing of their 2019 bar pass outcomes. The Council, through the Managing Director’s Office, will provide further guidance to law schools on the implementation of the revised standard.

The Council’s announcement stated that the revisions provide more straightforward and clear expectations for law schools and establish measures and process that are more appropriate for today’s environment. Further, the Council said it appreciated the attention and consideration this proposal received in the past by the ABA.
House of Delegates and other stakeholders in the legal education community. Two documents, this Standard 316 memorandum and this Standard 316 Q&A provide further background and information that House members will find helpful.

Center for Member Practice Groups

The recruitment and retention of law students and young lawyers is a critical aspect of the new membership experience. To provide a better focus to those efforts, in February we reorganized the staff of the Law Student Division (LSD) and the YLD into one unified staffing structure. The Early Career Strategy Group now serves as the key stakeholder for the coordination and development of ABA-wide strategies that focus on or include the young lawyer and law student segments.

Austin Groothuis serves as the Division Director of the Early Career Strategy Group. He provides strategic oversight and guidance to the YLD and LSD leadership and manages the combined staff of those entities. Donna Nesbit was promoted to the Director of Meetings and Operations and oversees the team responsible for meeting and event planning for the YLD and LSD. She also manages day-to-day business operations for the entities, including financial management, budgeting, administration, and sponsorships. Sara Stretch was promoted to the Director of Governance and Programs. She leads the team that provides leadership, management, and strategic/procedural guidance to the YLD and LSD volunteer leadership on matters involving governance, policy development and implementation, and special projects and initiatives. While the staff of the two groups was combined, there were no changes to their volunteer governance structures.

From May 2 to 4, the YLD hosted its Spring Conference in Washington, D.C. There was an impressive lineup of speakers which included former U.S. Attorney General Alberto Gonzales, Senate Judiciary Chairman Lindsey Graham (R-SC); Congressman Joe Kennedy, III (D-MA), Judge Diane Humetewa of the U.S. District Court, and David Lat, Founding Editor of Above the Law.

On April 26, the Antitrust Law Section conducted two "Why Antitrust/Why Consumer Protection?" programs. The first was held at the University of Chicago and had an attendance of 50 students. The panelists included Susan Ellis, Bureau Chief of the Consumer Fraud Bureau in the Illinois Attorney General's Office; Amy Gilbert, Associate at McGuire Woods; Elizabeth Horman with the U.S. Department of Justice's Antitrust Division; and Sanford M. Pastroff, Senior Counsel for Global Antitrust and Strategic Litigation, Whirlpool Corporation. The second program was held at the University of Iowa and had an attendance of 50 students. The panelists included Lance Lange, Partner at Faegre Baker Daniels LLP; Kristen Martilla of the Minnesota U.S. District Court; Max Miller of the Iowa Attorney General's office; and Sean Sullivan, Professor at the University of Iowa.

On April 25 the Judicial Division (JD) co-sponsored a joint CLE entitled, "Lessons Learned about Challenges and Changes" with the Chicago Bar Association. Panelists...
were JD Chair-Elect Justice Elizabeth Lang-Miers, and JD members Judge Robert Cohen, Judge Steve Leben, Judge Heather Welch, and bankruptcy Judge LaShanda Hunt, with Sections Officers Conference Chair Michael Bergmann moderating. The panel discussion included how to prepare for the bench and the professional activities, experiences, and trainings necessary to be a judicial success. They also discussed the transition to the bench and its impact on your personal and professional life, including the ever-popular topic “what I know now that I wish I knew then.” Panelists also looked at judicial independence including a comparative of the challenges facing our courts and the judiciary. The presentation was an in-person CLE, as well as a webinar with 25 in-person registrants and 15 webinar registrants.

The International Law Section has been busy the past few months. On April 4, the Section held its ninth Annual “Live from L,” a conversation with the U.S. Department of State Legal Adviser Jennifer Newstead. This year’s program focused on International Economic Law and was held at the George Washington University Law School, in conjunction with the American Society of International Law, and webcast to participants in at least 16 countries worldwide, in addition to the over 100 in-person participants.

The annual ABA Day at the U.N., which the International Law Section organizes, took place on April 29. The delegation, led by ABA President Carlson, heard from Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and U.N. Legal Counsel, as well as the Deputy Secretary-General, Amina Mohammed. The delegation also met with representatives at the U.S. Mission to the U.N. in the afternoon.

In March, the International Law Section submitted comments to U.S. Secretary of State Michael R. Pompeo and U.S. Secretary of Treasury Steven T. Mnuchin concerning the Rohingya refugee crisis in Burma. In the interests of promoting fundamental human rights, democracy, regional stability, and the rule of law, the Section urges the United States to take a number of measures in response to crimes committed against the Rohingya by the Burmese military.

In February, the International Law Section drafted a statement for ABA President Carlson on the suspension of the Chief Justice of Nigeria and expressed hope for Nigeria’s elections on February 23 to be credible, fair, free and transparent. President Muhammadu Buhari suspended the Chief Justice, the official responsible for overseeing the election, and the ABA statement noted that the independence of the judiciary and the separation of powers were essential to ensuring Nigeria’s adherence to the rule of law. The ABA’s statement was released the day before the elections and was picked up by the Nigerian media.

In April, the ABA Career Center sponsored and exhibited at the Annual National Association for Law Placement (NALP) Conference for the first time. Career Center Director Emily Roschek and ABA Membership Acquisition Director Amber Simpson attended the event, along with four of the Center’s Board members: Skip Horne, Karen Britton, Susanne Aronowitz, and Fiona Hornblower. The NALP Conference, which was held in San Diego, attracted 1,500 legal recruiters, law firm professional development registrants and 15 webinar registrants.

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staff, and law school career service offices. The Career Center brought flyers and promotional materials on its offerings and ABA’s Membership team distributed information educating the schools on group enrollment.

The Section of Science and Technology Law presented its fourth Internet of Things National Institute at the Washington, D.C. offices of Crowell & Moring on March 27 and 28. President-elect Judy Perry Martinez provided opening remarks and introduced opening keynote speaker Michael Chertoff, former Secretary of the Department of Homeland Security. The conference also included keynote addresses by Laura DeNardis, a globally recognized scholar of Internet governance and technical infrastructure and Professor in the School of Communication at American University; Georgetown Law Professor Paul Ohm who also serves as Faculty Director of the Georgetown Institute for Technology Law and Policy; and Rush Holt, Chief Executive Officer of the American Association for the Advancement of Science and former U.S. Congressman.

The State and Local Government Section held a collaborative spring conference, in Baltimore, Maryland from April 11 to 14, with five other ABA entities: Civil Rights and Social Justice Section, Section of Public Contract Law, Forum on Affordable Housing, Commission on Domestic and Sexual Violence, and the Commission on Racial and Ethnic Diversity. The collaboration afforded all entities the opportunity to network and enjoy a keynote luncheon with Congressman Elijah Cummings (D-MD), and dinner with Maryland State’s Attorney, Marilyn Mosby. In addition, the Section held a National Land Use Institute at the University of Baltimore School of Law during that same period.

The Intellectual Property Law (IPL) Section held its annual spring section meeting April 10 to 12 in Arlington, Virginia. The conference had 29 individual CLE program sessions on a wide variety of IP topics on patent law, trademark law, copyright law, trade secret law, ethics, counterfeiting, blockchain, artificial intelligence, Brexit, and other topics. The Section of Science and Technology Law and the Forum on the Entertainment and Sports Industries helped co-sponsor the event, as they have in the past. The conference featured a program with U.S. Patent and Trademark Office Director Andrei Iancu, the annual Mark T. Banner Award presentation luncheon, and a special Women in IPL luncheon with a discussion of Supreme Court rulings in the IP field.

The Criminal Justice Section partnered with ABACLE in March to host the 33rd National White Collar Crime Institute in New Orleans. The Institute hosted 22 breakout sessions and five main plenary sessions. There were 1,146 attendees, and topics included sentencing in white collar cases, securities enforcement, and antitrust prosecution trends. Also, in March, the Section’s White Collar Crime Division Public Corruption and Extortion Sub-committee hosted a panel, Defending Your Client Under Congressional Investigation Washington D.C. The panel had 32 attendees.

The Section of Tort, Trial, and Insurance Practice (TIPS) held its 2018-2019 Leadership Academy at the Midyear Meeting in January. It hosted many notable speakers including: ABA President Carlson; former ABA President Dennis Archer; the
Honorable Mark Bennett, who spoke on implicit bias; Larry J. Cohen who authored *Musings on Ethics: What the Rules Mean for Everyday Practice*; and Richard "Dickie" Scruggs, an influential trial lawyer and pioneer of mass tort litigation. TIPS' Leadership Academy is held every other year and is designed to increase diversity of leaders, nurture effective leadership, build relationships, and raise diversity awareness.

In December, the Business Law Section presented two free CLE programs. On December 18 it hosted "Legal Ethics and Cryptocurrency," which is part of the Section's *In The Know* series, monthly webinars focused on the fundamentals of key practice areas. The program had 455 registrants. Meanwhile on December 20 the Section presented "Ethics and Conflicts in Transactional Practice: Winter is Coming," which is part of the Section’s Business Law Basics series, monthly webinars focused on the fundamentals of key practice areas. The program had 570 registrants.

Global Programs

From April 30 to May 2, ABA Rule of Law Initiative (ROLI) hosted a regional workshop in Bangkok, Thailand on law enforcement integrity for 50 law enforcement and anti-corruption agency representatives from all members of the Association of Southeast Asian Nations.

On April 21, a series of bombings tore through hotels and churches killing an estimated 310 people and injuring at least 500 more in Sri Lanka. Six suicide bombers were involved and police have arrested 24 people in connection with the attacks. ROLI’s field-based staff in Colombo were safe but faced challenges with curfews, inability to move around the city, decreasing food supplies, intermittent communications, and fear of further attacks. The DC-based Sri Lanka team has been in frequent touch with our Colombo-based staff and continues to work with ROLI Security Director to carefully monitor the situation. Staff are minimizing their time outside and are staying clear of potential targets.

In April, the USAID-funded Advancing Human Rights for All in Armenia Project developed and widely publicized “Know Your Rights” (KYR) videos addressing right to pension, in addition to developing a script for a KYR video addressing pregnancy and maternity rights. In addition, the Project finalized the logistical and contractual arrangements for the International Pro Bono Communication Specialist to visit Armenia and work with the Human Resources Development Office on the development of the institutional communication strategy and implementation plan.

In April, ROLI conducted four training courses in El Salvador, with participation from a range of justice sector institutions, on the application of alternatives to detention to minors convicted of non-violent crimes. A total of 81 juvenile justice sector operators participated in these trainings, including judges, prosecutors, public defenders, and members of the Prevention Unit of the National Civilian Police.
In March, pro bono counsel secured by the Justice Defenders Program issued an analysis of an indictment against a Shia woman in Saudi Arabia charged with a capital offense related to her advocacy on behalf of religious minorities. After press coverage of the analysis, the prosecution amended the indictment to remove the death penalty. This is the second time that a minority rights advocate in Saudi Arabia facing the death penalty has been spared as a result of ABA advocacy.

In March another Saudi woman who had been detained for advocating for women’s rights and was scheduled to be tried in the Specialized Criminal Court for terrorism offenses, was transferred to a regular criminal court. The Center for Human Rights has been working for several years through intermediaries to raise concern about the misuse of the court against human rights activists, especially in light of the court’s lack of independence and failure to adhere to minimum due process standards. Several U.S. Senators and the U.N. Special Rapporteur on protecting human rights while countering terrorism have raised public concerns about the misuse of the court as a result of the Center’s analysis.

On February 7, the Center for Human Rights’ “Lawyers Without Rights Project,” held an event at the New York City Bar addressing “Legal Lessons from the Holocaust: When Lawyers Remain Silent.” The event welcomed more than 200 leaders of the City Bar and others. ABA President Carlson formally hosted the event.

In February, ROLI organized six roundtable discussions with civil society groups across the Philippines. The discussions reached a total of 66 civil society groups, raising awareness regarding ROLI’s work in the country to improve access to justice for the most vulnerable populations.

In January, as part of the Expanding Access to Justice (EAJ) Program, ROLI staff met with the Director General of the Somalia’s Ministry of Justice (MOJ), and the Directors of the MOJ Divisions of Planning, Access to Justice, and Human Rights and Prisons, to present program plans and begin coordination on the launch of the EAJ-supported Access to Justice Committee for the country.

ROLI in January released a legal and policy assessment to identify opportunities and challenges to female entrepreneurship in Cambodia. The assessment, which includes analysis of laws and policies derived from secondary materials and field research, focuses on barriers that young Cambodian women face in financing, starting up, growing, and sustaining their businesses.

After a year of deliberation, the Tajikistan Parliament in January decided to approve the recommended amendments to the legislation on trafficking in persons. These amendments were developed through the ROLI’s supported Legislative Reform Working Group, and will bring the country’s criminal code in line with international law.

In December, ROLI’s USAID-funded Elections and Human Rights Project collaborated with civil society and international partners such as the Organisation...
International de la Francophonie to train provincial magistrates on techniques to resolve electoral disputes in the run-up to the December 2018 elections in the Democratic Republic of Congo (DRC). A handbook provided information on key clauses of the Congolese electoral law, which is often omitted or covered only vaguely in general legal studies in the DRC, and provides technical guidance on addressing the different issues raised in various electoral disputes.

In December, ROLI organized and led the culminating event for the JUSTICE Project in the Philippines to share the accomplishments and outputs the Project with the judiciary and other key stakeholders. Ninety-six members of the judiciary, both from the appellate and trial courts took part in the event. The new Supreme Court Chief Justice Lucas Bersamin was one of the main speakers, in his first public event as Chief Justice. ROLI held a two-day technical skills training in December in Tripoli, Libya for 25 court support staff as a follow-up support of the Judicial Baseline Assessment. The even provided technical skills training for the staff as a follow-up support of the Judicial Baseline Assessment, a workshop for CSOs and human rights legal professionals, and an outreach event on the constitution with over 150 people attending, including several Drafting Assembly members.

Advocacy

The Governmental Affairs Office (GAO) collaborated with the ABA Day in Washington Planning Committee and its chair, Deborah Enis-Ross, to produce “ABA Day 2019.” State, local, and ABA bar leaders from across the country participated in the April 9 to 11 advocacy event. Participants urged their members of Congress to provide adequate funding for the Legal Services Corporation (LSC) and to support preservation of the federal Public Service Loan Forgiveness program (PSLFF). Highlights of the three-day program included:

- Over 340 attendees from all 50 states plus the Virgin Islands conducted meetings in hundreds of Capitol Hill offices, including with key members of Congress in leadership positions;
- Presentation of ABA Justice Awards to Sen. Jeanne Shaheen (D-NH), Sen. Dan Sullivan (R-AK), Sen. Jerry Moran (R-KS), Rep. Steve Stivers (R-OH), Rep. Alex Moone (R-WV), and Rep. Vicente Gonzalez (D-TX), four of whom received their award at a dinner held in the scenic International Spy Museum at L’Enfant Plaza;
- Special presentations by Jim Schultz, former White House Counsel, and Sen. Tim Kaine (D-VA);
- On April 11, GAO worked with the Law Library of Congress to provide special tours and educational briefings for attendees at ABA Day; and
- The creation of an #ABADay online and social media event intended to encourage entities and ABA members unable to come to Washington to contact their Members of Congress using social media during the April 9 to 11 period.

On April 23, ABA President Bob Carlson sent a letter to Attorney General William Barr to express the ABA’s serious concerns regarding his decision in Matter of M-S-,
which removes the right of certain asylum seekers to receive a bond hearing before an immigration judge. The ABA believes this decision will result in an increase in lengthy and unnecessary detention of vulnerable asylum seekers at significant cost to the government.

On January 25, the ABA Board of Governors approved the 116th Congress Legislative Priorities. The priorities are as follows (listed in alphabetical order):

- Access to Legal Services
- Access to the Civil Justice System
- Criminal Justice System Improvements
- Elimination of Discrimination
- Immigration Reform
- Independence of the Judiciary
- Independence of the Legal Profession
- International Rule of Law
- Legal Education
- National Security and Civil Liberties

The priorities were chosen based on a survey conducted by GAO to nearly 1,700 members of the ABA; an analysis by GAO that included the successes in the 115th Congress and the outlook for the 116th Congress; and the input and approval of the Standing Committee on Governmental Affairs.

In December, GAO prepared an article for publication in the ABA Journal outlining the ABA’s key legislative and regulatory victories during the 115th Congress, including major criminal justice system reforms, preservation of LSC funding, creation of new bankruptcy judgeships, defeat of mandatory accrual accounting proposals that would have accelerated law firms’ tax obligations, passage of tax reform legislation favorable to attorneys, increased attorney-client privilege protections for electronic devices during border crossings, and other achievements.

On December 15, GAO addressed a delegation of lawyers from China, including Wu Yuliang, Member of the National People’s Congress (NPC) Standing Committee, Chairman of the NPC Supervisory and Judicial Affairs Committee. The NPC recently formed the Judicial Affairs Committee and they wanted to learn more about how the House and Senate Judiciary Committees function, and how state and federal laws interact.

On December 19, GAO accompanied Amy Horton-Newell, the Director for the ABA Center for Public Interest Law, for a meeting with senior executive staff at the Council on Foundations concerning the Center’s plans and opportunities for collaboration. The Council on Foundations is an association of grant-making foundations and other funders which shares several of the policy interests as the ABA entities that comprise the ABA Center on Public Interest Law.
On December 21, President Trump signed two major criminal justice bills into law, implementing key ABA legislative priorities which had been lobbied by ABA members. First, the President enacted the Juvenile Justice Reform Act of 2018, which reauthorizes for the first time in sixteen years, the Juvenile Justice and Delinquency Prevention Act (JJDPA). The JJDPA provides critical support to state and local communities in the planning and operation of their juvenile justice systems. The ABA has been outspoken on this issue for several years, including a letter signed by ABA President Carlson to joint congressional leadership on December 11.

Secondly, the President enacted the First Step Act, which contains long-sought-after corrections and sentencing reforms that give judges greater discretion to depart from mandatory minimum sentences for lower level nonviolent offenders, provides sentence review for people who were sentenced under drug guidelines that have since been repealed as unfair, ends life imprisonment for juveniles, expands compassionate release for elderly and terminally ill inmates, and presents expanded opportunities for prisoners to transition to supervised release up to a year early based on accrued time credits for good behavior. The ABA lobbied on this legislation throughout the 115th Congress, including letters from ABA President Carlson to the House and Senate leaders in December, urging their final action to pass the legislation.

Media Relations

Media Relations (MR) worked closely with the GAO to promote ABA Day 2019 on Capitol Hill, managing photo and video documentation during the annual D.C. campaign. A Division-produced video on ABA Day activities, “Justice Through Advocacy,” commemorates the accomplishments of this year’s volunteers and will also be used to promote registration for next year’s effort.

Participants from all 50 states lobbied for legal aid and the PSLF program. “This year, we made important headway toward securing more funding for the Legal Services Corporation and advocating for the PSLF program,” ABA President Carlson said in an official statement reported in Division-prepared coverage. “These efforts will assist in aiding more people in America.”

With more than 340 lawyers converging on Capitol Hill for the three-day event, Carlson delivered written testimony to Congress in which he expressed support for LSC’s request of $593 million in federal funds next fiscal year, as shared on April 9 with media outlets in a Division-distributed news release. In his testimony, Carlson stressed the importance of legal aid for low-income Americans, writing that this funding would “put LSC on a better trajectory to achieve the pledge of justice for all.”

MR unveiled the new ABA Survey of Civic Literacy with a successful launch at the Newseum in Washington, D.C., on Law Day (Wednesday, May 1). The event featured a panel of distinguished speakers: ABA President Bob Carlson; Ruthe Catolico Ashley, Chair of the ABA Standing Committee on Public Education; Roger L. Gregory, Chief
Judge for the U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia; and Gene Policinski, president and chief operating officer of the Freedom Forum Institute.

At the forum, Carlson called the results "enlightening" but also "troubling." Ashley pointed out that "you can't have the rule of law if the people do not know what it is and how it works. That is the idea behind the new ABA Civic Literacy Survey." Both Gregory and Policinski said the survey provided a useful snapshot of the public's civic knowledge and stressed the importance to educate the public about civic rights and responsibilities. A MR-produced video on the results was also shown, and the event was livestreamed.

Among the results: The U.S. public shows strong support for the First Amendment. Eighty-one percent agree that people should be able to publicly criticize the president or other government leaders, and three-quarters agree that government should not be able to prevent news media from reporting on political protests.

In terms of civic knowledge, a majority of the public knows basic facts about the structure of government, and the U.S. Constitution. For instance, 95 percent recognize that the Supreme Court of the United States is the highest court in the nation, and 93 percent know the two chambers of Congress are the House of Representatives and the Senate. But less than half of the American public knows that John Roberts is Chief Justice of the Supreme Court, while almost one-quarter think it is Ruth Bader Ginsburg and 1 percent believe it is Clarence Thomas. One in 10 think the Declaration of Independence freed slaves in the Confederate states, and almost 1 in 5 believe the first 10 amendments of the U.S. Constitution are called the Declaration of Independence instead of the Bill of Rights.

Media Relations pitched the Survey to some 55 news outlets in Washington, D.C., and nationally. In a Law.com story on the results, Carlson was quoted as saying "Democracy is not a spectator sport, but to participate, you need to know the rules. It's too important to leave to chance." In a Maryland Daily Record story, the ABA is quoted as saying that some of the results are "troubling," while The Hill wrote the survey uncovered some "holes" in the public's knowledge of the Constitution, U.S. history and government. The Law & Crime Network also produced a positive video piece on the Survey during its Friday night show, The Daily Debrief.

Several media outlets, including the Las Vegas Sun, published an op-ed by Carlson on the results, in which he wrote that, "American democracy depends on an informed citizenry. It is vital that everyone share the same basic knowledge about the foundation of our democracy -- the rule of law -- and our rights and responsibilities." MR also placed an op-ed on Law Day by Carlson in the Chicago Daily Law Bulletin and produced a statement by Carlson on the Survey of Civic Literacy and the Law Day theme of "Free Speech, Free Press, Free Society."

In addition to the Survey on Civic Literacy, the MR Division nears completion on two other major projects. One is its Profile of the Legal Profession, which compiles statistics from across ABA entities on a range of topics. Staff has identified and analyzed...
available statistics in nine categories and is writing chapters and creating graphics for each. Release of this important data source for media and members is slated for the Annual Meeting in August.

Work also continues on the MR Division’s Access to Justice Index. MR has prepared a survey in Qualtrics that will be circulated in the coming weeks to help better understand factors in the criminal and civil justice systems that inhibit access to justice. The survey will be sent to ABA-affiliated leaders to help inform development of the informational tool. Based on results from this first round of surveying, MR will determine the next steps in the project. In addition, in February, MR received a $10,000 grant from the Herb Block Foundation to find development of the project.

In a case filed by the ABA, a D.C. federal judge overturned changes made by the U.S. Department of Education to its PSLF program that retroactively denied eligibility to many public interest lawyers, as shared nationwide in a Division-issued news release following the February 22 decision. Additional personal outreach to reporters by MR staff resulted in wide coverage by both mainstream news outlets, including the New York Times, Washington Post, Market Watch, and Inside Higher Ed, among several others; as well as by the legal press, such as the Jurist, Law360, and Courthouse News Service.

On February 14, the Tampa Bay Times published a Division-organized feature story with President Carlson, in which he shared the wide range of his areas of emphasis, discussing lawyer wellness, advancing diversity in the profession, criminal justice reform, and law school admissions and bar passage rates, among several other topics.

The MR Division was very active during the 2019 Midyear Meeting in Las Vegas. It worked closely with Legal Talk Network on live broadcasts from the Meeting, organizing several dozen ABA leaders and other legal luminaries for more than 20 podcasts on topics examined during the five-day conference. An archive of these programs is located on the network’s ABA Midyear webpage.

On January 10, MR issued a press release that alerted reporters to the ABA’s offering of free CLE classes to lawyers affected by the federal government shutdown, resulting in coverage by news outlets such as Bloomberg, The Daily Record, Virginia Lawyers Weekly, Tacoma Daily Index, and Birmingham Business Journal, among others. “The American Bar Association appreciates all the hard work done by lawyers who keep our government running. By offering free CLE courses, we are trying to show that we recognize their efforts and will try to assist them through these trying times,” President Carlson told The Indiana Lawyer in its coverage.

Last year, the ABA received a grant from the Clooney Foundation for Justice to create TrialWatch®, a new international initiative to monitor and respond to trials around the world that pose a high risk of human rights violations. Details on the new initiative were outlined in a December news release and were covered widely by diverse news organizations -- syndicators such as Reuters and Yahoo! News; mainstream publications including the Daily Mail; the international press as far away as the Jakarta Post; and legal
media, such as the Chicago Daily Law Bulletin and Law360. ABA President Carlson and Foundation President Amal Clooney praised the collaboration and underscored its importance. Clooney said TrialWatch will "shine a light on abuses and enable us to fight injustice when we see it." ABA President Carlson agreed, saying the initiative will "help institutionalize trial monitoring and bring more watchful eyes to the world's courtrooms," as reported in Above the Law and other outlets.

On April 25, the ABA formally launched TrialWatch with the Clooney Foundation for Justice and three other partners -- Microsoft Corporation, Columbia Law School, and the United Nations Office of the High Commissioner for Human Rights. The rollout was covered in an April press release, in an article published by Yahoo! News, President Carlson emphasized the Association's expertise, noting that "the ABA Center for Human Rights has observed trials and provided pro bono assistance to vulnerable human rights defenders in 65 countries." Other reporting outlets included the National Law Journal, Law360, Above the Law, (Longview, Texas) News-Journal, International Business Times, Digital Trends, and Geekwire, among several others.

In December, President Carlson called for additional resources for the U.S. immigration legal system in a Division-prepared letter to the editor published by the New York Times. Citing an "underfunded and undermanned" system with a backlog of more than 700,000 cases, Carlson emphasized the urgent need for additional judges and support staff, while also advocating that Congress and the White House "craft a comprehensive resolution to our country's immigration challenges" in response to tensions at the U.S.-Mexico border that will likely exacerbate problems created by an overburdened system.

Also in December, the Chicago Daily Law Bulletin quoted President Carlson on the importance of the Universal Declaration of Human Rights from his media statement issued by the Division to commemorate the 70th anniversary of the document's adoption. Carlson called on members of the legal profession to "protect the rights of immigrants, homeless people, survivors of domestic and sexual violence and other members of vulnerable populations." Just more than a week later, the legal publication also cited a MR-prepared news release in which Carlson applauded congressional passage of the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2018. Carlson noted the bill's significance, saying that it "provides the tools to defend one of the most at-risk groups in our system: juveniles," as reported in the Chicago Daily Law Bulletin on December 21.

Pro Bono Manager for the Commission on Immigration

The ABA and the Commission on Immigration express sincere appreciation for the recent award of a $150,000 American Bar Endowment (ABE) Opportunity Grant to fund the hiring of a pro bono manager. Laura Peña will officially assume responsibilities as our pro bono manager on June 3. She has significant experience with issues related to immigration and civil rights issues. Laura will work with the Commission and its offsite direct service projects, the South Texas Pro Bono Asylum Representation Project
("ProBAR") in Harlingen, Texas and the Immigration Justice Project ("IJP") in San Diego, California. The goal is to ensure that clients of ProBAR and IJP receive high quality pro se assistance and pro bono representation through the participation of volunteer attorneys in the provision of immigration legal services. The ABE grant provided the critical funding necessary to establish the position, and I am very pleased to report that we have been able to secure other grant support to assure the program’s continuation in the future.

As part of its efforts to enhance pro bono participation with its projects, the Commission has scheduled nine week-long service trips to ProBAR and IJP through the rest of 2019. The Commission has been very encouraged by the enthusiastic response to these opportunities and is happy to report that all nine trips are presently full.

The first week-long trip was from April 29 to May 3 at ProBAR. Three pro bono volunteers participated, including the Co-Chair of the ABA Working Group on Unaccompanied Minors, Mary Ryan. Along with Commission Director Meredith Linksy and Senior Staff Attorney Jennie Kneedler, the volunteers met with immigrants and asylum seekers detained at Port Isabel Detention Center. The volunteers assisted three gentlemen with their applications for asylum, represented one gentleman in his initial asylum interview, and prepared one other gentleman for an asylum interview.

Center for Operations and Finance

As of April 30, the Association generated consolidated operating revenues of $133.7 million and incurred operating expenses of $128.4 million in FY 2019, which resulted in a surplus of $5.2 million. The $9.4 million operating revenue shortfall to budget is more than offset by an $15.9 million favorable expense variance, leaving a $6.6 million favorable net variance to budget. A more detailed analysis of the Association’s finances can be found in the Treasurer’s report.

The ABA Fund for Justice and Education received many generous gifts in recent months. For the second year in a row, the Wells Fargo Foundation made a $30,000 contribution to the Standing Committee on Legal Assistance to Military Personnel (LAMP), whose initiatives include the Military Pro Bono Project and other resources for veterans and military families. In addition, Baker McKenzie contributed $20,000 to help support the Unaccompanied Immigrant Children’s Pro Bono Attorney Conference.

Midyear Meeting Review

In late January, the Midyear Meeting was held in Las Vegas at Caesars Palace Hotel. Final registration numbers were 2,646 registrants and 229 guests for a total of 2,875. This was up slightly from last year’s Midyear Meeting in Vancouver that had a total 2,455 attendees, but down from the Midyear in Chicago five years ago (3,721 attendees) and the Midyear in Boston 10 years ago (4,336 attendees). A survey was sent to registrants to measure their satisfaction with the meeting location and the new hotel reservation process. Findings showed over 50 percent of respondents were somewhat
or very satisfied with Las Vegas and Caesars Palace as a meeting location. The new hotel reservation process was well received with over 70 percent of our attendees feeling the process was convenient and easy to manage.

**Governance and Public Services Group**

The ABA Working Group to Advance Well-Being in the Legal Profession’s Pledge Campaign Kick-Off event was held at the Chicago offices of Latham & Watkins on February 22. This event brought together firm and legal employer leadership from around the globe to brainstorm ideas and compare notes on well-being initiatives that can be implemented in the workplace to improve the well-being of attorneys.

On March 13, the Diversity Center, in partnership with the Office of the President and Division for Bar Services, facilitated ABA President-elect Judy Perry Martinez’s collaborative meeting with the leadership of the National Affinity Bar Associations. The Presidents-elect from each of the four Bar Associations of Color participated in the meeting. In addition, for the first time, the President and Executive Director of the National LGBT Bar Association and the President of the National Association of Blind Lawyers participated. The meeting provided an excellent opportunity for President-elect Martinez and the National Affinity Bar Associations to outline their respective priorities as well as discuss opportunities for collaboration. The National Affinity Bar Associations heard presentations and received information from staff in various ABA departments, including the Office of the Executive Director, Governmental Affairs Office, and several entities within the ABA Governance and Public Services Group.

The Diversity Center is helping raise awareness of attorney and internship recruitment efforts for ProBAR. This includes facilitating communication with the Hispanic National Bar Association; sharing key information via the Diversity Center’s social media platforms; and showcasing ProBAR at its ABA Exhibit Tables during the National Affinity Bar Association’s annual conventions. ProBAR works to empower detained immigrants through legal education, referrals, and representation and serves detained adults and children in the Rio Grande Valley border region.

The Military Pro Bono Project placed 16 new cases with attorneys for pro bono assistance in March. That month, seven new attorneys signed up to be added to the program’s pro bono volunteer roster, and 17 new military attorney users were added to the website roster. Additionally, in March a total of 165 attorneys registered for the restructured Operation StandBy. Also in March, the Military Pro Bono Project’s website was viewed by 3,917 unique visitors with 9,531 views, and the ABA Home Front website received 3,782 unique visitors with 8,214 pageviews. In addition to Wells Fargo’s generous donation mentioned previously, the Project received continued financial assistance from the following ABA entities for FY 2019: ABA Business Law Section, Section of Public Contract Law, and Section of Antitrust Law.

The Standing Committee on Legal Aid and Indigent Defendants (SCLAID) recently worked with GAO to draft a letter from the ABA President to the legislature in Montana or very satisfied with Las Vegas and Caesars Palace as a meeting location. The new hotel reservation process was well received with over 70 percent of our attendees feeling the process was convenient and easy to manage.

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which was considering a bill to remove the suspension of driver's licenses as a punishment for nonpayment of fines and fees. The letter was submitted to Montana House Judiciary Committee, and the Montana Bar Association testified in support before the state’s Senate Judiciary Committee, in large part because of the initial ABA support. The bill passed both chambers of the Montana legislature and is now with the Governor.

SCLAID’s Assistant Counsel for Public Defense, along with the Chair of the ABA Working Group on Building Public Trust in the American Justice System, were invited to brief the National Governors Association Consortium of State Public Safety Executives on the impact of Timbs v. Indiana, the recent U.S. Supreme Court case holding that the Excessive Fines Clause of the 8th Amendment is incorporated through the 14th Amendment and therefore applicable to the states.

The Center for Innovation’s Miranda Project, an app intended to help police officers convey Miranda rights to those who speak Spanish, continues to advance in New Orleans. The IIT Design School has developed prototype car speakers that will allow the video version of the Miranda tool to be used by the New Orleans Police Department (NOPD). The speakers are being installed in all NOPD squad cars. Additionally, work has begun on initiating a second Miranda pilot project in Houston, Texas.

Late last year, the Division for Public Education held Civic Engagement Training Sessions at Harold Washington College. ABA staff worked with representatives from the Chicago office of Young Invincibles, an organization that aims to “amplify the voices of young adults in the political process and expand economic opportunity” for them. Throughout the semester, students attended several civic engagement sessions during their class time in which they learned how to develop a plan to advocate for change on an issue covered in their class. Students learned about identifying the appropriate stakeholders and allies for their issue and the importance of gathering credible data to support their position. Students then worked in groups to identify an issue within the juvenile justice system that they wanted to address, developed a plan to address the issue, and focused on developing an advocacy campaign with data to support both the need to address the issue as well as the solution or change that they proposed. Some of the issues that students focused on were raising the age for juveniles to be transferred out of the system and tried as adults, mental health treatment programs for youth experiencing trauma, community policing for improved relations between youth and law enforcement, and community-based early intervention programs. In early December, students enrolled in the course presented their issues-based advocacy campaign projects.

The Commission on Lawyer Assistance Programs has recorded and released a new episode in its Path to Law Student Well-Being podcast series on the topic of mindfulness. In this three-part episode, Scott Rogers, a nationally recognized leader in the area of mindfulness and the law, with host Stephen Sliwinski, a 3L at the University of Dayton, examines the benefits for law students of initiating a mindfulness practice, provides ways to get started, and offers advice on overcoming some of the roadblocks to

SCLAID’s Assistant Counsel for Public Defense, along with the Chair of the ABA Working Group on Building Public Trust in the American Justice System, were invited to brief the National Governors Association Consortium of State Public Safety Executives on the impact of Timbs v. Indiana, the recent U.S. Supreme Court case holding that the Excessive Fines Clause of the 8th Amendment is incorporated through the 14th Amendment and therefore applicable to the states.

The Center for Innovation’s Miranda Project, an app intended to help police officers convey Miranda rights to those who speak Spanish, continues to advance in New Orleans. The IIT Design School has developed prototype car speakers that will allow the video version of the Miranda tool to be used by the New Orleans Police Department (NOPD). The speakers are being installed in all NOPD squad cars. Additionally, work has begun on initiating a second Miranda pilot project in Houston, Texas.

Late last year, the Division for Public Education held Civic Engagement Training Sessions at Harold Washington College. ABA staff worked with representatives from the Chicago office of Young Invincibles, an organization that aims to “amplify the voices of young adults in the political process and expand economic opportunity” for them. Throughout the semester, students attended several civic engagement sessions during their class time in which they learned how to develop a plan to advocate for change on an issue covered in their class. Students learned about identifying the appropriate stakeholders and allies for their issue and the importance of gathering credible data to support their position. Students then worked in groups to identify an issue within the juvenile justice system that they wanted to address, developed a plan to address the issue, and focused on developing an advocacy campaign with data to support both the need to address the issue as well as the solution or change that they proposed. Some of the issues that students focused on were raising the age for juveniles to be transferred out of the system and tried as adults, mental health treatment programs for youth experiencing trauma, community policing for improved relations between youth and law enforcement, and community-based early intervention programs. In early December, students enrolled in the course presented their issues-based advocacy campaign projects.

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practicing mindfulness. In a fourth bonus episode, Scott leads a three-minute mindfulness exercise.

Center for Public Interest Law

In collaboration with the GAO and President Carlson, the ABA Center on Children and the Law sent a letter to Secretary Alex M. Azar II to commend the Department of Health and Human Services for its recent decision to update the Child Welfare Policy Manual, Section 8.1. This change marks the first time that the federal government has opened up funding for child and parent counsel in dependency cases.

On December 19, in a monumental win for child welfare attorneys and their clients, the U.S. Children’s Bureau modified the Child Welfare Policy Manual (Question 8.1b and 18) to allow states to use federal, IV-E dollars for parent and child legal representation for the first time in history. Previously, no federal funding could be used to support the parent or child attorney role in these cases. The federal money will be administered by state child welfare agencies across the country. This policy change underscores the federal government’s commitment to both advancing and investing in the importance of high-quality legal representation in the child welfare field to improve outcomes for children and families. ABA members and staff at the Center on Children and the Law were strong advocates of this policy change.

Following up on this victory, the Center on Children and the Law’s CLP Today published “Claiming IV-E Funds to Pay for Children’s and Parents Attorneys” on March 26. The article provides an overview of the IV-E federal policy change and is the first legal community article with guidance on how to help states draw down new IV-E funding for child and parent counsel in child welfare cases.

In December, Center on Children and the Law staff traveled to Carson City, Nevada to facilitate a day of meetings with Nevada stakeholders through a grant with the Walter S. Johnson Foundation. The three-year grant supports ABA staff to provide consulting expertise to the Washoe County Department of Human Services for a pilot program they created, Achievements Unlocked. This program provides targeted education case management and tutoring supports to high school students in foster care to support their high school graduation and postsecondary aspirations. The grant also supports the ABA to work with the Nevada Department of Children and Family Services, Nevada Department of Education, and the Supreme Court of Nevada to work collaboratively to create policies and programs that support students in foster care throughout the state.

In March, the Commission on Immigration launched the 2019 update of its seminal report from 2010, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases. The new report reviews and updates the 2010 recommendations and builds upon the Commission’s focus to ensure fair and unbiased treatment and full due process rights for immigrants, asylum seekers, and refugees within the United States. The report

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focuses on the issues relating to the four major government entities involved in immigration adjudication -- the Department of Homeland Security, immigration judges and the immigration courts; the Board of Immigration Appeals (“BIA”); and the federal circuit courts that review BIA decisions.

The Commission’s launch event took place at the National Press Club on March 20, with approximately 70 to 80 individuals and several media outlets in attendance. The program panel included a combination of Commission members and attorneys from the Arnold & Porter law firm, which assisted the Commission on a pro bono capacity to draft the original 2010 and the 2019 reports. The Commission’s report was covered through a range of media outlets, which included CNN, Washington Post, The Hill, Daily Beast, ABA Journal, Law 360, Telemundo, and Insider.

The Center for Public Interest Law hosted a free two-hour program at the 2019 Midyear Meeting showcasing the Association’s public interest law and pro bono initiatives. Nearly 100 people participated in the interactive program which included one hour of speed networking. Proactive outreach to local lawyers, including non-members, yielded robust participation. ABA membership materials were provided at the program and participants were encouraged to join in order to self-nominate for appointment. Nationally recognized experts on a variety of advocacy issues, including civil rights, human rights, immigration, poverty and more shared how lawyers can leverage their passion for making a difference to get connected with ABA efforts that inform the national discourse.

**Conclusion**

Thanks to the dedication of our staff, entities, and volunteer leaders, we have completed the initial steps towards a revitalized ABA. Our members will have exclusive access to benefits that support them as they grow their practices, enhance their professional development, and engage on issues affecting the profession.

2019 has been a year of tremendous and historic change at the ABA. Our new, personalized member benefits will help us reverse the slide in membership and revenues we’ve sustained in recent years. In the past, our efforts at recruiting and retaining members were too generic and uniform, relying on a “one size fits all” approach, rather than understanding their needs at each particular stage in their careers. Our new membership efforts will connect with lawyers throughout their professional journeys and will showcase how the ABA can be a strong asset and ally.

Instead of having merely impersonal and transactional relationships with our members, we seek meaningful relationships designed around their practices and interests. We want to empower our members and help them unleash their professional potential in the years and decades to come.

Please let me know of any concerns or questions. I look forward to meeting with you in San Francisco.

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Respectfully submitted,

Jack L. Rives
Executive Director
The following are the activities in which the Committee on Scope and Correlation of Work ("Scope") has engaged since its last report to the House of Delegates at the American Bar Association’s 2019 Midyear Meeting. Scope has continued to fulfill its constitutional mandate as a Committee of the House of Delegates, and the only one elected by it. It has carried forward its review of the structure, function and activities of Association committees and commissions to evaluate the effectiveness of their functioning and determine if overlapping functions exist.

Scope held its last meeting Saturday, April 27, 2019 in Chicago, Illinois. Scope will meet again in conjunction with the ABA’s Annual Meeting on Saturday, August 10, 2019, in San Francisco, California.

Scope reviewed the following entities during its Spring Meeting:

- Forum on Affordable Housing and Community Development
- Forum on Air and Space Law
- Forum on Construction Law
- Forum on Communications Law
- Forum on Entertainment & Sports Industries
- Cybersecurity Legal Task Force

Scope is continuing to review these entities and has not completed its evaluations. The completed evaluation and recommendations for these entities will be included in its report to the House of Delegates at the 2020 Midyear Meeting.

Center on Children and the Law

Scope concluded the Center for Children and the Law is active and not engaging in a function that unnecessarily overlaps or duplicated the activities of other ABA entities. Scope commends the Center for being a nationally recognized leader in providing support on a wide-ranging set of issues involving children in the legal system. Scope notes that there may be issues involving the integration of the Commission on Youth at Risk in the work of the Center on Children and asks that the Center and the Commission report back to Scope at its meeting in August on the extent of their collaboration. Additionally, Scope encourages the Commission and the Center to continue exploring how to involve
members in grant funded activities that traditionally have occurred at the staff level, in the hopes this may provide a paradigm for other similar partnerships within the Association.

**Center for Human Rights**

Scope concluded the Center for Human Rights is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Further, the Committee commends the entity for making a significant impact in the world in the area of human rights law and for doing so by leveraging a relatively modest investment by the Association in general revenue to attract significant outside grant and philanthropic funding.

**Commission on Domestic and Sexual Violence**

Scope concluded that the Commission on Domestic and Sexual Violence is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. We commend the Commission for its good works and excellent job; for its use of ABA resources as a platform to do good and in leveraging ABA human resources to obtain external funding; for exemplifying how the ABA can do well and do good, to make lasting change for people; and for educating/assisting lawyers in effecting that change.

**Commission on Homelessness & Poverty**

Scope concluded that the Commission on Homelessness & Poverty is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. We commend the Commission for being so active and diligent in working to fulfill its mission and assure that the ABA continues to support programs to address the legal needs of vulnerable people and communities.

**Commission on Law and Aging**

Scope concluded the Commission on Law and Aging is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. We commend the Commission for being so active and diligent in working to fulfill its mission and assure that the ABA continues to support programs to address the legal needs of the aged.

**Commission on Youth at Risk**

Scope concluded the Commission is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. The Committee commends the Commission for its good work and would encourage the Commission and Center to work more closely and integrate more efficiently to accomplish these goals.
Standing Committee on Disaster Response and Preparedness

Scope concluded that the Standing Committee appears to be active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. In light of the recent reorganization and movement of the Standing Committee into Scope, Scope asks that the Committee report back at the Scope meeting in August on the Standing Committee’s progress and operation in its new home and invites input on whether the current placement of the Standing Committee within LPM is the most logical fit.

Standing Committee on Gun Violence

Scope concluded that The Standing Committee on Gun Violence is active and not engaging in a function that unnecessarily overlaps or duplicates the activities of other ABA entities. Scope commends the Committee for its continuation of policy development in this area for the ABA and the expertise it provides ABA leadership when they are called upon to respond to gun violence generally and in the context of horrific events. Scope also commends the Committee for building important relationships such as with medical professionals to respond to this issue and its recognition that reform in this area is more likely on the state and local level. Scope commends the Committee for fund raising efforts with its new Program Support Fund and encourages the Committee to attempt to do more in this area including exploring grant opportunities if compatible with ABA policy. However, since various committees in the Center for Public Interest Law have similar fundraising challenges, Scope recommends a thoughtful approach be taken to the vehicles to be used for fundraising. For example, is the PSF vehicle a better approach than dedicated funds through FJE?

Scope recognizes the Committee has subject matter experts in its membership but encourages the Committee to obtain an upfront commitment to attendance and participation before recommending appointment.

Scope deferred its review of the following entities:

- Commission on IOLTA
- Commission on Lawyer Assistance Programs (COLAP)
- National Conference of Lawyers and CPA’s

Scope’s 2019 Annual Meeting agenda will include:

The following Governmental Affairs entities will be reviewed during the 2019 Annual Meeting:

- Standing Committee on Law Library of Congress

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- Standing Committee on Law Library of Congress
Standing Committee on Election Law
Standing Committee on Amicus Briefs
Standing Committee on Bar Services

Respectfully Submitted,

Amelia Helen Boss, Chair
W. Andrew Gowder, Jr.
José C. Feliciano, Sr.
Thomas M. Fitzpatrick
Linda Randell
Michael G. Bergmann, Chair, SOC
Kevin Shepherd, ex-officio
Darcee S. Siegel, ex-officio
The Committee on Scope and Correlation of Work ("Scope") consists of five members of the Association, one of whom is elected each year by the House of Delegates to serve a full (5 years) term beginning with the adjournment of the Annual Meeting during which he or she is elected.

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

The Nominating Committee was fortunate to have the difficult task of selecting from fifteen (15) exceptional applicants with impressive credentials. However, only one nominee could be selected. The Nominating Committee voted to nominate Harry S. Johnson of Baltimore, Maryland, to fill the vacancy that will occur at the conclusion of the 2019 Annual Meeting.

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

Respectfully Submitted,

William R. Bay, Chair
Amelia H. Boss
Michael G. Bergmann
W. Andrew Gowder, Jr.
Darcee S. Siegel

Dated: June 2019
RESOLVED, That the American Bar Association adopts the ABA Best Practice Guidelines for Online Legal Document Providers dated August 2019; and

FURTHER RESOLVED, That the American Bar Association urges online legal document providers to follow the ABA Best Practice Guidelines for Online Legal Document Providers.
ABA BEST PRACTICE GUIDELINES FOR ONLINE LEGAL DOCUMENT PROVIDERS

The Utility of Their Online Legal Documents and Forms

Online legal document providers ("Providers") should provide their customers ("Customers"), with clear, plain language instructions as to how to complete their forms, and the appropriate uses for each form.

Any notifications to be provided pursuant to these Best Practice Guidelines should be understandable to the average person. Such notifications should be prominent, written in plain language, and delivered by the Provider in ways customers are reasonably likely to see, hear or encounter. The term “notify,” as used in these Best Practice Guidelines, shall refer to notifications that conform to this Guideline.

The forms that Providers offer to their Customers should be valid in the intended jurisdiction (as represented by the Provider or requested by the Customer). If not, Providers should inform their customers, in plain language, that the form is not substantially valid, or of any possible limitations on enforceability, in the intended jurisdiction and what steps can be taken to make it valid, including if necessary the retention of a lawyer. Providers may limit their warranties to “as is” warranties, using notifications consistent with Best Practices Guideline 2.

Providers should keep their forms up-to-date and promptly account for material changes in the law. Providers should notify Customers or potential Customers as to when their forms were last updated.

If a Provider selects the service agent for a form, the Provider should not disclaim legal responsibility for the proper recording or filing of the document, and should disclose the fees charged by or for the use of such service agent.

Protection of their Customers

The term “online legal documents and forms” or “forms,” refers to documents and forms made available or prepared online, either for sale or free-of-charge from for-profit or not-for-profit enterprises, including lawyers or law firms (through ancillary businesses or otherwise), to members of the public who wish to engage in legal transactions (including, without limitation, real estate sales, purchase-and-sale transactions, corporate or partnership formation or structuring, wills, trusts, deeds, patent and trademark filings and the like) and/or to use or file in litigation (including, without limitation, form pleadings, releases, discovery requests, jury trial demands, and the like) without engaging a lawyer. This includes both static forms and forms created using an online document assembly process. This does not include: (a) forms prepared by lawyers, law firms, or legal services organizations for those with whom they have bona-fide client-lawyer relationships; (b) forms primarily prepared for or marketed to lawyers, either as part of legal treatises or otherwise; or (c) forms prepared by courts, court systems, court-related self-help centers, or government agencies. These Guidelines are not intended to address other online document marketplaces primarily addressed by other professionals, including without limitation tax filings and title searches.
Providers should notify Customers of the terms and conditions of their relationship to the Provider, and Customers should have to actively manifest their assent (such as clicking on an “accept” button) to those terms and conditions.

Providers should notify Customers of all of the ways (if any) they intend to use and share Customers’ information with third parties.

Providers should notify Customers that the information Customers provide is not covered by the attorney-client privilege or work product protection.

Providers should make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to Customer information. In the event of a significant data incident or breach the Provider should use reasonable remedial and notification efforts and otherwise comply with applicable data security statutes or other data security protections in a Customer’s jurisdiction.

Providers should notify Customers: (a) how long they intend to keep and maintain information provided to them; (b) how long the Provider will keep and maintain a completed form; and (c) how long the Provider will allow Customers access to their completed form without imposing a new or additional charge.

Providers should not charge their Customers an excessive fee for their services.

Recommendation of Attorneys to Assist

Providers should notify their Customers that their forms are not a substitute for the services of a lawyer, and that Customers may benefit from the services of a lawyer in any legal transaction.

Providers should not advertise or describe their services in a manner that suggests their forms are a substitute for the advice of a lawyer.

Dispute Resolution

Providers should notify their Customers of their legal name, address and email address to which Customers can direct any complaints or concerns about the Provider’s services.

Providers should provide a forum convenient to the Customer for resolution of any dispute. Providers should offer inexpensive, efficient and effective dispute resolution, either in court, arbitration, or mediation, including without limitation local ADR or court proceedings, online dispute resolution or similar means. Providers should not impose lawyer fee or cost shifting to the Customer in any such proceeding. Providers should not unreasonably delay the resolution of disputes with Customers.
I. Introduction

Online legal document providers ("OLPs")\(^1\) have helped millions of people gain access to the legal services they needed and could not otherwise afford. Despite these substantial benefits, there are no established guidelines for OLPs to follow when they deliver their services to the public. The proposed Best Practices Guidelines seek to fill this gap. They encourage OLPs to adopt appropriate consumer protections while recognizing the increasingly valuable role that OLPs play in meeting the public's legal needs and improving access to justice.

The Best Practices Guidelines are the product of careful study that began with a Task Force on Online Legal Providers established by the New York County Lawyers Association in 2016.\(^2\) The Task Force convened a public forum,\(^3\) which found that:

- OLPs are a worldwide multi-billion dollar industry that has created a new market for lower cost law-related services;
- By making accurate and modestly priced legal documents and forms available online, OLPs benefit many people, especially low- and moderate-income individuals, small businesses, and startups; and
- OLPs are a worldwide multi-billion dollar industry that has created a new market for lower cost law-related services;
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\(^1\)The term "online legal documents and forms" or "forms," refers to documents and forms made available or prepared online, either for sale or free-of-charge from for-profit or not-for-profit enterprises, including lawyers or law firms (through ancillary businesses or otherwise), to members of the public who wish to engage in legal transactions (including, without limitation, real estate sales, purchase-and-sale transactions, corporate or partnership formation or structuring, wills, trusts, deeds, patent and trademark filings and the like) and/or to use or file in litigation (including, without limitation, form pleadings, releases, discovery requests, jury trial demands, and the like) without engaging a lawyer. This includes both static forms and forms created using an online document assembly process. This does not include: (a) forms prepared by lawyers, law firms, or legal services organizations for those with whom they have bona-fide client-lawyer relationships; (b) forms primarily prepared for or marketed to lawyers, either as part of legal treatises or otherwise; or (c) forms prepared by courts, court systems, court-related self-help centers, or government agencies. These Guidelines are not intended to address other online document marketplaces primarily addressed by other professionals, including without limitation tax filings and title searches.

\(^2\) The members of the Task Force included NYCLA Past Presidents Arthur Norman Field, James B. Kobak, Jr., and Michael Miller; NYCLA Ethics Institute Director Sarah Jo Hamilton; NYCLA Committee on Professionalism and Professional Discipline Chair Ronald C. Minkoff; NYCLA Law and Technology Committee Co-Chair Joseph J. Bambara; and then-NYCLA Treasurer (now Vice President) Vincent T. Chang.

\(^3\) This forum followed a similar forum sponsored by the New York State Bar Association ("NYSBA") in Albany, New York earlier in 2016 that addressed the same topic and was, like the NYCLA forum, attended by industry representatives.
OLPs should provide consumers with basic and appropriate protections that reflect the importance of the documents and forms that OLPs deliver.

The forum led to a Task Force Report recommending, inter alia, a series of Best Practices Guidelines for OLPs. That Report was adopted by the New York State Bar Association (“NYSBA”) House of Delegates in November 2017 and was submitted as a proposed resolution in advance of the 2018 ABA Annual Meeting in Chicago. Though the proposed Resolution 10A and a subsequent resolution were eventually withdrawn, continued meetings and communications between NYSBA representatives and representatives of numerous constituent groups, both within and outside the ABA, ultimately led to the formation of a 30-member Working Group after the February 2019 ABA Midyear Meeting. That Working Group had representatives from fourteen separate ABA Sections, Committees and Centers, as well as several representatives from the NYSBA and other important constituencies, such as the OLP industry and the Legal Services Corporation.4

Over several months of work, the Working Group revised the Best Practices Guidelines in ways that more effectively advance the goals of consumer protection, improved access to justice, and support for innovative legal service delivery models. In short, these Best Practice Guidelines target specific issues and practices to protect the public while allowing responsible providers to meet a significant need.

II. A History of Legal Forms and Unauthorized Practice Concerns

The legal form industry did not start online. At least as far back as the 1700s, books described “do-it-yourself” law, and the concept of a scrivener service pre-dates the Internet.5 An 1859 book entitled “Everybody’s Lawyer and Counsellor in Business” contains 400 pages of legal forms and information.6 Many court systems and governmental agencies have long made legal forms available to the public.7

4 A complete roster of the Working Group is attached as Exhibit A.


6 FRANK CROSBY, EVERYBODY’S LAWYER AND COUNSELLOR IN BUSINESS (1859).

7 Such forms appear on, for example, the website of the New York Office of Court Administration (https://www.nycourts.gov/forms/) and the website of California’s court system (https://www.courts.ca.gov/forms.htm).

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Today, these services have moved online and help the public address a range of law-related issues, such as those related to trademarks, patents, copyrights, wills, living trusts, and LLC and corporate formation. For example, LegalZoom estimates that it has served four million customers, that its forms may have created one million corporations, and that someone uses its forms to write a will every three minutes in the United States. While Legal Zoom is the market leader, it has many competitors and emulators offering a variety of forms and related services, such as RocketLawyer, LawDepot, Legal Templates, FindLaw, FormSwift and Avvo. In all, it is estimated that OLPs currently generate approximately $4.1 billion in annual revenue.

Rather than recognizing the market need that OLPs fill, some bar associations have commenced litigation against OLPs, contending that they are engaged in the unauthorized practice of law (UPL). These efforts are almost always settled favorably to the OLPs or have resulted in court rulings in favor of OLPs. In those instances when


9 See Statement of Charles Rampenthal, supra note 5.


11 Moreover, at least one state legislature, Tennessee, is considering a statute that would restrict the ability of OLPs to operate. https://docs.wixalic.com/ugd/43d3ae_0f3b1e269c2148f58c98e1a10a8e5f4d.pdf?index=true.

12 As one commentator noted in 2015, “Eight state bar associations have filed actions against LegalZoom for the unauthorized practice of law. Of those, one has been sent to binding arbitration (Arkansas) and one, in North Carolina, is still pending [it has since been settled favorably to LegalZoom]. The other six lawsuits have either been settled or dismissed, and LegalZoom is still providing documents to every state.” https://www.lawtechnologytoday.org/2015/06/technology-and-the-unauthorized-practice-of-law/. This is still true – except LegalZoom now provides documents internationally as well. [Another] example is the Texas Supreme Court’s decision to promulgate online divorce forms despite the opposition of the Texas State Bar. See Anna Whitney, Some Family Lawyers Oppose Creating Divorce Forms, Texas Tribune, January 24, 2012, available at https://www.texastribune.org/2012/01/24/texas-state-bar-asks-supreme-court-stop-forms-task/. The Supreme Court of Texas’s Order approving the Divorce forms lays out some of the controversy on pp. 4-6; see Texas Supreme Court, Order Approving Uniform Forms – Divorce Set One, available at http://www.dallascounty.org/ocds/cert/media/SupOrder_PDF (last visited August 17, 2016).” As one commentator noted in 2015, “Eight state bar associations have filed actions against LegalZoom for the unauthorized practice of law. Of those, one has been sent to binding arbitration (Arkansas) and one, in North Carolina, is still pending [it has since been settled favorably to LegalZoom]. The other six lawsuits have either been settled or dismissed, and LegalZoom is still providing documents to every state.” https://www.lawtechnologytoday.org/2015/06/technology-and-the-unauthorized-practice-of-law/. This is still true – except LegalZoom now provides documents internationally as well. [Another] example is the Texas Supreme Court’s decision to promulgate online divorce forms despite the opposition of the Texas State Bar. See Anna Whitney, Some Family Lawyers Oppose Creating Divorce Forms, Texas Tribune, January 24, 2012, available at https://www.texastribune.org/2012/01/24/texas-state-bar-asks-supreme-court-stop-forms-task/. The Supreme Court of Texas’s Order approving the Divorce forms lays out some of the controversy on pp. 4-6; see Texas Supreme Court, Order Approving Uniform Forms – Divorce Set One, available at http://www.dallascounty.org/ocds/cert/media/SupOrder_PDF (last visited August 17, 2016).”

there have been rulings against OLPs, those rulings are sometimes overruled by legislatures.\textsuperscript{13}

The Federal Trade Commission (FTC) and Department of Justice (DOJ) also have been hostile to efforts to interpret UPL provisions broadly against OLPs. In a 2016 letter, they jointly recommended that the North Carolina General Assembly revise the definition of the practice of law to avoid undue burdens on “self-help products that may generate legal forms.”\textsuperscript{14} The FTC and DOJ stated that these self-help products and other interactive software programs for generating legal documents would promote competition by enabling OLPs “to provide many services that historically were provided exclusively by lawyers.”\textsuperscript{15} They also contended that:

Interactive websites that generate legal documents in response to consumer input may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services. Such products may also help increase access to legal services by providing consumers additional options for addressing their legal situations.\textsuperscript{16}

OLPs do, indeed, provide significant benefits to the public, and efforts to prevent OLPs from delivering their services are likely to continue to fail. This report argues for a different approach: the identification of voluntary best practices that would protect consumers without unduly burdening the OLP industry – all in recognition of the important role OLPs can play in promoting access to justice.\textsuperscript{17}

The ABA has adopted analogous resolutions in the past. In 2003, for example, the House of Delegates adopted a resolution entitled “Best Practice Guidelines for Legal


\textsuperscript{13} E.g., Texas Unauthorized Practice of Law Comm. v. Parsons Tech, Inc. 179 F.3d 956 (5th Cir. 1999) (ruling that providing Quicken Family Law forms online was UPL, but legislature subsequently excluded such products from the statutory definition of the “practice of law”).


\textsuperscript{15} See id.

\textsuperscript{16} See id.

\textsuperscript{17} For a similar approach, see Andrew M. Perlman, Towards the Law of Legal Services, 37 CARDOZO L. REV. 49, 88-90, 99-107 (2015).
III. OLPs’ Impact on Access to Legal Services

As noted above, online legal documents generate billions of dollars annually, and the OLP business is growing in size every year. Indeed, “as computers grow more powerful and ubiquitous, legal work will continue to drift online in different and evolving formats.” 18 Arthur Norman Field, past president of NYCLA, has noted, “the public has voted that it wants online legal providers and they are here to stay.” 19

18 Barton, Benjamin H., Some Early Thoughts on Liability Standards for Online Legal Providers of Legal Services, 44 Hofstra L. Rev. 541, 546 (2015).


III. OLPs’ Impact on Access to Legal Services

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Why have OLPs been this successful? The answer is that OLPs provide cost-
savings and convenience for individuals and small businesses of limited means. For
instance, people starting small businesses – particularly start-ups and other businesses
that require their intellectual property to be protected – cannot afford the hourly rates that
many lawyers charge. Though some lawyers provide substantial rate reductions and
other favorable financial arrangements for start-ups, those arrangements (such as
deferring costs) still create financial pressure on start-up companies. These
businesspeople view the economic equation as simple: they would rather rely on an
inexpensive legal form (in order to obtain some degree of protection) than pay money
(and risk financial stability) to hire a lawyer. For this reason, even some lawyers use OLPs
to service clients, often at a far lower cost than if the lawyers drafted the documents from
scratch.

Perhaps more importantly, the overwhelming majority of low-income individuals
and families, and roughly half of those of moderate income, face their legal problems
without a lawyer.20 This “justice gap” is huge and widening.21 According to some
estimates, “about four-fifths of the civil legal needs of the poor and two to three-fifths of
middle income individuals remain unmet.”22 Low cost internet legal providers, including
but not limited to OLPs, can help to provide more affordable legal services to underserved
individuals and families, and thereby help to bridge the justice gap.

20 Raymond H. Brescia, What We Know and Need to Know about Disruptive Innovation, 67 S.C.L. REV. 203, 206 (2016),
http://www.americanbar.org/content/dam/aba/images/office_president/brescia_whitepaper.pdf. See also

21 Discussion of the “justice gap” is not new. See e.g. Houseman, Alan, The Justice Gap: Civil Legal
Assistance Today and Tomorrow, CENTER FOR AMERICAN PROGRESS (June 2011),
https://www.americanprogress.org/wpcontent/uploads/issues/2011/06/pdf/justice.pdf; see also
Documenting the Justice Gap In America The Current Unmet Civil Legal Needs of Low-Income American,
LEGAL SERVICES CORPORATION (Sept. 2009),
https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGapA
merica2009.authcheckdam.pdf.

22 ABA COMM., supra note 10, at 3 (citing Deborah Rhode, Access to Justice 3 (2004)).
populations who cannot afford lawyers. The ABA and other bar associations must recognize this reality and work collaboratively with OLPs to serve the public effectively.

The establishment of Best Practices will not only provide a model for OLPs within the U.S., but in other countries as well. Internationally, various national bar associations have identified the appearance of OLPs in their jurisdictions as well as the need to close their own justice gaps, and the Best Practices Guidelines may prove to be useful abroad as OLPs become more common.

IV. Why We Chose the Best Practices Approach

In both written comments and oral discussions, NYSBA and the Working Group encountered two competing objections to the proposed Best Practices Guidelines.

First, there were those who expressed concern that OLPs hurt the legal profession, both by discouraging members of the public from using lawyers, as well as by reducing the prices that lawyers can charge for their services. These commenters felt that it was the ABA’s job to protect lawyers against competition from OLPs. We believe these concerns are misplaced for at least two reasons. First, the ABA is not just a trade association created to protect its members. It is a professional association that must focus on the needs of the public. Indeed, the ABA recently adopted Model Regulatory Objectives for the Provision of Legal Services that make clear that the ABA’s focus on issues such as those presented here should be on protecting the public, not the profession.23 OLPs are developing delivery models that are driving down the cost of legal services and helping to improve access to justice. We believe strongly that the legal profession must turn toward OLPs and work with them and the technology they create to better serve the public at large, rather than take the reactionist approach that OLPs are criminals violating unauthorized practice statutes. Second, as noted earlier, attacking OLPs has repeatedly failed; in case after case, OLPs have settled favorably or won outright, and have even garnered support from the Justice Department and Federal Trade Commission. To continue these ineffectual attacks benefits no one: not the legal profession, not the OLPs, and certainly not the public we claim to serve.

A second and opposing concern with the proposed Best Practice Guidelines is that lawyers have no place regulating their competitors and that the Best Practices Guidelines are simply a stalking horse for future regulation. Indeed, these commentators point out

that the original NYCLA/NYSBA proposal presented primarily a regulatory model. After listening to those who have expressed these concerns – some of whom are on the Working Group – we have eschewed the regulatory approach in favor of the Best Practices Guidelines, and for good reason. Any regulatory approach will inevitably lag behind changes in technology, rendering any regulation outdated almost as soon as it is adopted. Moreover, we want to encourage innovation in the OLP industry in order to improve access to justice, and at this point, regulation seems as likely to stifle innovation as promote it. In addition, regulation, particularly in Unified Bar states, could raise serious antitrust concerns. Even where the antitrust laws do not apply, a regulatory model conveys to the public that the bar is looking to protect its own interests, not those of the millions of people using OLPs each year.

The ABA has an important role to play in this area for several reasons. First, lawyers have substantial and longstanding experience with ensuring that legal and law-related services are delivered in ways that protect the public. Second, lawyers are the ones who have to solve, or at least address, any problems that result when OLPs create faulty documents or provide for inadequate dispute resolution mechanisms. Finally, and perhaps most obviously, the ABA and state and local bars, like NYSBA and NYCLA, have considerable knowledge and expertise related to the impact that legal documents and forms have on the public and the legal system. For these reasons, the ABA and other bar associations are well-positioned to offer voluntary guidance to the OLP industry about how it can best serve the public.

The Best Practices Guidelines approach offers the most appropriate middle ground between too much involvement of the bar in the OLP industry and no involvement at all. It is, in fact, a “win-win-win.” The legal profession wins because it engages with OLPs and begins to work with them, bringing to bear new technologies to serve the public and close the justice gap. The OLPs win because they are embraced rather than attacked, while getting the benefit of the profession’s experience with effectively providing legal services to the public while protecting the public’s interests. And, perhaps most importantly, consumers win because these Guidelines, if adopted, protect them while expanding their ability to obtain legal services. To put it simply: the public gains when all those providing legal services to the public – lawyers, OLPs and other legal services providers – work cooperatively rather than antagonistically.

24 See, e.g., North Carolina Board of Dental Examiners v. FTC, 135 S.Ct. 1101 (2015) (antitrust laws apply to rules as to non-dentists offering teeth whitening services made by state Dental Board, composed primarily of dentists, “particularly in light of the risks licensing boards dominated by market participants may pose to the free market”).

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V. Best Practices and Proposed General Provisions Regarding Online Providers of Legal Documents

The proposed Best Practice Guidelines protect the public without stifling the development of new technologies that benefit both the public and the profession.25 Broadly speaking, the Best Practice Guidelines cover three general topics:

- Guidelines for disclosure, transparency and enforceability of forms;
- Guidelines for the protection of personal information provided by the consumer; and
- Guidelines relating to arbitration and dispute resolution.

It is important to emphasize that the Guidelines advance the ABA Model Regulatory Objectives for the Delivery of Legal Services.26 Although framed as “regulatory” objectives, the clear intent behind their adoption was to offer objectives for the creation of regulatory and other forms of guidance for legal services delivery, including best practices. The Objectives include:

A. Protection of the public
B. Advancement of the administration of justice and the rule of law
C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
E. Delivery of affordable and accessible legal services
F. Efficient, competent, and ethical delivery of legal services
G. Protection of privileged and confidential information
H. Independence of professional judgment
I. Accessible civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct
J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system

25 LegalZoom’s General Counsel stated that LegalZoom already adheres to the great majority of these provisions. Rampenthal described many of these provisions as “best practices.” See Statement of Charles Rampenthal, supra note 4.

26 See supra note 23.
By recognizing the importance of OLPs in the delivery of legal services, the Guidelines taken as a whole advance at least Objectives A, B and C, and for the reasons explained below, specific Guidelines advance one or more Objectives in important respects.


Many of the proposed guidelines track the recommendations of the FTC and DOJ in their letter to the North Carolina legislature and advance Objective D.27 In particular, the Best Practices Guidelines take a disclosure-oriented approach to many issues by encouraging OLPs to provide clear, conspicuous and comprehensible disclosures regarding key aspects of the relationship between OLPs and their customers. As an example, the proposal adopts, with somewhat different wording, the essential concept contained in the Joint Letter, “that advertisers should ensure that disclosures are clear and conspicuous on all devices and platforms consumers may use.”28

b. Provisions Regarding Quality and Enforceability

Consumer protection is particularly important in this area because flaws in many legal forms cannot easily be discerned by most lay customers.29 For this reason, a fundamental aspect of Guideline 3 of the Best Practice Guidelines is that online forms should be valid in the intended jurisdiction (as represented by the Provider or requested by the Customer). If not, Providers should inform their customers, in plain language, that the form is not substantially valid, or of any possible limitations on validity, in the intended jurisdiction and what steps can be taken to make it valid, including if necessary the retention of a lawyer. At the same time, the Best Practice Guidelines allow OLPs to provide “as is” warranties, which is the standard in the software business. In these ways, the Guidelines advance Objectives A, B, D, and F.

c. Disclosure of and Customer Agreement to Contract Terms

The Best Practice Guidelines also suggest at Guideline 2 that all notifications to customers under the Guidelines “should be prominent, written in plain language, and delivered by the Provider in ways customers are reasonably likely to see, hear or read.”

27 See Letter from Marina Lao and Robert Potter to Bill Cook, supra note 14 at 10 (“a commercial software product for generating legal forms should not falsely represent, either expressly or impliedly, that it is a substitute for the specialized legal skills of a licensed attorney,...”). This tracks proposed Best Practices Guidelines 12 and 13.

28 See id.

29 Perlman, supra note 14, at 94 (noting that legal services are “credence goods” – “services whose quality is difficult to measure or assess”).
encounter.” Contractual terms also should be provided in this manner, and Customers should be able to actively manifest their assent to those terms. See id., Guideline 6. So-called “clickwrap” agreements in which website users are required to click on an “I agree” box after being presented with a list of terms and conditions of use, are one method of actively manifesting assent, but the Best Practice Guidelines are broad enough to encompass other methods of active assent, whether existing or to be developed.30 These provisions advance Objectives A and D.

d. Provisions Regarding Sharing and Protecting Customer Information.

The Best Practices Guidelines reflect a concern that Customer information be protected in various ways that advance Objective G. For example, Providers are advised to notify Customers of whether and to what extent they intend to use Customer information, of how long they intend to keep that information, and of the fact that the information they receive is not covered by the attorney-client privilege or work product protection. See Guidelines 7, 8 and 10. In addition, in the event of a significant data breach or incident, Providers should use reasonable remedial and notification efforts and otherwise comply with data security statutes and other data security protections applicable in a Customer’s jurisdiction. See Guideline 9.

e. Provisions Regarding Arbitration

The proposals contain several provisions related to arbitration and dispute resolution and thus advance Objective I. Many OLPs require the resolution of disputes in arbitration under standard commercial Rules (with their attendant costs) rather than in court and also require that arbitration take place in distant locations inconvenient to the customer.31 All of these restrictions reduce the likelihood that aggrieved customers would pursue their legal remedies. Restrictions on litigation are not uncommon in other form contracts; however, given what is at stake for users of OLP services, it is appropriate to provide dispute resolution mechanisms that are convenient, inexpensive and efficient, whether in court or via online arbitration. See Guideline 15.

30 “Clickwrap” agreements are distinguished from ‘browsewrap’ agreements, where a website’s terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen.” Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014). “The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists.” Be In, Inc. v. Google Inc., No. 12-cv-03373, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013).

31 The arbitration provision in LawDepot’s Terms of Use, for example, require arbitration in Edmonton, Alberta.
Conclusion

The OLP industry touches the lives of millions of consumers, drives down the cost of some legal services, and helps to address the public's unmet legal needs. At the same time, appropriate guidelines can help to protect consumers when they use OLPs to access important legal documents and forms.

Respectfully Submitted,

Michael Miller
President, New York State Bar Association

Michael J. McNamara
President, New York County Lawyers' Association

August 2019
1. **Summary of Resolution.**

The resolution adopts best practices and encourages online legal document providers to follow the ABA Best Practice Guidelines for Online Legal Document Providers.

2. **Approval by Submitting Entity.**

This report was based upon a similar report initially approved by the New York County Lawyers Association on June 13, 2017 and subsequently approved by the New York State Bar Association House of Delegates on November 4, 2017.

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

A similar Resolution was submitted in connection with the August 2018 and January 2019 meetings but each was withdrawn in order for a working group consisting of representatives from various ABA entities and stakeholders to consult and collaborate.

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

Resolution 103, adopted February 10, 2013 (03M110); Resolution 114, adopted August 8, 2016 (16A114).

Neither policy would be affected by adoption of this proposal.
5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation. (If applicable.)

N/A

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

It is anticipated that the report would be disseminated widely and promoted to states and online legal documents providers.

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

None.


N/A

10. Referrals.

Since the January 2019 meeting of the ABA House of Delegates, there has been a working group which met via conference call on a weekly basis to address relevant issues. The resolution and report is the product of this collaborative effort. The working group consisted of various ABA entities, bar groups, industry representatives and other stakeholders, including:

ABA ENTITIES:
ABA (Staff Liaison)
ABA Business Law Section
ABA Center for Innovation
ABA Center for Professional Responsibility
ABA Judicial Division
ABA Section of Administrative Law and Regulatory Practice
ABA Section of Dispute Resolution
ABA Section of Intellectual Property Law
ABA Section of International Law
ABA Section of Litigation
ABA Solo, Small Firm and General Practice Division
ABA Standing Committee on the Delivery of Legal Services
American Bar Foundation

OUTSIDE ENTITIES:
Legal Services Corporation
Legal Zoom (industry)
Lexis-Nexis (industry)
National Center for State Courts
New York County Lawyers’ Association
New York State Bar Association
Priori Legal (industry)
Responsive Law (Consumer Group)

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

Michael Miller, President
New York State Bar Association
666 Fifth Avenue, Suite 1717
New York, NY 10103
T - (212) 545-7000
M - (917) 375-2111
mm@michaelmilleresq.com
12. Contact Name and Address Information. (Who will present the report to the House.)

Henry M. Greenberg, President (as of 6/1/19)
New York State Bar Association
1 Elk Street
Albany, NY
greenbergh@gtlaw.com
(518) 689-1492
1. **Summary of the Resolution.**

The resolution adopts best practices and urges online legal forms providers to follow the ABA Best Practices Guidelines for Online Providers to protect consumers and provide a common-sense approach to self-regulation of online legal form providers.

2. **Summary of the issue which the Resolution addresses.**

Best practices are needed to allow online legal forms providers to meet a significant need and access to justice while protecting consumer privacy and protection of customer data.

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

The report proposes a set of best practices to enable self-regulation of online legal forms providers.

4. **Summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

There was a previous report and resolution 10-A which was withdrawn from consideration at the August 2018 meeting of the ABA House of Delegates in order to give ABA entities greater time for consideration. The August 2018 resolution called for both regulation of online legal document providers and the adoption of best practices. That resolution was withdrawn for further consideration.

A subsequent resolution 10-A was submitted at the January 2019 meeting of the ABA House of Delegates after consultation with various ABA entities, which had been revised to include only an effort for the adoption of best practices, based upon the foundation of Resolution 103 - “Best Practices for Legal Information Web Site Providers,” adopted by the ABA House of Delegates on February 10, 2003 and Resolution 114 – “Links to Lawyers,” adopted by the ABA House of Delegates on August 8, 2016.

The January 2019 resolution was withdrawn for further consultation and collaboration with a working group which included various ABA entities, bar groups and stakeholders, including:

ABA Business Law Section
ABA Center for Innovation
ABA Center for Professional Responsibility
ABA Judicial Division

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ABA Business Law Section
ABA Center for Innovation
ABA Center for Professional Responsibility
ABA Judicial Division
The present resolution is a product of those consultations and extensive collaboration. We know of no minority views of the resolution in its current form.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure equal access to justice for Americans living in rural communities by deploying, to at least 98% of the population, broadband infrastructure with a download speed of at least 100 megabits per second, and an upload speed of at least 30 megabits per second.
I. Introduction

Rural America is at risk of being left behind in an increasingly digital age. While reports of broadband and high-speed Internet coverage in rural areas vary, the overarching message is clear: Americans in rural areas have far less consistent access to high-speed Internet. In addition, the main street attorney in rural America is continuously becoming a thing of the past. This landscape creates two main problems for ensuring equal access to justice for those living in these areas: (1) rural communities are struggling to attract new attorneys partially based on difficulties to practice law, and (2) self-represented litigants have a heightened barrier to accessing court resources and non-profit organizations and being able to prosecute or defend their cases.

Approximately 24 million Americans lack broadband (high-speed Internet) access, 96% of whom live in rural areas.\(^1\) Broadband has been called the great infrastructure challenge of our time, and it is increasingly being referred to as the fourth utility.\(^2\) Even more striking, is less than half of households living on under $20,000 are connected.\(^3\) “The collective deficit in opportunity, education and prospects—everything implied in ‘being connected’—further separates [Americans] into haves and have-nots.”\(^4\)

In rural Caledonia, Missouri, for example, Jeanne Johnson raises sheep and goats, but has to drive four miles to a local gas station for internet access.\(^5\) At her 420-acre farm, Ms. Johnson pays $170 a month for satellite internet service, but it is too slow to even send emails, much less browse the Internet. In rural Caledonia, Missouri, for example, Jeanne Johnson raises sheep and goats, but has to drive four miles to a local gas station for internet access.\(^5\) At her 420-acre farm, Ms. Johnson pays $170 a month for satellite internet service, but it is too slow to even send emails, much less browse the Internet.


4 Id.

upload photos, let alone conduct business. Ms. Johnson is 60-years-old and describes the feeling of not having access to proper high-speed internet. “We don’t feel like we’re worth it.” Even the county’s 911 dispatch center sometimes loses its connection to the state emergency system. The ability to successfully operate a law practice under such conditions is nearly impossible.

The ABA has a long history of striving to ensure equal access to justice by supporting resolutions and dedicating resources to its access to justice committee and legal aid. The Resolution urges Congress, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure equal access to justice for Americans living in rural communities by deploying broadband infrastructure throughout the United States. This Report explains why ABA policy is necessary—not only for the legal profession, but across all professions. It also explains how broadband is defined, the history of the government’s role in the deployment of utilities, as well as government funding and existing legislation.

Rural Americans face plenty of uphill battles without adding unnecessary hurdles. Action must be taken to deploy broadband infrastructure to ensure these rural communities do not remain on the other side of the digital divide.

II. Access to Justice in Rural America

Access to justice is a problem throughout the United States. In rural America, however, the problem is worse. Geographic distance, declining and aging populations, problems attracting and retaining lawyers, outdated technology, and slow or nonexistent Internet connectivity contribute to the problem. Removing the internet connectivity barrier is an important place to start to help remedy the problem. Electricity was harnessed to turn the lights on, but ended up completely transforming society. Eliminating this digital divide and providing broadband access in rural communities across the country could have a similar impact.

E.g., 12A10B, when the ABA approved the State Bar of South Dakota’s 2012 proposed Resolution urging federal, state, territorial, tribal, and local governments to support efforts to address the decline in the number of lawyers practicing in rural areas and to address access to justice issues for residents in rural America. Report on the ABA Annual Meeting, Am. Bar Ass’n, 9 (Aug. 29, 2012), https://cdn.ymaws.com/www.nabenet.org/resource/resmgr/imported/Report%20on%20ABA%20Annual%20Meeting.pdf; Impact of Resolutions: Access to Rural Justice, Am. Bar Ass’n (Nov. 19, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2016/06/impact_of_resolution. See also 06A112B, where the ABA adopted the principles of a state system for the delivery of civil legal aid. and 06A112A, advocating for the right to counsel to low income persons where basic human rights are at stake.

Counts Need to Enhance Access to Justice in Rural America, supra note 1, at 1.

The Internet experience for millions of Americans in rural areas is appalling. Librarians in rural areas are observing students sitting in library parking lots after hours in order to use the free Wi-Fi to finish their homework. People are required to leave their homes to find fast enough Internet to upload or download files for work. An online college teacher in Weston, West Virginia has to regularly drive a half an hour to her brother’s house just to be able to enter grades in a database. Even using a cell phone in rural areas to access the Internet is not guaranteed, as Verizon has been known to terminate coverage to rural residents due to excessive roaming charges. Although some rural areas may be lucky enough to have high-speed Internet and cell phone service, the costs may be prohibitively expensive.

A. Attorneys in Rural America

A shortage of professionals exists in rural communities across our country. Attorneys, physicians, nurses, mental health counselors, and translators increasingly do not want to live in these rural areas. Many professionals who left their rural hometown for educational opportunities in urban centers stay because of the perceived potential of high-income and necessity to pay off high-debt. The fear of unemployment back home is not enticing. Nor is the potential of being digitally disconnected.

Regarding access to justice, there is an increasing shortage of attorneys, judges, and court staff in rural communities. The inability for a small town to attract these 12 professionals means that too few people are available to serve as judges, prosecutors, and court staff in rural communities. The inability for a small town to attract these professionals exists in rural communities across our country.

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13 id.
14 Izaguirre, supra note 1 (“There is a way around the notoriously sluggish Internet in West Virginia. You just need a car and some time. . . . I just kept wanting to beat my head into a wall. . . . It added so much additional work for me, and I just don’t have the time.”).
16 Jennifer Levitz & Valerie Bauerlein, Rural America Is Stranded in the Dial-Up Age, WALL ST. J (June 16, 2017), https://www.wsj.com/articles/rural-america-is-stranded-in-the-dial-up-age-1497535641 (“Rural America isn’t the proverbial broadband. Too few customers are spread over too great a distance. The gold standard is fiber-optic service, but rural internet providers say they can’t invest in door-to-door connections with such a limited number of subscribers.”).
18 Lisa R. Pruitt, et al., Legal Deserts: A Multi-State Perspective on Rural Access to Justice, 13 HARV. L. & POL’y REV. 15, 122 (2019). See also Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 2 (“Automated corporate farming, the depletion of natural resources, a desire for greater education and employment opportunities, and the lure of urban life have drawn the population away from rural areas to ever-expanding urban centers.”).
20 The Internet experience for millions of Americans in rural areas is appalling. Librarians in rural areas are observing students sitting in library parking lots after hours in order to use the free Wi-Fi to finish their homework. People are required to leave their homes to find fast enough Internet to upload or download files for work. An online college teacher in Weston, West Virginia has to regularly drive a half an hour to her brother’s house just to be able to enter grades in a database. Even using a cell phone in rural areas to access the Internet is not guaranteed, as Verizon has been known to terminate coverage to rural residents due to excessive roaming charges. Although some rural areas may be lucky enough to have high-speed Internet and cell phone service, the costs may be prohibitively expensive.

A. Attorneys in Rural America

A shortage of professionals exists in rural communities across our country. Attorneys, physicians, nurses, mental health counselors, and translators increasingly do not want to live in these rural areas. Many professionals who left their rural hometown for educational opportunities in urban centers stay because of the perceived potential of high-income and necessity to pay off high-debt. The fear of unemployment back home is not enticing. Nor is the potential of being digitally disconnected.

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professionals threatens the residents’ ability to access the justice system. Rural communities are struggling to attract new attorneys while the older attorneys are retiring.\textsuperscript{20} Even though 20\% of people in the United States live in rural America, only 2\% of small law practices are located in rural America.\textsuperscript{21} In South Dakota, “the strain on local budgets as a result of not having local lawyers is astronomical.”\textsuperscript{22} Rural governments sometimes need to pay judges, prosecutors, and private defense attorneys to handle local cases. In order to find legal help, a rural resident has to overcome vast distances, insufficient public transit, and a lack of Internet service.\textsuperscript{23}

Many states offer additional examples of the same problem. For example, Colorado’s Delta County is approximately 1,150 square miles with a population of over 31,000 people—comparable, for example, to Rhode Island, which is approximately 1,200 square miles. Only 22 practicing attorneys remain in Delta County, the youngest of whom is 55. In rural Inyo and Mono counties in California, there are approximately 22 attorneys in private practice—only a handful who are under 62.\textsuperscript{24} In Wishek, North Dakota, the situation became even more dire when Wishkek’s only lawyer retired.\textsuperscript{25} Residents were left without anyone nearby to handle their basic legal needs.\textsuperscript{26} Likewise, in Bennett County, South Dakota, after the only attorney retired, the closest lawyer is now 120 miles away.\textsuperscript{27}

Practically every state has a Delta County—a county or municipality in a similar situation. The average age of lawyers across the nation is reaching 49-years-old.\textsuperscript{28} As attorneys in rural communities begin retiring without anyone to replace them, many more counties like the ones above will begin appearing. Rural America constitutes approximately 97\% of the land area of the United States and every state has a county or municipality with a population of less than 2,500.\textsuperscript{29} Providing equal access to justice in rural communities should therefore be a priority for every state in the country.

\textsuperscript{22} Lorelei Laird, In Rural America, There are Job Opportunities and a Need for Lawyers, ABA J. (Oct. 2014), http://www.abajournal.com/magazine/article/too_many_lawyers_not_here.In_rural_america.lawyers_are_few_and_far_between. The problem includes criminal defense attorneys. See Jacob Kang-Brown & Ram Subramanian, Out of Sight: The Growth of Jails in Rural America, VERA INST. OF JUST., 18-19 (June 2017) (“Many rural counties lack skilled practitioners—judges, prosecutors, investigators, public defenders, and court administrators—to run or oversee the basic functions of a local criminal justice system, posing serious operational challenges.”).
\textsuperscript{23} Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 3.
\textsuperscript{24} Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 3.
\textsuperscript{25} Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 3.
\textsuperscript{26} Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 3.
\textsuperscript{27} Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 3.
Part of the access to justice problem in rural America is clearly due to attorney shortages. Without proper high-speed Internet, however, these communities have little chance of attracting new lawyers. High-speed Internet has great potential to attract attorneys to work in these places, as well as providing the ability to work remotely. Legal research, communication, and filings are all done primarily over the Internet today. Sufficient download and upload speeds are required. Non-metro-area attorneys cannot thrive without the ability to communicate and file documents electronically in their practices.

Most new lawyers will not accept inadequate Internet service in their practices. Young lawyers consider it a basic utility, as important as ensuring that the lights are on and the phones are working. The practice of law is no longer pursued with manila folders and 17-inch pleadings. In law school and in urban areas, practically everything is done over the Internet. In rural areas, however, stories about lawyers needing to drive over an hour to upload a pleading or motion are all too common. This type of antiquated practice is so outside the norm within law schools, newly graduated lawyers are simply not prepared or willing to make it the focus of their practice.

Some law schools and states are now putting forth efforts to attract law students to rural areas. For example, the State Bar of Wisconsin has organized an annual tour, taking law students and recent law grads to rural areas to familiarize them with practice opportunities.31 Similarly, the Maine Law Rural Lawyer Project pairs law students with lawyers in underserved rural communities with hopes they may practice there after graduation.32 On the national level, LSC and Equal Justice Works offer Rural Summer Legal Corps, which places students with civil legal aid organizations across the country.33 South Dakota has taken the most comprehensive approach through its Rural Attorney Recruitment Program, where attorneys receive a significant financial incentive to practice in a rural area for five continuous years. These efforts, coupled with the rising costs of living in many large cities, demonstrate some potential for attracting attorneys to rural areas. Without broadband access throughout the United States, however, these efforts will fail short.

Assuring these rural attorneys have proper broadband access can help them and their clients immensely. In addition to the basic legal practice needs of communication, research, and filings, technology allows lawyers to increase their client pool by drawing

from a larger area while reducing potential conflicts of interest. With adequate broadband access, modern lawyers can run virtual offices, permitting longer-distance client relationships allowing lawyers and clients to participate in video conferences and share documents which can be accessed remotely through client portals.

Indeed, Nebraska has demonstrated the potential of extending broadband to rural areas. As a result of improving broadband in Cherry and Cheyenne, Internet speeds increased 60%, which allowed the use of video interpreters in courts and participation by incarcerated individuals in court by video from correctional facilities. This not only increased access to justice and saved money, but also lowered the inherent risk in transporting inmates. The time has come to assure the practice of law in rural areas is not impractical and undesirable due to poor Internet connection.

B. Self-Represented Litigants in Rural America

Similarly affected are self-represented litigants in rural America. Not having a basic utility like broadband access creates an unnecessary burden on people who are already less likely to receive justice. One of the most pressing issues affecting access to justice is the staggering amount of people foregoing an attorney, primarily due to the rising costs of legal services. Approximately 86% of low-income Americans with a civil legal problem receive either inadequate or no help. This is not a small amount of people, as approximately ten million rural Americans have incomes below 125% of the federal poverty line. This demand far surpasses the supply of help, as only one legal aid attorney is available for every 6,415 eligible people. In Colorado, for example, it is estimated that more than 60% of all litigants arrive at the courthouse without a lawyer.

Real life does not mean a simple life without the need for legal help. Three-quarters of America’s low-income rural residents face at least one civil legal problem a year, while a quarter face six or more. The primary legal issues involve health, consumer and finance, and employment. Even more concerning is that elderly, disabled, and veterans are affected the worst in rural areas.

6 Courts Need to Enhance Access to Justice in Rural America, supra note 1, at 7.
39 Laird, supra note 20.
40 Erika Holmes, Modern Representation: A Win-Win for Clients and Lawyers, 46 COLOR. LAW., 77, (March 2017) (“Statistics from the State Court Administrator’s Office show that for fiscal year 2015, 75% of the parties in domestic relations cases, 37% of parties in district civil cases, and 60% of parties in county court civil cases proceeded pro se.”).
41 The Justice Gap, supra note 58, at 21.
42 Id. at 48.
Even if a person can afford an attorney, there may be none around, as discussed above. Rural residents may have to drive 100 miles or more to take care of routine matters like estate planning, taxes, and child custody.\(^\text{45}\) In North Dakota, for example, only 85 out of 357 towns have an attorney, while six rural counties in South Dakota and 12 in Nebraska have no attorneys at all.\(^\text{45}\)

For some, travelling to obtain legal help is not an option. Many people living in rural areas—particularly low-income rural residents—may not have the means to travel considerable distances to meet with a lawyer or go to court.\(^\text{46}\) Travel is even more difficult in locations like Colorado and California due to landscape and weather. Census information shows that rural communities are disproportionately poor, and with a day away from work, the gas required, and possibility of an overnight stay, travel becomes a logistical hardship widening the justice gap.\(^\text{47}\)

Due to the cost and/or the shortage of rural attorneys, rural residents may be left to represent themselves. This difficult task now becomes even worse without broadband access. Similar to the demands of attorneys, these individuals need the ability to download forms from courts’ websites and need to be able to communicate with organizations that provide assistance to self-represented litigants. Access to justice in the United States should not be made daunting or dangerous because a person lives in a rural area.\(^\text{48}\)

Technology, particularly broadband access, has already demonstrated its ability to help with access to justice for self-represented litigants. For example, Online Dispute Resolution provides opportunities to help with legal disputes outside of the courtroom.\(^\text{49}\) This umbrella term includes a range of services, which can be as simple as email or as complex as conducting an entire mediation session online.\(^\text{50}\) Across the country, states are utilizing broadband to create self-help programs. In Georgia, a law library provides Internet and computer access for legal research. In Wisconsin, a legal aid provider started an online legal advice program. In Montana, courts use video conferencing to better serve rural populations. In South Dakota, people can call “Ask a Lawyer” toll-free and ask for free advice on family issues contracts, wills, and real estate.\(^\text{51}\) Such efforts are of little use, however, in areas where Internet access is slow or non-existent. “Technology may be able to help with access to justice for self-represented litigants. For example, Online Dispute Resolution provides opportunities to help with legal disputes outside of the courtroom.\(^\text{49}\) This umbrella term includes a range of services, which can be as simple as email or as complex as conducting an entire mediation session online.\(^\text{50}\) Across the country, states are utilizing broadband to create self-help programs. In Georgia, a law library provides Internet and computer access for legal research. In Wisconsin, a legal aid provider started an online legal advice program. In Montana, courts use video conferencing to better serve rural populations. In South Dakota, people can call “Ask a Lawyer” toll-free and ask for free advice on family issues contracts, wills, and real estate.\(^\text{51}\) Such efforts are of little use, however, in areas where Internet access is slow or non-existent. “Technology may
offer several opportunities to connect rural residents with urban legal services, but its effectiveness depends on the existence of technology infrastructure, like high-speed Internet and cell reception, in the rural communities to be served.52

Many self-represented litigants find themselves on the wrong side of this digital divide. A lack of broadband access affects attorneys in rural areas as well as those who represent themselves. Without universal broadband access in our country, these rural self-represented litigants may lose the opportunity to meaningfully defend or prosecute their cases. With such a high barrier, “rural residents may cease to recognize their legal rights.”53 They may begin to see the legal system as irrelevant to them, and these vulnerable populations will become even more disconnected from the rest of the country.54

III. National Importance Beyond the Legal Profession

Deploying broadband access throughout the United States will not only benefit access to justice, but also will provide countless opportunities for rural communities to participate in national and global economies on a broader scale. A brief discussion of the scope of the issue is important to mention. When you start to look closely, it becomes apparent that practically every field requires high-speed Internet in today’s digital age.55

Traditionally, when people used the Internet only for email and simple websites, speeds of 1-2 Mbps would suffice.56 Today, however, with video conferencing, modern websites, the ability to work remotely, streaming video, and high volume file transfers, broadband speeds are essential. Without such access, rural communities are being left behind.

Extending broadband to rural America is not just about faster Internet. Rather, it is about connecting these communities to the rest of the country in the digital age. “Broadband is a platform to create today’s high-performance America—an America of universal opportunity and unceasing innovation, an America that can continue to lead the global economy.”57 Here are some additional reasons why broadband access is essential:

A. Public Safety. Broadband can assure everyone has proper access to emergency services, as well as improve how Americans are notified about emergencies. Providing broadband access to emergency personnel

52 Hillary A. Wandler, Spreading Justice to Rural Montana: Expanding Local Legal Services in Underserved Rural Communities, 77 MONT. L. REV. 235, 261 (2016).
53 Pruitt, supra note 18, at 127.
54 Id.
57 Connecting America: The National Broadband Plan, supra note 2, at 3.
provides these professionals with the resources they need to serve and better protect citizens.\textsuperscript{58}

B. Health Care. Broadband can improve access to health records, doctors, and prescriptions. Such access is also necessary for many medical devices today. Medical professionals can communicate in real time with global specialists around the world, as well as quickly send large files and images for review.\textsuperscript{59}

C. Education. Broadband provides students with the technology they need in the 21st century. For example, approximately 12 million school-aged children do not have the broadband at home that they need for nightly schoolwork.\textsuperscript{60} Broadband allows students to engage in proper research, as well as earn degrees remotely and connect with teachers in different countries.

D. Agriculture. Broadband can help farmers take advantage of precision agriculture technology and increase their efficiency by upward of 10%.\textsuperscript{61} Rural farmers could also sell their products all over the world. "Using GPS, the harvester could, in real time, map, monitor, and record massive amounts of data—such as crop yield and soil moisture levels—which would let a farmer know exactly which rows required attention."\textsuperscript{62}

E. Environment. An increase in the ability to work remotely can help decrease carbon emissions from excess commuting. Broadband can play a major role in the transition to a clean energy economy, as well as modernize the electrical grid by making it more reliable and efficient.\textsuperscript{63}

F. Civic Engagement. Broadband can improve the quality and quantity of engagement with representatives and agencies. With proper broadband access, government can become more open and transparent, and allow those in rural areas to participate in the democratic process easily and efficiently.\textsuperscript{64}

G. Technology. Impending technological advancements such as driverless cars will require a high-speed connection. As homes and appliances become "smart," for example, with smoke alarms and thermostats

\textsuperscript{58} Id. at XIV.
\textsuperscript{59} Kruse, supra note 11, at 3.
\textsuperscript{61} Whitelaw Reid, Stuck In Mud: Broadband ‘Disconnect’ has Big Consequences for Midwest Farmers, UVA TODAY (Oct. 8, 2016), https://news.virginia.edu/content/stuck-mud-broadband-disconnect-has-big-consequences-midwest-farmers.
\textsuperscript{62} Id.
\textsuperscript{63} Connecting America: The National Broadband Plan, supra note 2, at XIV.
\textsuperscript{64} Id.
connected to the Internet, a reliable and fast broadband connection is essential. With the rise of smart phones, tablets, streaming video, etc., the demand for high-speed, reliable Internet is widespread.65

H. Business. For business, broadband access is a key infrastructure to capitalize on the benefits of the Internet.66 Research demonstrates a direct correlation between businesses’ use of Internet applications and revenue growth and productivity.67 Businesses can store their data offsite, reducing the risk of loss, and can now sell their goods anywhere in the world over the Internet.

IV. Broadband Internet Service

The term broadband originally described a type of data transmission where a single wire could carry multiple signals at once.68 In contrast, baseband transmission could carry only one signal at a time.69 Practically, however, the term broadband has become synonymous with high-speed Internet, which is faster than outdated dial-up access. It implies a certain threshold speed for an Internet connection.70

Internet speed is measured by how many bits of data can be received and sent to and from your Internet connection. This speed is measured in “bits per second” (bps) units, and contains a downstream figure (the download speed) and an upstream figure (the upload speed).71 The two speeds are not always equal. The FCC is the primary authority on providing the minimum speed to be considered broadband. The current FCC minimum speed is 25 megabits (1,000,000 bps) per second (Mbps) download and 3 Mbps upload.72 As indicated above, approximately 24 million Americans and 30% of rural Americans do not have access to these speeds.

Broadband can be provided through various delivery technologies, including wireless connections. Unlike dial-up Internet, broadband ensures a continuous connection to the Internet. All of the following may be considered broadband:73

A. Fiber. Considered the gold standard of broadband. Fiber optic cables convert electrical signals to light and send the light through glass fibers about the size of a human hair. Speeds up to 1000 Mbps (“Gigabit Internet”) are possible. Fiber is often the most expensive to build.

65 Kruse, supra note 11, at 6.
66 Id. at 2.
67 Id.
69 Id.
71 What Every County Commissioner Needs to Know About Broadband, supra note 2, at 3.
72 2018 Broadband Deployment Report, supra note 1.
73 Kruse, supra note 11, at 3-4.

connected to the Internet, a reliable and fast broadband connection is essential. With the rise of smart phones, tablets, streaming video, etc., the demand for high-speed, reliable Internet is widespread.65

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71 What Every County Commissioner Needs to Know About Broadband, supra note 2, at 3.
72 2018 Broadband Deployment Report, supra note 1.
73 Kruse, supra note 11, at 3-4.
B. **Cable.** Delivers an Internet connection through the coaxial cables already installed for cable TV. Speeds typically range from 30-150 Mbps. Cable is a shared service where speed can decrease with many people using it in the area.

C. **DSL (Digital Subscriber Line).** Delivers an Internet connection through the existing copper telephone lines. Speeds typically range from 1.5-30 Mbps. Speed diminishes with distance from telephone company's central office.

D. **Wireless Broadband.** Wireless Internet is a way of using radio waves to send and receive data. Often used to provide service to rural areas where the above varieties are not available. The Wi-Fi used in homes and businesses converts a physical connection into short-range radio waves. The term encompasses mobile, fixed wireless, and satellite.

1. **Mobile Broadband.** Mobile phone carriers began using the term “mobile broadband” as a synonym for Internet access to a portable device. Wireless Internet access is delivered through cellular towers to smartphones and other digital devices. A mobile service must have a base station that is connected to a landline.

2. **Fixed Wireless.** A type of wireless Internet access different than mobile broadband where the connection to service providers again use radio signals rather than cables. Small stations transfer data at high speeds to each other similar to satellites. Unlike satellites, however, the speed is not affected by bad weather. These dedicated wireless connections are usually faster than cellular networks.

3. **Satellite Broadband.** Satellites orbiting the Earth provide necessary links for broadband. Service can be disrupted in extreme weather conditions and are typically oversubscribed. Due to the large distance from satellites, there can be latency issues (high lag time between sending and receiving data). A home satellite dish is required.

The range of speeds can vary dramatically between the various technologies listed above. Many rural locations simply do not have any broadband options, or may have to pay high costs for very slow technology, typically in the range of 1.5-3 Mbps.\(^\text{11}\) Sometimes only dial-up Internet may be available, which is slower than broadband by a huge magnitude, typically averaging only 0.05 Mbps. With bandwidth consumption by homes and businesses doubling every year, rural communities will not be able to keep up.

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Fiber-optic cables have frequently been laid along highways and railroad lines. This infrastructure is referred to as the “middle mile.” Many rural areas require connection from this middle mile backbone to individual residences and businesses. The end-user connection (via copper, satellite, microwave, broadband, etc.) is known as the “last mile.” The last mile must yield enough subscriber dollars to entice private enterprise to invest in that infrastructure. The last mile is frequently missing because it is not economical based purely on private investment. The last mile, however, is necessary to make high-speed service possible.

The cost to deploy FCC minimum broadband infrastructure and connect this last mile using fiber cables is estimated to be $40 billion—less than 1 percent of the federal government’s 2019 budget as currently proposed. The proposed Resolution recommends deploying broadband infrastructure with a download speed of at least 100 megabits per second and an upload speed of at least 30 megabits per second to at least 98% of the United States population. These speeds were chosen to assure rural residents have proper high-speed Internet for the foreseeable future. Achieving minimum broadband deployment to the remaining 2% of the population is estimated to cost another $40 billion based on the challenges associated with the extreme remoteness and/or topography of these areas.

V. History of Government Involvement in Utilities and Current Governmental Funding and Legislation

In the 1930s, many parts of rural America were left in the dark without electricity or telephone lines. An electrical divide existed between rural and urban America. Due to a lack of return on investment, electrical and telephone companies were unwilling to lay the infrastructure necessary to connect these areas to the rest of the country. Similar to the creation of the transcontinental railroad of the prior century, the federal government eventually intervened in 1936 by creating and funding the Rural Electrification Administration. Along with help from private utilities and cooperatives, rural electrification was finished in a remarkably short time. In nine years, more than nine thousand miles of line was laid, connecting 1.6 million new consumers. From 1945 to 1950, a thousand miles of line was laid, connecting 1.6 million new consumers. From 1945 to 1950, $40 billion was spent on rural electrification.

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Kline, supra note 77, at 141; Rural Electrification Act of 1936, 7 U.S.C. § 901 et seq. (effective May 20, 1936).

Kline, supra note 77, at 220.

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Kline, supra note 77, at 220.
1954, the percentage of electrified farms grew from 48 to 93 percent, and the postwar years have been called "the climax of the great transformation of rural America."80 It is now time for the government to focus on the "fourth utility" and create and fund a program to deploy broadband infrastructure. The proposed Resolution from the Colorado Bar Association requests the ABA to urge Congress, state, local, territorial, and tribal legislatures to enact legislation and provide adequate funding for broadband expansion into rural America. Broadband should be a top priority for any future infrastructure legislation. Past efforts thus far from the government and private entities have not been particularly successful on a broad scale across the country. New legislation and funding will be necessary to complete the last mile and bridge the divide.

Following a 2008 release of broadband statistics, which suggested that the U.S. may be lagging in broadband, Congress passed the American Recovery and Reinvestment Act of 2009, requiring the FCC to draft a National Broadband Plan.81 In March 2010, the FCC released its 360-page plan, which set out a roadmap for extending broadband and maximizing its benefits.82 The Obama administration stated that universal broadband access was a top priority and such access was critical to America's future. A federal grant program to expand wireless Internet in rural areas looked helpful but is on hold while the FCC investigates whether carriers submitted incorrect data for the maps used to allocate funds.83 More coordination, funding, and legislation need to be implemented.84

More recently, on April 12, 2019, the White House and the FCC announced a $20.4 billion "Rural Divide Opportunity Fund" to help connect up to four million rural homes and small businesses over the next decade. The program would be part of a Universal Service Fund, an existing program from the prior administration. Although lacking details, the FCC intends to utilize a physical broadband base along with upcoming 5G technology to deliver high-speed Internet to rural communities.

New 5G technology stands for the 5th Generation of digital cellular networks. The speed of 5G could be in the range of 200-634 Mbps, which would be significantly faster than current speeds.85 New legislation should be enacted to manage infrastructure investment, encourage competition, and promote innovation to allow 5G development. If the FCC was to implement a program to deliver high-speed Internet to rural communities, it would need to establish a legal framework to ensure the efficient use of the spectrum and the sustainable development of the 5G ecosystem.86

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than the current 4G and could be widespread by 2020. A broadband base, however, is still required as 5G mobile networks need fiber lines to cell sites, and will likely not be a solution for rural communities. The nature of 5G infrastructure does not make sense in rural America, and will likely only be available in larger cities for the foreseeable future.

The Rural Divide Opportunity Fund is still in its infancy and proper oversight and adequate funding will be required. The inclusion of state and local governments and cooperatives, research on the safety of future technology, the creation of accurate and up-to-date broadband maps, along with the accountability of participating private carriers will all be necessary in order to properly deliver high-speed Internet at a fair price to rural America.

A recent bill in Congress, House Bill 1328, called the Access Broadband Act, is relevant to this Resolution. This bill was first introduced last year (H.R. 3994), where it passed the House but failed to move forward in the Senate. The bill was re-introduced this year with a companion bill in the Senate (S. 1046).

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89 Kendra Chamberlain, Municipal Broadband is Roadblocked or Outlawed in 26 States, BROADBANDNOW (Apr. 17, 2019), https://broadbandnow.com/report/municipal-broadband-roadblocks/ (“There are now 26 states with laws on the books that either roadblock or ban outright municipally-owned broadband networks.”).

90 Access Broadband Act, H.R. 1328, 116th Cong. (2019). (The Access Broadband Act was first introduced in 2017 and failed to pass the House. This bill is significantly different than the “Leading Infrastructure for Tomorrow’s America Act.”)

91 Municipal Broadband is Roadblocked or Outlawed in 26 States, BROADBANDNOW (Apr. 17, 2019), https://broadbandnow.com/report/municipal-broadband-roadblocks/ (“There are now 26 states with laws on the books that either roadblock or ban outright municipally-owned broadband networks.”).

92 A recent bill in Congress, House Bill 1328, called the Access Broadband Act, is relevant to this Resolution. This bill was first introduced last year (H.R. 3994), where it passed the House but failed to move forward in the Senate. The bill was re-introduced this year with a companion bill in the Senate (S. 1046).
The Access Broadband Act is a bipartisan act that would establish the Office of Internet Connectivity and Growth within the National Telecommunications and Information Administration. The act is primarily administrative in nature and calls for no additional funding. One of the current problems regarding federal broadband funding is the patchwork of agencies and applications handling the limited funds. The Office of Internet Connectivity and Growth would streamline the management of federal broadband resources and simplify the process for small businesses and local developers.

The act would also establish a single point of contact to tap into existing federal broadband resources, and only one application would need to be submitted to apply for all federal broadband support programs. The new office would conduct outreach, including holding workshops to help rural communities develop the best plan for their specific needs. Additional funding and the establishment of minimum broadband speeds in rural areas, however, will still need to be addressed.

VI. Conclusion

This resolution will allow ABA staff and members to educate Congress, state, local, territorial, and tribal legislators about ensuring rural communities are not left behind in the digital age. Providing access to the fourth utility of high-speed Internet to rural communities is a nationwide issue that touches practically every sector of our economy from the legal profession, to healthcare, to the education of our children. The United Kingdom, Spain, Switzerland, and Finland all consider broadband service a "universal service obligation," and ensure all their citizens have proper Internet access. The United States should too. The digital divide needs to be bridged before Americans living in rural communities are left behind.

Respectfully Submitted,

John M. Vaught, President
Colorado Bar Association
August 2019


1. Summary of Resolution

The Resolution calls for the American Bar Association to adopt policy urging federal, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure at least 98% of the United States population has proper broadband access (high-speed internet). The policy would call for a download speed of at least 100 megabits per second and an upload speed of at least 30 megabits per second across the country. Slow or non-existent broadband access is a major issue in many rural communities throughout the United States, affecting practically every field including the legal profession. Without proper high-speed internet, attorneys and self-represented litigants in rural areas face extremely high barriers, and these communities cannot attract new lawyers. The result is a pressing access to justice issue. Federal, state, and local funding, legislation, and oversight is necessary to successfully bridge this digital divide.

2. Approval by Submitting Entity

The Colorado Bar Association Board of Governors approved this Resolution on May 7, 2019. The following organizations have also approved co-sponsorship of this Resolution: the State Bar of Montana on May 3, 2019; the ABA Tort Trial & Insurance Practice Section on May 4, 2019; the ABA Standing Committee on the Delivery of Legal Services on May 24, 2019; and the ABA Solo, Small Firm, and General Practice Division on May 4, 2019.

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 compliments Resolution 12A10B by helping address access to justice in rural communities through improvements in broadband access. Resolution 01AM105A addresses the need for access to technology in underserved communities. This Resolution relates to 01AM105A but provides a more modern and specific solution. This Resolution also supports ABA policy favoring access to justice, such as 08A112A and 08A112B, which support civil legal aid and the right to counsel.
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)

House Bill 1328, called the Access Broadband Act, was first introduced last year, where it passed the House but failed to move forward in the Senate. The bill was re-introduced this year with a companion bill in the Senate, S. 1046. The Access Broadband Act is a bipartisan act that would establish the Office of Internet Connectivity and Growth within the National Telecommunications and Information Administration. This new office would streamline the management of federal broadband resources and simplify the process for small businesses and local developers to apply for government grants.

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

The policy would allow ABA staff and members to educate federal, state, local, territorial, and tribal legislatures to appropriate adequate funding to ensure that the future of our American rural communities includes access to justice for each of its citizens. Additionally, adopting this policy would permit the ABA president to speak on behalf of this cause, as well as provide ABA support for legislation.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

This Resolution is in the process of being referred to the bar associations for all 50 states as well as the following ABA entities that may have an interest in the subject matter:

- Center for Professional Responsibility
- Coalition on Racial and Ethnic Justice
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Immigration
- Commission on Racial and Ethnic Diversity in the Profession
- Commission on Sexual Orientation and Gender Identity
- Commission on Women
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

John M. Vaught
President, Colorado Bar Association
1290 Broadway, 17th Fl.
Denver, Colorado 80203
Tel: 303-244-1876
vaught@wtotrial.com

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

John M. Vaught
President, Colorado Bar Association
1290 Broadway, 17th Fl.
Denver, Colorado 80203
Tel: 303-244-1876
vaught@wtotrial.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the American Bar Association to adopt policy urging federal, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure equal access to justice for Americans living in rural communities by assuring proper broadband access is provided throughout the United States.

2. Summary of the Issue that the Resolution Addresses

Approximately 24 million Americans lack the bare minimum broadband speeds according to the Federal Communications Commission, 96% of whom live in rural areas. These individuals lack access to high-speed broadband at a rate four times higher than the national average. Non-metro-area attorneys cannot thrive without the ability to communicate and file documents electronically in their practices. Rural communities are struggling to attract new attorneys and the attorneys practicing in many of those areas are aging out. Self-represented litigants also need to be able to prosecute and defend their cases in rural communities. The ABA consistently hears concerns regarding the rising costs of legal services and the availability of lawyers in certain areas is limited. As a result, more and more people are forced to appear pro se. These individuals need the ability to download forms from courts’ websites and communicate with organizations that provide assistance. Not having the ability to do so creates an unnecessary burden on people who are already less likely to receive justice.

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

Deploying broadband infrastructure promotes access to justice by removing the electronic barrier of inadequate internet service affecting attorneys and self-represented litigants in rural areas. Reliable high-speed internet in rural communities will help bridge the divide between rural and urban areas, giving lawyers and self-represented litigants the tools they need in today’s digital world. Solving the digital divide will also have tremendous consequences outside the legal profession, including public safety, health care, education, and agriculture.

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

None identified.

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

None identified.
RESOLVED, That the American Bar Association urges all private and public universities and colleges to adopt the following principles in furtherance of free expression on university and college campuses:

1. Universities and colleges have a responsibility to promote freedom of debate and thought, and to protect that freedom when others attempt to restrict it;
2. Except as necessary to comply with reasonable administrative rules applied on a content-neutral basis, universities and colleges should not restrict freedom of speech and debate; and
3. Universities and colleges should protect all members of their communities and all speakers on their campuses and other locations from censorship, intimidation or retaliation on the basis of their opinions or beliefs.
Introduction

Free expression is indispensable to free thought, and therefore to achieving justice and the rule of law. From protecting minority interests to facilitating intellectual exchange, societies open to free expression foster safety, stability, and progress. Distrust and decay typically define regimes resigned to unitary ideological discourse. In England, successive monarchs spent centuries persecuting dissenting viewpoints to perpetuate their power. This generated unprecedented support in early America for intellectual inclusion, culminating in the adoption of the First Amendment. While various tyrannical regimes of the 20th century revived speech restrictions to suppress political opponents, the United States Supreme Court spent the latter part of the 20th century crafting First Amendment principles into cohesive doctrine. However, free expression is threatened, particularly on college and university campuses. From exerting pressure to disinvite an LGBT speaker at Madonna University, to preventing anti-Trump student columns at Liberty University, students and administrators alike often sacrifice First Amendment principles to advance their own policy agendas. The American Bar Association has a long history of upholding open dialogue as a core constitutional right and preferred mechanism for dispute resolution.

Section I: Expression on Campus Today

A. General

As Erwin Chemerinsky and Howard Gillman have argued, “free speech and freedom of thought are essential components of any truly diverse society. Without them, the pressure for conformity will overwhelm potential iconoclasts and outcasts, and there will be no true diversity of experiences, perspectives, or identities within the community.”1 Today, some consider free expression a settled right and dismiss calls to protect it as alarmist remedies lacking a concrete cause. In truth, college campuses routinely limit free expression based on ideological and esteem-based concerns. These burdens on free expression originate from both student groups and administrators.

Many universities face significant backlash for permitting speech some deem offensive. At Evergreen State College, Professor Bret Weinstein suffered ostracism and widespread calls to resign when he publicly opposed calls for a “Day of Absence” in which all white people would stay away from school for a day.2 Individuals close to Mr. Weinstein described him as “one of racism’s most powerful foes.”3 Yet, challenging the “Day of Absence” resulted in harassment.4 Protestors at the College of William & Mary shut down a First Amendment talk by ACLU director Claire Guthrie Gastanaga when they physically

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1 ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 24 (2017).
3 Id.
4 Bari Weiss, When the Left Turns on Its Own, N.Y. TIMES (June 1, 2017).
10C

The stage was blocked and the Chancellor, "ACLU, you protect Hitler, too." Xavier Becerra, the Democratic Attorney General of California, suffered similar treatment at Witter College, where Trump supporters wearing "Make America Great Again" hats interfered with Becerra’s presentation by screaming insults at both Becerra and audience members. Charles Murray, a Harvard-educated sociologist, ignited violent efforts to suppress his presentation at Middlebury College due to alleged bias when protestors blocked the auditorium doorway and launched a physical assault that left Murray’s co-panelist injured. Likewise, when Heather MacDonald attempted to deliver a speech critical of the "Black Lives Matter" movement at Claremont McKenna College, student protestors "photo-shopped devil horns onto her picture," committed to "shutting [the event] down," and ultimately forced her to speak in an empty room. These attempts by students to silence disfavored viewpoints pose a continuing threat to free speech on college campuses.

School administrators also sacrifice free speech principles to shield their own interests. Liberty University selected Donald Trump as its 2017 commencement speaker. Therefore, university administrators allegedly censored a student column highlighting the fact that some university students opposed Trump. While university officials claimed the article was canceled for being "redundant," the very piece removed from publication had previously been guaranteed editorial space as a recurring column. Administrators at Madonna University ceded to similar pressures when a religious group successfully lodged them to disinvite a "pro-LGBT speaker." The group wanted the speaker silenced "so that young, impressionable Catholics are not led into sin by anti-Catholic discourse." Princeton University canceled a speech by the Israeli Deputy Foreign Minister, Tzipi Hotovely, because a progressive group accused Hotovely of racism. While Princeton’s 10C
decision to disinvite Hotovely apparently aimed to appease activist students, rather than to suppress Hotovely, it effectively stifled one viewpoint in favor of another. And as recently as November 2016, officials at the University of Wisconsin – La Crosse reprimanded Chancellor Joe Gow for inviting an adult actress to lead "discussions about consent and safe sex practices." 15

These incidents are not anomalous. The Foundation for Individual Rights in Education discovered:

192 incidents in which students or faculty have pushed for speakers invited to campus (both for commencement and other speaking engagements) to be disinvited since 2000. Eighty-two of those incidents were ‘successful’ in that ultimately the speaker did not speak. Of those 82 successful disinvitations, 53 occurred via the revocation of the speaker’s invitation to campus . . . and 12 were ‘heckler’s vetoes’ in which speakers were shouted down, chased off stage, or otherwise prevented from speaking. 16

Moreover, reports of such incidents have risen at an alarming rate. “Of those 192 disinvitation efforts since 2000, 114 have happened since 2009, when FIRE first noticed an uptick in the frequency of disinvitation incidents. Of the 82 ‘successful’ disinvitation attempts, 50 occurred during or after 2009.” 17

B. The University of Chicago’s Free Speech Policy

The University of Chicago addressed this troubling trend in 2014 by appointing a Committee on Freedom of Expression charged with creating a statement "articulating the University's overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University’s community." 18 The Committee—chaired by Geoffrey R. Stone and composed of a diverse array of professors19—recalled an historic incident in which students invited the Communist Party’s presidential candidate to lecture on campus at the height of American anti-communist sentiment. Despite significant public criticism, then President Robert M. Hutchins affirmed the importance of significant public criticism, then President Robert M. Hutchins affirmed the importance of

17 Id.
19 Initial signers included: Geoffrey R. Stone (Edward H. Levi Distinguished Service Professor of Law, Chair), Marianne Bertrand (Chris P. Dialynas Distinguished Service Professor of Economics, Booth School of Business), Angela Olszto (Homer J. Livingston Professor, Department of Astronomy and Astrophysics, Enrico Fermi Institute, and the College), Mark Siegler (Lindy Bergman Distinguished Service Professor of Medicine and Surgery), David A. Strauss (Gerald Ratner Distinguished Service Professor of Law), Kenneth W. Warren (Fairfax M. Cone Distinguished Service Professor, Department of English and the College), and Amanda Woodward (William S. Gray Professor, Department of Psychology and the College). See id.
Section II: Free Speech and the Supreme Court

Though free expression on campus has value independent of constitutional protections, it nevertheless is true that the most prominent manifestation of this country’s commitment to free expression lies in the First Amendment. In the latter part of the 20th century, the Supreme Court expounded upon the First Amendment through a number of important decisions.

**Edwards v. South Carolina** involved a group of African-American students who marched to the South Carolina State House to “protest . . . discriminatory actions against [African Americans].” Authorities arrested members after they ignored orders to disperse and, instead, sang “The Star Spangled Banner.” In ruling that the arrests violated the First Amendment, the Court reasoned that fear of public agitation could not justify infringing free speech, which “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”

Five years later, in **Keyishian v. Board of Regents of University of State of NY**, a public university implemented a policy conditioning teachers’ continued employment on a pledge that they had never exercised membership in the Communist Party. In ruling that this violated the First Amendment, the Court called “academic freedom…a special concern of the First Amendment.” It premised this elevated protection on America’s need for “leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.”

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Cohen v. California was tried at the height of the Vietnam War, when authorities arrested Paul Robert Cohen for wearing a jacket bearing the words “Fuck the Draft” in a courthouse where women and children were present. In overturning Cohen’s conviction, the Court rejected restrictions on discourse intended “solely to protect others from hearing [it].” The government could not censor profane speech merely because it offended observers. Such authority, the Court noted, “would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”

Tinker v. Des Moines Independent Community School District further amplified Supreme Court support for free expression in academic environments. In Tinker, school administrators sent students home for wearing black armbands supporting a truce in Vietnam. The Court observed that students did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” To the administration’s defense that it acted to prevent “fear” and “apprehension” among students, the Court responded: “Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.”

In Rosenberger v. Rector and Visitors of University of Virginia, a public university refused to pay for the printing costs of a religious student newspaper because it promoted “a particular belief in or about a deity.” The Court held that this violated the First Amendment because the “ideology . . . of the speaker [was] the rationale for the restriction.” Moreover, it reasoned that casting “disapproval on particular viewpoints” posed exceptional dangers on “its college and university campuses.”

Protecting free expression sometimes permits offensive expression. Snyder v. Phelps dealt with the Westboro Baptist Church’s infamous picketing of public events (including military funerals) proclaiming “God Hates Fags.” Yet protecting offensive expression is often necessary to preserving socially desirable speech. As decided in the recent Blackhorse and Tam litigations, the same First Amendment invalidation of the Lanham Act’s bar on registering “offensive” marks that facilitated the ability of Pro Football, Inc. to continue calling Washington, D.C.’s NFL team the “Redskins” also facilitated Simon Blackhorse’s “God Hates Fags” picketing.

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also critical sites for the transmission of beliefs and values from one generation to the next. Curriculum disputes in the culture wars idiom are not going away anytime soon.”.)
Tam’s ability to fight race bias by referring to his Asian-American rock band as “The Slants.”43

Section III: The ABA’s Historical Role as Free Speech Advocate

The ABA’s stated mission is to “defend liberty and deliver justice as the national representative of the legal profession.”44 The ABA Constitution says it exists to “uphold and defend the Constitution of the United States,” which obviously includes the First Amendment.45 As early as 1939, the ABA filed an amicus brief with the Supreme Court condemning a municipal ordinance allowing officials to deny city leases to groups advocating government obstruction; the ABA argued that such discretion constituted “a manifest manifestation of intolerance” and cautioned that “the American way of life…cannot survive only if we support tolerance and free discussion within wide limits.”46 In 1943, the ABA filed another amicus brief arguing that a compulsory flag salute violated the due process rights of children with sincere religious scruples against such acts.47 It has since opposed considerations of “content, the subject matter, message or idea” in government decisions regarding funding for the arts48 and, separately, “the use of government funding programs as a vehicle to suppress or discourage speech activities by government grantees based on the government’s disapproval of a particular content of the speech.”49 Recognizing the unique importance of protecting free speech in academia, in 2017, the ABA passed a resolution urging state, local, and tribal legislative bodies to “rigorously protect the ability of student journalists…to make the independent editorial judgments necessary to meaningfully cover issues of social and political importance without fear of retaliation or reprisal.”50

Section IV: Why the ABA Should Endorse Campus Free Speech

Free expression promotes peace and constitutes an essential element of a free and just society. Ideological oppression in Tudor England ultimately injured every major religious and political group as monarchs with competing creeds traded places atop the throne.51

The ABA Mission and Goals: American Bar Association

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King Henry VIII killed insubordinate subjects (most famously, Thomas More) for refusing to ratify the king’s religious supremacy;51 Queen Mary I persecuted “heretics” unwilling to embrace her Catholic ideology;52 and Elizabeth I turned the same laws against Catholicism into a tool for eliminating opposition.53 Thus, the suppression of anti-government viewpoints.54 While speech suppression typically produces violence, free speech is no recipe for tranquility. The Supreme Court recognizes its tendency to “[stir] people to anger.”55 Nonetheless, it celebrates such commotion as the sign of a healthy democracy56 and reminds us that using “speech [to] rebut speech” outweighs using force to punish taboos.57 As early as 1939, the ABA premised the very survival of the American way of life depended on ideological tolerance.58

Free speech often bruises public sensibilities, but it avoids the violence, imprisonment, and extermination otherwise necessary to perpetuate a unitary political ideology.59 Diminished free expression is unlikely to spark genocide on college campuses any time soon. However, efforts at eradicating alternative viewpoints have caused violence already. Free expression encourages the use of words, not violence, to settle disputes. Furthermore, free expression uniquely benefits minority interests. In Nazi Germany, the eradication of competing viewpoints created a vacuum through which the state normalized racist propaganda, leading to the marginalization and subsequent genocide of minority groups, especially Jews.60 David Cole, the National ACLU Legal Director, has observed that “in a democracy, the state acts in the name of the majority, not the minority. Why would disadvantaged minorities trust representatives of the majority to decide whose speech should be censored?”61 As noted, the Supreme Court has repeatedly commented that restrictions on discourse tend to permit majoritarian groups to impose their personal viewpoint on others.53

Furthermore, free expression uniquely benefits minority interests. In Nazi Germany, the eradication of competing viewpoints created a vacuum through which the state normalized racist propaganda, leading to the marginalization and subsequent genocide of minority groups, especially Jews.60 David Cole, the National ACLU Legal Director, has observed that “in a democracy, the state acts in the name of the majority, not the minority. Why would disadvantaged minorities trust representatives of the majority to decide whose speech should be censored?”61 As noted, the Supreme Court has repeatedly commented that restrictions on discourse tend to permit majoritarian groups to impose their personal viewpoint on others.53

56 See generally id.
57 Dennis, 341 U.S. at 503.
58 See Brief of the Committee, supra.
59 See, e.g., Keller, supra.
preferences on a minority. Litigants appealing to First Amendment free expression principles share a common characteristic: the desire to express their view of truth regardless of whether it is politically ascendant.

Free expression impels intellectual progress. The Supreme Court has observed: “Free debate of ideas will result in the wisest governmental policies.” History demonstrates the toxic effects of suppressing expression. It is hardly coincidental that ideologically repressive regimes produce few artistic, scientific, and literary contributions compared to more ideologically tolerant societies. One scholar notes: “Insofar as literature is defined negatively, by what it is not, censorship has had a determining role in its historical constitution.” After all, a brutally honest expose on the state of society incurs wrath, not accolades, in a political environment unwilling to endure criticism. Free expression also reflects ideological humility. By accommodating conflicting viewpoints, we acknowledge our intellectual limits and broaden our ability to understand truth.

Free expression is uniquely important in the realm of education. Liberal education began in ancient Greece as a collection of individuals dedicated to freely discussing the most important subjects of the day. Early philosophers such as Socrates relied on open dialogue to explore the nature of justice and the merits of existing political regimes.

Though the issues are different today, controversy over campus freedom of expression is not new. In 1974, the Committee on Freedom of Expression at Yale reported “a willingness to compromise standards, to give priority to peace and order and amicable relations over the principle of free speech when it threatens these other values.” It continued:

A significant number of students and some faculty members appear to believe that when speakers are offensive to majority opinion, especially on such issues as war and race, it is permissible and even desirable to disrupt them; that there is small chance of being caught, particularly among a mass of offenders; that if caught there is a relatively good chance of not being found guilty; and that if found guilty no serious punishment is to be expected.

More recently, President Obama remarked:

See Cohen, 403 U.S. at 21.
Dennis, 341 U.S. at 497.
Id.

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See Cohen, 403 U.S. at 21.
Dennis, 341 U.S. at 497.
Id.
I’ve heard some college campuses where they don’t want to have a guest speaker who is too conservative or they don’t want to read a book if it has language that is offensive to African-Americans or somehow sends a demeaning signal towards women. I gotta tell you, I don’t agree with that either. I don’t agree that you, when you become students at colleges, have to be coddled and protected from different points of view. I think you should be able to — anybody who comes to speak to you and you disagree with, you should have an argument with ‘em. But you shouldn’t silence them by saying, “You can’t come because I’m too sensitive to hear what you have to say.” That’s not the way we learn either.  

Liberal education should prepare students to endure, understand, and combat opposing viewpoints with better facts and arguments. Education equips Americans to consider religious, political, and philosophical beliefs beyond their own. This skill is uniquely important to our multicultural society.

Conclusion

As Chemerinsky and Gillman maintain:

[T]he record shows that restrictions on freedom of thought and expression on campuses have been used to stifle and punish dissenters, social critics, vulnerable and marginalized voices, and the sort of innovative thinkers who fuel social progress. . . . [C]ampuses cannot censor or punish expression of ideas, or allow intimidation or disruption of those who are expressing ideas, without undermining their core function of promoting inquiry, discovery, and the dissemination of new knowledge.

The accompanying resolution advocates the idea that institutions of higher learning should teach students how to think, not what to think. Inaction undermines the ABA’s identity and influence on matters of law and public policy. The ABA should adopt this resolution in support of free expression on university and college campuses.

69 See Janell Ross, Obama Says Liberal College Students Should Not Be ‘Coddled.’ Are We Really Surprised?, WASH. POST (2015), washingtonpost.com/news/the-fix/wp/2015/09/15/obama-says-liberal-college-students-should-not-be-coddled-are-we-really-surprised/?utm_term=.64a4dfdb5a3 (emphasis added).

70 Chemerinsky & Gillman, supra, at 52-53.
Respectfully submitted,

Melinda Sloma  
President, Maricopa County Bar Association  
August 2019
In 1968, at another time of great turmoil in universities, President Edward H. Levi, in his inaugural address, celebrated “those virtues which from the beginning and until now have characterized our institution.” Central to the values of the University of Chicago, Levi explained, is a profound commitment to “freedom of inquiry.” This freedom, he proclaimed, “is our inheritance.” More recently, President Hanna Holborn Gray observed that “education should not be intended to make people comfortable, it is meant to make

universities exist for the sake of such inquiry, [and] that without it they cease to be universities.”

In 1968, at another time of great turmoil in universities, President Edward H. Levi, in his inaugural address, celebrated “those virtues which from the beginning and until now have characterized our institution.” Central to the values of the University of Chicago, Levi explained, is a profound commitment to “freedom of inquiry.” This freedom, he proclaimed, “is our inheritance.” More recently, President Hanna Holborn Gray observed that “education should not be intended to make people comfortable, it is meant to make
them think. Universities should be expected to provide the conditions within which hard thought, and therefore strong disagreement, independent judgment, and the questioning of stubborn assumptions, can flourish in an environment of the greatest freedom."

The words of Harper, Hutchins, Levi, and Gray capture both the spirit and the promise of the University of Chicago. Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all members of the University community "to discuss any problem that presents itself."

Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the University's commitment to a completely free and open discussion of ideas.

In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission.

As a corollary to the University's commitment to protect and promote free expression, members of the University community must also act in conformity with the principle of free expression. Although members of the University community are free to criticize and contest the views expressed on campus, and to criticize and contest
speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.

As Robert M. Hutchins observed, without a vibrant commitment to free and open inquiry, a university ceases to be a university. The University of Chicago’s longstanding commitment to this principle lies at the very core of our University’s greatness. That is our inheritance, and it is our promise to the future.

Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor of Law, Chair
Marianne Bertrand, Chris P. Dialynas Distinguished Service Professor of Economics, Booth School of Business
Angela Olinto, Homer J. Livingston Professor, Department of Astronomy and Astrophysics, Enrico Fermi Institute, and the College
Mark Siegler, Lindy Bergman Distinguished Service Professor of Medicine and Surgery
David A. Strauss, Gerald Ratner Distinguished Service Professor of Law
Kenneth W. Warren, Fairfax M. Cone Distinguished Service Professor, Department of English and the College
Amanda Woodward, William S. Gray Professor, Department of Psychology and the College
1. Summary of Resolution(s).

This Resolution urges all private and public universities and colleges to uphold the principles of free expression on university and college campuses. They should follow these principles by promoting freedom of debate and thought, and to protect that freedom when others attempt to restrict it. Except as necessary to comply with reasonable administrative rules applied on a content-neutral basis, universities and colleges should not restrict freedom of speech and debate. They should protect all members of their communities and all speakers on their campuses and other locations from censorship, intimidation or retaliation on the basis of their opinions or beliefs.

2. Approval by Submitting Entity.

The Maricopa County Bar Association Board of Directors voted unanimously to sponsor this Resolution on May 16, 2019.

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

No, but the ABA has historically advocated rights of free speech protected by the First Amendment.

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

The ABA has historically advocated rights of free speech protected by the First Amendment. See Report, Section III.

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.

Not applicable.
The Resolution and Report would be circulated to university and college presidents, and law school deans.

8. Cost to the Association. (Both direct and indirect costs)
None, beyond any staff time associated with preparing and circulating the Resolution as proposed above.

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

10. Referrals.
Section of Litigation
Section of Civil Rights and Social Justice
Section of State and Local Government Law
Center for Human Rights

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
Charles W. Wirken
Maricopa County Bar Association Delegate
Gust Rosenfeld, PLC
1 E. Washington St., Suite 1600
Phoenix, AZ 85004-2553
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(602) 257-7869

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)
Charles W. Wirken
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges all private and public universities and colleges to uphold the principles of free expression on university and college campuses. They should follow these principles by promoting freedom of debate and thought, and to protect that freedom when others attempt to restrict it. Except as necessary to comply with reasonable administrative rules applied on a content-neutral basis, universities and colleges should not restrict freedom of speech and debate. They should protect all members of their communities and all speakers on their campuses and other locations from censorship, intimidation or retaliation on the basis of their opinions or beliefs.

2. Summary of the Issue that the Resolution Addresses

Free expression is indispensable to free thought, and therefore to achieving justice and the rule of law. From protecting minority interests to facilitating intellectual exchange, societies open to free expression foster safety, stability, and progress. Distrust and decay typically define regimes resigned to unitary ideological discourse. In England, successive monarchs spent centuries persecuting dissenting viewpoints to perpetuate their power. This generated unprecedented support in early America for intellectual inclusion, culminating in the adoption of the First Amendment.

Many universities face significant backlash for permitting speech some deem offensive. School administrators also sacrifice free speech principles to shield their own interests. Though free expression on campus has value independent of constitutional protections, it nevertheless is true that the most prominent manifestation of this country’s commitment to free expression lies in the First Amendment. Liberal education should prepare students to endure, understand, and combat opposing viewpoints with better facts and arguments. Education equips Americans to consider religious, political, and philosophical beliefs beyond their own. This skill is uniquely important to our multicultural society.

This Resolution addresses the great debate about all students having the opportunity to freely express their opinion at private and public universities and colleges. Thus, the belief that the universities and colleges must adhere to specific principles to ensure that all forms of views are allowed and not actively suppressed by the majority opinion.

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

Given the current political climate, urging universities and colleges to protect other opinions will not only foster a greater learning environment for students, but it will also promote safety for those who feel they will be retaliated against for their opinion. Universities and colleges are institutions for learning and for challenging thinking, by them actively taking a stance to not restrict opinion.
4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None as of this writing.
SPONSOR: Edward Haskins Jacobs

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

Amends §1.2 of the Constitution to read as follows:

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

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

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

For consideration at the August 12 and 13, 2019 Annual Meeting

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

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

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

Once again, God willing, I will move for the adoption of this proposal at the House of Delegates in San Francisco in August 2019. I made the same motion before the House of Delegates the last eighteen years in a row. My hope continues that some day our culture of death will be overcome. We lawyers must not turn a blind eye to our children being poisoned to death and torn apart in our midst. I may be crying in the wilderness, but the cry – and the thirst for justice it represents - will never die.
If adopted, the proposal would require the American Bar Association to stand up for the God-given right to life of all innocent human beings, a right that must be protected in the man-made law of all just societies. As Alexander Hamilton wrote: "The first and primary end of human laws, is to maintain and regulate ... absolute rights of individuals. ... The sacred rights of mankind are ... written ... by the hand of the divinity itself, and can never be erased or obscured by mortal power."

Given everything that has been happening lately (being written in early March 2019) in New York, Virginia, and in the U.S. Senate, involving abortion up to the moment of birth, and then infanticide, how long will it be before we start seeing letters like this, a hypothetical future letter from daughter to mother, found on the internet:

"January 22, 2023

"Dear Mom,

"Sorry we haven't really chatted since Christmas. I have some difficult news. It's about Timmy. He's been a real problem, Mom. He's a good kid, but quite honestly he's an unfair burden at this time in our lives. Ted and I have talked this through and finally made a choice. Plenty of other families have made it and are much better off.

"Our pastor is supportive and says sometimes hard decisions are necessary. He told us to be prayerful, consider all the facts, and do what is right to make the family work.

"He said that even though he probably wouldn't do it himself, the decision really is ours. He was kind too to refer us to a children's clinic near here, so at least that part's easy.

"I'm not an uncaring mother. I do feel sorry for the little guy. I think he overheard Ted and me talking about "it" the other night. I turned around and saw him standing at the bottom step in his pj's with the little bear you gave him under his arm and his eyes sort of welling up.

"Mom, the way he looked at me just about broke my heart. I honestly believe this is better for Timmy, too. It's not fair to force him to live in a family that can't give him the time and attention he deserves.

"And please don't give me the kind of grief Grandma gave you over your abortions. It's the same thing, you know."


2
Leaving our horrifying glimpse into the future to address my proposal:

In none of the meetings of the House of Delegates where my proposal was considered was there an actual vote on the proposal. The first ten years, and almost all the years thereafter, 3 after the presentation of the proposal, the Standing Committee on Constitution and Bylaws reported to the House that the proposal is inconsistent with another purpose of the ABA – to uphold and defend the Constitution of the United States - and that therefore the proposal was “out of order.” Each time the Committee has made that bold assertion, it has failed to explain either in writing to me before the House of Delegates meeting or at the meeting, why the proposal is inconsistent with upholding and defending the Constitution (despite my explicit written request to the Committee for many years to explain in writing why this position is taken). In each of those first ten years, then a motion was made that the House postpone indefinitely action on my proposal. In 2010, 2013, 2015, 2017, and 2018; Robert L. Weinberg from Washington, D.C., who disagrees with this proposal, tried to get the House to vote directly on the proposal, but his motion was rejected. In 2017, the chair of the House called for a headcount of the votes for and against the typical motion to postpone indefinitely a vote on the proposal itself, since she could not tell from the voice vote whether the motion carried. The motion to postpone indefinitely action on the proposal won in the headcount by a vote of 279 to 178. Of course, this vote tells us nothing about whether there would be any votes in favor of the proposal itself, if it were ever to come to a vote.

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

2 Of course, even if the proposal were voted upon and rejected, it could continue to be made year after year. At the 2018 meeting, the Chair confirmed that if rejected, the proposal could be made the next year.

3 The Committee has almost always contended the proposal is inconsistent with the ABA constitutional purpose to uphold and defend the U.S. Constitution, although one year no specific inconsistent provision was cited, and another year the Committee simply claimed the proposal was “out of order and inappropriate” without bothering to state why this is so. In 2011 the Committee took no position on the merits but said the language of the proposal did not belong in the ABA constitution.

4 In 2001 by a non-committee member of the House, and in each time thereafter by the Committee representative himself or herself until 2016, when the motion to postpone indefinitely was made by a member of the ABA Board of Governors; and in 2018 a non-Committee member of the House moved for the indefinite postponement.
In 2012, the Committee chairperson said that the proposal is inconsistent with other purposes of the Association and should be rejected, but he did not state why he concluded that the proposal is inconsistent with other purposes of the Association and did not specifically mention any of the inconsistent purposes. Then someone else moved, not that the proposal be rejected as suggested by the Chairperson, but rather that the proposal be postponed indefinitely. In the voice vote then taken, I’d say about ten delegates opposed the motion, some quite vociferously. By overwhelming voice vote, the proposal was postponed indefinitely.

In 2013, when Bob Weinberg opposed the motion to postpone indefinitely, arguing for a vote on the proposal itself, another delegate, who also seemed to be opposed to the proposal, rose to say he agreed it should be voted on, and stated that the ABA can take positions on “moral issues,” and said the proposal is not inconsistent with upholding and defending the Constitution of the United States - such supposed inconsistency being the reason given for postponing action on the proposal year after year after year. That year there were many “nayes” on the vote to postpone indefinitely - probably because more delegates wanted to vote the proposal down directly - but upon the voice vote that the ayes had it, and the proposal was again postponed indefinitely on the extraordinarily odd contention that defending the right to life of all innocent human beings is inconsistent with upholding and defending the Constitution of the United States. What a perverse Constitution we must have!

In 2014, the Chair of the Standing Committee on Constitution and Bylaws said the proposal is “out of order and inappropriate” and a non-committee member of the House moved to postpone the proposal indefinitely. Although a House member rose to “bark at the moon,” seeking a vote on the proposal instead of postponing it; postponed it was, with maybe ten voice votes against. In 2015, three speakers raised the red herrings that the proposal asks the House to address not a legal issue, but rather a medical, theological, or a philosophical issue; or simply an issue of legal privacy, as reasons to postpone the issue indefinitely; or in Bob’s case, to reject it on its merits. In 2016, the chair of the Standing Committee again asserted the proposal is inconsistent with ABA purposes to uphold and defend the Constitution of the United States and representative government, and said the proposal should be proposed as a ABA policy position only, and a member of the ABA Board of Governors moved that the proposal be postponed indefinitely.5

5 If the proposal to defend the right to life of all innocent human beings is inconsistent with the ABA purposes (i) to uphold and defend the Constitution of the United States, and (2) to uphold and defend representative government, as the ABA Standing Committee on Constitution and Bylaws has repeatedly claimed, why does it make any sense to downgrade the proposal and make it as simply a proposed policy position of the ABA, instead of an ABA constitutional provision? If defending the right to life of all innocent human beings is inconsistent with the ABA purposes of upholding and defending the Constitution of the United States and upholding and defending representative government, as the Standing Committee keeps claiming, then how can the proposal possibly be appropriate as an ABA policy on a national issue? Shouldn’t the proposal be postponed indefinitely as a proposed policy position also if the Committee is right? So why should I seek its approval as a mere policy proposal? Of course, the Committee is wrong about this claimed inconsistency, and this is explained later in this report.
In 2001 the vote on the motion to postpone action indefinitely was 209 to 39, but you will never find the precise vote in the record of proceedings of that meeting, because even though the vote was displayed electronically on a large screen in the front of the room, the precise vote itself was not recorded. In 2002 through 2016, and in 2018, the vote on the motion to postpone indefinitely was taken by voice vote. In 2002 through 2015, with the noted exception of 2013, many uncounted voices intoned “yes,” and perhaps a hand full of people said “no,” except 2005, when I thought I heard maybe ten “no’s.”

I want to see the House pass this proposal, but I realize passage now would take a miracle. This is driven home in each annual meeting when new members of the House who have never been members before stand up in order to be introduced to the assemblage. Each year there are fewer than twenty new members who have never been members before. And the House several years ago defeated a term limits proposal. It would seem, then, that the House of Delegates is a pretty closed club with lots of long-term members. In addition to looking for that miracle, I am also hoping that the consciences of a few of the members will be pricked enough that they will be willing to “submit a salmon slip” and stand up in the House and speak out for the right to life of the innocents in the face of embarrassment and possible ostracism. I would say perhaps the most amazing thing about the last eighteen years is that never once has any member of the House of Delegates submitted a salmon slip and stood up before the House to acknowledge the ABA must make it its mission to defend the right to life of all innocent human beings. Not once. Not a single person, ever.

Even if I have no chance short of a miracle for passage of the proposal, if we can just “get the ball rolling” with a little bit of courage from members who agree, who knows? The ABA House of Delegates is a speck, but an important speck in the process. Maybe before too many more years, or at least, eventually at some point in the future.

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6 Although the ABA has an annual budget substantially in excess of $100 million, the House of Delegates is not willing to commit the relatively minor sum it would take in order to bring transparency and accountability to the actions of the House by having every member’s vote electronically recorded when it deals with the most important matters, such as amendments to the ABA constitution or bylaws, and the adoption, amendment, or rescission of ABA policy positions. In 2001, I presented to the ABA House of Delegates a proposal to bring that transparency and accountability to the House and to have the results posted for a year on the ABA website. It failed miserably, with only about ten of the 500 or so in attendance voting in favor (based upon my guestimate at the time of the voice vote). Transparency in actions of the House of Delegates should be pressed for every year until it is reached, but for now at least I leave that to others. In 2009 the chairperson of the House mentioned in his remarks that he, too, thinks the House should have electronic voting. And it would not take much money to bring accountability to the House. At a CLE program in the Virgin Islands several years ago, hand-held voting devices were given to the attendees to make part of the program interactive, so it cannot be very expensive, even if the individual votes, tied to specific members, are permanently recorded as part of the process. It is amazing in this day and age that the ABA House of Delegates is utterly opaque. The House intentionally refuses to put in place systems to reveal the votes of its members on the many important issues upon which it takes positions. No doubt the members of the House demand transparency of others in other contexts. The opaque nature of the House is indefensible. Amazing, really.
when sanity is restored, baby-killing-in-the-womb (or upon emergence from the womb) will go the way of slavery. It could happen.

"My section [bar association, committee, etc.] does not want its representative to vote on this kind of legislative issue. I believe this issue is not a legitimate question for the House of Delegates to address. This issue is beyond the pale.

The House of Delegates addresses these kinds of issues dealing with human rights and legislative proposals every annual meeting. The current ABA policy manual includes ABA policies: (1) supporting legislation on the federal and state level to finance abortion services for indigent women (adopted August 1978); (2) supporting state and federal legislation which protects the right of a woman to choose to terminate a pregnancy before fetal viability, or thereafter, if necessary to protect the life or health of the woman; and (3) opposing state or federal legislation which restricts this right. (adopted August, 1992).

Other related and likely still current ABA policies are listed toward the end of this report.

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

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

Or does your child, by her mere humanity, have a sacrosanct right to live, and continue to develop and grow in liberty and pursue happiness as she comes to know it? The answer: Human life, including that of our littlest ones, is sacred. This realization was one of the greatest advances of Christianity over the paganism that tolerated exposing unto death the unwanted child. Abortion in our society is quicker than exposure, and is hidden away in the womb (or at the end of the birth canal) so that we

7 The human tragedy addressed by this proposal and the abandonment in the United States of the most basic rule of law demanded of any sane society has been highlighted by the failure in the United States Senate to have sufficient votes in favor of the Born-Alive Abortion Survivors Protection Act to protect the act from filibuster by getting 60 votes or more; as well as by legislative acts in New York and Virginia to allow for abortion up to the moment of birth. When a society labels intense evil as a good, we are truly beyond the pale.
can lie to ourselves about what we are doing. But respect for innocent human life must be fundamental to civilized society, as “Thou Shalt Not Kill” signifies.

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

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

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

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

Dr. Condic rightly rejects the use of these three flawed arguments about when life begins. Instead, she cogently argues that we should determine when the new human
organism begins, because that is the true beginning of the human being. She points out that one must distinguish between mere living cells that are not organized into an organism, and living organisms. Dr. Condic points out that “[o]rganisms are living beings composed of parts that have separate but mutually dependent functions. While organisms are made of living cells, living cells themselves do not necessarily constitute an organism. The critical difference between a collection of cells and a living organism is the ability of an organism to act in a coordinated manner for the continued health and maintenance of the body as a whole. ... Unlike other definitions, understanding human life to be an intrinsic property of human organism does not require subjective judgments regarding ‘quality of life’ or relative worth. A definition based on the organismal nature of human beings acknowledges that individuals with differing appearance, ability, and ‘desirability’ are, nonetheless, equally human. ... Once the nature of human beings as organisms has been abandoned as the basis for assigning legal personhood, it is difficult to propose an alternative definition that could not be used to deny humanity to virtually anyone.” The zygotes, the embryos, the fetuses in the wombs of human mothers are all human organisms; that is, to say, human beings.8

But can any of us, with what we know about the child’s unique set of DNA beginning at conception, even pretend now that this is not true? The possibility of twinning does not diminish the recognition that upon conception there is brand new, separate, unique human life in the mother’s body – a new person or persons. The mother is responsible for taking care of that child, but she does not own the child – God does. Slavery made the mistake of thinking that one human being can own another. We now know that no man should be permitted under man’s law to own another. But how can one justify killing another innocent human being if one does not own him? The existence of the other’s life on one’s own is sufficient to keep the dependent relation does not end at the birth canal. How far should the right to kill those dependent upon us go? Should the standard evolve from the complete dependence of the womb to the excessive dependence of severe mental retardation and severe physical handicaps? The “right” to kill an already born baby by lack of ordinary care is the new advocacy for those who want all preborn baby rights denied.

Just because the child is held and nourished within her mother does not give her mother the right to kill her. To the contrary, the mother with a child in the womb has a special responsibility to protect and care for her child. In the language of the law, the mother, the parents, have a fiduciary duty to the child. The generally recognized principle that parents must take care of their children once they are born applies as well to the children while they are growing and developing in the womb. I am not judging

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

We would do well also to realize that the Constitution of the United States - and the Supreme Court's interpretation of it - is not the fundamental source of human rights within the United States. Our rights to life, liberty, and the pursuit of happiness do not arise out of our own "social contract" - the Constitution. To the contrary, as the Declaration asserts, these rights are endowed upon us by our Creator. The rights of the child are a burden to the mother, but fundamental rights of others are a burden we must bear.
At the 2001 Annual Meeting, the Chair of the Standing Committee on Constitution and Bylaws reported that the Committee "voted to recommend to the House that the proposal be considered out of order, in that it is inconsistent with the first purpose clause of Association’s Constitution, which is ... "To uphold and defend the Constitution of the United States and maintain representative government. The same claim was made in subsequent years, until 2011, when the Committee took no position on the merits of the proposal, but asserted the proposed language does not merit inclusion in the purposes section of the ABA constitution." Then in 2012 the Committee said the proposal should be rejected due to unexplained inconsistencies with other Association purposes.

Although the Committee changed its position in 2011, it went back to the earlier position in later years, so I hereafter explain again why defending the right to life of all innocent human beings, including all those conceived but not yet born, is consistent with supporting and defending the Constitution of the United States. Later in this report I explain why the language I propose does belong in the purposes section of the ABA constitution, which positioning has also been opposed by the Standing Committee on Constitution and Bylaws.

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

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

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

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

Like St. Thomas Aquinas, I construct the argument against my position. I have repeatedly asked the Standing Committee on Constitution and Bylaws to articulate the reason for its – to me, bizarre – position that taking a stance defending the right to life of all innocent human beings including all those conceived but not yet born is somehow inconsistent with upholding and defending the Constitution of the United States, but the Committee refuses to articulate the reasons for its position – either orally or in writing. The same claim was made in subsequent years, until 2011, when the Committee took no position on the merits of the proposal, but asserted the proposed language does not merit inclusion in the purposes section of the ABA constitution. Then in 2012 the Committee said the proposal should be rejected due to unexplained inconsistencies with other Association purposes.

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

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

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

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

The truth is quite to the contrary of the position of the Standing Committee on Constitution and Bylaws. The reality is that the rationale underlying these two Supreme Court decisions deserves no support from an organization pledged to uphold and defend the Constitution of United States.11 This is because the underlying rationale for the decisions is bogus, even if one accepts the concept of the privacy rights penumbra. The Supreme Court's opinion in *Roe v. Wade* takes the position that neither Texas nor any

11 As one wise-observer has noted, "*Roe v. Wade* has deformed a great nation. The so-called right to abortion has pitted mothers against their children and women against men. It has sown violence and discord at the heart of the most intimate human relationships. It has aggravated the derogation of the father's role in an increasingly fatherless society. It has portrayed the greatest of gifts – a child – as a competitor, an intrusion, and an inconvenience. Human rights are not a privilege conferred by government. They are every human being's entitlement by virtue of his humanity. The right to life does not depend, and must not be declared to be contingent, on the pleasure of anyone else, not even a parent or a sovereign."
other State may legislatively determine that human life begins at conception, since (the Court asserted) there is uncertainty over the legitimacy of that claim - that human life does begin at conception. But this claimed uncertainty is a figment of the Supreme Court’s imagination. There is no real uncertainty over the point at which each human life begins - we all have our own unique set of 46 chromosomes. This set is forged at the moment of conception. The new child (or, perhaps, eventually, the new twins) is new human life - residing within the child’s mother, but not simply a part of her.

Based on the faulty contention that the child in the womb cannot properly be legislatively determined to be a human being, the Supreme Court denigrated the child to the status “potential life,” stripping the child of her rightful status under the law as a human being. The Court then set up a false dichotomy of competing rights: the mother’s “right to privacy” right to kill the non-human blob in her womb versus the State’s interest in protecting the “potential life” in the womb and the health of the mother.12 (Referring to a living being with its own DNA as “potential life” is doublespeak at its best.) The hand dealt the child in the womb by the Supreme Court was dealt from a stacked deck - based upon the lie that the child in the womb is not really a child. As a “potential life” rather than a real, live human being, the child’s real rights get pushed aside by the Supreme Court. The rationale of Roe v. Wade is not indisputable (and thus, one might argue, the Constitution itself); rather, the rationale of Roe v. Wade is fatuous.

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

Several times, including in 2018, the Committee on Constitution and Bylaws has suggested that what I advocate should be proposed as a policy position for the ABA, not a purpose of the ABA, and therefore my proposal should be rejected on the ground that it does not belong in Section 1.2 of the ABA Constitution. Putting aside the absurdity of

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12 Not does basing a supposed constitutional right to abortion upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (= nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”), as advocated by Justice Ginsburg and three other Justices in the Ginsburg dissent in Gonzales v. Carhart, 550 U.S. 124, 172 (2007) make any more sense. The child in the womb is still a human being; a child; and her right to life trumps the mother’s interest in having her killed, whether based on a supposed right to privacy or upon the Equal Protection Clause. See also, Erika Bachisch, Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights, Harvard Journal of Law & Public Policy, vol. 34, no. 3, Summer 2011.

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

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

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

The Committee claimed that the subject of the proposal is not fundamental enough - or is not of the right character - to be included in the purposes section of the ABA constitution. But compare a stance against stripping the right to life from millions of innocents to the purposes that are in the ABA constitution. Defending the right to life of innocents when it is being denied by our “law” is much more fundamental than even the upholding and defending of our hallowed U.S. Constitution and representative government. The ABA purpose I propose goes to the very heart of what an association of American lawyers should be all about. We are supposed to be the upholders of the law. We are supposed to champion those whose rights are being disrespected. Incredibly, a fundamental disrespect for a category of persons’ rights has been suggesting a policy that is supposedly inconsistent with the ABA constitution, I disagree with this contention also. After all, what is a purpose? A purpose is simply a fundamental policy. The innocent human beings in the wombs of their mothers (many of whom have become mortal enemies of their own children) cry out for our country to renew its commitment to the basic principles of the Declaration of Independence - that every innocent human being has the right to life, liberty, and the pursuit of happiness. And it is not just the innocents in the womb who cry out for champions. We are sliding down the slippery slope of disregard for the sanctity of human life for many outside the womb as well - the old, the infirm, and the disabled. If we do not wake up and start standing up for what is right, soon many of these innocents will have to be justifying why their lives should be spared - why we should be spending money and effort on their inconvenient and bothersome lives. The intentional killing of perhaps 1.2 million innocent human beings by abortion in the United States each year in recent years (and even more before) is such an affront to justice that the ABA should make defending the rights of those (and other) innocent beings one of its fundamental policies – one of its very purposes.

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incorporated as a fundamental tenant of our American “law.” A stand against this cries out for inclusion in the purposes section of the ABA constitution.

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

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

The ABA Policy and Procedures Handbook lists hundreds of standing policies adopted by the ABA over the years, although action was taken at the 2001 meeting to “archive” some policies over ten years old, taking them off the list of current policy positions. Way back in 1978, the ABA adopted a policy, still in the 2013-2014 Handbook, supporting federal and state legislation to “finance abortion services for indigent women.” In 1991, the ABA adopted a policy supporting legislation to promote “full counseling and referrals on all medical options” in federally funded family planning clinics. In 1992, the ABA adopted a policy, still in the Handbook, opposing federal legislation restricting abortions prior to viability and thereafter if the abortion is “necessary to protect the life or health of the woman.” And in 1994, the ABA adopted a policy recommending that the United States, at the Fourth World Conference on Women in Beijing, China, in 1995, “actively support the inclusion in the Platform for Action of [e]ffective measures to accelerate the removal of the remaining obstacles to the realization of women’s basic rights.” At the annual meeting in 2001 the ABA adopted a policy provision opposing the Mexico City Policy, which prohibits overseas funding by the United States of nongovernmental organizations that provide abortion-related health or medical services. The ABA House of Delegates has also fairly recently adopted a policy implicitly approving government-funded killing of innocent human beings in their embryonic stage for stem cell and other research work.

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

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P. George of Princeton University gave an address at Georgetown University the day after President Obama’s initial presidential inauguration. In urging his listeners to pray for an end to legal abortion in the United States, Professor George said, “We must ask God’s forgiveness for our great national sin of abandoning the unborn to the crime of abortion and implore His guidance and assistance in recalling the nation to its founding ideals of liberty and justice for all.”

Feel free to join me as a sponsor next year, or at least to submit a salmon slip to speak in favor of the proposal. Email me at edwardjacobs@yahoo.com.
Amends § 6.2(a)(1) of the ABA Constitution to provide the United States Virgin Islands with a State Delegate.

Amends § 6.2(a)(1) of the ABA Constitution to read as follows:

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

(1) The State Delegates, one for each state and the United States Virgin Islands, who also serve as chairs of the delegate groups from the respective states.

...
Article 9 of the ABA Constitution provides the means for nomination for elected offices of the Association for elected members of the Board of Governors. Nominations may only be made in two ways: by the Nominating Committee, pursuant to Section 9.2, or by petition to the House of Delegates, pursuant to the provisions of Section 9.3. As a practical matter, virtually all nominations are made by the Nominating Committee, and nomination by the Nominating Committee is tantamount to the election to office by the House of Delegates.

Of the 69 members of the Nominating Committee, 52 are State Delegates, who represent the 50 States, the District of Columbia, and Puerto Rico. Nine members represent sections and divisions (seven selected by the Section Officers Conference, with the other two members elected, respectively, by the Young Lawyers Division and the Judicial Division). In recognition of the importance of assuring that membership on the Nominating Committee reflects membership in the profession as a whole, eight members of the Nominating Committee are Goal III members at-large selected from at-large nominations; however, the Goal III members are limited to those who are women, minorities, LGBT, or have a disability.

The U.S. Virgin Islands, despite having approximately 1,100 attorneys—only a couple of hundred less than small states such as North Dakota, and Wyoming—is not represented by a State Delegate, and therefore lacks representation on the Nominating Committee. This exclusion of lawyers from the U.S. Virgin Islands from the electoral process is inconsistent with the Association’s policy of inclusion, particularly Goal III, which states that it is the objective of the Association to “[p]romote full and equal participation in the association, our profession, and the justice system by all persons.” In fact, it is inconsistent with the Association’s long-standing policy, first adopted in 1992, urging that the United States Constitution be amended to permit citizens in American’s territories to vote in national elections.¹ It is also contrary to the governance policies of other national legal organizations—including the National Bar Association, the Federal Bar Association, and the Conference of Chief Justices—as well as other national professional organizations like the American Medical Association, none of whom exclude their dues-paying members from governance opportunities solely due to which part of the United States they call home.

This amendment, if adopted, would amend Article 6.2 of the ABA Constitution to provide the the U.S. Virgin Islands with a State Delegate, who pursuant to the existing language of Article 9.2 would automatically serve as a member of the Nominating Committee. Because the amendment only changes the definition of State Delegate to include the U.S. Virgin Islands, but does not change the definition of state found in Article 2.2, its adoption would not place the U.S. Virgin Islands in a district for the Board of Governors.

Every member of the American Bar Association ought to have a true voice in the election of the officers of the Association. This proposal would accomplish this objective for the U.S. Virgin Islands, whose attorneys have a long history of active involvement in the ABA.

Respectfully submitted,

Anthony M. Ciolli
SPONSORS: Anthony M. Ciolli

PROPOSAL: Amends § 6.4(a) of the ABA Constitution to allow individuals who meet a state’s definition of young lawyer to serve as a young lawyer member of the House of Delegates for that state.

Amends § 6.4(a) of the ABA Constitution to read as follows:

§6.4 State Bar and Local Bar Association Delegates. (a) A state bar association is entitled to at least one delegate in the House of Delegates, except that if there is more than one state bar association in a state the House shall determine which associations may select delegates. A state bar association in a state that has more than 4,000 lawyers is entitled to an additional delegate for each additional 2,500 lawyers above 4,000 until it is entitled to four delegates. A state bar association in a state that has more than 14,000 lawyers and not more than 20,000 lawyers is entitled to five delegates. If it has more than 20,000 lawyers, it is entitled to six delegates. If the bar associations of a state are entitled to four or more delegates, at least one delegate representing the state bar or a local bar association in that state must have been admitted to practice in his or her first bar within the past five years, or must be less than 36 years old at the beginning of the term, or meet the state’s definition of a young lawyer. Each state delegation, or meet the state’s definition of a young lawyer, as well as the United States Virgin Islands, that did not have an additional young lawyer delegate prior to the 2015 Annual Meeting shall be entitled to one additional delegate, chosen by either the state bar association or one of the qualifying local bar associations referred to in Articles 6.4(b) and 6.9 below, provided that such delegate was admitted to his or her first bar within the past five years or is less than 36 years old or meets the state’s definition of a young lawyer at the beginning of his or her term. It is the responsibility of the state bar association to ensure that this requirement is satisfied. However, a state bar association is entitled to at least as many delegates as it was entitled to certify at the 1990 annual meeting.

(Legislative Draft – Additions underlined; deletions struck through)

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ensure that this requirement is satisfied. However, a state bar association is entitled to at
least as many delegates as it was entitled to certify at the 1990 annual meeting.
These amendments reconcile the eligibility requirements for young lawyer members of the House of Delegates representing state bar associations with the more-inclusive definition of "young lawyer" employed by 23 state bar associations.

The term "young lawyer" is not defined in the ABA Constitution, but is defined in the Bylaws of the ABA Young Lawyers Division as "a lawyer who has been admitted to practice in his or her first bar within the past five years, or is less than thirty-six years old." These age and practice limitations have been incorporated into the language of § 6.4(a) of the ABA Constitution. However, the positions created by § 6.4(a) are not intended to represent the ABA Young Lawyers Division, but young lawyers generally throughout the country.

When the ABA YLD first enacted the less than thirty-six years old age requirement in 1934, the average age of law school graduation was in the early 20s. However, in the ensuing 65 years, the average age of law school graduation has risen to the mid-to-late 20s. As a result, 23 state bar associations, other sections of the ABA, as well as numerous national, local, and international bar associations, have enacted expanded definitions of "young lawyer" that allow for greater age and years of practice limitations. Recognizing that state bar associations and other entities have enacted different definitions of "young lawyer," the ABA Young Lawyers Division has amended its Bylaws to provide that individuals may continue to participate in Division governance if they are members in good standing of their state or local young lawyer affiliate, even if they are not members of the ABA YLD.

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1 AM. BAR ASS'N YOUNG LAWYERS DIV. ByLaws § 2.1.
2 The ABA Young Lawyers Division is directly given representation in the House of Delegates and the Nominating Committee through § 6.2(5) and § 6.7. These provisions do not directly include specific age or practice limitations, but include them indirectly by requiring that the individuals be members of the ABA Young Lawyers Division.
3 The state bar associations with a definition of "young lawyer" that exceeds the definition of "young lawyer" found in the ABA YLD Bylaws include Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, the U.S. Virgin Islands, Vermont, and West Virginia.
4 ABA sections with a definition of "young lawyer" that exceeds those in the ABA YLD Bylaws include the ABA Business Law Section and the ABA Real Property, Trust, and Estates Section.
5 The number of local, national, and international bar associations that define "young lawyer" more inclusively is too voluminous to list, but includes the National Bar Association, the National Asian Pacific American Bar Association, the Canadian Bar Association, the American Association for Justice, the Defense Research Institute, the American Intellectual Property Law Association, the Chicago Bar Association, the Columbus Bar Association, and the New York City Bar Association.
6 AM. BAR ASS'N YOUNG LAWYERS DIV. ByLaws § 4.2(a).
7 AM. BAR ASS'N YOUNG LAWYERS DIV. ByLaws § 4.2(a).
8 AM. BAR ASS'N YOUNG LAWYERS DIV. ByLaws § 4.2(a).
9 AM. BAR ASS'N YOUNG LAWYERS DIV. ByLaws § 4.2(a).
These amendments, if adopted, will allow states that have enacted more-inclusive definitions of “young lawyer” to allow individuals who meet that state’s expanded definition to serve as that state’s young lawyer member of the House of Delegates, or to serve as a young lawyer member-at-large to the Board of Governors. Although it does not appear that any state has a less-inclusive definition of “young lawyer” than that found in the ABA YLD Bylaws, the ABA YLD definition of “young lawyer” will remain in § 6.4(a) so as to provide a floor for eligibility. These changes will respect the decisions of our states and territories to define young lawyer differently from the ABA, and allow all young lawyers to fill positions designated for young lawyers generally.

Respectfully submitted,

Anthony M. Ciolli
SPONSORS: Negeen Sadeghi-Movahed (Principal Sponsor), Matthew Wallace, Sarah Correll, Taurus Myhand, Miosotti Tenecora, Erika Lessane, Ashley Baker

PROPOSAL: Amends Section 6.7(b) of the ABA Constitution to increase the number of delegates from three to six.

Amends Section 6.7(b) of the ABA Constitution to increase the number of delegates from three to six.

§6.7 Division or Conference Delegates.

... (b) Each year the Law Student Division shall elect, in the manner prescribed by its bylaws, three six of its members as delegates to the House for one Association year.

(Legislative Draft – Additions underlined; deletions struck through)

§6.7 Division or Conference Delegates.

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§6.7 Division or Conference Delegates.

... (b) Each year the Law Student Division shall elect, in the manner prescribed by its bylaws, three six of its members as delegates to the House for one Association year.
Law student reach has grown rapidly because of the Division’s changes. In 2014, law student membership in the ABA was hovering around 20,000 members, down from over 40,000 members at its peak in the 2000s. In 2015, to help address the steady decline in student membership and waning relevancy, the ABA Board of Governors took action to eliminate the $25 law student membership dues. ABA membership became free for American law students. Since then, the Division’s membership has grown rapidly. It now serves over 110,000 members, including law students and graduates who have not yet passed the bar. That represents an estimated three-quarters of all law students who attend ABA accredited law schools.

After the change to its membership dues, the Division worked diligently at ABA Board of Governors’ behest to create a “freemium” business model. For a yearly fee, students can upgrade to a premium membership which entitles them to extra benefits. The freemium business model and its benefits were developed in less than a year after the elimination of law student dues. The Division now has over 18,000 paid premium members included in its count of over 110,000 non-dues paying members. The premium program has brought in around $800,000 in revenue to the ABA over the last two fiscal years. Also during this time, Division volunteer leaders worked with staff to restructure its governance and implement voluntary cost-saving measures in order to redirect resources to activities and benefits that might attract a broader range of students. The new revenue streams and cost-cutting measures helped alleviate the loss in dues revenue to the Association. Despite this progress, the Law Student Division’s delegate count has not changed since its rapid membership growth and structural changes.

Law student voices are underrepresented in the ABA House and across the Association.

With only four students eligible to vote among the 589-member House of Delegates - three delegates and one Student at-Large on the ABA Board of Governors - students make up less than one percent (0.679%) of its composition. Given that students are ineligible to serve in various other House opportunities, these four are the only law students in the House. The House of Delegates infographic distributed in 2019 shows that only 3% of delegates are under thirty (30) years old. As the Association continues to focus on recruiting and retaining law students and young lawyers, those who join can be disheartened by a dearth of people who look like them in important Association roles.

Section 6.6 of the ABA’s Constitution and Bylaws entitles each section to a minimum of two delegates, with one additional delegate for a Section with more than 20,000 members, and one additional for a Section with more than 45,000 members. This model ensures that most constituencies and groups in the ABA have a level of representation that reflects their membership. This formula does not consider the additional, indirect representation that Sections and Divisions have through other types of delegate seats such as state and affiliate delegations, which law students are not eligible to hold. If the Law Student Division were a Section and its delegates were decided by the above-stated formula, the Division has not only surpassed the 45,000 member threshold to qualify for threequarters of all law students who attend ABA accredited law schools. After the change to its membership dues, the Division worked diligently at ABA Board of Governors’ behest to create a “freemium” business model. For a yearly fee, students can upgrade to a premium membership which entitles them to extra benefits. The freemium business model and its benefits were developed in less than a year after the elimination of law student dues. The Division now has over 18,000 paid premium members included in its count of over 110,000 non-dues paying members. The premium program has brought in around $800,000 in revenue to the ABA over the last two fiscal years. Also during this time, Division volunteer leaders worked with staff to restructure its governance and implement voluntary cost-saving measures in order to redirect resources to activities and benefits that might attract a broader range of students. The new revenue streams and cost-cutting measures helped alleviate the loss in dues revenue to the Association. Despite this progress, the Law Student Division’s delegate count has not changed since its rapid membership growth and structural changes.

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a 4th delegate - it has more than doubled it. In comparison, the Young Lawyers Division, which now counts law students as a majority of its membership, is prescribed six (6) delegates.

At the 2018 Annual Meeting, the House of Delegates approved the Senior Lawyers Division’s proposal to increase its number of delegates in the House from two (2) to four (4) following its membership increase from approximately 3,500 members to around 63,000. The Division cited its increase in membership as justification for such a change. Similar to the Law Student Division, the Senior Lawyers Division’s increase in membership was the result of the Division’s transition from a dues-based entity to one free-of-charge to eligible Association members. And while the Senior Lawyers Division was awarded additional representation in 2018, the Senior Lawyers Division’s transition to a new business model and its membership growth occurred after the Law Student Division’s successful transition and even larger member growth.

The Law Student Division has been at the forefront of the American Bar Association’s efforts to turn around decreasing membership. It has changed its business model, increased law student membership, expanded its reach, developed new revenue streams, and cut ever-increasing costs. Yet, its representation in the House remains relatively miniscule. It is often stated that the Association’s new membership model must be implemented in a way that connects with law students and young lawyers- and that these groups must be a priority if the Association is to survive. We hear consistently from Association leadership that the next generation of lawyers must be given a meaningful voice within the ABA, and that all Association members must listen to that voice. This resolution is one step, albeit a small one, to put those words into action.

Respectfully Submitted,

Negeen Sadeghi-Movahed
Chair, 2018-19 Law Student Division

Matthew W. Wallace
Law Student at-Large, ABA Board of Governors
2018-19 Law Student Division
Proposal: Amend § 6.8(a) of the Constitution to include the Electric Cooperative Bar Association as an Affiliated Organization.

Amends § 6.8(a) of the Constitution to read as follows:

The following organizations are entitled to be represented in the House of Delegates as affiliated organizations: The American Immigration Lawyers Association, the American Law Institute, the Association of American Law Schools, the Association of Life Insurance Counsel, the Conference of Chief Justices, the Energy Bar Association, the Federal Bar Association, the Federal Circuit Bar Association, the Federal Communications Bar Association, the Hispanic National Bar Association, the Judge Advocates Association, the Maritime Law Association of the United States, the National Asian Pacific American Bar Association, the National Association of Attorneys General, the National Association of Bar Executives, the National Association of Criminal Defense Lawyers, the National Association of Women Judges, the National Association of Women Lawyers, the National Conference of Bar Examiners, the National Conference of Commissioners on Uniform State Laws, the National Conference of Bar Associations, the National District Attorneys Association, the National Legal Aid and Defender Association, the National LGBT Bar Association, the National Organization of Bar Counsel.

(Legislative Draft – Additions underlined; deletions struck through)

The following organizations are entitled to be represented in the House of Delegates as affiliated organizations: The American Immigration Lawyers Association, the American Law Institute, the Association of American Law Schools, the Association of Life Insurance Counsel, the Conference of Chief Justices, the Energy Bar Association, the Federal Bar Association, the Federal Circuit Bar Association, the Federal Communications Bar Association, the Hispanic National Bar Association, the Judge Advocates Association, the Maritime Law Association of the United States, the National Asian Pacific American Bar Association, the National Association of Attorneys General, the National Association of Bar Executives, the National Association of Criminal Defense Lawyers, the National Association of Women Judges, the National Association of Women Lawyers, the
National Bar Association, the National Conference of Bar Examiners, the National Conference of Commissioners on Uniform State Laws, the National Conference of Women’s Bar Associations, the National District Attorneys Association, the National Legal Aid and Defender Association, the National LGBT Bar Association, the National Organization of Bar Counsel, and the National Native American Bar Association, and the Electric Cooperative Bar Association.
The purpose of this report is to respectfully request the Constitution be amended as set forth above so the Electric Cooperative Bar Association (ECBA) can be recognized as an Affiliated Organization and have a delegate in the American Bar Association (ABA) House of Delegates (House). Such status would be mutually beneficial for ABA and ECBA members. An ECBA delegate would add further diversity of practice and perspective to the debates and decision making of the House. It would also provide the House with another means by which to promote its important work. Equally, representation in the House would allow ECBA to be more formally engaged with the ABA and be more effective at supporting the ABA’s mission. Having an ECBA delegate would be a real opportunity to serve both organizations’ members and the legal profession.

ECBA would be a unique contributor to the existing ABA Affiliated Organizations. ECBA’s uniqueness is attributable to its members, where they practice law, the aspects of law they practice, and their clients – America’s Rural Electric Cooperatives.

The majority of ECBA’s roughly 770 attorney members are small firm or solo practitioners representing electric cooperatives across the United States – mostly in rural America. An ECBA delegate would provide an opportunity for the ABA to have a unique touchpoint for attorneys who predominately practice in communities across rural America. As the ABA has recognized, practicing law in rural America has unique issues, challenges, and opportunities.1 As a result, the ABA has supported efforts to help rural practitioners and communities – including pro bono and access to justice projects in rural communities. Some examples are the ABA’s support for Project Rural Practice2 and the ABA’s Rural Pro Bono Delivery Initiative. ECBA could assist the ABA with these and other efforts to support the practice of law in rural communities.

ECBA attorneys also have special knowledge about the cooperative business model – which is unique as compared to the for-profit business model. Businesses that operate using the cooperative business model can be found in many different industries in the United States, not just the utility industry. These cooperatives, including electric cooperatives, play a significant part in the U.S. economy, and play a vital role – such as the distribution of electricity – to parts of the country where there may not otherwise be electric service. Interestingly, as far as we know, ECBA is the only formally organized bar association comprised of attorneys who represent cooperatives, and thus have this special knowledge of the cooperative business model and the legal issues that follow.

Finally, ECBA was established in 2000, and its roughly 770 attorneys are collegial, engaged, and care deeply about the legal profession. They are represented by a member-elected advisory board. They form a strong community of legal professionals that are proud to support their electric cooperative clients who are consumer-owned and whom serve the community. ECBA members also volunteer; for example, some ECBA members

1 See Laird, Lorelei, “In rural America, there are job opportunities and a need for lawyers.” ABA Journal (Oct. 2014) (Cover Story).
have, and still do, volunteer to serve on ABA committees. ECBA members also show their engagement by frequently contributing to conversations about electric cooperative legal issues through an ECBA discussion list and attendance at ECBA sponsored events, like webinars and the ECBA annual meeting. If ECBA were honored with an ABA delegate, that same level of engagement and care would be made at the House meetings.

We respectfully ask the House to adopt the proposed amendment.

Respectfully submitted,

Tyrus H. Thompson (Principal Sponsor)
Paul M. Breakman
Adrienne E. Clair
Patricia Dondanville
Lisa Dunner
Dorothy B. Franzoni
Sheila S. Hollis
Jonathan C. Ihrig
Christopher Koon
Richard Meyer
Steve Minor
Jay A. Morrison
Robert B. Schwentker
Matthew R. Rudolphi
Wallace Tillman
Clinton A. Vince
SPONSORS: William Weisenberg, Russell Frisby, Estelle Rogers, and Mark Tuohey

PROPOSAL: Amends Section 31.7 of the Bylaws to dissolve the Standing Committee on Governmental Affairs.

Amends Section 31.7 to delete the paragraph headed Government Affairs.

Governmental Affairs. The Standing Committee on Governmental Affairs consists of not more than 11 members. The Committee has jurisdiction over matters relating to the Association’s governmental affairs program. In carrying out its functions, the Committee shall:

(a) Make recommendations to the Board of Governors regarding the governmental affairs program;
(b) Provide assistance to the Governmental Affairs Office;
(c) Review the legislative and governmental priorities recommendations of the Governmental Affairs Office;
(d) Make Committee recommendations to the Board of Governors on legislative and governmental priorities as it deems appropriate; and
(e) Select the members of Congress to receive recognition at ABA Day in Washington.
On May 2, 1996, a Task Force of distinguished lawyers highly knowledgeable about how the federal government makes policy issued a report to the ABA Board of Governors recommending that the ABA invest greater resources, both financial and staff, to become a more effective lobbying force on Capitol Hill and with the federal government generally. The report included the following seven recommendations:

1. Increase the staff and resources for the GAO, and ensure the staff has members from both sides of the political aisle.
2. Enhance the ABA’s grassroots network and grassroots involvement in Association advocacy.
3. Focus the governmental affairs agenda on a small number of core issues of the highest priority to the Association — those that affect the profession and the administration of justice.
4. Increase the Association’s leadership and Bar leaders in the Association’s advocacy effort, including the convening of a day-long annual lobbying event on Capitol Hill.
5. Create a Standing Committee on Governmental Affairs to work with the Governmental Affairs Office to review the approaches and methodologies employed to implement the Association’s governmental affairs agenda and to advise the Board on ways the program can be enhanced (specifically, “focus should remain on the process, not issues”).
6. Endorse and reaffirm the ABA’s role in the selection of federal judges.
7. Not establish a PAC, make campaign contributions, or endorse candidates for office.

During the next 20+ years, the ABA’s Executive Director and Director of Governmental Affairs insured that the ABA invested adequate staff and financial resources into the Association’s advocacy role to improve its effectiveness and bipartisan efforts. The Standing Committee on Governmental Affairs (SCGA) focused more on working with the ABA GAO staff to execute annual lobby days on Capitol Hill led by ABA leadership, state bar leaders, and grassroots advocates; improve on the Associations' grassroots network; prioritize legislative issues for each Congress; and focus the governmental affairs agenda as the need arose.

Initially, the Committee met at each annual and midyear meeting to achieve these objectives. In the last several years, however, there has been no need to meet in person. Instead, SCGA has used teleconferences to assist the GAO team on a more limited scope of tasks. Specifically, the SCGA has helped identify issues on which to advocate during ABA Day in Washington DC, approved recipients for the ABA’s Justice Awards, and helped identify and present recommended legislative priorities for each Congress to the BOG. Selection of advocacy issues for ABA Day and identification of recipients for the ABA Day awardees (Justice Awards and Grassroots Advocates Awards) are tasks also done by the ABA Day Planning Committee that the ABA President appoints. The Director of GAO continues to manage staff, resources, the grassroots network, and prioritization.
of lobbying efforts to support the Association’s day-to-day advocacy mission. Currently, the only task done solely by the SCGA is the identification and presentation of the recommended legislative priorities for each Congress.

As the last four Chairs of the Standing Committee on Governmental Affairs, we think that maintaining this standing committee is no longer a judicious use of dedicated Association resources. The Standing Committee requested $2,750 for FY2019, but that amount was cut completely in the final budget. At this point, we think the committee itself should be cut too and we unanimously offer the following recommendations: 1) the SCGA be defunded during the FY 2020 budget process; 2) the SCGA sunset at the conclusion of the 2019 Annual meeting; 3) the ABA Day Planning Committee assume full responsibility for working with the GAO to identify issues for the annual ABA Days in Washington DC and select recipients for the ABA’s Justice and Grassroots Advocacy Awards, and 4) the ABA President appoint one Board liaison experienced in governmental affairs to serve as a subject matter mentor to the Governmental Affairs Office and to help identify and present recommendations on legislative and governmental priorities to the Board of Governors for approval at the beginning of each Congress.

Respectfully submitted,

William Weisenberg
Chair, Standing Committee on Governmental Affairs

PROPOSAL: Amends §31.7 of the Bylaws to dissolve the Standing Committee on the American Judicial System.

Amends §31.7 of the Bylaws to delete the paragraph headed American Judicial System.

American Judicial System. The Standing Committee on the American Judicial System shall consist of twenty-one members as described in paragraph (a) and shall be composed of the Subcommittee on State Courts and the Subcommittee on Federal Courts, as described in paragraphs (c)-(d).

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

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

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

(2) assist courts, administrative judiciaries, and bar associations to prepare for and respond to attacks on judicial independence, the ability of the courts to remain fair and impartial, and any other threats to the fair, impartial and efficient administration of justice;
(3) support efforts to increase public understanding of the importance of fair and impartial courts, the role of the judicial branch, and other matters related to the fair and efficient administration of justice within American judicial systems;

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

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

(c) The Subcommittee on State Courts shall:

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

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

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

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

(d) The Subcommittee on Federal Courts shall:

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

(2) study, monitor, and make recommendations regarding

(i) the appropriate compensation for federal judges,

(ii) the adequacy of the number of federal judgeships, including authorization of additional judgeships and filling judicial vacancies, and

(iii) the adequacy of the funding of the federal judicial system;

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

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

(5) maintain liaison with other persons and organizations concerned with judicial reform, with the judiciary, and with other appropriate government officials and court-related entities.
(3) work and maintain liaison with the federal judiciary and other appropriate government officials and court-related entities to support and improve the fair and effective administration of justice in the federal judicial system; and

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

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

(f) Honorary Co-Chairs. Two Honorary Co-Chairs of the Standing Committee shall be invited by the executive committee of the Standing Committee to serve one-year renewable terms. One shall be a recently retired state Supreme Court Justice or Judge of a state’s highest court of appeals. One shall be a retired federal court judge. The Honorary Co-Chairs shall have such duties as determined by the Chair.
The Standing Committee on the American Judicial System ("SCAJS") was created by the ABA House of Delegates at the 2014 Annual Meeting to continue and expand upon the work of its predecessor entities, the Standing Committee on Federal Judicial Improvements and the Standing Committee on Judicial Independence. SCAJS focuses on protecting fair and impartial courts, improving the administration of justice, ensuring adequate court funding, and defending against unfair attacks on the judicial branch. It supports efforts to increase public understanding about the role of the judiciary and the importance of fair courts within the American democracy. Since its creation, SCAJS has elevated its profile, obtained significant grants, and engaged in outreach to state and federal judges around the country. SCAJS seeks to have a meaningful impact and ensure access to courts that are fair, efficient, and accountable, and is committed to carrying out its mission, providing greater coordination of efforts, and enhancing the ability of the ABA to be a national voice on behalf of the American judicial system.

In 2018, the Board of Governors voted to reduce the funding of the SCAJS to $8600 per year. The Committee lost all staff support, although the Judicial Division staff provided administrative assistance. The Committee met by conference call and in person at donated space at the Midyear Meeting in Las Vegas. SCAJS leaders presented a proposal to the Section of Litigation, asking that the Committee become part of the Section. The Section voted in favor of the proposal and the SCAJS seeks to dissolve its status as a standing committee and become an entity of the Section of Litigation.

The ABA President-Elect Judy Perry-Martinez and Alan Kopit, Chair, Standing Committee on the American Judicial System understand and agree with the decision to sunset the Committee.

Respectfully submitted,

Alan Kopit
Chair, Standing Committee on the American Judicial System
PROPOSAL: Amends Article 31.7 of the Association’s Bylaws to change the jurisdictional statement of the Standing Committee on Public Education.

Amends Article 31.7 of the Association’s Bylaws to change the number of members for the Standing Committee on Public Education and the Advisory Commission to the Standing Committee.

§31.7 Designation, Jurisdiction, and Special Tenures of Standing Committees.

The designation, jurisdiction, and special tenures of standing committees are as follows:

... Public Education. The Standing Committee on Public Education shall consist of fifteen members, one of whom shall be a designated national Law Day chair, appointed annually by the President, and the chair of the Standing Committee on Gavel Awards, who shall serve ex officio. The Standing Committee shall:

(a) Provide policy direction and oversight for the Division for Public Education and coordinate the activities of its component entities;
(b) Assist Association activities designed to improve public understanding about the law;
(c) Promote activities of, and assist, state and local bar associations, other legal groups, and nonlegal organizations in educating the public about the law; and
(d) Foster and promote comprehensive, multifaceted school and community-based public education programs, including the development and implementation of model public education programs for youth, college and adult audiences.

(Legislative Draft – Additions underlined; deletions struck through)

... Public Education. The Standing Committee on Public Education shall consist of twelve members, one of whom shall be designated national Law Day chair, appointed annually by the President, and the chair of the Standing Committee on Gavel Awards, who shall serve ex officio. The Standing Committee shall:

(a) Provide policy direction and oversight for the Division for Public Education and coordinate the activities of its component entities;
(b) Assist Association activities designed to improve public understanding about the law;
(c) Promote activities of, and assist, state and local bar associations, other legal groups, and nonlegal organizations in educating the public about the law; and
(d) Foster and promote comprehensive, multifaceted school and community-based public education programs, including the development and implementation of model public education programs for youth, college and adult audiences.

(Legislative Draft – Additions underlined; deletions struck through)
(a) Provide policy direction and oversight for the Division for Public Education and coordinate the activities of its component entities/In activities;
(b) assist Foster Association activities designed to improve public understanding about the law;
(c) Promote activities of, and assist, state and local and provide assistance for bar associations, other legal groups, and nonlegal organizations in educating the public about the law; and
(d) foster and promote multifaceted school and community-based public education programs, including the development and implementation of model Develop and implement public education programs for youth, college, and adult audiences.

In 1997, the House of Delegates created the Advisory Commission to the Standing Committee on Public Education with the following charge:

The Advisory Commission shall consist of fourteen members.
The Advisory Commission membership will include educators and scholars, civic and media leaders, and representatives from new constituencies that public education programs seek to reach.

(Legislative Draft – Additions underlined; deletions struck through)
The Standing Committee on Public Education seeks these changes to its jurisdictional statement to reduce the size of the Committee and its Advisory Commission. In the current budget environment, a reduction in the number of members of the Committee and Commission will significantly reduce expenses for meetings and travel for the Committee and Commission.

In 2018, the budget for meetings was cut to $8,600, which was based on a typical committee size of seven members. The Standing Committee on Public Education does not recommend reducing the size of the Committee and Commission to that level because the Division relies on the larger Standing Committee membership to be advocates and partners in the Division’s outreach and public education programs. Similarly, it wishes to maintain the Advisory Commission at a sufficient size to retain a diverse range of voices of educators, scholars, and other leaders who are audiences for and partners in the work of the Division.

The Standing Committee plans to reach the target numbers over three years by adding fewer members to the Committee and Commission each year as current members finish their three-year terms. The Committee and Commission expects to complete the reduction by the 2021-2022 bar year.

Respectfully submitted,

Stephen Chappelear, Chair
Standing Committee’s Subcommittee on Oversight and Planning
PROPOSAL: Amends Article 33.1 and Article 33.2 of the Association’s Bylaws to change the jurisdictional statements.

Amends §§ 33.1 and 33.2.

Article 33. Publications

§33.1 American Bar Association Journal. (a) The American Bar Association Journal shall be published by Board of Editors consisting of the President, the President-Elect, the Chair of the House of Delegates, and the Treasurer, who are members ex-officio, and nine Association members elected by the Board of Governors as vacancies occur.

(b) The Board of Editors shall elect one of its members as Chair. The Chair shall act as liaison with the Board of Governors and, on the invitation of the President, shall report to it and attend its meetings.

(c) Members of the Board elected by the Board of Governors serve for three-year terms and are ineligible to serve more than two terms. However, a member who is serving as Chair when his or her second term expires is eligible to serve a third term.

(Proposed amendment)

§33.1 American Bar Association Journal. (a) The American Bar Association Journal shall be published by Board of Editors consisting of the President, the President-Elect, the Chair of the House of Delegates, and the Treasurer, who are members ex-officio, and nine Association members elected nominated by the Board of Governors Editors and elected by the Board of Governors as vacancies occur.

(b) The Board of Editors shall elect one of its members as Chair. The Chair shall act as liaison with the Board of Governors and, on the invitation of the President, shall report to it and attend its meetings.

(c) Members of the Board elected by the Board of Governors serve for three-year terms and are ineligible to serve more than two terms. However, a member who is serving as Chair when his or her second term expires is eligible to serve a third term.
§33.2 Authority of Board of Editors. The Board of Editors shall manage the Journal and its financial affairs. It may employ an editor and such other employees as it considers necessary. It may create an advisory board. The proceedings of the Board of Editors shall be reported to the Board of Governors which, by a majority vote of its entire membership, may disapprove, change, or rescind any action or appointment of the Board of Editors.

(Legislative Draft – additions underlined; deletions struck through)

§33.2 Authority of Board of Editors. The Board of Editors shall manage the Journal and its financial affairs. It may employ an editor and such other employees as it considers necessary. It may create an advisory board. The proceedings of the Board of Editors shall be reported to the Board of Governors which, by a majority vote of its entire membership, may disapprove, change, or rescind any action or appointment of the Board of Editors.

The Board of Editors may provide recommendations to the Board of Governors on budget matters and revenue opportunities involving the Journal. An Editor-in-Chief/Publisher shall be employed by the Association and selected with consultation and advice from the Board of Editors. The Editor-in-Chief/Publisher shall be responsible for managing the operation, editorial content and editorial integrity of the Journal. The proceedings of the Board of Editors shall be reported to the Board of Governors which, by a majority vote of its entire membership, may disapprove, change, or rescind any action or appointment of the Board of Editors.
The current version of Article 33 of the Constitution and Bylaws has been substantially unchanged since the early 1920s, just after the ABA Journal was created. The language of sections 33.1 and 33.2 refers to actions that have been and are performed by management and thus, the language does not conform with actual practice. The proposed amendment to Article 33 will normalize the work of the Board of Editors, and the appointed volunteer members will be able to provide their perspectives and guidance regarding the Journal. Nothing in the proposed amendments will change the current practice of journalistic independence. The amendment will enable the Board of Editors to function in the manner that other appointed volunteer leaders function, and to permit the professional staff to handle the day-to-day management responsibilities.

Respectfully submitted,

Scott C. LaBarre
Lynne B. Barr
Andrew J. Demetriou
H. Russell Frisby, Jr.
Rew Goodenow
Susan Holden
Andrew J. Markus
Lorelie S. Masters
Hon. Leslie Miller
C. Edward Rawl

Respectfully submitted,

Scott C. LaBarre
Lynne B. Barr
Andrew J. Demetriou
H. Russell Frisby, Jr.
Rew Goodenow
Susan Holden
Andrew J. Markus
Lorelie S. Masters
Hon. Leslie Miller
C. Edward Rawl
The Standing Committee on Constitution and Bylaws is directed by the Association’s Bylaws to study and make appropriate recommendations on all proposals to amend the Association’s Constitution and Bylaws, except for certain specified proposals that are submitted by the Committee on Scope and Correlation of Work.

Since its last report at the 2018 Annual Meeting, the Committee has received nine proposals to amend the Association’s Constitution and Bylaws and House Rules of Procedure. The Committee met during the Midyear Meeting on January 26, 2019, in Las Vegas, Nevada, and on April 23, 2019, via telephone conference call, and herewith makes its recommendations on the proposed amendments as follows:

Proposal 1

The Committee considered a proposal to amend §1.2 of the Constitution to include the following language as one of the purposes of the Association: “to defend the right to life of all innocent human beings, including all those conceived but not yet born.” The Committee voted to recommend to the House that the proposal is out of order and, accordingly, that it not be approved because (i) it is incompatible with the Supreme Court’s interpretation of the Constitution of the United States that the Association is committed to uphold and defend, (ii) it would be redundant and unnecessary if the Court were to adopt the interpretation of the U. S. Constitution advocated by the proponent, and (iii) the Association’s Constitution is designed to state the overarching purposes of the Association; it is not the appropriate place to enumerate specific rights or articulate positions of the Association on specific issues of law or policy within the overarching purposes already stated.

Proposal 2

The Committee considered a proposal to amend §6.2(a)(1) of the Constitution to provide the U.S. Virgin Islands with a State Delegate, who pursuant to the existing language of §9.2 would automatically serve as a member of the Nominating Committee. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 3

The Committee considered a proposal to amend § 6.4(a) of the Constitution to allow individuals who meet a state’s definition of young lawyer to serve as a young lawyer member of the House of Delegates for that state. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.
Proposal 4

The Committee considered a proposal to amend §6.7(b) of the Constitution to allow the Law Student Division to increase its number of delegates in the House of Delegates from 3 to 6 delegates. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 5

The Committee considered a proposal to amend §6.8 of the Constitution to include the Electric Cooperative Bar Association (ECBA) as an affiliated organization of the American Bar Association (ABA) and be represented in the ABA House of Delegates accordingly. The Committee disapproved as to form. However, the Committee took no position on the substance of the proposal.

Proposal 6

The Committee considered a proposal to amend §31.7 of the Bylaws to sunset the Standing Committee on Governmental Affairs. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 7

The Committee considered a proposal to amend §31.7 of the Bylaws to sunset the Standing Committee on the American Judicial System. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 8

The Committee considered a proposal to amend §31.7 of the Bylaws to reduce the number of members for the Standing Committee on Public Education from 15 to 12 and reduce the number of members of its Advisory Commission from 14 to 8 members. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.

Proposal 9

The Committee considered a proposal to amend §§ 33.1 and 33.2 of the Bylaws to change the language to normalize the work of the Board of Editors, and the appointed volunteer members to be able to provide its perspectives and guidance regarding the Journal. The Committee approved the proposal as to form. However, the Committee took no position on the substance of the proposal.
Respectfully submitted,

Carlos A. Rodriguez-Vidal, Chair
Hon. John Preston Bailey
M. Joe Crosthwait, Jr.
Hon. James S. Hill
Eileen M. Letts
Michael Haywood Reed
Joseph D. O’Connor
Mary L. Smith, Board of Governors Liaison
RESOLVED, That the American Bar Association urges state, local and territorial jurisdictions to use a central panel system for state administrative law adjudications; and

FURTHER RESOLVED, That the American Bar Association encourages state legislatures to implement several recommendations to increase central panel fairness and efficiency, including (1) independent funding allocated directly by the legislature; (2) the creation of an advisory council to review, analyze, and advise on current and proposed central panel practices; (3) a more balanced system of generalist/specialist ALJs within the central panels; (4) a complaint process for parties to voice their concerns; and (5) more training for adjudicating pro se litigants, addressing implicit bias, and increasing ALJ diversity.
Introduction

In the 1970s, states began to experiment with the central panel system of administrative adjudication, in which administrative law judges ("ALJs") are not employed by the agencies whose cases they hear, but by a separate central panel agency created to adjudicate a broad spectrum of cases arising from other agencies. The central panel system is a framework to increase the judicialization of the state administrative process by distancing ALJs from the agencies they serve, to thereby ensure fair, high-caliber decision-making, and to promote cost efficiencies. Central panels may differ in aspects such as the kinds of cases they hear, how they are funded, how decision-making independence is insured, and whether there are cost efficiencies.1

Those familiar with state administrative law have long favored the central panel system. Malcolm Rich and Alison Goldstein’s The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices2 summarizes a recent, extensive study of the benefits of central panels.2 Rich and Goldstein trace the rise of the central panel system in over 30 states and municipalities in the past 50 years and analyze its state-specific impacts.4

Why Recommend Expansion of State Central Panels?

The Resolution encourages state legislatures to implement several recommendations to increase central panel fairness and efficiency, including (1) independent funding allocated directly by the legislature; (2) the creation of an advisory council to review, analyze, and advise on current and proposed central panel practices; (3) a more balanced system of generalist/specialist ALJs within the central panels; (4) a complaint process for parties to voice their concerns; and (5) more training for adjudicating pro se litigants, addressing implicit bias, and increasing ALJ diversity.

The authors of the Appleseed Report found that state central panels increased administrative transparency, perceived fairness, and ALJ independence. They further noted the historical trend towards the expansion of both the central panel approach to more states and, after adoption, expansion of

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jurisdiction to additional agencies within those states, as the panels have increased due process and efficiency.

Benefits of the Central Panel Approach

Central panels separate investigative and prosecutorial powers from adjudicatory powers, making administrative adjudications fairer and closer to Article III judicial proceedings. They decrease the appearance of bias that occurs when ALJs are hired, promoted, supervised, and paid by the agency that appears before them as a party.  

Individuals that bring claims against agencies often feel they are treated unfairly under the traditional agency hearing system. This is largely due to the perception that the presiding ALJ worked directly with, and was dependent on, the litigating agency. This is especially true for pro se litigants representing themselves against the state.  

The public generally perceives central panel ALJs as more impartial, and believe that they produce fairer decisions. Litigants feel as if they have been afforded greater due process of law when they appear before an ALJ who is a member of a central panel rather than an agency employee. This appearance of increased judicial independence is an important factor in the success of the central panels.  

Most ALJs surveyed identified the benefits of central panels as improved public trust, more positive perceptions of administrative courts, and cost effectiveness. They suggested that more state agencies should be incorporated into the panel’s jurisdiction, and that more ALJs should be recruited so that they would be easily able to recuse themselves when appropriate. None of the ALJs that were surveyed thought it would be wise to return to the traditional model of administrative adjudication. Indeed, ALJs generally found greater job satisfaction and prestige belonging to a central panel.  

The Evolution of the Central Panel Movement

Concerns about the constitutionality of in-agency adjudicators date back to the early 20th Century; as the administrative state expanded, so too did questions of agency accountability. Agencies, and their adjudicatory processes, have often been criticized for failing to adequately protect the rights of litigants or apply policy fairly. A growing number of states have responded by instituting central panels to improve judicial independence and efficiency.

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better ensure a high-quality, effective, efficient, and independent administrative judiciary.9

The central panel experiment began in 1938, when the California State Bar issued a report detailing the need to separate agencies’ prosecutorial and adjudicatory functions and develop a judicial review process for administrative decisions. After extensive study, both the California APA and the nation’s first central panel were adopted in 1945.8

In the 1970s other states began to experiment with their own central panels, and by the end of the decade seven states had adopted a version of the central panel approach. This was often part of broader administrative reform, spurred by a desire for greater transparency, the appearance of justice, and fiscal responsibility. Colorado, for example, adopted a central panel “to promote decision-making independence and cost-cutting.” The movement towards central panels was embraced by nearly all ALJs, who welcomed the opportunity to hear a wider variety of cases, and by state bar associations, who viewed it as a way to enhance their members’ prestige and to make administrative adjudication more independent, efficient, and professional. The State of Maryland adopted a central panel for good government reasons.9

Current Issues and Recommended Practices

Structure of Successful Central Panels

Central panel structure can vary widely among states. The movement has grown out of an “interactive web of legislative negotiations, state-based politics, policies and procedures of the hearing system, [and] due process considerations.” To capture some of this variety, the Appleseed Project surveyed 23 central panel directors around the country, asking about both panel structure and more qualitative perceptions of the central panel approach. Some of the main takeaways are summarized below.

Funding

Central panels may receive money through general funding, where the state legislature appropriates a set amount of money for the panel’s operating budget through a revolving fund, or through a mandatory cost allocation system, where the legislature mandates a portion of agencies’ allocated budgets to fund the central panel. Funding may also be through an “Oregon Plan,” where the central panel bills agencies an hourly rate for adjudication services. This system has been tried and rejected by some central panels, including Colorado and Maryland. Many ALJs perceive the first two methods as fostering impartiality, since it frees ALJs from reliance on payment from the agency.

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Jurisdiction
Most states have exempted specific agencies or types of decisions from central panel jurisdiction. This is decided by state legislatures responding to particular concerns and political pressures, often from agencies concerned with losing administrative autonomy. Workers compensation proceedings, for example, are frequently exempted from central panel adjudication, making Colorado, Minnesota and Florida unusual in this respect. Some agencies that deal with complex scientific or technical matters opt to exempt specific subsets of their hearings from central panel adjudication, while still sending their more general hearing matters to the panel.

Central panel jurisdiction can be voluntary, mandatory, or a hybrid of the two. Under voluntary jurisdiction, agencies decide which cases to refer to the central panel. Critics believe that this undermines the appearance of justice, as agencies can consciously divide hearing loads between their agency ALJs and the central panel.

Level of ALJ Specialization
One objection that central panel opponents raise is that ALJs hearing a diverse range of cases will be less knowledgeable on technical subjects than their specialized agency counterparts, which may leave them vulnerable to manipulation by the parties. Central panel ALJs are generalist judges, although they generally have more specialized expertise than Article III judges. Proponents argue that the central panel model avoids the “insularity and complacency” of specialized ALJs hearing cases from the same few agencies. Some states have adopted a “hybrid approach,” where specialized ALJs hear more technical cases and other ALJs hear a variety of less-complex cases. Among the central panel directors surveyed, one third divided central panels into sub-units based on ALJ specialization in technical areas. The majority of directors/chief judges reported making assignments with ALJ expertise in mind, and felt that having a generalist hear the arguments added to the impartiality of the hearing process.

Suggested Practices and Recommendations for Newly Established Central Panel Agencies
Based upon the conclusions reached in their research, Rich and Goldstein advised that state jurisdictions adopting central panel systems should follow these key recommendations in order to create the fairest and most efficient adjudicative system.10

1. Direct funding of central panels from state legislatures through revolving funds or from mandatory cost-allocation systems in the agencies, rather than from hours billed to state agencies for use of the panel’s adjudicatory services.

2. Creation of an advisory council to provide central panels with direction and advice on rulemaking, with the goal of implementing standardized central

10 The Appleseed Report, supra note 1, at 72-73.
panel procedural rules from the beginning. This could include a review of current practices and procedures within both the judicial court system and the administrative hearing system. Central panels should avoid importing existing procedural rules from diverse agencies.

3. Consultation with ALJs before setting reasonable standards for case quotas, decisional deadlines, along with flexibility in adjusting such standards.

4. Experimentation with assigning ALJs to tiers to determine what cases they could hear based on experience. The ALJs could be promoted to higher tiers, creating an incentive system to reduce complacency.

5. High selection standards for ALJs to increase the cadre’s quality and diversity.

6. Implementation of a hybrid system of generalist and specialist ALJs, while avoiding assigning ALJs to cases from their former agencies.

7. Better use of technology, including electronic data collection systems to track cases, electronic filing systems, online access to forms, and a complaint process for parties to voice concerns.

8. Regular implicit bias and pro se litigant training for central-panel ALJs.

In order to monitor progress, new and existing central panels should issue annual reports which provide analytic data for such factors as (1) changes in jurisdiction and documentation of the cost impact of these changes; (2) expertise and experience levels of current and newly hired ALJs and staff; (3) case processing time; (4) case-flow-management data; and (5) cost efficiency data.
Conclusion

State, local and territorial jurisdictions that do not presently have a central panel are encouraged to establish a central panel structure. The resolution encourages adoption of this proven model of state administrative law adjudications. Doing so would promote public confidence and maintain trust in the independence of administrative law adjudicators, as well as encourage continued efficiency of the administrative adjudicatory processes.

Respectfully submitted,

Judson Scott
Chair, National Conference of the Administrative Law Judiciary
August, 2019
1. Summary of Resolution(s).

This Resolution encourages state, local and territorial jurisdictions to establish the central panel model for administrative hearings as it has been demonstrated that this system of administrative adjudication delivers decisional independence, increased efficiency, cost effectiveness, greater transparency, a highly-qualified cadre of administrative law judges, expansion of jurisdiction, greater protection for unrepresented litigants, and enhanced public trust in an impartial system of administrative justice for all litigants. The Resolution also outlines five specific recommendations to increase central panel fairness and efficiency.

2. Approval by Submitting Entity.


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 improvement and overall national uniformity in the fair and impartial dispensation of administrative justice in the United States.

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

Not Applicable

6. Status of Legislation. (If applicable)

Not Applicable

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

The National Conference of the Administrative Law Judiciary (NCALJ), a
conference within the Judicial Division, has worked with the Appleseed Project to assist states in implementing their administrative law systems into a central panel. Through voluntary promotion of this Resolution to states and territories where central panels are not yet in place, NCALJ members will continue to successfully assist state governments in transitioning to a central panel. ABA policies concerning legal systems are compelling to state legislatures. Assistance in this fashion has been successful with Alaska and Oregon. Currently, Illinois has commenced a pilot project to begin a central panel with the assistance of the Appleseed Project and NCALJ members and the Indiana legislature has enacted legislation to fully implement a central panel in July, 2020. NCALJ has the ability to continue its efforts by informing state governments of the underlying Appleseed study, its prior successes, the ABA Resolution, if adopted, and respond to inquiries that state officials may have while acting in accordance with ABA policy.

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

It is not anticipated that passage of this resolution will bear any costs for the Association.


The only interest the National Conference of the Administrative Law Judiciary has is improving the quality of administrative justice in the United States.

10. Referrals.

This Resolution encourages state, local and territorial jurisdictions to establish the central panel model for administrative hearings as it has been demonstrated that this system of administrative adjudication delivers decisional independence, increased efficiency, cost effectiveness, greater transparency, a highly-qualified cadre of administrative law judges, expansion of jurisdiction, greater protection for unrepresented litigants, and enhanced public trust in an impartial system of administrative justice for all litigants.

States and local jurisdictions currently operating with a Central Panel system:

Alaska    Arizona    California    Colorado
Florida    Georgia    Illinois    Indiana
Iowa    Louisiana    Maryland    Massachusetts
Michigan    Minnesota    Missouri    New Jersey
North Carolina    North Dakota    Oregon    South Carolina
Tennessee    Texas    Washington    Wisconsin
Chicago (City)    New York (City)    Washington, DC    Cook County, IL
Quebec (Canada)

States and local jurisdictions currently operating with a Central Panel system:

Alaska    Arizona    California    Colorado
Florida    Georgia    Illinois    Indiana
Iowa    Louisiana    Maryland    Massachusetts
Michigan    Minnesota    Missouri    New Jersey
North Carolina    North Dakota    Oregon    South Carolina
Tennessee    Texas    Washington    Wisconsin
Chicago (City)    New York (City)    Washington, DC    Cook County, IL
Quebec (Canada)
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Hon. Judson Scott  
Chair, National Conference of the Administrative Law Judiciary  
4033 Vail Divide  
Bee Cave, TX. 78738  
(925) 895-8348  
judscott1@gmail.com

Hon. Julian Mann, III  
Member, National Conference of the Administrative Law Judiciary  
Chief Administrative Law Judge  
North Carolina Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh, NC  27609  
julian.mann@oah.nc.gov

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Hon. Dean Metry  
Delegate to the House of Delegates  
National Conference of the Administrative Law Judiciary  
dean.c.metry@uscg.mil
EXECUTIVE SUMMARY

1. Summary of the Resolution

As more state, local and territorial governments look to create efficiency in the administration of their duties, administrative adjudication is increasingly utilized to resolve litigation instituted by governmental agencies or the general public. Typically, litigation in an administrative hearing is presided over by an Administrative Law Judge, or comparable hearing officer (“ALJ”), who is employed by or contracted by an agency that is usually a party to the litigation. While the ALJ and the agency can and often do take steps to ensure impartiality and independence, a negatively inherent perception of this relationship remains. This perception seldom reflects the reality of a conflict, but in the eyes of the citizen-litigant the perception creates doubt.

A central panel removes the ALJ from the agency and places the ALJ in a neutral central agency reporting to a chief ALJ. By removing the ALJ from the agency that is a party to the litigation, the central panel removes the stigma of this inherently negative perception. This creates in the ALJ a degree of decisional independence that allows the ALJ the ability to decide cases based on the facts and the law, avoiding even the appearance of a conflict.

This Resolution encourages state, local and territorial jurisdictions to establish the central panel model for administrative hearings as it has been demonstrated that this system of administrative adjudication delivers decisional independence, increased efficiency, cost effectiveness, greater transparency, a highly-qualified cadre of administrative law judges, expansion of jurisdiction, greater protection for unrepresented litigants, and enhanced public trust in an impartial system of administrative justice for all litigants. These conclusions have now been confirmed by the 2019 Chicago Appleseed Fund for Justice Report entitled, The Need for a Central Panel Approach to Administrative Adjudications: Pros, Cons, and Selected Practices, authored by Malcolm C. Rich, JD and Alison C. Goldstein, MPH (with pro bono assistance from Goldberg Kohn). The Resolution also outlines five specific recommendations to increase central panel fairness and efficiency.

2. Summary of the Issue that the Resolution Addresses

The continued expansion of central panels into state, local and territorial governments will enhance the administrative law judiciary by removing the perception associated with a judiciary that is compensated by a party to the litigation. A majority of the states and many metropolitan areas have already converted from the old decentralized agency adjudicator system to the central panel model. Most central panels are different and custom designed. This resolution recommends the continuation of a custom design central panel based...
on conclusions reached in a new comparative central panel study. In support of this concept, Malcom Rich’s original research in 1981 was the seminal study of the then existing seven state central panels. His original monograph study was commissioned by the American Judicature Society in 1980 and was later published as a law review article, entitled, *Adapting the Central Panel System: A Study of Seven States*, in 65 JUDICATURE 246 (1981). After almost 40 years Malcom Rich again undertook a thorough study of the now greatly expanded majority of states that have now established a central panel. Since his original study the central panel model has also spread to several major metropolitan areas. His conclusions in his most recent monograph study emphasizes the success of the existing central panels as “laboratories in developing new approaches to resolving disputes” when “the lives of hundreds of thousands of persons and businesses are at stake.” His latest study was partially underwritten by the American Bar Association. This Resolution, supported by the findings of this study and as previously conceptually endorsed by the ABA, encourages jurisdictions that have not adopted a central panel to now do so and thereby provide litigants a more just, effective and efficient forum.

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

Common within the broader context of the judiciary within American jurisprudence, the core functions of an ALJ is to hear the presentation of facts and law by the parties involved in litigation, make an impartial decision that is independent from all outside influences, and conduct mediations when appropriate. A separate central panel agency within a governmental unit becomes free to focus on judicial independence and efficiencies while providing the citizens a fair and impartial administrative hearing. To that end, ABA endorsement of the central panel approach for administrative adjudications will encourage other states, local and territorial jurisdictions that have not adopted this approach to consider doing so.

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

No minority or opposing views have been identified.

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RESOLVED, That the American Bar Association urges Congress to ensure that all Administrative Adjudicators, whether designated as Administrative Law Judges, Administrative Judges, Immigration Judges, Administrative Appeals Judges, Hearing Officers, Presiding Officers, or any other Administrative Adjudicator who decides matters of statute, regulation, or any equivalent thereto shall be free from improper influence in decision-making, including decisional quotas or agency pressure to decide a case on any basis other than on the evidence and in accordance with duly adopted agency rules and regulations, and that their decisional independence shall be protected; and

FURTHER RESOLVED, That the American Bar Association urges all state, local, county, territorial and tribal lawmakers to ensure that their respective Administrative Adjudicators, whether designated as Administrative Law Judges, Administrative Judges, Administrative Appeals Judges, Hearing Officers, Presiding Officers, or any other Administrative Adjudicator who decides matters of statute, regulation, or any equivalent thereto shall be free from improper influence in decision-making, including decisional quotas or agency pressure to decide a case on any basis other than on the evidence and in accordance with duly adopted agency rules and regulations, and that their decisional independence shall be protected.
Congress enacted the Administrative Procedure Act (APA) in 1946. This Act created Administrative Law Judges (ALJs). However, since that time the use of non-ALJs has grown significantly and now non-ALJs out number ALJs more than 5:1. A burgeoning system now exists of ALJs and non-ALJ adjudicators, whose decisions are impactful and touch the lives of many individuals. Some call them the “hidden judiciary,” however, there is nothing hidden about them. They are less well known than the traditional courts of Article III at the federal level, and state equivalents, however, Administrative Adjudicators (whether called ALJs, Administrative Judges, Immigration Judges, Hearing Officers, Presiding Officers or other nomenclature) adjudicate millions of administrative matters, claims and disputes each year competently and efficiently. This resolution seeks to ensure that public confidence in these less well-known adjudications will remain high.

Administrative agencies affect every aspect of American life, including matters as diverse as licensing, Social Security and Medicare matters, Veterans matters, regulatory violations and certain contractual claims and appeals. Administrative Adjudicators were created by statute to decide unresolved disputed matters where appellate rights from administrative determinations were needed. The traditional courts would be overwhelmed if those millions of disputes also had to be decided in their courtrooms. Traditional courts have neither the time nor expertise to deal with specialized matters arising from claims or disputes within the jurisdictions of these agencies.

By a variety of means, some subtle and others not so subtle, federal agencies have attempted to erode the decisional independence of Administrative Adjudicators. See discussion, infra, Section I. Whether by performance reviews, bonuses, unilateral docket management, artificial time limits, production quotas, or by myriad other ways, Administrative Adjudicators have had their decisional independence threatened. This resolution seeks to end that threat and to restore the full ability of Administrative Adjudicators to hear and decide their cases only upon the evidence of record, and pursuant to the applicable statutes, as well as the rules and regulations which were duly adopted by their respective agencies through formal rule making.

The choice of which avenue to follow to secure decisional independence is not specifically delineated because federal agencies vary in their rules and procedures and jurisdictional responsibilities. This resolution is not meant to lessen the protections already in place for a variety of Administrative Adjudicators but rather to increase protections from improper influence for all of them. Public confidence hinges on a policy of competent, objective and unbiased decisional independence. Without such a policy, no system of adjudication will enjoy the confidence, trust, and willingness of the participants to abide by administrative decisions as having been fairly determined on their merits. As much as the traditional courts enjoy the recognition of impartiality from the governmental bodies that seek to impose actions upon the governed, so should the administrative judiciary. Both the public and each agency will benefit from a recognition of the legitimate ability of the administrative adjudicator to fairly, impartially, and dispassionately decide disputes.

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I. Current Federal Problems

Administrative Adjudicators do not enjoy the full protections of the traditional judiciary. In the recently revised federal system after the Lucia, 585 U. S. ___, 138 S.Ct. 923 (2018) decision and resultant Executive Order 13843 (July 10, 2018)¹, an ALJ appointee is now selected by the agency department head with only the requirement that they be a licensed attorney in good standing. The previous ALJ qualifications of merit selection by the Office of Personnel Management including testing; interviews, personal references and background checks; and at least a minimum number of years of litigation experience were eliminated. This threatens to politicize the appointments of ALJs which were previously nonpolitical appointments made transparently after a careful and competitive evaluation of qualifications and merit.

Of significance for this Resolution, the Supreme Court, in Lucia, determined that federal ALJs were “inferior officers of the United States” under the Appointments Clause of the United States Constitution, rather than “mere employees” of their agencies after applying a test of the judicial functions they performed. Slip. Op., at 12. This focus on the judicial duties performed blurs the distinctions between many federal adjudicators and ALJs because their judicial duties and functional roles vary from agency to agency. Further, many federal Administrative Adjudicators perform similar roles when it comes to administrative adjudication, regardless of position or title. Yet, as currently situated, only ALJs have the statutory protections of the APA against many traditional means of agency influence such as performance evaluations and pay incentives. As this report will document, even the ALJs are being subjected increasingly to improper agency influence pressure and influence, despite their APA protections. The situation is even worse for the other federal Administrative Adjudicators who are not ALJs and, as is discussed in the following section, for state and other non-federal Administrative Adjudicators, as well.

A. Agency Interference in the Federal Sector

By a variety of means, some subtle and others not so subtle, federal agencies have attempted to erode the decisional independence of ALJs and non-ALJ adjudicators. See discussion, infra, sections B and C. Consequently, this resolution seeks to increase protections for all Administrative Adjudicators from improper influence in their decision-making. Without lessening protections already in existence, or mandating a specific path to implementation of defined types of protection, this resolution reaffirms the policy of the ABA that all Administrative Adjudicators at every level of government be free to decide cases fairly, impartially, and without fear of reprisal or discipline, so that the public confidence in these myriad adjudications will be justified.

1 Execuive Order 13843 can be read in its entirety at the following website or URL: https://www.bing.com/search?q=Excepting+Administrative+Law+Judges+from+the+Competitive+Service&qs=n&form=QBLH&sp=-1&pq=&sc=0-0&sk=&cvid=AD35E3F4EC7F433F9927B4F53F3CF49

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B. Administrative Law Judge Interference and Threats

1. Production Quotas - The Social Security Administration ("SSA") was recently exposed as pushing its ALJs to produce more and more case decisions and dispositions. See Complaint in Association of Administrative Law Judges v. Colvin, Case No. 1:13-cv-02925, Document #1, Filed 04/18/13 (N.D. IL), Exhibit G, Memorandum of Social Security Administration Inspector General, February 6, 2008. These quotas have been imposed arbitrarily without any objective or valid time/work process evaluation to determine realistic numbers of cases which can be properly handled by those judges, while also complying with agency rules and procedures and the due process rights of the parties involved. Id. Judges who have missed the numbers of required case dispositions have been punished through loss of work at home privileges, or by receiving formal written directives to produce 500-700 policy compliant decisions a year which are placed into their personnel files as the potential basis for further punitive action against them.

For example, an SSA ALJ decided to retire early when pressured by the SSA to schedule more hearings than he could prepare for ethically. Prior to becoming an ALJ in 2010, the judge served as an Air Force Judge Advocate General for 21 years, retiring as a Colonel. Since his appointment as an ALJ in 2010, he had consistently scheduled 36-42 hearings per month and had annual dispositions in excess of 400 cases, well within the median for the SSA ALJs as a whole. However, the judge was given a letter of reprimand for failing to schedule 50 hearings per month. He recognized that the agency’s emphasis on quantity, at the expense of quality, conflicted with his sense of duty and ethical obligations. As a result, the judge decided to retire a full year before early retirement eligibility and he will not be eligible for any civilian retirement benefits until 2026.

2. Rule Making – The SSA issued two Proposed Rules which will eradicate a fair due process hearing and harm constituents. Id. The first is a Proposed Rule entitled – “Setting the Matter for the Appearance of Parties and Witnesses at a Hearing.” This rule eliminates the claimant’s decision regarding whether to have an in-person hearing and instead makes this totally at the SSA’s sole discretion. Claimants should have the opportunity to be seen in person so the ALJ can better understand their physical and mental limitations. There are many fine details particular to a person which simply do not register on a video screen that can affect the outcome of a case. Claimants deserve an ALJ who understands their local challenges including access to health care and the familiarity of the type of injuries that can arise from local industries. This change would deprive millions of Americans of their right to due process and could result in hearings which are less fair and less efficient. Congress has urged the SSA to maintain its current policy, which allows claimants to choose to use video hearings on a voluntary basis or to have an in-person hearing if the party chooses to do so.

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The second is a Proposed Rule entitled “Hearings Held by Administrative Appeals Judges of the Appeals Council” which attempts to revise SSA regulations
to allow administrative appeals judges, who are attorney examiners from the SSA’s appeals council, to hold hearings and issue decisions in disability determination cases, where currently only ALJs perform these actions. A de novo disability hearing before an ALJ is essential to due process. ALJs are independent, impartial adjudicators who have been extensively vetted. Attorney examiners are employees and not ALJs. As such, they receive performance appraisals and are eligible for bonuses, making them subject to agency influence when they adjudicate and make a determination. This Proposed Rule was approved by Office of Management and Budget but has not yet been published in the Federal Register.

3. **Pressure to find in favor of employing agency** - A white paper examining agency pressure exerted on ALJs at the Securities and Exchange Commission was recently published by improper means or through improper influence. The ABA Commission on Immigration recently issued statements regarding the lack of safeguards for the immigration courts from these same problems in its report of March 20, 2019. See, “Insider Trading: The Problem with the SEC’s In-House ALJs.” In that examination, Judge McEwen candidly stated that she felt pressure to decide cases in favor of her agency, rather than independently. The white paper went on to examine case outcomes before ALJs at the SEC over the past several years and found that the agency enjoyed much better outcomes in cases decided before its ALJs than similar cases decided in the U.S. District Courts. It is further recognized by the drafters that in order to help ensure a qualified, independent administrative law judiciary there must be a transparent appointment process. While it is doubtful that the ALJ Competitive Service Restoration Act merit-based selection process will ever encompass the thousands of Administrative Adjudicators who are not ALJs, these judges’ decisional independence must be ensured as well.

C. **Immigration Judges (Non-ALJ Adjudicator Interference)**

This resolution recognizes that decisional independence is also gained by protection from reprisal by improper means or through improper influence. The ABA Commission on Immigration recently issued statements regarding the lack of safeguards for the immigration courts from these same problems in its report of March 20, 2019. See, “Insider Trading: The Problem with the SEC’s In-House ALJs.” In that examination, Judge McEwen candidly stated that she felt pressure to decide cases in favor of her agency, rather than independently. The white paper went on to examine case outcomes before ALJs at the SEC over the past several years and found that the agency enjoyed much better outcomes in cases decided before its ALJs than similar cases decided in the U.S. District Courts. It is further recognized by the drafters that in order to help ensure a qualified, independent administrative law judiciary there must be a transparent appointment process. While it is doubtful that the ALJ Competitive Service Restoration Act merit-based selection process will ever encompass the thousands of Administrative Adjudicators who are not ALJs, these judges’ decisional independence must be ensured as well.

The method needed to protect each group of Administrative Adjudicators is not defined here. Improper influence is not defined for each, nor should it be. Broadly speaking, it is anything extra-judicial, including outside pressure or things the adjudicator is pushed to factor into the decision other than the law, formally adopted agency rules and regulations and the evidence presented. It is precisely this improper influence which this Resolution seeks to eliminate. Such improper pressures or influence are exemplified by some non-exhaustive listed examples that have occurred to Administrative Adjudicators.

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2. 67 Emory Law Journal 123 (2017)
In 2012, a respected federal immigration judge of Iranian descent, was ordered to recuse herself from all immigration cases involving Iranian nationals. Complaint, Tabaddor v. Holder, et al., Case No. 2:14-cv-06309 (C.D. CA); https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf | That order came from Attorney General Eric Holder’s office shortly after the judge was invited to attend an event at the White House to connect with the Iranian-American community leaders. The agency continued to defend its action even after the designated DOJ agency ethics officer informed the Department that the action was “inappropriate” and “discriminatory.” It was only after the judge filed a lawsuit in federal court that the agency agreed to withdraw the offensive order, pay the judge’s attorneys’ fees, and settle the matter amicably. This judge’s case illustrates not only the need for protection of administrative judges against arbitrary conduct and interference with their ability to perform their judicial duties, but also that officials of both political parties have engaged in such actions. This overt action ordering the recusal of the judge based solely on the judge’s place of national origin is an obvious discriminatory effort. More significantly, it also illustrates actions taken and pressures imposed against Administrative Adjudicators outside the proper judicial arena.

In its March 19th Report referenced above, the Commission on Immigration expressed concern about the use of backlog-induced case completion quotas for Immigration Judges which are tied to their employment evaluations, and called for greater transparency in how the immigration standards for Immigration Judges operate and are applied. New quotas and deadlines were imposed on those judges in October 2018 despite no lack of performance or efficiency by those judges, however the new standards directly infringe on decisional independence. An Immigration Judge who fails to meet those quotas and deadlines will face discipline which can result in termination of employment. This creates pressure on the judges to rush through their decisions to protect their own jobs. Even worse, it pressures the judges to take the factor of their own continued employment into consideration while making decisions on the bench.

By way of example, Immigration Judges are now required to complete at least 700 cases per year. They must meet this arbitrary quota regardless of whether such number is possible or even realistic, and that quota fails to account for variation in case complexity. Consequently, the quota puts artificial pressure on Immigration Judges to complete cases, no matter the cost. Worse, the imposition of a quota that is artificial and unattainable is in direct conflict with the provision of due process. Although special dispensation may be granted in certain individual cases, the chilling effect of the quota remains impactful on the Immigration Judges. By extrapolation, the 700-case completion quota mandates that Immigration Judges complete 13.46 full trials per week, which equates to 2.69 full trials per day, at 2.97 hours per trial. Yet, since Immigration Judges also need to take time to engage in case preparation, review motions, and engage in other off-the-bench responsibilities which cuts into this allotted time, they must weigh providing fairness and due process against failure to meet this quota and possible termination. The American Bar Association has recommended an Immigration Court model that embodies the ideals proposed by the Institute for Advancement of the American Legal System:
“These models stress judicial improvement as the primary goal, emphasize process over outcomes, and place a high priority on maintaining judicial integrity and independence.” (emphasis added) See ABA Resolution 101B, adopted August 6, 2001.

Another subtle aspect of influencing administrative adjudication results is the arbitrary assignment of resources to any particular judge. By assigning insufficient resources to assist an adjudicator, the agency significantly curtails that judge’s ability to efficiently and properly work up, review, and rule fairly on the question brought before the judge. Here, too, the judge gets the message that his or her job is made easier or more difficult by their willingness to rule in the manner the agency wishes, rather than independently in compliance with the law and the evidence presented.

As can be seen from these examples, both subtle and overt efforts are made to affect the judge’s decision-making ability. This resolution discourages efforts to interfere by condemning all forms of improper influence. Although the resolution mentions quotas, the resolution should not be so narrowly read to only include such things. As the examples illustrate, wide-ranging agency abuse can take many shapes. Other factors not mentioned, but also recognized as improper influence include withholding (or granting) of bonuses, favorable (or unfavorable) performance evaluations, and promotions. Report of the ABA Section of Administrative Law on proposed changes to the Administrative Procedure Act (February 2005).

II. Corrective Efforts and Remaining Problems at the State Level

Many states have now moved to a central panel model for both selection and assignment of ALJs to adjudicate agency disputes. This expanding system brings the Administrative Adjudicators under a single administrative organization and then assigns or details them to the state agencies which require their judicial services. The method of assignment varies, but the common benefits are reduced cost by eliminating redundant judicial administration, improved public perception of transparency, judicial independence and fairness and improved judicial satisfaction. The number of jurisdictions which have adopted central panel systems continues to steadily increase and the benefits of that system are perceived and now numbers about 35 states and local jurisdictions.

There are many different types of central panel organizations. Some states do not use the central panel judges to decide all state agency disputes. Others use the central panel to assign judges to the differing agencies so that the adjudicator is not perceived to be an employee of the state agency involved in the dispute. Some also use the central panel to examine and qualify potential administrative adjudicator candidates to depoliticize the selection, much like the role the federal Office of Personnel Management previously had in the selection of candidates for federal ALJs. The point is that all state and local central panels recognize on some level that separation of the adjudicator from the agency builds trust and confidence in the public so that the litigants are far more likely to accept the decision of the judge.

Another subtle aspect of influencing administrative adjudication results is the arbitrary assignment of resources to any particular judge. By assigning insufficient resources to assist an adjudicator, the agency significantly curtails that judge’s ability to efficiently and properly work up, review, and rule fairly on the question brought before the judge. Here, too, the judge gets the message that his or her job is made easier or more difficult by their willingness to rule in the manner the agency wishes, rather than independently in compliance with the law and the evidence presented.

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Unfortunately, the state administrative systems are subject to many of the same pressures and problems detailed above. Additional problems are denial of final decision authority to their Administrative Adjudicators so that the judge’s decision becomes a recommendation to the agency head who can independently decide whether to follow it or make his or her own independent decision. There may be some reasons to reserve the final authority to prevent erroneous decisions, however it is widely perceived that this causes the perception that the judge’s decision is not independent. It is recognized that an appellate system to review the judge’s decision offers a more objective and transparent method of addressing judicial errors, while preserving confidence in the independence of that decision-making process. Although those which have adopted the central panel system have mitigated many of these problems, improper pressure and influences upon their Administrative Adjudicators remain and support the expansion of this Resolution to also encompass state, local, territorial and tribal Administrative Adjudicators.

Additionally, good cause removal requirement protections in many states also help insulate their administrative judiciary from arbitrary action or reprisal for unpopular decisions.

This resolution recognizes the need for a strong ABA policy statement to speak against improper agency incursions into the qualified decisional independence of Administrative Adjudicators. Application of this Resolution to state and local administrative adjudication will also provide a strong tool to combat related erosion of adjudicative independence through performance reviews, production quotas, arbitrary discipline, pay bonuses, and other direct and indirect efforts to affect the work performance of their administrative judiciary.

III. Conclusion

The framers of the Constitution recognized that one sure means of achieving true judicial independence was to isolate removal from the appointing authority and to eliminate pay and incentives for performance. Alexander Hamilton, Federalist No. 78, 521-30, (28 May 1788), Section 2, The framers felt, as did the drafters of the Administrative Procedure Act, that only ‘good cause removal’ could truly be effective in ensuring the adjudicator true decisional independence and thus build public confidence in the judicial process and system. Id.; 72 VA. L. REV. 219, 232 (1986). Their wisdom still applies today. It is now fully embodied in the Article III court system.

It is the mission of the American Bar Association to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession. Statement of ABA President Bob Carlson, dated March 20, 2019. This resolution seeks to further the mission by ensuring that administrative justice is delivered to all and that all decisions are based on legitimate concerns for the evidence, or lack of evidence and not based on external pressures on the administrative adjudicator.

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Respectfully submitted,

Judson Scott
Chair, National Conference of the Administrative Law Judiciary
August 2019
GENERAL INFORMATION FORM

Submitting Entity: National Conference of the Administrative Law Judiciary

Submitted By: Judge Judson Scott, Chair, National Conference of the Administrative Law Judiciary

1. Summary of Resolution(s).

This resolution seeks to restore public confidence in both state and federal administrative tribunals by strengthening and preserving their ability to render fair and impartial decisions in agency proceedings. One of the cornerstones of traditional judicial independence is the inability to remove a judge based upon the judge’s decision or actions related to official actions. For example, only in very limited circumstances may a federal Article III judge be removed, and only then by impeachment charges passed by the House of Representatives and trial in the Senate. The Administrative Procedures Act found at 5 USC 551 (et seq) seeks to afford the Administrative Law Judiciary (ALJs) protection from influence by allowing removal only for limited circumstances confirmed after hearing by the Merit Systems Protection Board. Only the federal ALJs currently enjoy this insulation from official interference. There are thousands more in the federal and state administrative judiciaries who carry the same general responsibilities as ALJs, but don’t enjoy the similar protections. These adjudicators go by various names, but all conduct similar fact gathering functions, are appointed in similar fashion as ALJs and issue decisions that can become final agency actions. This resolution does not delineate a certain method of ensuring insulation, and does not seek to lessen any entity protections they currently have, but rather, it seeks increased insulation for the Administrative Adjudicators who currently find their decisional independence threatened by a variety of subtle/not so subtle means by their agencies.

2. Approval by Submitting Entity.

Yes, this Resolution has been approved by the Executive Committee of NCALJ on March 13, 2019.

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?

Currently, policy exists in the ABA calling for adoption of the principles of judicial independence and fair and impartial courts. (See 07A110D). While that resolution clearly called for a fair and independent judiciary, it was focused on the Article III courts, stating that the judiciary is a separate and co-equal branch of government.
This new Resolution seeks to bring the principles of fair administrative adjudication into line with those of Article III adjudication.

Next, in 2019 NCALJ is recognizing the importance of a strong and independent state administrative law judiciary and reaffirmed the ABA’s opposition to any weakening of the authority of the ALJs in any state that used a central panel model of appointing judges through the introduction of a proposed resolution. The resolution recognized that it “should support the judicial independence and authority granted to the central panel administrative law judges...”. Again, this Resolution recognizes the importance of decisional independence and freedom from improper influence for State Central Panel ALJs.

This Resolution addresses the need for the administrative judiciary to be independent and free from improper influence, recognizing the same concerns have plagued other adjudicatory systems also need to be eliminated in the administrative adjudication arena.

This proposed Resolution brings Administrative Adjudicators under the same umbrella as all other adjudicators to avoid the pitfalls that improper pressure and influence can have on the ability to adjudicate fairly and maintain public trust.

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

Not Applicable


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

Support passage of current federal legislative efforts and encourage development of other means to ensure administrative judicial independence. For example, but not by way of limitation, reaffirming the APA, creation of a federal central panel, and recognition of an independent court status for federal Administrative Adjudicators.

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

Passage of this resolution will not bear any costs for the Association.

9. Disclosure of Interest. (If applicable)

Not Applicable
10. Referrals.

Administrative Law and Regulatory Practice Section
Civil Rights and Social Justice Section
Commission on Immigration
Government and Public Sector Lawyers Division
Judicial Division
Litigation Section
Tort Trial and Insurance Practice Section

11. Contact Name and Address Information.

Hon. Judson Scott
Chair, National Conference of the Administrative Law Judiciary
4033 Vail Divide
Bee Cave, TX. 78738
(925) 895-8348
judscott1@gmail.com

12. Who will present this resolution in the House?

Hon. Dean Metry
Delegate to the House of Delegates
National Conference of the Administrative Law Judiciary
601 25th Street
Galveston, TX  77550
dean.c.metry@uscg.mil
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution encourages federal, state, and local governments to take all measures to maximize the ability of all Administrative Adjudicators to render decisions, freely, fairly, and independent of agency interference.

2. Summary of the Issue that the Resolution Addresses

All persons appearing before an Administrative Adjudicator are entitled to a fair and impartial hearing that fully comports with the requirements of due process. Any outside considerations that could impact the Administrative Adjudicator’s independent decision-making in a given case, whether they be job incentives, personal allegiances, or otherwise, are anathema to the judges’ constitutional duties. These resolutions seek to address those fundamental concerns.

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

The resolution will encourage Congress and state, territory, tribal, and local governments to take steps to insulate the administrative judiciary from improper influences from their employing agencies.

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

None.
RESOLVED, That the American Bar Association urges the federal government to immediately implement the First Step Act of 2018 by providing all necessary funding for its full implementation;

FURTHER RESOLVED, the federal government should engage the National Institute of Justice to choose a nonpartisan, nonprofit organization, with expertise in risk and needs assessment, to host an Independent Review Committee to develop a risk-and-needs-assessment system necessary to implement the “earned time credits” provided for in the Act, so that certain federal prisoners can earn good-time credits by completing rehabilitative programming and engaging in productive activities that can be applied to pre-release custody or supervised release;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to apply retroactively all of the sentencing amelioration provisions of the Act;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to make effective immediately the increase in “good time credits” for federal prisoners from 47 days credit per year to 54 days per year; and

FURTHER RESOLVED, That the American Bar Association urges that, until legislation is adopted to make all of the sentencing amelioration provisions of the Act retroactive, the President and the Department of Justice should immediately implement a systemic program to consider commutation of the sentences of federal prisoners whose sentences would be lower if all of the ameliorative sentencing provisions of the Act were retroactive.
Imprisonment is both a societal and economic failure. It’s expensive. And the numbers are staggering. State correctional costs have quadrupled over the past two decades and now top $50 billion a year. That’s 1 in every 15 general fund dollars. Despite the expensive price tag, the public gets little for its investment. Imprisonment does nothing to assist an individual to reintegrate into society as a productive citizen, it prevents economic mobility for entire communities, and it simply does not prevent recidivism. Re-arrest rates for released prisoners in the United States is over 50 percent. Knowing that persons who are sentenced will ultimately be released should focus society on the need to prepare these persons to return to communities as functioning persons. Accordingly, criminal justice stakeholders are dispensing with the idea that we can discard people who have committed crimes and punish them forever for their worst mistakes, even after they have served their punishments in prison. If we truly want to better assure that a person will not reoffend, it is necessary to invest elsewhere: in education, rehabilitation, and providing socio-economic support through job skills training.

Ameliorative sentencing provisions

The First Step Act takes preliminary action to reintegrate persons who have completed their sentences. The Act does so through rehabilitation programs and motivating participation in these programs through the potential of earning substantial good time credits. Persons who participate in these programs can earn ten days good time credit for every thirty days that they participate in the programs. These persons are also spurred to qualify as lower risk under risk-and-needs assessments so they can use those credits for early release.

The Act also takes steps to ease federal mandatory minimum sentences. It expands the “safety valve” judges can use to sentence below mandatory minimums for drug offenses. It restricts the current practice of stacking gun charges against drug offenders that added potentially decades to prison sentences. The combination of these changes will lead to shorter prison sentences in the future and should apply to those who have been sentenced for the same offenses. The Act substantially eases reentry by providing that persons, once released, receive their birth certificates and photo identifications.

The Act increases general “good time credits” as well. Currently for good behavior, inmates can earn 47 days credit per year. The Act has increased this general earned cap to 54 days per year, after the creation and application of certain risk assessment tools. Due to a legislation drafting error, this change is delayed for the formation and application of risk assessment tools that are relevant to the programmatic good time credits; additional ten days credit for thirty days of program participation.

In addition, the Act retroactively applies the 2010 Fair Sentencing Act, which decreased the disparity in sentences for crack and powder cocaine offenses from a one-hundred to one ratio. The Act increases general “good time credits” as well. Currently for good behavior, inmates can earn 47 days credit per year. The Act has increased this general earned cap to 54 days per year, after the creation and application of certain risk assessment tools. Due to a legislation drafting error, this change is delayed for the formation and application of risk assessment tools that are relevant to the programmatic good time credits; additional ten days credit for thirty days of program participation.

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1 The First Step Act is available at: https://www.congress.gov/bill/115th-congress/senate-bill/756/text
2 Extended punishments after release include collateral consequences.
one weight ratio to an eighteen to one weight ratio and eliminated the five-year minimum mandatory sentence. The prior draconian and disparate crack sentences were enacted after tragic cases of crack related deaths.

In all, the purpose of the Act is to apply sensible sentences both for those who are sentenced for crimes going forward and for those who have been sentenced for the same crimes before the Act.

The Numbers

As of July 19, 2018, the United States had the highest prisoner rate in the world with 655 prisoners for every 100,000 people. Although the United States accounts for only 5% of the world’s population, it imprisons about 25% of the total persons incarcerated. As of 2014, the United States was also the world leader in an imprisoned population by incarcerating roughly 2.2 million prisoners. Within the federal system, the majority of U.S. prisoners were black or African-American. Of these African-American inmates, about 500,000 were men and only 26,000 were women. Within the state system, 237,000 prisoners were sentenced for drug related offenses, which account for about 17.4% of all the state prisoners in the United States. Sentences relating to murder account for roughly 12.2% of those in the state system and robbery sentences accounted for about 13.6%. However, of federal inmates, about 50% are serving sentences for drug-related offenses. The state statistics are particularly relevant because of the trickle-down effect of changes in federal sentencing and imprisonment policies. The First Step Act is expected to have an indirect impact on states’ sentencing, imprisonment and reentry policies.

Overview of Major provisions of the First Step Act

The Act applies to sentencing and imprisonment of persons in the federal system, and primarily makes changes to drug offense sentencing. It also includes violent offenses in sentencing enhancements for repeat offenders. Further, it makes more good conduct time available for those federal inmates who participate in certain programs while in custody. The Act also prohibits the use of restraints on most pregnant and postpartum-recovering women. It expands compassionate release by allowing prisoners who are terminally ill or elderly to move for their release after exhausting administrative remedies. The Act expressly makes the reforms enacted by the Fair Sentencing Act of 2010 retroactive, which reduce the disparity between crack and powder-cocaine sentences.

The delay in implementation

2 Data obtained through https://www.prisonpolicy.org/global/appendix_2018.html, including the Bureau of Justice Statistics
The First Step Act was enacted by Congress on December 21, 2018, with the purpose of reducing mass incarceration in the federal system and increasing successful reentry of those who have completed their federal sentences. It applies to persons who have not been sentenced before enactment. However, it does not appear to apply retroactively, with the exception of the direct retroactive application of the Fair Sentencing Act of 2010, which targeted crack/cocaine disparity. In addition, the Act reduces some federal sentences for repeated drug offenses and adds violent offenses to those for which repeat offenders’ sentences are increased. For those persons who have not yet been sentenced, these decreased penalties and the requirement for a serious drug felony predicate conviction apply immediately. The Act also requires hearings to determine whether a person’s prior final convictions qualify the individual for an enhanced sentence under 21 U.S.C. §851 in which the Government bears the burden of proof beyond a reasonable doubt.

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The Act also uses vocational and rehabilitative programs and risk assessment devises, once imprisonment begins, to determine which inmates will qualify for earlier release or earlier post confinement reintegration. Currently for good behavior, inmates can earn 47 days credit per year. The Act has increased this earned cap to 54 days per year. But this correction will not be realized until the assessment devices are in place and functioning, and the Department of Justice and Bureau of Prisons have not begun to put the necessary assessment tools in place. Once they do, implementation of the Act will also qualify some persons for up to 10 days good conduct credit for every 30 days of participation in programs. Those whose offenses or risk assessments do not qualify them for this good conduct time, can earn more telephone or visitation time or higher limits on commissary purchases by participating in programs.

The Act also makes some changes to ease federal mandatory minimum sentences. It expands the “safety valve” judges can use to sentence below mandatory minimums for drug offenses. It addresses the issue of stacking gun charges against drug offenders to add potentially decades to prison sentences. The combination of these changes will lead to shorter prison sentences in the future.

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Research has shown that education and training reduce recidivism. For this reason, the Act allows inmates “earned time credits” who participate in vocational and rehabilitative programs. These credits allow persons to be released early to halfway houses or to home confinement. This practice will not only decrease the incarcerated population, but the
early post confinement reintegration. Currently for good behavior, inmates can earn 47 days credit per year. The Act has increased this earned cap to 54 days per year. But this correction will not be realized until the assessment devices are in place and functioning, and the Department of Justice and Bureau of Prisons have not begun to put the necessary assessment tools in place. Once they do, implementation of the Act will also qualify some persons for up to 10 days good conduct credit for every 30 days of participation in programs. Those whose offenses or risk assessments do not qualify them for this good conduct time, can earn more telephone or visitation time or higher limits on commissary purchases by participating in programs.

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The Importance of the Act and its Retroactive Application

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education programs will decrease recidivism and, as a result, reduce crime and mass incarceration.

The Act is designed to help almost everyone in the federal criminal justice system. However, not everyone will see immediate benefits. Some benefits will manifest over time. For offenders with a high-risk level, the good behavior and good time training credits they earn cannot be utilized until their risk levels are reevaluated to being within acceptable limits. Offenders who have been convicted of high-level offenses or who are undocumented immigrants will not be able to earn credits. The Act will motivate incarcerated persons, regardless of their eligibility for early release, to improve their risk assessments by providing increased privileges in exchange for participation in reentry programs. Those who qualify will be motivated to improve their risk assessments to achieve early release. But since very few provisions of the Act will apply until it is implemented, we will not see the benefits of the programs come to fruition. Further, many recidivism-prevention tools and measures intended to decrease mass incarceration are not clearly retroactive in the Act.

Implementation of the Act is Critical

Within 180 days of enactment, the Attorney General was slated to develop and release a risk and needs assessment system after consultation with the Independent Review Committee created by the Act. The needs assessment system will (i) determine the recidivism risk of each prisoner upon intake as low, medium, or high; (ii) determine the risk of violent or serious misconduct of each prisoner; (iii) determine the type and amount of recidivism reduction programming for each prisoner and assign them to it; (iv) reassess the recidivism risk of each prisoner periodically based on dynamic factors; (v) reassign prisoners to appropriate recidivism reduction programs or productive activities based on the revised determination; (vi) determine when to provide incentives and rewards; and (vii) determine when a prisoner is ready to transfer into prerelease custody or supervised release.

The risk assessment system will be implemented another 180 days after the Attorney General completes and releases the risk and needs assessment system. The Bureau of Prisons has a two-year period to provide programs for eligible and interested prisoners and to develop and validate the risk and needs assessment tool to be used in reassessments. It will give priority for programs for prisoners with earlier release dates. It has the authority to expand programming. In addition, the Attorney General will create policies to partner with faith-based, art, community-based organizations, higher education institutions or private entities on a paid or volunteer basis. These partnerships will also be

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used to provide vocational training, to employ prisoners, or assist prisoners in prerelease custody or supervised release to find jobs. The Bureau of Prisons director is required to provide all prisoners with an opportunity to participate in the programs. The director will give priority to medium and high-risk prisoners for recidivism reduction programs and priority access to productive activities for medium and low risk prisoners.8

The Attorney General is required to submit a report to Congress upon successfully implementing the Act and must provide data such as recidivism rates, types of programs and activities, details on each prisoner in a program, fiscal savings, and recommendations for how to reinvest savings into other federal, state, and local law enforcement activities and evidence-based recidivism reduction programs in the Bureau of Prisons.9 Substantial funding is appropriated to implement the Act.

In order to advance these effective measures to decrease mass incarceration and recidivism, all reforms made in the First Step Act should be made retroactive by Congress. The President should also use his powers to commute the sentences of currently incarcerated persons to decrease10 them to what they would have been had the First Step Act reforms been available when they were sentenced.

Respectively submitted,

Drew Findling
President
National Association of Criminal Defense Lawyers
August 2019

8 Id.
9 Id.
10 A retroactive increase in sentence violates the ex post facto clause. Article 1, Section 9, Clause 3, United States Constitution.
1. **Summary of Resolution(s).** The resolution urges Congress to make the ameliorative provisions of the First Step Act retroactive and urges the President and Attorney General to take action to implement the provisions of the Act. It also urges the President to implement a systemic program to consider commutation of the sentences of federal prisoners whose sentences would be lower if all of the ameliorative sentencing provisions of the Act were retroactive.

2. **Approval by Submitting Entity.** The NACDL approved the resolution at its Midwinter meeting in Phoenix, Arizona in February 2019.

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 other resolution will be affected by this resolution.

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

6. **Status of Legislation.** (If applicable) The First Step Act was passed by Congress on December 21, 2018.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The NACDL and ABA should urge Congress to clarify or enact legislation as appropriate to assure that the ameliorative sentencing provisions of the Act are all retroactive. These organizations should also urge the President of the United States to utilize his commutation power to effectively make the ameliorative sentencing provisions of the Act retroactive.

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

9. **Disclosure of Interest.** (If applicable)
10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the National Association of Criminal Defense Lawyers is sending the resolution and report to the following entities and/or interested groups:

Criminal Justice Section
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)

Cynthia Orr
House of Delegates Representative
For the National Association of Criminal Defense Lawyers
310 S. St. Mary’s Street, 29th Floor Tower Life Building
San Antonio, Texas
T: (2210)865-4222
Email: Whitecollarlaw@gmail.com

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

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For the National Association of Criminal Defense Lawyers
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EXECUTIVE SUMMARY

1. Summary of the Resolution. The resolution urges Congress to make the ameliorative provisions of the First Step Act retroactive and urges the President and Attorney General to take action to implement the provisions of the Act. It also urges the President to take action through his power to commute federal sentences to reduce them to what they would be if the ameliorative sentencing provisions of the Act were retroactive.

2. Summary of the Issue that the Resolution Addresses. It assures that the correction of harsh federal prison sentences corrected by the Act are corrected for all eligible federal inmates regarding whom it is unclear whether the Act currently applies. The Act is unclear about retroactive application of its provisions or does not apply for the retroactive application of provisions.

3. Please Explain How the Proposed Policy Position Will Address the Issue. The proposed policy would seek to make the ameliorative sentencing provisions in the Act retroactive.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified. There have been no minority views expressed within or outside the ABA.
RESOLVED, That the American Bar Association urges state, territorial, tribal courts, and
law schools to adopt a “Pro Bono Scholars Program” in their respective jurisdictions that
allows law students, in their final semester of law school, to obtain a full-time externship
placement providing supervised pro bono services which deliver legal and other law-
related services to the underserved through non-profit legal organizations; and

FURTHER RESOLVED, That the American Bar Association urges that eligible “Pro Bono
Scholars” be provided the opportunity to take the February bar examination in their
respective jurisdictions (if offered) during their final semester of law school.
**Introduction**

In February of 2014, the State of New York spearheaded a new initiative: the “Pro Bono Scholars Program.” This program marries practical experience for law students with the community’s need for more pro bono legal services.

The Pro Bono Scholars Program allows third-year law students to devote their final semester of law school studies to serving underprivileged populations in an externship-style placement. Following an application process, accepted students take New York’s February Bar Exam and proceed to work full-time from March through May, performing approximately 500 hours of pro bono legal services. In addition, these students attend a weekly seminar, hosted by law school faculty, on topics chosen by their respective law schools. In essence, the Pro Bono Scholars Program is an academic externship with extra benefits for those involved. Growing continually, 2018 graduated the largest class of participants yet - close to 80 students across the state of New York.²

We encourage the American Bar Association (“ABA”) to embolden law schools, courts, and bar associations nationwide to design and implement a Pro Bono Scholars Programs in their respective jurisdictions. While this Report will use New York as an example and model for the purposes of illustration, each state has the ability to design and implement its own Pro Bono Scholars Program, in conjunction with local legal aid providers, court systems, and law schools.

**Responsibility of the Profession**

Pro bono service is a pillar of the legal profession. For law students, it provides a multitude of personal and professional benefits. Underlying these benefits, however, is the responsibility that pro bono service presents the members of the profession and those who seek to gain admission to it.³ Such service calls for lawyers, regardless of

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2 Verified by Samantha Pallini (primary drafter) in the Summer of 2018. Data available upon request.

3 Indeed, Rule 6.1 of the ABA Model Rules of Professional Conduct state that “a lawyer should aspire to render at least (50) hours of pro bono publico legal services per year” and that “a substantial majority of the (50) hours” should be to “persons of limited means” or to organizations that support the needs of persons of limited means. Model Rules of Prof’l Conduct R. 6.1 (2009).
“prominence” or “workload,” to use their talents and skills to improve the lives of underprivileged populations. Developing this understanding and skillset during law school can significantly benefit underprivileged populations and bridge the rapidly growing gap between the legal needs of those who cannot afford legal services and the resources available to meet those needs.

In 2013, the ABA’s Standing Committee on Pro Bono and Public Service conducted a report on American lawyers’ pro bono work. This nationwide study revealed that, in order to fulfill the legal profession’s responsibility to provide pro bono legal services to those most in need, institutional leadership needed to come from, among other entities, law schools. This came as no surprise to the Committee or to those reading the report. Yet, access to justice initiatives today still struggle with a host of monetary, resource, and volunteer-related issues. In fact, in 2017, the Legal Services Corporation (“LSC”) reported that “low-income Americans approached LSC-funded legal aid organizations for support with an estimated 1.7 million problem[s],” for which those Americans could receive “only limited or no legal help for more than half of the problems due to a lack of resources.”

It is for these reasons that law schools must continue to expand and grow their pro bono involvement and programming, so as to fulfill their professional obligations, prepare their students for the profession to which they seek to gain admission, and, most importantly, to continue to work toward bridging the gap between legal services and those in need of them.

5 See, e.g., Preamble to the Model Rules of Prof’l Conduct R. 6.1 (2009). “A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”

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Composition and Administration of the Program

This program enables law students to effectively complete their law school academic classes in five semesters, with the sixth semester of coursework being dedicated to providing full-time pro bono legal services to underprivileged populations. As the former New York Court of Appeals Chief Judge, Jonathan Lippman, stated in his announcement of New York’s program, “[t]he overarching goal for the Pro Bono Scholars Program is to instill in future members of the New York Bar the value of public service to the poor.”9

After an application and acceptance process, and at the completion of their fifth semester of law school, 3L law students accepted into the Pro Bono Scholars Program are effectively finished with traditional law school academic coursework.10 During the couple of months that follow, program participants study in preparation for the February Bar Exam (if offered).11 After taking the February Bar Exam, participants proceed to their pro bono placements in March, wherein they work approximately 45-hour weeks “under the supervision of a legal services provider, law firm, or corporation in partnership with their law school.”12 This placement lasts for 12 weeks, and it provides the participants with a minimum of 12 academic credit hours.13 In addition to working at their placements, students attend a weekly seminar hosted by their respective law schools, wherein they discuss a variety of legally-relevant topics (e.g., client confidentiality).14 At the close of their 12-week commitment, participants will have completed at least 500 hours of pro bono work and will proceed to walk at graduation with their fellow 3L classmates.15

In summary, participants “receive law school credit for their work and remain under their law school’s educational umbrella and stewardship while gaining practical

9 Id. at 4.
11 Id.
14 Id.
15 Id.
experience in the real world and helping those who cannot afford legal services.”¹⁶ This is the current composition and administration of New York’s version of a Pro Bono Scholars Program; however, the management and operation of a Pro Bono Scholars Program is not something that needs to be identical from state-to-state. Law schools are encouraged to work closely with their respective court systems and bar associations to develop a program that is best for their students, their community, their jurisdiction, and their legal aid providers.

Pursuant to ABA Standards 303 and 304, a program of this nature also satisfies the curriculum standard that students must participate in a minimum of six credits of experiential learning.¹⁷ Moreover, a Pro Bono Scholars Program mimics the format of the already ABA-approved externship programs. It is, therefore, a feasible program for law schools nationwide to implement, as the framework for externship programs is already a heavily-utilized and widely-accepted educational arrangement.¹⁸ Finally, each state (except Delaware) has a February Bar Exam, furthering the ability of almost every state to implement a Pro Bono Scholars Program.

Benefits of Nationwide Adoption

I. Benefit to Students

Pro bono work in a full-time, semester-long capacity provides students with an abundance of practical experience, which also fulfills curriculum standards set forth by the ABA.¹⁹ As aforementioned, this program is an externship with additional benefits. The


¹⁹ ABA Section of Legal Education and Admissions to the Bar, Managing Director’s Guidance Memo (March 2015), accessible at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_authcheckdam.pdf.
key differences between an externship and the Pro Bono Scholars Program is accelerated testing for the Bar and how the work specifically targets "the availability of legal services to needy populations."\textsuperscript{20}

Following New York's creation of the Pro Bono Scholars Program, Chief Judge Lippman formed an advisory committee made up of law school deans from around the state.\textsuperscript{21} Led by Judge Victoria Graffeo, Chief Judge Lippman tasked the committee with “collaboratively and expeditiously resolv[ing] any outstanding issues related to program implementation and evaluation[,] in addition to the assurance of] a smooth transition for the new protocols.”\textsuperscript{22} Following the implementation of New York’s first semester of the Pro Bono Scholars Program in the spring of 2015, Judge Graffeo authored an article in the *Journal of Experiential Learning*.\textsuperscript{23} Therein, she clarified the program’s objectives, structure, administration, and need.\textsuperscript{24}

Moreover, one thing made abundantly clear is that accelerated testing for the Bar is an adequate reward for those law students who dedicate their final semester of law school to working exclusively on behalf of underprivileged populations.\textsuperscript{25} This perk of the program, however, would not be a reward if the students taking the Bar Exam were not adequately prepared for it and, in consequence, did not pass the Exam. Hearteningly, the law students who have participated in New York’s Pro Bono Scholars Program are most often the students who pass on their first try. In February of 2017, 71% of first-time New York Bar Exam takers passed the Bar.\textsuperscript{26} However, this statistic refers to all of the February Bar Exam takers. With specific reference to those who were Pro Bono Scholars, The University at Buffalo School of Law reported that their students passed with a 100% pass rate.

\begin{footnotesize}
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\item[24] Id.
\item[25] Id.
\end{itemize}
\end{footnotesize}
Moreover, Brooklyn Law School reported that 100% of their Pro Bono Scholars have passed every year since the program went into effect in the spring of 2015. The other New York schools echo these statistics, with rates at or above 80%, even dating back to the spring of 2015, when the statewide program’s first participants took the February Bar Exam. Consequently, this special reward offered to the Pro Bono Scholars has proven to be a fruitful one, as the students emerge from the February Bar Exam ready to take on the legal profession. New York features law schools ranging from a #5 ranking to no ranking at all; and yet, the students participating in its various Pro Bono Scholars Programs have nevertheless proven that the commitment was worth the reward.

In most instances, program participants in New York enter their first post-graduate job with an advantage over their fellow first-year associates. One Pro Bono Scholars Program participant reports that she will be entering her post-graduate job in September of 2018 with “second-year associate status,” in a Manhattan attorney position, as a direct result of the 500 hours of practical experience she will have completed at her current pro bono placement. This advantage sets her, and other program participants, up for great success immediately upon starting at their post-graduate jobs. In some cases, participants of the program can even begin their post-graduate jobs as admitted attorneys as early as June or July, unlike their peers who will be in the midst of bar preparation and will not be admitted until several months later.

For those participants who do not have jobs upon graduation, the Pro Bono Scholars Program is an invaluable marketing tool for students to become more attractive to employers. The nature of the work performed in their placements benefits them by


29 “Of the 106 Pro Bono Scholars who sat for the February 2015 examination, 90 passed the examination for a passing rate of 85%.” New York State Board of Law Examiners, Press Release: February 2015 Bar Exam. Consequently, this special reward offered to the Pro Bono Scholars back to the spring of 2015, when the statewide program’s first participants took the February Bar Exam. Consequently, this special reward offered to the Pro Bono Scholars


31 “Of the 106 Pro Bono Scholars who sat for the February 2015 examination, 90 passed the examination for a passing rate of 85%.” New York State Board of Law Examiners, Press Release: February 2015 Bar Exam. Consequently, this special reward offered to the Pro Bono Scholars


34 For those participants who do not have jobs upon graduation, the Pro Bono Scholars Program is an invaluable marketing tool for students to become more attractive to employers. The nature of the work performed in their placements benefits them by


37 Students who do not attend a law school in New York, but who intend to take the New York Bar Exam, may participate in the Pro Bono Scholars Program, with certain permissions. Pro Bono Scholars Program: Interested Student, New York State Unified Court System, at 2, accessible at https://www.nycourts.gov/attorneys/probonoscholars/InterestedStudents.pdf.


40 Phone interviews with N.P. of Pace Law School, Spring 2018 participant in the Pro Bono Scholars Program, conducted January 9, 2018 and March 26, 2018.
“increasing their knowledge and marketability, [providing] practical experience, developing skills, enhancing their reputations[,] and [letting them] explore[] alternative career opportunities.”33 In their placements, program participants accumulate hundreds of hours of experience in motion practice, transactional work, client interaction, and appearances before courts - in addition to the experiences they have already amassed from prior internships and externships throughout their law school careers. This puts participants at an advantage over their peers when seeking out post-graduate job opportunities, as it affords them the time, space, and networking to explore viable post-graduate opportunities they may not have otherwise been afforded.

Chief among the benefits to program participants, however, is the education that comes from serving those in need. One program participant, Joseph Schofield of CUNY School of Law, spoke highly of his spring 2015 placement with the Housing Unit of the New York Legal Assistance Group (“NYLAG”):

“From the moment you arrive, there is a distinct impression that people are being pushed along in the machine of a deeply impersonal bureaucracy. It was the day of one of our last big snow storms. People were waiting outside as the snow fell, then waiting again to get through security where they had to remove their belts and jackets and weren’t allowed to bring in food or water. Their next task was to wait as long as an hour or more for a landlord’s attorney to call their name and begin negotiations. Too often in Housing Court, things happen only at the mercy of the landlord attorney. It is such a privilege to be able to help level that playing field.”34

Following Joseph’s placement with NYLAG, he was hired on as a full-time Poverty Justice Solutions Fellow after graduation, and today, he works as a Staff Attorney for NYLAG’s Tenants’ Rights Unit.35 Joseph is just one of the many examples where law students are given a window into the world of public service, providing them an occasion to witness the need for legal services for underprivileged communities whilst giving them opportunities, as it affords them the time, space, and networking to explore viable post-graduate opportunities they may not have otherwise been afforded.

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*Joseph Schofield, Staff Attorney at New York Legal Assistance Group, accessible at https://www.nylag.org/staff/joseph-schofield.*


*Joseph Schofield, Staff Attorney at New York Legal Assistance Group, accessible at https://www.nylag.org/staff/joseph-schofield.*
the opportunity to do something about it. Even when program participants do not find themselves in placements that become their “passion projects,” they are nonetheless exposed to the importance of service and the recognition of the immense privilege that accompanies those who pursue a career in the legal profession.36

As a final point, the reward of taking a Bar Exam prior to graduation means that the students who participate in the Pro Bono Scholars Program are non-degree-holding, full-time students. As a result, they receive academic credit for their placement, and, therefore, are able to proceed with the funding they have had for the entirety of their law school studies.37

II. Benefit to Law Schools

In recent years, the push for more innovative experiential programming – study abroad programs, accelerated programs, and externships in large cities – has become a focus for most legal institutions. With the creation of a Pro Bono Scholars Program, law schools will be able to market to prospective students the opportunity to switch academic coursework after two and a half years, thereafter permitting those students to go on into academic ‘practice’ in the spring of their third year. All of this adds to the attractiveness of exiting law school with an advantage and a greater base of hands-on, practical knowledge.

Chief among the benefits to law schools is the preservation of law school autonomy. A Pro Bono Scholars Program is a baseline that each school must meet: placements focused on underprivileged populations, a weekly academic seminar, an attorney supervisor, and so on.38 Despite these baselines, the creative minds behind New York’s Pro Bono Scholars Program emphasized the importance of each of the 15 law schools in New York having the flexibility to craft their programs according to their own

36 Jeff Donigan, a 2015 graduate of SUNY Buffalo Law School, was drawn to the Pro Bono Scholars Program after working for a summer with the Erie County Bar Association Volunteer Lawyers Project and observing the need for greater access to services. “[M]any of our clients are in terrible situations,” he said. “It is so rewarding to assist them and put a mile on their faces.” Gayle T. Murphy, New York State Bar Association, Pro Bono News, Volume 25, No. 2, at 14 (Spring 2015), accessible at https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=56200.

37 “Students are able to keep their scholarships, financial aid, and grants that they have because, during their sixth and final semester, they are still a full-time student. They haven’t received a degree yet, they’re still taking the weekly seminar class, so they’re doing the same thing that they would if they were participating in a clinic or an externship.” In-person interview with Kim Wolf Price, Externship Director of Syracuse University College of Law, conducted April 17, 2018.

students, curricula, and local communities’ needs.39 For example, program tailoring can be exercised with regard to details as minor as the amount of credits a law school awards to its students for participating.40 In contrast, program tailoring can also be as great as the qualifications expected of its participants,41 the means of application to the program,42 the number of students accepted to each program,43 and the selection of placements where students can be sent.44

Beyond autonomy, law schools will benefit from the relationships they form with alumni, legal aid providers, and clientele. In giving back to their local communities through the service of their students, law schools engage underprivileged populations in more meaningful ways, strengthen alumni relationships through mentorship and supervision of their law students, and successfully comply with and exceed the standards and expectations of the ABA. In essence, permitting students to apply to a prestigious

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39 NORC at the University of Chicago for Legal Services Corporation, The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans, Legal Services Corporation (2017), accessible at https://www.lsc.gov/media-center/publications/2017-justice-gap-report (“Respecting the autonomy of law schools, the issues of student tuition assistance or financial aid are not addressed by the Pro Bono Scholars Program guidelines — those are matters left to each law school. In addition, each American Bar Association-approved law school, whether situated in New York or elsewhere in the United States, is given the flexibility to develop its own guidelines for student eligibility, including deciding the extent to which academic standing will be a factor in the selection of participants. […] Each law school will determine and design the appropriate academic component. To facilitate the role of the law school, in addition to a placement or clinical supervisor, each participant will be assigned a law school faculty supervisor who will monitor the student’s progress and specify the nature of the classroom/seminar requirements of the program. Hence, a student benefits from the involvement of two supervisors — one from the faculty and one overseeing the pro bono work performed for the placement sponsor.”).


42 Id.

43 See chart on page 13.

“Scholars” program, accepting those students deemed qualified, and then sending those students out to serve in the community doubles back as a public relations and marketing tool for law schools. It builds a positive reputation in the community whilst enhancing its public image with prospective students and alumni.

Finally, by offering a Pro Bono Scholars Program, law schools can fulfill their obligations to the profession as a whole. As aforementioned, a nationwide study by the LSC revealed that, in order to “fulfill [the legal profession’s] responsibility to provide pro bono legal services to those most in need,” institutional leadership needed to come from, among other entities, law schools.\textsuperscript{45} It is crucial that law schools take this call to action seriously, and the offering of a Pro Bono Scholars Program would present a viable solution, with proven results, that would help so many people in such a short period of time.\textsuperscript{46} In summary, this offering could impact students for their entire career and it could impact clients for a lifetime.

III. Benefit to the Community

Pro bono work is vital to communities and families, who rely on such services not only for counsel, but for the protection of the essentials of their lives, such as housing, food, work, and familial ties. One New York City attorney described pro bono service as a foundational element of the American justice system.

“If access to justice is achieved through meaningful participation in the courts, then those of us who are officers of the court have a lot of work to do. By most accounts, some 80 percent of low-income litigants in our civil courts proceed without representation, and their legal outcomes suffer as a consequence. Not only do litigants face great harm — such as the loss of children, liberty and/or housing — but they learn that the courts are not a place of justice for all. It should be no surprise then that many low-income people eschew the courts when they have legal problems. The more our court system loses the trust of its citizens the less well it functions. . . . If pro


In 2011, the LSC created a Pro Bono Task Force to consider "how to effectively increase pro bono involvement by all lawyers" due to "the sharp rise in demand for legal services . . . as economic turbulence ha[d] caused the number of people living below the poverty line to soar." 48 The Task Force outlined a variety of "requests for the legal profession as a whole." 49 One of these requests was that LSC and its grantees "[include mechanisms for engaging non-lawyers as pro bono volunteers, including law students[)]." 50

As the demand for pro bono services rises in communities, and the demand for law students to have more practical experience upon graduation remains a key request of employers, there is no more telling statistic than that of last year’s pro bono services rendered by law students. Not including the pro bono hours that go uncounted or are difficult to track, law students contributed 3.8 million hours in pro bono legal services in the 2016-2017 academic year. 51 This is the equivalent of more than $92 million in legal services. 52

In New York, the cities of Syracuse and Rochester have been ranked 13th and 12th, respectively, for the highest poverty rates in the country. 53 Syracuse University College of Law’s Class of 2018 – compiled of approximately 180 students – has contributed $81M worth of pro bono legal services. 54

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49 Id.
50 Id.
52 Id.
53 Id.
completed a total of 6,007 pro bono hours for the underprivileged populations of Syracuse and Rochester between August of 2015 and March of 2018.\textsuperscript{54} That is an average of 5.5 hours per student, per semester. That is an excellent start for servicing the underprivileged populations of a community in need. With the Pro Bono Scholars program, however, Syracuse Law’s two spring 2018 participants performed a total of 1,000 pro bono hours in just 12 weeks. The impact of these two students offering 1,000 hours to the local Syracuse and Rochester underprivileged communities is incomparable. It is vital, therefore, that law schools and law students across the country are encouraged to take part in this opportunity to transform communities through service, all while benefitting personally and professionally.

Conclusion

By creating a Pro Bono Scholars Program in each state, the ABA, law schools, and law students will actively assist their communities and those who are desperately in need of pro bono services. If 3.8 million hours of pro bono legal services were provided by law students in one year, imagine how many more hours would be performed, and how many more people would be helped, if all 50 states, and all 200+ ABA-accredited law schools, created a Pro Bono Scholars Program for their 3Ls to participate in.

As United States Supreme Court Justice Sandra Day O’Connor once said, “The ever-increasing pressures of the legal marketplace, the need to bill hours, to market to clients, and to attend to the bottom line, have made fulfilling the responsibilities of community service quite difficult. But public service marks the difference between a business and a profession. While a business can afford to focus solely on profits, a profession cannot. It must devote itself first to the community it is responsible to serve. I can imagine no greater duty than fulfilling this obligation. And I can imagine no greater pleasure.”\textsuperscript{55}

We hope the ABA, and all of its members, will give serious consideration to this Resolution and Report, as we seek the encouragement of the creation of Pro Bono Scholars Programs across the country. “Those who have the privilege to know have the duty to act.”\textsuperscript{56}

Negeen Sadeghi-Movahed
Chair, Law Student Division
August, 2019

\textsuperscript{54} Pro Bono Graduation Honors for the Syracuse Law Class of 2018, compiled April 4, 2018.

\textsuperscript{55} U.S. Supreme Court Justice Sandra Day O’Connor, Speech: Professionalism, 78 Or. L. Rev. 385, 391 (1999).

\textsuperscript{56} Albert Einstein
**GENERAL INFORMATION FORM**

**Submitting Entity:** Law Student Division

**Submitted By:** Law Student Division Chair, Negeen Sadeghi-Movahed

1. **Summary of Resolution(s).** This Resolution urges state, territorial, tribal courts, and law schools to adopt a "Pro Bono Scholars Program" in their respective jurisdictions that allows law students, in the final semester of law school, to obtain a full-time externship placement providing supervised pro bono services which deliver legal and other law-related services to the underserved through non-profit legal organizations. The Resolution also urges that eligible "Pro Bono Scholars" be provided the opportunity to take the February bar examination in their respective jurisdictions (if offered) during their final semester of law school.

2. **Approval by Submitting Entity.** Approved by the LSD Council on April 28, 2018.

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.** N/A.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Each state court system, in conjunction with the state’s law schools, will have a choice to implement this policy.

8. **Cost to the Association.** No costs.

9. **Disclosure of Interest.** No Law Student Division Council members are currently participating in a Pro Bono Scholars program. However, Matthew Wallace, the Law Student at-Large on the ABA Board of Governors as well as Samantha J. Pallini, the primary drafter of this resolution, both attended Syracuse University College of Law which is referenced throughout the resolution as a model for future Pro Bono Scholars programs. There are no personal interests to be gained by this Resolution.

10. **Referrals.**

ABA Judicial Division
ABA Section of Legal Education and Admissions to the Bar
ABA Standing Committee on Delivery of Legal Services
102

ABA Standing Committee on Ethics and Professional Responsibility
ABA Standing Committee on Legal Aid and Indigent Defendants
ABA Standing Committee on Pro Bono and Public Service

11. Contact Name and Address Information.

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Samantha Pallini (Primary Drafter)
2017-18 Pro Bono Caucus Chair
Law Student Division

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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Samantha Pallini (Primary Drafter)
2017-18 Pro Bono Caucus Chair
Law Student Division
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges state, territorial, tribal, courts, and law schools to adopt a “Pro Bono Scholars Program” in their respective jurisdictions that allows law students, in the final semester of law school, to obtain a full-time externship placement providing supervised pro bono services which deliver legal and other law-related services to the underserved through non-profit legal organizations. The Resolution also urges that eligible “Pro Bono Scholars” be provided the opportunity to take the February bar examination in their respective jurisdictions (if offered) during their final semester of law school.

2. Summary of the Issue that the Resolution Addresses

This Resolution hits on three main issues: (1) moving towards closing the access-to-justice gap through the administration of greater pro bono legal services; (2) preparing law school graduates for the profession with greater practical experience; and (3) providing schools and states with a program that better prepares their students and better attracts students to their law schools and jurisdictions.

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

First, with regard to the access-to-justice gap, each law student who participates in a Scholars program will provide, on average, 500 hours of pro bono legal services to their local community. This is a substantial, immediate impact on communities nationwide.

Second, with regard to practical experience, it is undisputed that working full-time for several months prior to graduation from law school will prepare law students to be better lawyers. It will benefit both those students who do have jobs lined up to excel as first-year associates; and, it will give a significant advantage to those students who do not yet have jobs, by providing them connections, experience, and a head-start on their career.

Finally, through the development of these programs, law schools will maintain autonomy in designing a program, accepting students, selecting placements, and offering the classroom component. Moreover, this program provides an attractive marketing opportunity with regard to prospective students, forms strong connections between law schools and their local communities (thereby helping schools reap short and long term benefits), and does not dismiss schools’ needs with regard to tuition.

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

No opposition has been identified.
RESOLVED, That the American Bar Association urges Congress to enact S. 22, the Medicare Dental Benefit Act of 2019 (116th Cong.), or similar legislation to repeal the statutory exclusion of dental care and dentures in Section 1862(a)(12) of the Social Security Act and expressly add coverage of comprehensive dental and oral health services to the Medicare program.
I. Introduction

Medicare is the federal health insurance program created in 1965 for people ages 65 and over, regardless of income, medical history or health status. The program was later expanded to cover certain persons with disabilities who are under age 65, as well as individuals who have End Stage Renal Disease (ESRD) or Amyotrophic Lateral Sclerosis (ALS). Today, Medicare plays a key role in providing health and financial security to 59 million older people and people with disabilities. Yet, the oral health status of the Medicare population and its ability to afford and access oral health care are issues that the federal government has failed to address seriously. This resolution calls for Congressional action to repeal the statutory exclusion of dental care and dentures from Medicare and expressly add coverage of comprehensive dental and oral health services to the Medicare program.

II. Background

This report is the White Paper: An Oral Health Benefit in Medicare Part B: It's Time to Include Oral Health in Health Care, produced by Oral Health America (2018). Many people lose their dental insurance when they retire, and traditional Medicare does not include coverage for routine oral health care like checkups, cleanings, and x-rays, or restorative procedures (fillings, crowns, bridges and root canals), tooth extractions and dentures. While some Medicare beneficiaries may be able to obtain dental coverage through other sources such as private Medicare Advantage plans, employer-sponsored retiree health plans or individually-purchased dental plans, the scope of dental benefits varies widely across plans. Persons with low income may qualify for Medicaid in addition to Medicare, but whether Medicaid will provide oral health coverage at all and the scope of that coverage varies widely across the country, depending on individual state Medicaid policies.


Accordingly, an estimated 70 percent of seniors lack or have limited dental insurance and fewer than half access dental care each year. The gap in coverage leads to high out-of-pocket expenses for those who do access dental care. For those on a fixed or reduced income who may not be able to afford dental care, it can lead to higher expenditures for medical and emergency care associated with untreated dental problems. About 1 in 5 older Americans has untreated tooth decay, and more than 70 percent have periodontal disease. Younger Medicare beneficiaries with disabilities also lack oral health coverage, and over a third of these adults have untreated dental caries. A significant percentage of this group, as well as the low-income Medicare population, have reported delaying or foregoing dental care due to cost.

Oral health problems can adversely affect one’s ability to maintain optimal nutrition, self-image, social interactions, and mental and physical health. Caries and gum disease may lead to chronic pain, tooth loss and serious infections. It is also not uncommon for Medicare beneficiaries to have medical conditions and medications that worsen their oral health, or oral health issues that exacerbate or complicate treatment of their other medical conditions.

Increasingly, studies are showing that oral health is closely correlated to overall health. Adding comprehensive oral health coverage to Medicare would keep older adults and persons with disabilities healthier and reduce other health care costs.

### Statement of Need

People who rely on Medicare face numerous barriers to maintaining their oral health, including lack of coverage and affordable care, as well as costly medical conditions that lead to chronic pain, tooth loss and serious infections. It is also not uncommon for Medicare beneficiaries to have medical conditions and medications that worsen their oral health, or oral health issues that exacerbate or complicate treatment of their other medical conditions.


can also impact their oral health. While the importance of good oral health is generally accepted, dental care use among older adults diminishes with age for those with limited income or no dental insurance.9 Since income and dental insurance coverage are typically tied to employment, the ability to pay for dental services decreases with both age and retirement.10 Similarly, people who leave work due to permanent disability lose dental coverage at a time that they also have lost income.

Medicare beneficiaries spend a significant portion of their income on health care. More than one-third of beneficiaries in traditional Medicare spend at least 20 percent of their per capita total income on out-of-pocket health care costs. Between 2013 and 2030, out-of-pocket health care costs are projected to increase from 41 percent to 50 percent of income per capita Social Security income.10 The spending burden is even greater for individuals in poor health, aged 85 and over, and those with modest income or who derive most of their income from Social Security. In fact, cost is the number one reason that older adults cite for not having gone to a dentist in the past year.11

The majority of persons on Medicare are of modest means and median per capita income declines with age, which limits their ability to afford dental coverage and care. The median incomes for white beneficiaries over age 65 ($30,050) is significantly greater than for black ($17,350) and Hispanic ($13,650) beneficiaries. The median income for beneficiaries under the age of 65 with disabilities is even lower, $17,950. Between 2013 and 2030, median income and savings are projected to increase after adjusting for inflation, but much of that growth will be concentrated among a small subset of beneficiaries with relatively high incomes and assets.

Further, Medicare beneficiaries also have limited savings. One-out-of-four Medicare beneficiaries have savings below $14,550, no savings or are in debt. Half of Medicare beneficiaries have under $75,000 in savings, including retirement accounts. As with income, median per capita savings vary greatly across demographic characteristics, with


lower rates of savings among black ($16,000), Hispanic ($12,250), disabled under age 65 ($33,300), and single ($25,750) beneficiaries. For people who have less than a high-school education, per capita savings is only $11,450.12

While some seniors continue to have sufficient income to enjoy private dental benefits after turning 65, half of all Medicare beneficiaries live on annual incomes below $26,200, one-quarter have incomes below $15,250.13 Over half of beneficiaries ages 85 and older have incomes of less than $20,400. And, 70 percent of all seniors have no dental coverage. Further complicating access to dental care is the belief by many retirees that oral health care is included within Medicare, and many of those who do report having dental insurance do not realize that their Medicare coverage does not include a dental benefit.14 Numerous studies have documented that more than 50 percent of people, ages 50-64, do not know that Medicare does not include dental coverage.

A substantial segment of the Medicare population with fixed incomes and limited resources will need to spend more of their incomes on dental care if they choose to access care, while others may forgo this vital care except in emergency cases, while prioritizing other life necessities like food and shelter.15 Providing dental coverage to older Americans and people with disabilities would close previous gaps in dental use and expense between the uninsured and the insured,16 and ensure that America’s seniors and people with disabilities have access to good oral health throughout their lifetime.

Medical Necessity
Disparities in oral care for older adults are significant for those with few financial resources and limited oral health education, particularly if they are entering their senior years with a


significant history of oral disease. The prevalence increases for those who are homebound or institutionalized and is more pronounced among groups who have been traditionally underserved, such as black, Asian and Hispanic adults, persons with low incomes, and those without dental benefits. Untreated, decay and other oral diseases result in pain, chronic and acute infection, tooth fractures and loss, as well as compromised oral function and quality of life.

To adequately address their oral health needs, older adults and persons with disabilities who receive health care through Medicare require a comprehensive oral health benefit. Given the importance of oral health as part of overall health, integrating a dental benefit into the Medicare structure is essential. Medicare beneficiaries face increased risks to their oral health as a consequence of direct and indirect consequences of systemic diseases, conditions and medications common to older populations. Oral pain and tooth loss can make it difficult to eat, leading to poor nutrition, weight loss or gain, and exacerbation of chronic conditions like hypertension, diabetes, and hyperlipidemia - conditions that individuals are more likely to acquire later in life. Further, for older adults with weakened immune systems, oral infections can act as a source of ongoing infection. Without the means to address oral health problems, many Medicare beneficiaries face adverse consequences to their overall health, oral health, quality of life and financial stability.

There has been a paradigm shift in dentistry with increased focus on risk assessment, interprofessional collaboration and minimally invasive treatment to maintain oral health, an approach that is especially critical for adults with multiple morbidities and frail older adults at the end of life. While the inclusion of oral health care as an integral part of health care is important, these models are not widespread. Lack of resources and an absence of coordinated care results not only in more extensive and expensive care, but also prevents the collection of data that will further our knowledge about the relationship between general and oral health. Without the addition of a dental benefit to Medicare, Medicare beneficiaries face adverse consequences to their overall health, oral health, quality of life and financial stability.

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many older adults will not have the resources to benefit from these changing models in health care that include oral health as part of comprehensive care. Access through Medicare Part B would provide a significant opportunity for more coordinated oral and primary health care.

III. Adding Dental to Medicare Part B

Since Medicare Part B is the part of the Medicare program that covers outpatient services, a comprehensive oral health benefit would be most effectively administered and delivered through Part B. Such a benefit would include medically necessary procedures, as well as preventive services - a set of services similar to those covered by Part B for other forms of medical care.

The Medicare Part B benefit would be amended to include dental services using the medically necessary and reasonable standard that applies to all Part B services: Part B would cover care that is medically necessary and reasonable to address the oral health condition. Preventive services such as cleanings, x-rays, screenings, and examinations would be defined and covered in a similar fashion to services already provided through Medicare "wellness visits" and preventive services.

An oral health benefit fully integrated into the Medicare Part B benefit would be subject to the same cost-sharing rules as other Part B components (i.e. the same deductible, coinsurance requirements and protections). Additional costs would be funded as Part B is now, through general revenues and beneficiary premiums ($134 per month for beneficiaries paying the standard premium in 2018), using the current Medicare processes to determine premium amounts. Low-income individuals would receive the same level of financial assistance and protections regarding oral health services as they do for other Part B services. Additionally, Medicare Advantage plans would be required to provide oral health coverage just as they cover all other Part B benefits.22

Part B Coverage, Costs

Medicare Part B covers physician services including surgery, consultations and visits, outpatient services, x-rays, lab work, and other diagnostic tests, certain preventive benefits, durable medical equipment and prosthetic devices. Part B benefits are subject to a deductible ($185 in 2019), and most Part B benefits are subject to coinsurance of 20 percent. No coinsurance or deductible is charged for an annual wellness visit or for preventive services that are rated ‘A’ or ‘B’ by the U.S. Preventive Services Task Force.

Medicare is a defined benefit program. Coverage is grounded in the "medically reasonable and necessary" standard. Part B is funded by general revenues and beneficiary premiums. State Medicaid programs pay the Part B premiums, as well as cost-sharing for some low-income beneficiaries. Beneficiaries with incomes greater than

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$85,000 for individuals or $170,000 for married couples pay a higher, income-related monthly Part B premium, ranging from $135.50 to $460.50 per month depending on income level in 2019. In 2017, the majority of the 57 million people on Medicare were covered by traditional Medicare, with one-third (33 percent) receiving their Medicare benefits through a private Medicare Advantage (MA) plan that may impose different premium and cost-sharing requirements. These plans must provide all items and services that are covered under Medicare Parts A and B, except for hospice.

Proposed Structure & Cost Analysis

As part of an ongoing investigation of alternatives to serve the dental care needs of a growing elder population, the American Dental Association (ADA) recently commissioned a study that analyzed the cost structure for various dental benefit designs within Medicare. Pricing was based on 2016 self-insured market rates. This study estimated that a comprehensive benefit without dollar value caps would cost the federal government 31.4 billion in 2016 dollars, or $32.3 billion in 2018. This estimate assumes a general fund contribution of 75 percent of all costs, similar to the current Medicare Part B funding structure.

The estimated base premium increase for a Part B benefit is $14.50 per beneficiary per month. This cost estimate accounts for low-income beneficiary subsidies applied to premiums and cost-sharing and surcharges paid by high-income beneficiaries. A statistically 20 percent co-insurance was applied across all services. Additionally, this model assumes dental services are not subject to any additional deductible.

This study assumes a reimbursement rate at the median (50th percentile) fee (i.e. fees charged by at least 50 percent of dentists in the United States.) Funding a benefit at appropriate levels to support participation is essential to assure adequate access for Medicare beneficiaries. Apart from cost of services, overhead charges experienced by dental offices are significant. Unlike a typical physician’s office, a dental practice that offers comprehensive services houses significant equipment, creating a relatively larger overhead. Unlike Part B, within Medicare Part A, hospitals are paid a facility fee to account for equipment costs for each service rendered in the hospital.

Further, within dental fee-for-service reimbursement models, other unique costs such as dental laboratory material and supplies are included within the fee for each procedure. Practice viability is dependent upon a mix of patients who are eligible for various discounted rates versus full-fee paying patients in a practice. Thus, practice overhead, along with total cost of the services relative to discounted fees, will be an important factor for dental practices considering whether to participate in Medicare.

Note that these estimates are based on the current coverage trends for working-age adults. For example, the cost of coverage for dental implants is not included within these estimates. Should dental coverage include services like implants (necessary for some adult. For example, the cost of coverage for dental implants is not included within these estimates. Should dental coverage include services like implants (necessary for some
Medicare recipients), the utilization and cost of such services would need to be added to these estimates. Similarly, any current "pent-up" demand for dental services has not been modeled within these estimates. The ADA continues to consider many options to address care for elders. ...

23 Inclusion of the results of the ADA studies on this issue is not intended as an endorsement of other statements included in this white paper. 24 Families USA, results of survey conducted by GS Strategy Group and PerryUndem of likely voters, (December 2017) https://familiesusa.org/blog/2017/12/public-supports-better-insurance-coverage-dental-care-survey-finds.

Advantages
Incorporating the oral health benefit into Part B has several advantages:

- Advances the goal of integrating oral health into total health care by incorporating the benefit administratively into the Medicare program that covers other health care providers. Administrative integration facilitates programmatic integration.
- Provides oral health coverage to everyone enrolled in Medicare, including those in Medicare Advantage plans, and ensures that public funding goes toward allowing the greatest number of beneficiaries access to a basic level of dental care and a healthy mouth. This is logical not only from a health equity standpoint, but because it would also encourage provider participation.
- Including an oral health benefit in Medicare Part B is simpler for beneficiaries and providers than setting up a separate benefit as was done for prescription drugs under Medicare. Beneficiaries would not have to navigate or enroll in a new, potentially confusing program. Oral health providers could interact with each other and the federal government in the same way that medical providers currently interact in the Part B system.
- There are established protections for both Medicare beneficiaries and providers. These include established Part B grievance and appeal procedures, existing precedent on medical necessity standards, and existing provider enrollment procedures, provider rate-setting processes and payment protections for Qualified Medicare Beneficiaries. Including the Part B benefit avoids the need to create new systems and bureaucracies, saving significant time and costs.

IV. Legislative Changes Needed
Currently, Medicare does not cover dental benefits due to the statutory exclusion in Section 1862(a)(12) of the Social Security Act. Removing this statutory exclusion is the most important legislative change to establish a comprehensive Medicare Part B oral health benefit. However, additional statutory changes would be needed to ensure that a scope of services is established and that the oral health benefit is integrated into Medicare Part B as seamlessly as possible.

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Specifically, Congress would need to pass legislation to remove the exclusion of oral health benefits from the Medicare Program. Further, the legislation would need to establish dental coverage in Part B and permit payment for services prescribed in the dental benefit. Dental services would need to be defined in the Medicare statute, and various sections addressing provider payment would need to be amended to address oral health services. Also, CMS would require the authority to promulgate any needed regulations to implement and administer oral health benefits as part of Medicare Part B.

V. Related ABA Policy

Previous ABA policies adopted by the House of Delegates addressing benefits coverage issues in Medicare consist of the following:

A 2017 policy calls on 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. It further urges Congress to define “prognosis” as the forecasting of the likelihood of or probable course of any current or future illness, injury or condition. (2017 MM 116)

A 2015 policy supports federal and state legislation and regulation that promotes access to and financing of high-quality, comprehensive long-term supportive services for persons with advanced illness, although this policy does not mention Medicare. (2015 MY 100)

A 2010 policy addresses Medicare observation status, calling on Congress to adopt legislation deeming an individual receiving outpatient observation care services in a hospital to be an inpatient for purposes of satisfying the three-day inpatient hospital stay requirement for Medicare coverage of a post-hospitalization stay in a skilled nursing facility. (2010 AM 101)

A 2007 policy supports the principle that insurance coverage for the treatment of alcohol and drug disorders should be at parity with that for other diseases. While not mentioning Medicare specifically, the principle would be applicable to Medicare. 2007 AM 106A

A 2006 policy urges the adoption of federal and state laws that require insurers to provide coverage for the treatment of alcohol or drug abuse and dependence based on the best evidence. (2006 AM 106A)

29 42 U.S.C. § 1395y(a)(12) [Section 1862(a)(12) of the Social Security Act]
30 For example, the best evidence could be amended by section 42 U.S.C. § 1395k [Section 1832 of the Social Security Act].
31 Preventive services are addressed at 42 U.S.C. § 1395y(a)(1).
32 For example, dental could be included in the definition of Medical & Other Health Services at 42 U.S.C. § 1395x(s) or defined separately somewhere in 42 U.S.C. § 1395x. [Section 1861 of the Social Security Act.]
scientific protocols and standards of care, so as significantly to enhance the likelihood of successful recovery for each patient. While not mentioning Medicare, the scope of this policy would include Medicare. (2001 AM 109)

A 1989 policy supports the development of long-term care services for Americans of all ages, consistent with principles of equity, fairness, consumer choice, quality of care, and responsible financing. This policy also does not specify Medicare, but the principles would apply if Medicare coverage were expanded to long-term care. (1989 MY 105)

Several other ABA policies are not referenced here because they address non-coverage Medicare issues such as reporting; claims adjudication, dispute resolution, and administrative procedures; medical set-asides for 3rd party settlements; billing, payment, and reimbursement issues; and notice of rights.

VI. Need for ABA Action

On January 3, 2019, Sen. Ben Cardin (D-MD) introduces S. 22, the Medicare Dental Benefit Act of 2019, which would repeal the statutory exclusion on Medicare coverage of dental care and dentures in Section 1862(a)(12) of the Social Security Act. The bill expands Part B benefits to cover dental and oral health care services, including routine cleanings and exams, fillings and crowns, major services such as root canals and extractions, emergency dental care, and other services.

On February 27, 2019, Rep. Lloyd Doggett (D-TX) introduced H.R.1393, the Medicare Dental, Vision, and Hearing Benefit Act of 2019. The legislation proposes benefits well beyond the dental benefit advocated by this resolution, but to the extent it expands the Medicare dental benefit, it aligns with this resolution. A previous version of this bill was introduced in the 115th Congress (2017-18) as H.R. 3111, which did not move beyond committee referral.

For the first time, Medicare coverage of dental and oral health services has gained a foothold in both houses of Congress. While the task of advancing such proposals will be long and uncertain, the support of the ABA behind such proposals is an important statement of the rights of elders to receive medically necessary and appropriate health care services under Medicare.

This resolution is germane to ABA policy because as an organization, the ABA has recognized the human right to medically necessary and appropriate health care in many iterations over the years, frequently calling on governments to protect and strengthen both Medicare and Medicaid coverage.

ABA policy recognizes a shared legal obligation that the federal, state, and territorial governments have to provide a comprehensive set of benefits to all individuals who meet Medicaid eligibility criteria. (Annual 2005).
ABA policy has called on governments to provide access to palliative care, community-based supportive services, and caregiver support to enable persons with advanced illness to remain in the home and community in accord with their preferences and need (2015 MY 100).

Other policies call on the federal government to require the annual Medicare wellness examination, or other periodic doctor-patient interactions, to include both an opportunity to engage in and have resource options available relating to advance care planning for health decisions. (2012 AM 106A)

More broadly, the ABA supports federal legislation that would ensure every American access to quality health care regardless of the person’s income, and without regard to the payor system.... (2009 AM 10A)

And, other policies call for better mental health coverage. Thus, that health care scope of coverage questions as addressed by this resolution are germane to the ABA, given our history. The critical policy question is whether the coverage for which we are advocating is truly medically necessary and appropriate. When Medicare was adopted, dental care was not a very sophisticated science or practice. It was considered a secondary issue. We now know today that it is a critical component of health maintenance; it has developed a vast set of interventions that are medically effective; and the effects of neglected dental care are devastating to one’s functioning, to quality of life, and length of life. Different times call for different actions, and the present time invites appropriate action by the ABA.

VII. Conclusion

Oral health is necessary for overall health. Older adults need timely and affordable access to dental care in order to age successfully. Oral health care is also essential for millions of those with permanent disabilities. A dental benefit in Medicare Part B will ensure that oral health care is integrated with, and elevated to, the same importance as the rest of health care. All older adults and people who are permanently disabled, regardless of socio-economic status, need increased oral health literacy, along with access to oral health services and preventive care. Accordingly, the ABA should adopt the resolution proffered herein.

Respectfully submitted,

Hon. Louraine Arkfeld
Chair, Commission on Law and Aging
August 2019
1. Summary of Resolution(s).
   The resolution calls for Congressional action to repeal the statutory exclusion of dental care and dentures from Medicare and expressly add coverage of comprehensive dental and oral health services to the Medicare program.

2. Approval by Submitting Entity.
   Approved by Commission on Law and Aging April 26, 2019.
   Approved by the Senior Lawyers Division Council on May 4, 2019.

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?
   Six policies identified in the report call for expanded coverage of health or long-term benefits under federal law, including Medicare, but none address oral health issues. This policy resolution does not affect those policies and is consistent with them.

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

6. Status of Legislation. (If applicable)
   S. 22, the Medicare Dental Benefit Act of 2019 was introduced in the Senate on January 3, 2019 by Sen. Ben Cardin (D-MD) and referred to the Committee on Finance. No further action.

   On February 27, 2019, a related but much broader bill, H.R. 1393, the Medicare Dental, Vision, and Hearing Benefit Act of 2019 was introduced in the House by Rep. Lloyd Doggett (D-TX) and referred to the Committee on Energy and Commerce and the Committee on Ways and Means. No further action.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
   Congress and its appropriate leadership will be informed of ABA’s support of dental coverage objectives of the above two bills and any related legislation. The Commission on Law and Aging will expand its educational efforts on the need for access to dental coverage by older persons and persons with disabilities who are covered by Medicare.
8. **Cost to the Association.** (Both direct and indirect costs)
   None.

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

10. **Referrals.**
    - Standing Committee on the Delivery of Legal Services
    - Standing Committee on Governmental Affairs
    - Standing Committee on Legal Aid and Indigent Defendants
    - Standing Committee on Pro Bono and Public Service
    - Commission on Disability Rights
    - Commission on Domestic and Sexual Violence
    - Commission on Homelessness and Poverty
    - Commission on Hispanic Legal Rights and Responsibilities
    - Government and Public Sector Lawyers Division
    - Section of Administrative Law and Regulatory Practice
    - Section of Business Law
    - Section of Civil Rights and Social Justice
    - Section of Family Law
    - Section of Health Law
    - The Judicial Division
    - Section of Labor and Employment Law
    - Section of Litigation
    - Section of Real Property, Probate and Trust law
    - Section of Science and Technology Law
    - Senior Lawyers Division
    - Section of State and Local Government Law
    - Section of Taxation
    - Section of Tort, Trial and Insurance Practice
    - Solo, Small firm and General Practice Division
    - Young Lawyers Division
    - National Legal Aid & Defender Association

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)
    Charlie Sabatino, Director
    Commission on Law and Aging
    American Bar Association
    1050 Connecticut Ave., NW, Suite 400
    Washington, DC 20036
    (202) 662-8686
    charles.sabatino@americanbar.org
12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Louraine Arkfeld, Chair
2615 S Sierra Vista Circle
Tempe, AZ 85282-2341
(480) 250-5044
louraine.arkfeld@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution
   The resolution calls for Congressional action to repeal the statutory exclusion of dental care and dentures from Medicare and expressly add coverage of comprehensive dental and oral health services to the Medicare program.

2. Summary of the Issue that the Resolution Addresses
   The lack of access to oral health benefits under Medicare, especially for the poor and minorities, results in major health complications, poor health overall, economic hardship, and increased medical costs to the public for treatment of the adverse effects.

3. Please Explain How the Proposed Policy Position Will Address the Issue
   It supports legislation to repeal the current statutory exclusion of dental care and dentures from Medicare and expressly add coverage of comprehensive dental and oral health services to the Medicare program.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
   None identified.
RESOLVED, That the American Bar Association urges all lawyers who provide estate planning services to include counseling for advance care planning that comports with the following principles:

1. The most important legal component of advance care planning is careful selection and appointment of a health care agent/proxy in a valid power of attorney for health care document. Persons who cannot or do not want to identify a proxy should delineate their wishes in an advance directive.

2. Advance care planning takes place over a lifetime. It changes as one’s goals and priorities in life change through different stages of life and health conditions. Reflection, discussion, and communication with one’s proxy and clinical professionals, along with family, friends, and advisors is essential to having one’s wishes understood and honored.

3. Reflection and discussion should focus primarily on one’s values, goals, and priorities in the event of worsening health rather than on specific treatments or clinical interventions for distant hypothetical situations.

4. Advance care planning decision tools and guides can provide structure and guidance to the process of reflection and discussion and help individuals identify their values, goals, and priorities, and ensure more authentic and useful conversations and advance directives.

5. Instructions and guidance documented in an advance directive should result from the process of information sharing, reflection, discussion, and communication and provide enough flexibility in application to allow surrogate decision-makers to respond to new circumstances and complexities.

6. Documentation of one’s values, goals, and wishes in the form of an advance directive or other record should be shared with one’s proxy, loved ones, significant
(7) If individuals are facing serious diagnoses, such as cancer, or have been told they have a limited prognosis, the focus may then move to specific treatment preferences. In these cases, the client should be advised to confer with their health care provider to create a care plan that aligns with the client’s goals, values and preferences. For advanced illness, clients should be advised to inquire about palliative care options and the appropriateness of portable medical orders such as Physician’s Orders for Life Sustaining Treatment (POLST) to ensure that the individual’s wishes are translated by medical professionals into actionable medical orders; and

FURTHER RESOLVED, That the American Bar Association urges lawyers who provide estate planning services to seek greater coordination of advance care planning efforts with the healthcare system and medical providers through congruent advice and practices, greater willingness to reach out to one another, and greater collaboration in joint continuing education.
This resolution derives from a best practices initiative initiated by the Commission on Law and Aging with the American Academy of Hospice and Palliative Medicine, and partners from the University of California at San Francisco Medical School and the UC/Hastings Consortium on Law, Science & Health Policy to undertake this initiative. The initiative was funded by the John A. Hartford Foundation with supplemental funding from the Borchard Foundation Center on Law and Aging.

Under this effort, the Commission interviewed and then brought together a select group of over 30 legal and clinical experts for a day-long forum to shed light on how the approaches to advance care planning (ACP) of lawyers and clinicians differ and how greater alignment of practices could be achieved in a manner that would better ensure patient/client values, goals, and wishes are known and honored near the end of life.

The enumerated principles in this resolution reflect consensus practice guidelines of this interdisciplinary body, applicable to both lawyer and clinician practitioners.

Background

Advance care planning research literature strongly identifies the process of repeated, meaningful discussion among patient and family and health care providers and use of decision aids as critical factors in effective advance care planning. While the existence of an advance directive makes a difference, the real driver for having patients' wishes known and honored is the conversation before and during any clinical episode. In other words, advance directives documents, in and of themselves, without additional preparation and discussion, have marginal effect on end-of-life decision-making.

This is where the differing approaches between lawyers and clinicians have been out of alignment. Lawyers have tended to see advance care planning primarily as a legal matter, centered on patient autonomy and the creation of legally recognized advance directives. Health care professionals today see it as a clinical matter involving not only patient autonomy, but also pursuit of the patient's best interests in light of evolving clinical facts, treatment options, often uncertain risks and benefits, and the goal of engaging whatever family unit is involved in the patient’s care. Some commentators have gone as far as to recommend “de-legalizing” advance directives so that they are treated entirely as clinical and not as legal documents.

The divergence in approaches has a historical root. Living wills or medical declarations emerged in legislation in the 1970s and health care powers of attorney in the 1980s.


2 Joshua A. Rolnick, David A. Asch, & Scott D. Halpem, “Delegalizing Advance Directives — Facilitating Advance Care Planning,” 376(22) N. ENGL. J. MED. 2105-2107 (June 1, 2017).
These laws created a legal transactional template for advance planning that focused on ensuring knowing and voluntary execution of the directive and imposing a multitude of legal formalities, ranging from detailed execution requirements to mandatory language and forms. But research and clinical experience has demonstrated the need for a much more robust and on-going communications approach to ACP, and best practices have evolved.

Since the early legislative enactments, some states have sought to ease up, at least partially, on the legal template applied to advance directives, following the example of the Uniform Health-Care Decisions Act. At the same time in the clinical world, consensus over best practices has changed dramatically. The clinical concept of advance care planning has evolved into an ongoing, holistic, shared communication process about goals of care, priorities, and wishes in the face of serious and eventually fatal illness. The most recent authoritative statement comes from the National Academy of Medicine in its seminal 2015 report Dying in America which describes ACP as follows:

Advance care planning refers to the whole process of discussion of end-of-life care, clarification of related values and goals, and embodiment of preferences through written documents and medical orders. This process can start at any time and be revisited periodically, but it becomes more focused as health status changes. Ideally, these conversations (1) occur with a person’s health care agent and primary clinician, along with other members of the clinical team; (2) are recorded and updated as needed; and (3) allow for flexible decision making in the context of the patient’s current medical situation.

In clinical practice, countless initiatives and protocols have emerged with the goal of supporting patient- and family- centered care, shared decision-making, and meaningful advanced care planning. Many of these initiatives have grown part and parcel with the growth of the discipline of palliative care. In practice, health care systems and professionals as a whole still have a long way to go to catch up to the state-of-the-art concepts and skills advocated by clinical leaders in advance care planning, but the wheels are in motion. In contrast, in the legal profession, less progress has been visible. Yet, of the little research that has been done on who helps with ACP, the studies have found that individuals are as likely or more likely to consult a lawyer than their physician. Thus, the

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3 Examples include a 2003 AARP telephone survey of 804 Minnesotan adults found that two-thirds of respondents reported they had talked to someone about their end-of-life wishes; 17% with a lawyer and only 12% with a health care provider [AARP. 2003 Minnesota Advance Directives Survey (December 2004)]. In 2006, the American Bar Association conducted an online, interactive survey through Harris Interactive and found that 81% of adults had talked to someone about their health care wishes; 15% with a lawyer and 16% with a healthcare provider [Harris Interactive Survey for the American Bar Association (April 9-11, 2006)]. Furthermore, a Pew study found that attorneys ranked 2nd behind family members and before members of one’s church or health care providers as the one person they would talk to about advance care planning [PEW Charitable Trusts, Advance Care Planning and End-of-Life Care: Attitudes of Diverse Populations (unpublished survey, 2016), available on request].

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importance of lawyer counseling that will be in alignment with the clinical realities clients will face when they become patients can't be ignored.

To explore these issues the ABA Commission interviewed and convened a summit of national experts in law and medicine in 2018. Findings from the summit and from prior interviews of participants suggested that most lawyers tend to view ACP through a legal lens in which the primary result is the production of advance directive documents that are legally valid, appoint a health care agent, and include instructions to guide the decision-maker. The legal forms tend to be based on state statutory forms or other form clearly recognized in the state. In practice, the lawyers generally reported that they customize the basic forms to address a variety of issues, from specific medical treatments and powers of the named agent to family involvement and other personal wishes. Clinicians commonly perceive advance directive forms drafted by lawyers as much too long and legalistic, which they regard as a barrier to their effectiveness.

Lawyers are generally not well-positioned to engage clients fully in that process. The lawyer participants acknowledged that the time frame for discussion of client's advance directives prior to drafting is relatively short and typically mixed in with larger estate planning matters. Lawyers develop their own style of asking questions to elicit client preferences, but the interview time does not normally allow for fully thoughtful explorations of clients’ goals of care in the context of their health and illness trajectories, clinical options, relationships with health care providers, and relationships within families. Nor are the health and illness dimensions of the client’s circumstances within the expertise of lawyers.

In the clinical world, our clinical experts reported that health care providers are increasingly recognizing the importance of ACP as an essential component of person and family-centered care and palliative care. They are increasingly being urged to begin care planning discussions as part of clinical care throughout the adult life span of the patient. However, the documents most often used in advance care planning – legislatively created living wills and powers of attorney – are somewhat ill-fitted to clinicians’ normal face-to-face care planning and case note mode. At the same time, clinicians too often lack the training and time to hold effective conversations about advance directives. They may also hold misconceptions about key legal concepts of planning, such as legal capacity for decision-making and the roles of surrogates.

Having both legal and clinical doorways to ACP should be a benefit our diverse national population; but if the doors don’t lead to the same place, they may lead to patients' wishes not being elicited, documented, understood, or honored. In its effort to align clinical and legal approaches, the summit generated three products: eight consensus principles for clinical and legal ACP practice (seven relating to counseling and one related to collaboration between the professions); a counseling checklist for lawyers; and a resource list compiling ACP tools that both lawyers and clinicians can provide to clients or patients to engage them in ACP reflection and discussion. The eight consensus principles constitute the substance of this resolution.
The resolution urges all lawyers who provide estate planning services to include counseling for advance care planning that comports with seven principles that were developed through the John A. Hartford Foundation funded project, under which the Commission on Law and Aging brought together legal and clinical experts together to examine how the advance care planning practices of lawyers and clinicians could be brought into greater alignment, so as to ensure patient/client values, goals, and wishes are known and honored near the end of life.

The principles are not practice standards nor standards of care. They are aspirational in nature and offer directions for enhanced counseling by lawyers who wish to focus more keenly on advance care planning counseling with clients.

- Principle one recognizes that the most important legal component of advance care planning is careful selection and appointment of a health care agent/proxy in a valid power of attorney for health care. The authority of an agent for a person lacking capacity is a function of state statute. Such authorization does not exist at common law. All other aspects of advance care planning involving articulating clients' wishes are communications tasks. Whether and how that communication is accomplished is up to the client. An advance directive document is helpful but not the only way nor necessarily the best way to communicate wishes about one's health care priorities and preferences.

- Principle two acknowledges that advance care planning takes place over a lifetime. It changes as one's goals and priorities in life change through different stages of life and health conditions. This helps put advance directives into context, because they are often considered one-time tasks by clients, a misperception that lawyers can help disabuse.

- Principle three points out that reflection and discussion, which is central to advance care planning, should focus primarily on one's values, goals, and priorities in the event of worsening health rather than on specific treatments or clinical interventions for distant hypothetical situations. Neither lawyers nor their clients have a crystal ball to tell them what medical conditions and decisions they will ultimately face, nor do they have the medical expertise to dictate specific medical interventions for hypothetical circumstances. But, clients do have the ability to articulate important values, goals, and priorities in their lives that are stable and can inform medical decision-making when they can no longer speak for themselves.

- Principle four recommends the use of advance care planning decision tools and guides that can provide structure and guidance to the client’s process of reflection and discussion. These are tools clients can and should use on their own and with those relations who will be involved in medical decision-making for them. An increasing number of tools are easily available, of no cost, and have been shown to be effective. The tools are used on the client's own time, not in the lawyer's office, so they do not
add an additional time burden on lawyers. But lawyers can play an important role in directing clients to the right resources.

- Principle five offers a guiding principle in the drafting of advance directive documents, recommending that instructions and guidance documented in an advance directive should result from the process of information sharing, reflection, discussion, and communication and provide enough flexibility in application to allow surrogate decision-makers to respond to new circumstances and complexities. This principle purposefully comes after principle four, because that is the sequence in which the process ideally works. In other words, before the drafting stage, the client should have done his or her thinking/reflecting/discussing (and ideally with decision tools recommended in principle four).

- Principle six recommends that the documentation of one’s values, goals, and wishes in the form of an advance directive or other record be shared with one’s proxy, loved ones, significant others, and primary/key health care providers, and be included in the medical record, so that they are adequately informed before a crisis arises. This is important because an all-too-common shortcoming of advance directives is that they are not present or known of at the right time or the right place. Thus, making sure it is visible, known, and accessible is an important goal.

- Principle seven acknowledges that when individuals are facing serious diagnoses and have a limited prognosis, the focus then moves to very specific treatment preferences. This is when it is most important for the individual and health care provider to create a care plan that aligns with the individual’s goals, values and preferences. The principle also acknowledges the importance of palliative care options and the use of portable medical orders such as Physician’s Orders for Life Sustaining Treatment (POLST) to ensure that the individual’s wishes are translated by medical professionals into actionable medical orders. Lawyers have a role in educating clients about POLST, and ABA policy is supportive of the use of POLST for appropriate patients.

The second resolved clause urges greater coordination of advance care planning efforts with the healthcare system and medical providers through congruent advice and practices, greater willingness to reach out to one another, and greater collaboration in joint continuing education. Community education programs, in which many lawyers commonly engage, offer an example of this. Presentations on advance care planning and advance directives are substantially enhanced when delivered by a lawyer-doctor team. The education of doctors and lawyers regarding health-care decision making issues represent another opportunity for collaboration.

Need for ABA Action

Today, lawyers who do any amount of estate planning work routinely include advance directives in the services provided, and every state and territory has advance directive laws that recognize the appointment of health care agents and the documentation of medical wishes. The ABA has historically been a supporter of these legal tools of ACP...
as shown by the description of ABA policy below. The ABA also has a long history of leading the way in defining optimal practices in the field of law. Health care decision-making for future planning that every family has struggled with, is struggling with, or will struggle with in the future. Lawyers are playing an important role in helping individuals and families meet that struggle successfully. Thus, the promulgation of consensus guidelines to promote good practices is a proper and necessary role for the ABA.

Related ABA Policy

The ABA has been active in the promotion of health care decision-making rights that promote the individual’s decision-making autonomy, planning, and quality end-of-life care since the 1980s. Key policies include the following:

- 1989. The House of Delegates adopted policies to encourage the use and recognition of durable powers of attorney for health care. (89AM120)
- 1990. The House adopted a policy to support the right of competent individuals to consent to or refuse suggested medical interventions and to recognize that an appropriate surrogate may exercise this right on behalf of an incompetent individual. (90MY108A)
- 1990. The ABA also actively supported passage of the Patient Self-Determination Act in 1990, the federal law that promotes information and education on advance directives. (Archived)
- 1994. The ABA recognized a new Uniform Health-Care Decision-Making Act, promulgated by the National Conference of Commissioners on Uniform State Laws. (94MY115B)
- 1994. The ABA adopted a resolution supporting preemption of state law by any advance medical directive prepared for members of the Armed Forces. Such a law was passed by Congress in 1996. (94AM117)
- 1995. The ABA adopted policy supporting better planning opportunities, including the use of advance medical directives, for people with HIV, AIDS, or other serious eventually fatal illnesses. (95AM122)
- 2008. The ABA House urged widespread support of protocols such as Physicians Orders for Life-Sustaining Treatment that help ensure that patients’ end-of-life care preferences are translated into visible and portable medical orders. (08AM103)
- 2012. The ABA adopted policy calling for amending the federal Patient Self-Determination Act, to strengthen advance care planning rights and procedures for health care decisions, including providing an opportunity to discuss advance care planning with trained representatives of the health care provider, requiring Health Insurance Exchanges to provide ACP information and assistance, and including ACP in the annual wellness exam for Medicare beneficiaries. (12A106A)

The policy proposed herein is entirely consistent with the above line of ABA policy and furthers the well-established goals of patient autonomy through the articulation of practice principles that enhance advance care planning and help ensure that clients’ values, goals, and wishes for care are known and honored.
Conclusion

Advance care planning and advance directives have become an integrated part of the tool kit lawyers use in estate planning for clients. Yet, the evolution of advance care planning from a document-based legal model to a clinical communications model has left legal planning increasingly out of alignment with the clinical decision-making challenges and processes that clients will face. The consensus practice principles set forth in this resolution will align ACP counseling by lawyers with the clinical realities clients face and, thereby, will help ensure that clients’ values, goals, and wishes will be known and honored near the end of life. For the reasons stated above, the Commission on Law and Aging requests the House of Delegates to adopt the resolution herein.

Respectfully submitted,

Hon. Louraine Arkfeld
Chair, Commission on Law and Aging
August 2019
1. **Summary of Resolution(s).**

The resolution urges all lawyers who provide estate planning services to include counseling for advance care planning that comports with seven principles that were developed through the John A. Hartford Foundation funded project, under which the Commission on Law and Aging brought together legal and clinical experts together to examine how the advance care planning practices of lawyers and clinicians could be brought into greater alignment, so as to ensure patient/client values, goals, and wishes are known and honored near the end of life.

The second resolved clause urges greater coordination of advance care planning efforts with the healthcare system and medical providers through congruent advice and practices, greater willingness to reach out to one another, and greater collaboration in joint continuing education.

2. **Approval by Submitting Entity.**

Approved by Commission on Law and Aging April 26, 2019.
Approved by the Senior Lawyers Division Council on May 4, 2019.
Approved by the Real Property, Trust & Estate Law Section on April 17, 2019.

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

No

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

The ABA has adopted several policies enumerated in the report that support advance care planning, advance directives, the right to consent to or refuse treatments, patient direction in health care generally. This resolution is entirely consistent with previous ABA policy and furthers the well-established goals of patient autonomy through the articulation of practice principles that enhance advance care planning and help ensure that clients' values, goals, and wishes for care are known and honored.

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

N/A

6. **Status of Legislation. (If applicable)**
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Commission on Law and Aging will disseminate the ABA-supported principles to bar groups and incorporate into CLE programming.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

- Standing Committee on the Delivery of Legal Services
- Standing Committee on Governmental Affairs
- Standing Committee on Legal Aid and Indigent Defendants
- Standing Committee on Pro Bono and Public Service
- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Homelessness and Poverty
- Commission on Hispanic Legal Rights and Responsibilities
- Government and Public Sector Lawyers Division
- Section of Administrative Law and Regulatory Practice
- Section of Business Law
- Section of Civil Rights and Social Justice
- Section of Family Law
- Section of Health Law
- The Judicial Division
- Section of Labor and Employment Law
- Section of Litigation
- Section of Real Property, Probate and Trust Law
- Section of Science and Technology Law
- Senior Lawyers Division
- Section of State and Local Government Law
- Section of Taxation
- Section of Tort, Trial and Insurance Practice
- Solo, Small firm and General Practice Division
- Young Lawyers Division
- National Legal Aid & Defender Association

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

Charlie Sabatino, Director
Commission on Law and Aging
12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

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The second resolved clause urges greater coordination of advance care planning efforts with the healthcare system and medical providers through congruent advice and practices, greater willingness to reach out to one another, and greater collaboration in joint continuing education.

2. Summary of the Issue that the Resolution Addresses

Advance care planning research literature strongly identifies the process of repeated, meaningful discussion among patient and family and health care providers and use of decision aids as critical factors in effective advance care planning. Lawyers are not well-positioned to engage clients fully in that process. Lawyers have mainly been drafters of advance directive documents. While the existence of an advance directive makes a difference, the real driver for having patients’ wishes known and honored is the conversation before and during any clinical episode. Effective practice principles and techniques have been developed that can be incorporated into the usual workflow of lawyers that can enhance their clients engagement in advance care planning and result in more effective advance directives.

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

These practice principles developed by clinical and legal experts will change both the conceptual understanding and the counseling practices of lawyers to bring legal practices into greater alignment with clinical realities and ensure patient/client values, goals, and wishes are known and honored near the end of life.

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

None identified.

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

None identified.
RESOLVED, That the American Bar Association urges Congress to enact legislation to exempt from the Controlled Substances Act any production, distribution, possession, or use of marijuana carried out in compliance with state laws;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to remove marijuana from Schedule I of the Controlled Substances Act, 21 U.S.C. §§ 801 et seq.; and

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation to encourage scientific research into the efficacy, dose, routes of administration, or side effects of commonly used and commercially available cannabis products in the United States.
Introduction

This resolution resolves the current stalemate between state and federal law over marijuana regulation and to update federal marijuana policy. A majority of states have legalized marijuana in at least some circumstances, while the federal government continues to ban the drug outright. Although the federal government has taken limited steps to accommodate state reforms, the gap between state and federal law has created a regulatory quagmire that is counter-productive for all parties interested in marijuana policy. Taken together, these three Resolutions allow states to develop their own sensible marijuana policies while giving the federal government an important role in establishing minimum regulatory standards. The Resolutions also enable beneficial access to marijuana under federal law and promote research to ensure that both state and federal policy are informed by scientific knowledge.

Background on State Reforms

Over the past two decades, a large majority of states has legalized “marijuana” for at least some purpose. The regulatory approaches pursued by these states vary, as befits our federal system, but each of these states can be divided into one of two basic groups: (1) “Medical Only” states; and (2) “Adult and Medical Use” states.

“Medical Only” states have legalized the use of marijuana—including marijuana that contains tetrahydrocannabinol (THC), the psychoactive cannabinoid produced by the cannabis plant—for the treatment of symptoms associated with certain medical conditions. “Adult and Medical Use” states have adopted broader reforms. Like “Medical Only” states, each of these states has legalized the medical use of marijuana, but they have also legalized adult use of the drug for non-medical purposes as well, in the same way they once legalized consumption of alcohol by adults following the repeal of Prohibition. By the end of 2018, 23 states had adopted “Medical Only” laws, and another 10 states (11, if we include the District of Columbia) had adopted “Adult and Medical Use” laws.1

Each of these reform states has adopted a comprehensive body of regulations to replace outright prohibition.2 The regulations stipulate detailed rules for a litany of marijuana-related activities. For example, Colorado has adopted nearly two-hundred pages of regulations governing the supply of marijuana just for the adult use market.3 Among many other things, this Retail Marijuana Code requires vendors to apply for a special license

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1 Robert A. Mikos, Only One State Has Not Yet Legalized Marijuana in Some Form . . . Marijuana Law, Policy, and Authority Blog, https://my.vanderbilt.edu/marijuanalaw/2018/07/only-one-state-has-not-yet-legalized-marijuana-in-some-form/ (July 16, 2018). The “Medical Only” category does not include an additional 16 states that have legalized the medical use of marijuana that is low in THC but rich in cannabidiol (CBD), a non-psychoactive cannabinoid produced by the cannabis plant.

2 For a thorough discussion of how states now regulate marijuana, see Robert A. Mikos, MARIJUANA LAW, POLICY, AND AUTHORITY (2017).

3 1 CCR 212-2.
from the state; maintain detailed records of inventory; limit their advertising; and apply warning labels to all marijuana products. The state has even created a Marijuana Enforcement Division within its Department of Revenue to regulate the state’s more than 1,000 licensed marijuana facilities.

Background on Federal Prohibition

Even as these state reforms have proliferated—and public support for them has ballooned, federal law governing marijuana has remained essentially unchanged since the passage of the Controlled Substances Act (CSA) in 1970.

Under the CSA, all controlled substances (essentially, all substances—with the notable exceptions of alcohol and tobacco—that can cause dependence) are placed onto one of five Schedules (I-V) using criteria that relate to the substance’s medical benefits and its harms. Congress itself placed marijuana on Schedule I when it passed the CSA, reflecting the belief (circa 1970) that marijuana was a dangerous drug without any proven medical benefits that could otherwise redeem it.

This classification means that marijuana—like other Schedule I drugs, such as heroin and LSD—is subjected to the strictest possible regulatory controls. Indeed, the manufacture, distribution, and even possession of Schedule I substances, including marijuana, are criminal offenses outside of very narrowly circumscribed FDA-approved clinical research trials.

The Resulting Regulatory Quagmire

There is an obvious tension between marijuana’s Schedule I status—which prohibits marijuana in virtually all circumstances—and state regulatory reforms—which increasingly authorize marijuana for at least some purposes. While state and federal law often diverge—on everything from environmental to workplace laws—marijuana policy is the only area where the states regulate and tax conduct the federal government nearly universally prohibits.

In recent years, the federal government and the states have reached an uneasy truce that has reduced, but not eliminated, this tension. Guidance memos from the Department of Justice (DOJ) to United States Attorneys around the country once generally counseled

6 See, e.g., Justin McCarthy, Two in Three Americans Now Support Legalizing Marijuana, Gallup, Oct. 22, 2018 (reporting that 66% of Americans support legalizing marijuana, up from only 12% in 1970). 7 The CSA is codified at 21 U.S.C. §§ 801 et seq. Congress has recently enacted one notable reform: it narrowed the definition of “marijuana” for purposes of the CSA, and thus the scope of the statute’s ban on the drug, when it passed the 2018 Farm Bill. See Robert A. Mikes, See New Congressional Farm Bill Legalizes Some Marijuana, Marijuana Law, Policy, and Authority Blog, https://mvm.vanderbilt.edu/marijuanalegal/2018/12/new-congressional-farm-bill-legalizes-some-marijuana/ (Dec. 13, 2018) (noting that 2018 Farm Bill excludes from the definition of marijuana cannabis that contains less than .3% THC by dry weight). 8 21 U.S.C. § 812(b). These criteria include the substances’ accepted medical use (if any), its potential for abuse, and its physical and psychological effects on the body. Id. 9 See id. at § 841 (criminalizing marijuana trafficking); Id. at 844 (criminalizing marijuana possession).
deference to state policy. While those memos have been rescinded, the federal government continues to acquiesce to state legalization and regulation of marijuana.

Within the last few years, Congress has written some temporary protections against federal criminal enforcement into budget legislation. In particular, beginning in 2014, Congress has attached riders prohibiting the DOJ from using any of its budgeted funds to "prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." The federal courts have interpreted these riders to bar federal prosecution of persons acting in conformity with state medical marijuana laws.11

Notwithstanding these steps, however, the tension between state and federal laws governing marijuana persists. For one thing, spending riders do not shield anyone acting in compliance with any state’s Adult Use marijuana laws. Moreover, the protection afforded by such riders is only temporary. If a rider lapses, both medical and non-medical marijuana users and suppliers would be subject to arrest and prosecution by the DOJ, and not just for their conduct going forward. Those using and producing marijuana could also be prosecuted for violations of the Controlled Substances Act they committed while the riders were in effect (so long as the statute of limitations has not expired). Moreover, anyone out of compliance with state regulations would also be subjected to criminal sanction, even if their violations of state regulations were de minimis.

More fundamentally, however, because the spending riders operate only as a restraint on DOJ action, they have not prevented other parties from using federal law against state-compliant marijuana businesses and users. For example, state-licensed and state law-abiding marijuana businesses continue to have difficulty obtaining banking services, due to financial regulations that limit transactions in the proceeds of “unlawful” activities; they pay unusually high federal taxes, due to federal tax code rules that deny them deductions other (federally legal) businesses are allowed to take; they cannot secure federal protection for their trademarks, due to administrative rules that limit such protection to marks used in “lawful” commerce; and they have faced a growing number of private

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8 See Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U.S. Attorneys (Oct 19, 2009); Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys (Aug. 29, 2013).

9 See Memorandum from Jefferson B. Sessions, III, Attorney General, to All United States Attorneys (Jan. 4, 2018).

10 The latest of these riders can be found in Section 538 of the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, March 23, 2018, 132 Stat. 348.

11 E.g., United States v. McNichols, 833 F.3d 1163, 1177 (9th Cir. 2016) (“We therefore conclude that, at a minimum, [that the spending rider] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.”).

12 McNichols, 833 F.3d at 1179 n.5 (“Congress currently restricts the government from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding.”).
lawsuits under federal law, because the federal RICO statute considers growing and selling marijuana to be actionable racketeering activities.13

What is more, the ongoing tension has generated considerable confusion over the enforceability of some state regulations. Although Congress may not force the states to ban marijuana (e.g., to enact or retain their own state law prohibitions on marijuana activities), just how far the states may depart from the federal government’s approach to regulating marijuana remains unclear.14 State laws regulating a variety of activities—from employment discrimination against marijuana users to taxation of marijuana sales—have been subject to preemption challenges brought by private parties and even state officials.15

No one should be satisfied with the regulatory quagmire that has resulted from the unresolved tension between state reforms and federal law. Although many of the burdens described above fall upon marijuana users and suppliers, not all of these costs are internalized to those violating federal law. For example, the unavailability of even the most basic banking services means that marijuana is a multi-billion dollar cash business. This makes marijuana businesses and their clients targets of crime and significantly hampers the work of the state regulators and tax collectors who govern them.

To Resolve the Tension Congress Should Allow States to Opt out of the CSA

Congress could solve this regulatory quagmire by passing federal legislation that empowers states to opt out of the CSA. Such legislation would make the CSA’s strict prohibitions inapplicable to any conduct that complies with state law. Because compliance with state law would also make their conduct legal under federal law, individuals and businesses would no longer encounter the obstacles described above: marijuana businesses could obtain banking and legal services, deduct their reasonable business expenses when computing their federal tax liability, obtain federal protection for their trademarks, avoid civil RICO liability, and so on. Within those states still wishing to prohibit marijuana (in some or all circumstances), the existing federal prohibitions would remain in place, and federal resources would be available to bolster state efforts to eradicate the drug within the state’s borders.

Congress could also use this legislation to shape state marijuana regulations in a way it cannot under federal prohibition; it could impose conditions on opting out of the CSA that powers).14

See Erwin Chemerinsky, et al., Cooperative Federalism and Marijuana Regulation, 62 UCLA L. Rev. 74, 90-100 (2015); Mikos, Marijuana Law, Policy, and Authority, supra note 2, at 396-412 (detailing these and other obstacles faced by state-licensed marijuana businesses).


14 E.g., Bourgoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10 (Maine 2018) (holding state workers compensation law preempted to the extent it required employer to compensate injured employee for purchase of medical marijuana); Nebraska v. Colorado, 136 S. Ct. 1034 (2016) (denying states’ request for leave to file complaint in Supreme Court’s original jurisdiction; complaint had sought declaration that regulatory structure created by Colorado’s Amendment 64 conflicts with and is thus preempted by the federal CSA).

15 E.g., Bourgoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10 (Maine 2018) (holding state workers compensation law preempted to the extent it required employer to compensate injured employee for purchase of medical marijuana); Nebraska v. Colorado, 136 S. Ct. 1034 (2016) (denying states’ request for leave to file complaint in Supreme Court’s original jurisdiction; complaint had sought declaration that regulatory structure created by Colorado’s Amendment 64 conflicts with and is thus preempted by the federal CSA).
would incentivize states to adopt and maintain careful controls on marijuana activities. For example, legislation could specify that compliance with state law would exempt individuals from the CSA only if a state’s reforms met certain minimum criteria, like banning possession by minors (other than for medical use) or limiting the volume of individual retail transactions.16

The Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act)17, a bipartisan bill introduced in Congress last term, provides a concrete example of how this could be done. The STATES Act provides in relevant part that the marijuana prohibitions set forth in the CSA “shall not apply to any person acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marihuana.”18 The intent of the STATES Act is clearly to do away with the collateral consequences of marijuana’s federal illegality discussed above (e.g., the inability to access banking services).19 The STATES Act also imposes some minimal conditions on a state’s ability to opt-out of the federal ban, e.g., by continuing to ban the sale of non-medical marijuana to anyone under 21 years of age, regardless of how state law might treat such sales.20

To Remove Unnecessary Federal Restrictions, Congress Should Also Remove Marijuana from Schedule I of the CSA

In addition to passing legislation that would allow states to opt out of the CSA’s strict prohibitions, the ABA also urges Congress to move marijuana off of Schedule I. By itself, the opt-out legislation described above would not change marijuana’s status as a Schedule I controlled substance under the CSA. As a result, federal law would continue to criminalize virtually all activities involving marijuana in states that continued to ban the drug. Congress, however, may wish to roll back some federal restrictions on marijuana, regardless of how states choose to regulate the drug for purposes of their own laws.

When Congress placed marijuana on Schedule I nearly half a century ago, it never intended for its decision to be etched in stone. Congress authorized the Drug Enforcement Administration (DEA), in consultation with the Food and Drug Administration (FDA), to reschedule substances,21 including marijuana, according to the criteria discussed above. Indeed, Congress arguably expected the agencies to revisit its original marijuana scheduling decision as regulators learned more about the drug.22

16 This use of the conditional preemption power would not run afoul of the anti-commandeering principle, so long as the pressure exerted by Congress is not coercive. See Mikos, On the Limits, supra note 14, at 1460-1462 (discussing conditional preemption power).
18 Id. at §2.
20 Id. (discussing continuing limits imposed by STATES Act).
In the decades since the CSA was passed, views of marijuana's harms and benefits have evolved. For example, whereas research once suggested that marijuana was a gateway to harder drugs, even the DEA has recently downplayed the causal relationship between use of marijuana and use of more dangerous drugs.22 Put simply, while no one seriously claims that marijuana is a harmless drug, few believe today it is as harmful as once believed (or as harmful as other drugs on Schedule I). Likewise, although federal agencies continue to question marijuana’s medical utility, they are now more open to the idea that marijuana shows promise as a medical treatment for various illnesses. In its last response to a rescheduling petition (in 2016), for example, the DEA recognized that there were at least 11 “proof of concept” studies that “provide preliminary evidence” of marijuana’s therapeutic potential.23 Indeed, following the DEA’s response, the National Academies of Sciences, Engineering, and Medicine conducted its own thorough review of the scientific literature regarding marijuana’s therapeutic benefits. It concluded that while the jury is still out regarding some of marijuana’s health effects, “there is conclusive or substantial evidence that cannabis or cannabinoids are effective. For the treatment of chronic pain in adults (cannabis); As antiemetics in the treatment of chemotherapy-induced nausea and vomiting (oral cannabinoids); and For improving patient-reported multiple sclerosis spasticity symptoms (oral cannabinoids).”24 What is more, irrespective of its medical utility, the general population has also become increasingly comfortable with non-medical use of marijuana.25

However, marijuana’s placement on Schedule I has proven more resistant to change than the 91st Congress might have anticipated. This is due in part to the very high bar federal agencies have set for moving a drug off of Schedule I. According to the DEA, doing so requires demonstrating, with a high degree of certainty, that a drug has an accepted medical use. To demonstrate accepted medical use, the DEA and FDA have interpreted the CSA to require large scale, double-blind, and well-controlled clinical research trials.26 But Congress’s decision to place marijuana on Schedule I has complicated the task of conducting such research. Because of its status as a Schedule I drug, marijuana is subject to a number of special controls that increase the cost and difficulty of conducting

22 See Drug Enforcement Administration, Maintaining Marijuana in Schedule 1 of the Controlled Substances Act, 81 Fed. Reg. 53838 (July 2016) (acknowledging that “although many individuals with a drug abuse disorder may have used marijuana as one of their first illicit drugs, this does not mean that individuals initiated with marijuana inherently will go on to become regular users of other illicit drugs”).

23 Id. at 53836. And since the first put marijuana on Schedule I, the FDA has approved three marijuana-related products for medical use. These include two drugs containing synthetic THC: Nabilone (Schedule II) and Dronabinol (Schedule II), as well as one drug made from natural CBD, Epidiolex (Schedule V).


25 See McCarthy, supra note 4 (discussing polling data).

26 E.g., Drug Enforcement Administration, Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. at 53779 (Aug. 12, 2016) (demanding “adequate, well-controlled, well-designed, well-conducted, and well-documented studies” to establish drug’s accepted medical use). By contrast, the agencies discount or ignore altogether other probative evidence of a drug’s medical utility, such as the judgments of medical practitioners, small scale trials, or the views of the 33 states (and counting) that have sanctioned the medical use of marijuana. See, e.g., id. at 53780 (stating that “medical practitioners are not qualified by scientific training and experience to evaluate the safety and effectiveness of drugs”).
large-scale studies to test its efficacy. 28 In other words, Congress’s decision to place marijuana on Schedule I in 1970 has proven to be one of the principal reasons that marijuana remains on Schedule I today.

To lessen existing federal restrictions on beneficial access to marijuana throughout the nation, Congress should move marijuana off of Schedule I. Congress could then place marijuana on a lower Schedule (II-V) under the CSA. To be sure, moving marijuana to Schedule II would have a very limited effect on the problems discussed earlier, because Schedule II drugs are subject to tight regulatory controls, similar to those applicable to Schedule I drugs. But moving marijuana to a lower Schedule (III-V) would allow for easier access to the drug for research and therapeutic purposes. Congress could even choose to remove marijuana from the CSA altogether, in the same way it exempted alcoholic beverages and tobacco from the statute’s coverage in the first instance. Namely, when it passed the CSA, Congress expressly declared that the CSA would not apply to “distilled spirits, wine, malt beverages, or tobacco” notwithstanding the manifest health risks posed by them. Instead, Congress chose to subject those two substances to a different body of regulations. In similar fashion, Congress could de-schedule marijuana and then adopt federal regulations to help states control the production, packaging, marketing, and interstate sale of marijuana (much as it has done for alcohol and tobacco).

In sum, simply enabling the states to opt-out of the CSA’s marijuana ban may not be enough to fix federal marijuana policy. Without further change, the CSA would continue to limit beneficial access to the drug, especially in those states that continue to ban the drug outright.

To Ensure that State and Federal Marijuana Laws Are Well-Informed by Science, Congress Should Also Encourage Further Research into the Health Effects of Marijuana

As noted above, marijuana’s status as a Schedule I drug has made scientific research into marijuana and marijuana products extremely difficult to conduct.

The third Resolution goes beyond removing those barriers to research. It urges Congress to actively facilitate research into marijuana, a recommendation that should be uncontroversial. In 2016, the DEA announced that the agency “—along with the Food and Drug Administration (FDA) and the National Institutes of Health (NIH)—fully supports expanding research into the potential medical utility of marijuana and its chemical constituents.”30 The National Academies of Sciences, Engineering, and Medicine has also called upon “public agencies, philanthropic and professional organizations, private companies, and clinical and public health research groups . . . [to] provide funding and

support for a national cannabis research agenda that addresses key gaps in the evidence base.\textsuperscript{31} The third Resolution would answer that call. It urges Congress to actively support scientific research on marijuana. As greater scientific knowledge of the benefits and harms of marijuana develops, Congress and the states can work together to ensure that the benefits of marijuana can be realized while the harms of the drug are properly addressed. Encouraging careful scientific study of marijuana will be beneficial regardless of the direction of marijuana law reform in the future.

Respectfully submitted,

Lucian Dervan
Chair, Criminal Justice Chair
August 2019

\textsuperscript{31} National Academies, supra note 25, at 9.
1. Summary of Resolution(s).

This resolution is to help resolve the current stalemate between state and federal law over marijuana regulation and to update federal marijuana policy. A majority of states have legalized marijuana in at least some circumstances, while the federal government continues to ban the drug outright. Although the federal government has taken limited steps to accommodate state reforms, the gap between state and federal law has created a regulatory quagmire that is counter-productive for all parties interested in marijuana policy. The resolution allows states to develop their own sensible marijuana policies while giving the federal government an important role in establishing minimum regulatory standards. Finally, the resolution enables beneficial access to marijuana under federal law and promotes research to ensure that both state and federal policy are informed by scientific knowledge.

2. Approval by Submitting Entity.

This resolution was approved by the Criminal Justice Council at its Spring Meeting on April 7, 2019, in Nashville, TN.

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

Not to our knowledge.

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

In 1984, the ABA approved two recommendations from the Section of Individual Rights & Responsibilities, now the Section of Civil Rights and Social Justice; first, to support the right of individuals to treat serious illnesses with marijuana under the supervision of a physician, and, second, to enact federal legislation that would allow physicians to use marijuana to treat patients with serious illnesses. Nothing in the present resolution would impact the 1984 resolution.

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

Not applicable.

6. Status of Legislation. (If applicable)
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This resolution allows the Governmental Affairs Office to actively support the drafting and enactment of federal legislation consistent with them.

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

We don’t believe there are additional costs to the ABA.

9. Disclosure of Interest. (If applicable)

Not applicable

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and interested groups:

- Business Law
- Civil Rights & Social Justice
- Government & Public Sector Lawyers
- Health Law
- Infrastructure & Regulated Industries
- Judicial Division
- Labor & Employment Law
- Litigation
- Science & Technology
- State & Local Government Law
- Taxation
- Tort Trial & Insurance Practice
- 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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2 South Biscayne Blvd., Suite 2600
Miami, Florida 33131-1819
T: 305-358-2000
Cell: 305-333-5444
E: nrslaw@sonnett.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution resolves the current stalemate between state and federal law over marijuana regulation and to update federal marijuana policy. A majority of states have legalized marijuana in at least some circumstances, while the federal government continues to ban the drug outright. Although the federal government has taken limited steps to accommodate state reforms, the gap between state and federal law has created a regulatory quagmire that is counter-productive for all parties interested in marijuana policy. The resolution allows states to develop their own sensible marijuana policies while giving the federal government an important role in establishing minimum regulatory standards. The resolution enables beneficial access to marijuana under federal law and promotes research to ensure that both state and federal policy are informed by scientific knowledge.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the outdated placement of marijuana as a Schedule 1 controlled substance in federal Controlled Substances Act and the continuing conflict with newly-enacted state statutes that either allow marijuana use by adults and/or for medical purposes. Businesses that produce marijuana lawfully within state borders are not able to utilize banking services and other federal statutes regulating commerce. Placement of marijuana as a Schedule 1 controlled substance is a barrier to research, and without research, the DEA cannot recommend that marijuana be moved to another schedule or be eliminated from the CSA altogether.

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

These resolutions will allow the ABA to advocate for federal statutes that remove marijuana from Schedule 1 of the CSA, that enable marijuana businesses to utilize banking and other services run by the federal government, and encourages research into marijuana.

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

These resolutions do not address and do not promote international trafficking of marijuana, which many believe should still be illegal at both the state and federal level. In addition, there are concerns about the overuse of marijuana by young people and adults, or the public threat by those who operate a motor vehicle while under the influence of marijuana; many of these views would be addressed if there was greater factual evidence of the benefits and harm of marijuana.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal courts and legislatures to develop policies and protocols as to who may carry firearms in courthouses, courtrooms, and judicial centers that allow only those persons necessary to ensure security, including approved safety officers, judges, and court personnel, have weapons in the courthouse, courtroom, or judicial center, including common areas within the buildings as well as the grounds immediately adjacent to the justice complex, and that require training for those who are permitted to carry firearms.
REPORT

Throughout the United States of America, the courthouses and justice centers are symbols of our constitutional system of justice. The judiciary has a compelling interest in ensuring the safety of the public as it avails itself of our courts, to seek redress from wrongs and resolve disputes.

Courtroom proceedings may sometimes become contentious and emotional, creating concerns for the safety of the litigants, as well as judges, lawyers, support staff, and law enforcement. Increasingly there have been occurrences where violence has erupted and firearms are used inside and outside of the courtroom. When the litigants and the court personnel “believe their courthouses and court facilities are not safe integrity of the entire judicial process is compromised and undermined.”1 “Beyond mere access [to courthouses], people require a safe and secure environment free from fear or intimidation. Judges, employees, and members of the general public need to feel safe if they are to conduct themselves impartially and decorously.”2

In 2012, Timm Fautsko, Principal Staff, National Center for State Courts wrote:

The number of threats and violent incidents targeting the judiciary has increased dramatically in recent years. At the federal level, the U.S. Marshals Service’s Center for Judicial Security reports the number of judicial threat investigations has increased from 592 cases in fiscal year 2003 to 1,258 cases by the end of fiscal year 2011. At the state and local levels, the most informative data about state courts comes from studies conducted by the Center for Judicial and Executive Security (CJES). Their data shows that the numbers of violent incidents in state courthouses has gone up every decade since 1970.3

All three branches of our governments should work together to promulgate, promote, and provide for responsible firearm regulations in courthouses, judicial centers, and court facilities. However, there is no uniformity among the state laws as to who may carry a firearm in a courtroom or a courthouse, nor to what extent or areas a judge may exercise discretion in limiting the possession of firearms. The National Center for State Courts did an exhaustive survey that examined the laws of all the states.4 While the majority of the states restrict firearm possession in the courtroom, only a small number restrict firearms in the courthouse. Additionally, most states allow so many exemptions as to make any ban of firearms useless.

2 Don Hardenbergh, Protecting America’s Courthouses, 44 No. 3 Judges’ J. 14 (Summer 2005).
William Rafferty of the National Center for State Courts notes that interest in allowing guns in the courtroom is nothing new.

“The recent uptick in interest can be traced back to two items: the U.S. Supreme Court decision in District of Columbia v. Heller, 554 U.S. 570 (2008), holding that the Second Amendment included an individual right to keep and bear arms, coupled with several high-profile courthouse shootings. These events have prompted efforts to redefine who can carry a firearm in a courthouse and where firearm bans may be imposed. For the most part, such efforts have been designed to expand the ability of individuals to carry guns into courthouses and, in some instances, directly into courtrooms.”5

In Heller, the Supreme Court held the Second Amendment protects “an individual right to keep and bear arms,” 554 U.S. at 595, but not a right “to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,” id. at 626. More specifically, the Court held unconstitutional the District’s “ban on handgun possession in the home,” as well as its “prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense,” id. at 635 (emphasis added), noting “the inherent right of self-defense [is] central to the Second Amendment right,” id. at 626.

In McDonald v. City of Chicago, 561 U.S. 742 (2010), the Supreme Court held that the second amendment right recognized in Heller is fully applicable to the states through the due process clause of the Fourteenth Amendment. In so holding, the Court reiterated that “the Second Amendment protects the right to keep and bear arms for the purpose of self-defense,” id. at 750, and that “individual self-defense is ‘the central component’ of the Second Amendment right,” id. at 767.

Neither Heller nor McDonald would prohibit restrictions on carrying firearms in to buildings which house court facilities or the grounds immediately surrounding the courtroom facilities. The United States Supreme Court emphasized the narrowness of its holding by noting, “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial side of arms.” Heller, 554 U.S. at 626–27. (Emphasis added)

The 10th U.S. Circuit Court of Appeals in Denver ruled that the Second Amendment right to bear arms does not extend to federal buildings, finding a post office and its parking lot are considered one of those “sensitive places.”6 It would not be

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4 McDonald v. City of Chicago, 561 U.S. 742 (2010)
6 Bonidy v. U.S. Postal Serv., 790 F.3d 1121 (10th Cir. 2015) cert denied, 136 S. Ct. 1406, 194 L. Ed. 2d 550 (2016)
unreasonable to extend the same prohibition to buildings that house courtrooms as well as the spaces and parking lots immediately adjacent to those court house complexes.

Additionally, it is not especially surprising that research data indicates that more liberal rules regarding gun possession, such as right-to-carry (RTC) laws, do not reduce crime. "Supporters of the idea that such an effect occurs assume that the laws reduce crime because prospective criminal offenders are deterred by a greater perception of risk of confronting an armed victim, which supposedly results from either the enactment of RTC laws or the issuance of large numbers of carry permits to potential crime victims."7

Unfortunately, some state legislatures seek to expand the class which would be permitted to carry firearms not only in to the courthouse, but the courtroom as well. In April 2014, the Georgia legislature enacted, and the governor, signed The Safe Carry Protection Act, a new gun law that, among other things, will allow Georgians to legally carry firearms into churches, schools, airport common areas, bars, courtrooms, and government buildings.

When Iowa Chief Justice Mark Cady issued on June 19, 2017, a supervisory order directing "all weapons are prohibited from courtrooms, court-controlled spaces and public areas of courthouses," the county supervisors, claimed that was an "over-reach" by the court and conflicted with the new gun law. A new supervisory order by the Iowa Supreme Court, issued on December 19, 2017, will enable individual counties to seek to allow weapons in public areas of floors of a courthouse that are not totally occupied by the court system.

On July 1, 2011, a Mississippi law that enhanced concealed carry permit holders "shall also be authorized to carry weapons in courthouses except in courtrooms during a judicial proceeding[,]" Miss. Code Ann. § 97-37-7(2) (Rev. 2014). On November 28, 2011, the chancellors of the Fourteenth District issued an order prohibiting those permit holders from carrying weapons within 200 feet of any door to any courtroom. On June 7, 2018 the Mississippi Supreme Court in a divided opinion ruled that local judges can't restrict conceal carrying at courthouses.

The chancellors may have good and noble intentions, and their concerns are well founded. However, their personal fears and opinions do not trump, and cannot negate, constitutional guarantees. The ultimate outcome of today's issue is reserved for the Legislature, not to be commandeered by unilateral local judicial proclamations. Courts must give more than lip service to the rule of law; they must insist upon its lawful application. Judges cannot allow their sense of superior knowledge, perceptions, or


8 NO. 2016-M-01072-SCT RICKY W. WARD v. DOROTHY WINSTON COLOM
understandings to justify open defiance of the very laws that they are called upon to uphold. Indeed, we have held repeatedly that courts are guardians of the Constitution, not guardians of the courthouse. Without question, the orders defy existing law and seek to exercise a power that plainly is reserved for the other branches of government. The orders contain no authority to suggest otherwise. The law of Mississippi is clear: enhanced-carry licensees are permitted to possess a firearm in courthouses. No matter how well-intentioned, judges are without the power to limit enhanced concealed-carry licensees’ right to carry a firearm beyond courtrooms in the State of Mississippi. The orders are vacated.

In a well-reasoned dissent, Justice Leslie D. King noted,

“The judiciary, and access thereto, implicates numerous constitutional rights. The safety of those compelled to be at the courthouse is necessary for the fair administration of justice, keeping safe and free from threat those people necessary to the judicial process, such as parties, criminal defendants, witnesses, and jurors, is crucial for the administration of justice, the integrity of the judicial system, and the preservation of the constitutional rights implicated at the courthouse.

While most statutes and court decisions recognize the right of judges to restrict who may carry a firearm into the courtroom the reality is that the firearms in the courthouse and the immediate areas surrounding the court facility pose the greatest danger.9 Trained courtroom security provide protection for the court personnel and litigants while inside the courtroom. However, once in the hallways or elevators or parking lots, those who were constrained within the courtroom now are free to act out their hostilities.10 And if one is prohibited from carrying a firearm into the courtroom, the weapon must be stored somewhere in a safe place. If courthouse security does not include gun boxes, the owner is likely to give the weapon to another family member or friend who is not as well trained or security conscious as the owner.

The American Bar Association should urge state legislatures to follow the example of the federal government, which prohibits the possession of firearms or dangerous weapons by any person in either a federal facility or federal court facility except those engaged in ‘the lawful performance of official duties by an officer, agent, or employee of the United States, a State, or a political subdivision thereof, who is authorized by law to

9 Many courts are housed within buildings with multiple functions. For example, many court buildings also house non-judicial government offices, including law enforcement offices. In such multi-function buildings, judges and other building occupants are encouraged to collaborate to develop firearm policies and gun safety protocols that appropriately reflect the unique circumstances of the building as a whole, including its security needs.


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engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law.” The term “Federal facility” is defined as “a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties.” The term “Federal court facility” means the courtroom, judges’ chambers, witness rooms, jury deliberation rooms, attorney conference rooms, prisoner holding cells, offices of the court clerks, the United States attorney, and the United States marshal, probation and parole offices, and adjoining corridors of any court of the United States.

In a society that has become increasing volatile and where civility has diminished, the time has come for firearms to be banned from the courtroom, courthouses and court facilities except for those persons properly trained and charged with providing security at these locations. Where permitted, only a limited number of exemptions should be allowed. The judges and the law enforcement agency charged with providing security in the courthouse or judicial center should collaborate and decide who should be permitted to carry a firearm.

Respectfully submitted,

Joshu Harris
Chair, Standing Committee on Gun Violence
August 2019

12 1 Deputy Dead, 1 Critical After Being Shot Outside County Courthouse. Oklahoma’s News 4, June 15, 2018
1. **Summary of Resolution(s).**

Urges state, local, territorial, and tribal governments to enact statutes, rules, or regulations and judges promulgate policies to limit the possession of firearms in court houses and judicial centers, including common areas within the buildings as well as grounds immediately adjacent to the justice complex, to those charged with courtroom and judicial center security or active law enforcement officers, unless they are a party to the action pending before the court. All persons permitted to carry firearms in the courtroom, courthouse or judicial center, should be required to train in firearm safety.

2. **Approval by Submitting Entity.** Approved by the Standing Committee on Gun Violence by conference call on September 11, 2018.

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

Resolution was originally submitted in January 2019 for Midyear, but was withdrawn.

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

The ABA has approved a number of policies regarding state and federal regulation of firearms. These include: Gun Violence Restraining Orders (17A118B), Court adoption of protocols, guidelines, and policies to protect the safety of domestic violence victims and court employees (96A120). The ABA also has policy expressly supporting the right of employers and private property owners to exclude firearms from their places of business or other private property (7M107).

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

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

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

If adopted this policy can be the basis of advocacy at the federal and state level and possible amicus brief applications. It will also be incorporated into trainings that the Gun Violence Committee offers.

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

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**GENERAL INFORMATION FORM**

Submitting Entity: Standing Committee on Gun Violence
Submitted By: Joshu Harris, Chair

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

Urges state, local, territorial, and tribal governments to enact statutes, rules, or regulations and judges promulgate policies to limit the possession of firearms in court houses and judicial centers, including common areas within the buildings as well as grounds immediately adjacent to the justice complex, to those charged with courtroom and judicial center security or active law enforcement officers, unless they are a party to the action pending before the court. All persons permitted to carry firearms in the courtroom, courthouse or judicial center, should be required to train in firearm safety.

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

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

If adopted this policy can be the basis of advocacy at the federal and state level and possible amicus brief applications. It will also be incorporated into trainings that the Gun Violence Committee offers.

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

10. Referrals.
    Commission on Domestic & Sexual Violence: co-sponsored
    Commission on Youth at Risk: supported
    Criminal Justice Section: co-sponsored
    Government & Public-Sector Lawyers Division
    Health Law Section
    Judicial Division: co-sponsored
    Section of Civil Rights and Social Justice: co-sponsored
    Section of Family Law
    Section of Litigation
    Section of State and Local Government Law
    Standing Committee on Pro Bono and Public Service
    Tort Trial & Insurance Practice Section
    Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
    Joshu Harris, Chair
    1239 Crease St
    Philadelphia, PA 19125-3901
    (646) 621-4164

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.)
    TBD
1. **Summary of the Resolution**

Urges state, local, territorial, and tribal governments to enact statutes, rules, or regulations and judges promulgate policies to limit the possession of firearms in court houses and judicial centers, including common areas within the buildings as well as grounds immediately adjacent to the justice complex, to those charged with courtroom and judicial center security or active law enforcement officers, unless they are a party to the action pending before the court. All persons permitted to carry firearms in the courtroom, courthouse or judicial center, should be required to train in firearm safety.

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

Increasingly, there have been occurrences where violence has erupted and firearms are used inside and outside of the courtroom as well as areas in the surrounding justice complex. When parties and court personnel believe court facilities are not safe, the integrity of the entire judicial process is compromised and undermined. Courtrooms and the judicial complex should be perceived as safe and secure environments. Most restrictions on possession of firearms within the courthouse complexes provide so many exceptions as to make such constraints meaningless. Tragically firearms have been wrestled away from personnel who are authorized to carry firearms while providing courtroom security.

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

Limited exceptions to any ban as to who may possess firearms in the courtroom and expanding the area of the ban to the entire judicial complex will provide both for the immediate safety of persons attending court proceedings as well as a cooling off period before persons have access to their personal firearms. Courtroom personnel who are both proficient in firearm safety as well as firearm use, will reduce the incidences of firearms seized from lawfully armed individuals.

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

None.

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**EXECUTIVE SUMMARY**

1. **Summary of the Resolution**

Urges state, local, territorial, and tribal governments to enact statutes, rules, or regulations and judges promulgate policies to limit the possession of firearms in court houses and judicial centers, including common areas within the buildings as well as grounds immediately adjacent to the justice complex, to those charged with courtroom and judicial center security or active law enforcement officers, unless they are a party to the action pending before the court. All persons permitted to carry firearms in the courtroom, courthouse or judicial center, should be required to train in firearm safety.

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

None.
RESOLVED, That the American Bar Association urges all employers in the legal profession to implement and maintain policies and practices to address and close the compensation gap between similarly situated men and women lawyers. Such policies and practices for achieving that goal may, depending on the circumstances, include the following:

1. Commit to a policy where leadership and governance committees are comprised of a critical mass of women including diverse women;
2. Commit to include a critical mass of women including diverse women in the pool of candidates for leadership roles;
3. Not rely solely on prior salary history when setting compensation for new hires;
4. Implement training for the elimination of gender bias for all involved in hiring and compensation setting processes;
5. Ensure that in the performance review process implicit bias does not go unchecked and does not lead to an unwarranted compensation gap;
6. Have a transparent compensation system to allow leaders and executives to identify compensation gaps with attorneys who are similarly situated to them;
7. Identify, in writing, key elements that determine compensation and which may help the attorneys succeed and increase their compensation;
8. Provide an appeal process for compensation decisions;
9. Analyze on an individual basis the causes for any compensation gap between similarly situated attorneys of different genders, whether in base, bonus, or other compensation;
10. Have a written protocol for allocation of credit for business generation, including an appeal process;

11. Remove barriers to business generation, including gendered exclusion from business generation teams, inordinate legacy credit for existing clients and implement a transparent system for business origination opportunities;

12. Provide equal access to mentoring and sponsoring relationships and marketing opportunities across genders, and implement a transparent system for succession of leadership opportunities;

13. Analyze gaps in promotion rates between similarly qualified attorneys of different genders and addressing the cause of such gaps;

14. Review the assignment system to ensure that attorneys of different genders have equal access to high-impact and high-visibility assignments that may lead to higher compensation; and

15. Consider the impact of non-legal task assignments on attorneys of different genders and their compensation.
I. Introduction and Overview

This resolution urges all employers in the legal profession to implement and maintain policies and practices to close the compensation gap between similarly situated men and women lawyers. This Resolution also identifies policies and practices that legal employers may implement to work toward eliminating the gender pay gap in their organizations.

The ABA is committed to the elimination of bias and the enhancement of diversity in the legal profession. This commitment is not only recognized in prior resolutions passed by the House of Delegates, but also by the adoption of Goal III, which promotes full and equal participation in the association, the legal profession, and the judicial system. As one of the Goal III entities, The Commission on Women in the Profession focuses on developing and supporting initiatives and research to secure full and equal participation of women in all areas of the legal profession.

II. The ABA Has Been A Pioneer In Addressing Issues of Gender Equity and Equal Pay for Women

The ABA has a long history of promoting gender equality in the legal profession and more specifically, equal pay between men and women lawyers. For nearly 50 years the ABA has passed resolutions and maintained active policy addressing discrimination in the legal profession. In 1972, the association passed resolution 72M23A, strongly condemning all forms of discriminatory hiring practices within the legal profession, including on the basis of sex.\(^1\) Later, in 1988, resolution 88A23A was passed to address the persistence of overt and subtle barriers that deny women the opportunity to achieve full integration and equal participation in the work, responsibilities, and rewards of the legal profession. This resolution also affirmed the fundamental principle that there is no place in the profession for these barriers and calls upon members to eliminate these barriers.\(^2\) In 1995, the ABA passed resolution 95M119 opposing bias and discrimination based on race and gender that prevented women from gaining full and equal participation in the legal profession and actively supporting efforts to eradicate this bias.\(^3\)

In addition to policy addressing the legal profession the ABA has more broadly called for gender equality in the workplace. In 2007, ABA passed resolution 07A302 urging Congress to amend Title VII of the Civil Rights Act of 1964\(^4\) and other federal age and disability employment discrimination laws to ensure that the statute of limitations regarding claims involving compensation run from each payment that reflects the claimed

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unlawful disparity. In 2010, the ABA passed resolution 10M107 urging Congress to enact legislation to provide more effective remedies, procedures, and protections for those subjected to pay discrimination. More recently, in 2016, the ABA passed resolution 16M10B supporting constitutional equality for women and urging the extension of legal rights, privileges, and responsibilities to all. This resolution also reaffirmed support of and affirmatively acts toward the goal of the ratification of the Equal Rights Amendment to the U.S. Constitution.

In addition to the resolutions passed by the House of Delegates, in August 2012, under the leadership of then-President Laurel Bello, the ABA created a Blue-Ribbon Task Force on Gender Equity which addressed, in part, pay disparity between men and women lawyers. The Gender Equity Task Force created three reports and a toolkit. Those publications are: (1) Closing the Gap: A Roadmap for Achieving Gender Pay Equity in Law Firm Partner Compensation; (2) Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers; (3) Toolkit for Gender Equity in Partner Compensation; and (4) What You Need to Know about Negotiating Compensation. The recommendations in each report created by the Gender Equity Task Force are still relevant today.

More recently, Hilarie Bass initiated a study in her Presidential term titled Achieving Long Term Careers for Women in Law. This project is continuing in Bob Carlson’s current term as President of the ABA. The report for this research has not yet been published. However, several recommendations for practice changes set out in this Resolution are derived from these ABA Presidential projects. Others, as set out below, are derived from research conducted by the ABA Commission on Women in the Profession.

ABA Toolkit for Gender Equity in Partner Compensation, ABA WOMEN IN THE PROFESSION (June 15, 2019), https://www.americanbar.org/groups/diversity/women/resources/toolkit_for_lawyer_compensation_achieving_gender_equity/
Achieving Long Term Careers for Women in the Law, ABA PRESIDENTIAL INITIATIVE, https://www.americanbar.org/content/dam/aba/administrative/office_president/Initiative_Overview.pdf (last visited Apr. 11, 2019) (detailing the initiative which includes research projects to find “best practices to stem the steady loss over time of experienced women lawyers in private practice”).
III. The Statistics Show That the Gender Pay Gap Is Still Wide

The 2012 Closing the Gap report, which was published by the ABA because of the work of the Task Force on Gender Equity, highlighted the extent of the gender pay gap regarding the compensation paid to men and women in law firms.13 The Closing the Gap report cites to significant research on the wage gap issue. Sadly, the issues raised in the Closing the Gap study have not been resolved. The most recent studies on the gender wage gap show:

- In 2018, the average male partner total compensation in an AM Law 200 firm was 53% more than the average female partner;14
- In 2016, the average male partner total compensation in an AM Law 200 firm was 44% more than the average female partner;15
- In 2019, male General Counsels were paid 39% more than their female counterparts, with only one woman among the 10 top-paid General Counsel positions.16

According to the Association of Corporate Counsel, female in-house counsel (non-GC) also earned less than their male counterparts at all junctures of their career. Female in-house counsel, barred between 2015-2018, earn 91% of what their male colleagues earn.17 This disparity increases for in-house women barred before 2000, who earn only 74% of what their male counterparts earn.18 Looking at the entire legal profession including all levels of practice, the 2018 Bureau of Labor Statistics shows full-time women lawyers earn 77.8% of what full-time male lawyers earn.19 If current trends in pay persist, women would achieve parity to men in 2029; however, it would take substantially longer for women of color.20 For African American women, pay equity would not be achieved within their lifetimes.21

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13 See generally Closing the Gap, supra note 1.
15 Id.
18 Id.
until 2119, while Latinas would have to wait until 2224, over a hundred years, to secure parity.\textsuperscript{21} The Commission on Women in the Profession’s seminal reports, \textit{Visible Invisibility: Women of Color in Fortune 500 Legal Departments}\textsuperscript{22} and \textit{Visible Invisibility: Women of Color in Law Firms},\textsuperscript{23} discuss the factors contributing to gaps in compensation for women of color in corporate legal departments and law firms. The Commission’s research showed that women of color were the least likely to be hired for top legal management positions and most likely to be hired at salary scales that were lower to both their white male and female counterparts.\textsuperscript{24} As both reports note, disparities in hiring and compensation have a ripple effect for future salary compensation and retention. For example, “what starts as a $2,000 salary gap for a woman entering a law firm, becomes a $66,000 annual gap upon promotion to equity partner.”\textsuperscript{25}

In both law firm and corporate legal department settings, women of color face barriers not only in securing pay equity but also in salary negotiations. Both of the \textit{Visible Invisibility} reports found that women of color are disproportionately the sole breadwinners in their households;\textsuperscript{26} they also worry that if they ask for too much, they will miss out on opportunities or will be viewed as aggressive.\textsuperscript{27} For women of color from ethnic groups, cultural socialization also affects how they navigate their advancement in the legal profession. For example, in a study by the Hispanic National Bar Association’s Commission on Latinas in the Profession, the report found Latinas are taught to be humble and not to “act bigger” which at times impacts their ability to push for advancement or higher salaries.\textsuperscript{28}

\begin{footnotesize}
\textsuperscript{21} Id. \\
\textsuperscript{22} Visible Invisibility: Women of Color in Fortune 500 Legal Departments, ABA COMMISSION ON WOMEN IN THE PROFESSION (2013), https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility_500.pdf. \\
\textsuperscript{24} Women of Color in Fortune 500 Legal Departments, supra note 15, at xv. \\
\textsuperscript{25} Id. at xvii (quotinig Roberta D. Liebenberg, Foreword to Joan C. Williams & Veta T. Richardson, \textit{New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women, THE PROJECT FOR ATTORNEY RETENTION AND MINORITY CORPORATE COUNSEL ASSOCIATION (July 2010), https://worklifeaw.org/publications/SameGlassCeiling.pdf). \\
\textsuperscript{26} Women of Color in Fortune 500 Legal Departments, supra note 15 at xvii; Women of Color in Law Firms, supra note 16, at 27. \\
\textsuperscript{27} Women of Color in Fortune 500 Legal Departments, supra note 15 at xvii. \\
\end{footnotesize}
IV. Why The ABA Should Adopt This Resolution

The American Bar Association has been one of the organizations at the forefront of making recommendations to eliminate the gender pay gap. As this Resolution illustrates in the 16 suggested policies and procedures that legal employers may look to to close the gap, the gap is not created by compensation systems alone. There are many pieces to the puzzle that impact the gender wage gap. These include the failure to promote women to leadership roles, gender bias (combined with racial bias for women of color), lack of transparency in compensation and hiring systems, and allocation of work assignments. In law firms the systems for establishing origination credit can have a negative impact on women lawyers’ salaries.26 In corporate legal departments the failure to promote women creates a disparate impact on wages.

In 2018 the Association of Corporate Counsel reported that although there was growing parity in hiring within legal departments of Fortune 500 companies (57% male and 43% female), with promotions the gap was startling with men making up 79% of promotions and women only 21%.27 For law firms, external hires are over three times more likely to be men than women.28

The ABA has addressed many of these issues in various studies, toolkits and programs. The ABA is already providing research and information to assist legal employers in enacting some of the recommended policies and procedures outlined in this Resolution.29 Although the ABA already has an active voice in seeking to eliminate the gender wage gap, the adoption of this Resolution will amplify that voice.

This Resolution provides legal employers with a list of suggested actions that can be taken to eliminate practices that may contribute to the pay gap. The Closing the Gap

26 See Closing the Gap, supra note 1 at 15 (“Research shows that women are often excluded from the internal networks where male colleagues assist one another’s efforts and, in many cases, are bullied or otherwise intimidated by more senior male colleagues who aggressively pursue credit allocation.”).

27 The 2019 General Counsel Landscape, supra note 8 at 15.


29 See, e.g., ZERO TOLERANCE: BEST PRACTICES FOR COMBATING SEX-BASED HARASSMENT IN THE LEGAL PROFESSION (Wendi S. Lazar et al. eds., 2018) (providing tools for legal organizations and victims of harassment and bullying); Achieving Long Term Careers for Women in the Law, ABA PRESIDENTIAL INITIATIVE, https://www.americanbar.org/content/dam/aba/administrative/officer_president/Initiative_Overview.pdf (last visited Apr. 11, 2019) (detailing the initiative which includes research projects to find “best practices to stem the steady loss over time of experienced women lawyers in private practice”); Joan C. Williams, et al., You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession, ABA COMMISSION ON WOMEN IN THE PROFESSION AND MINORITY CORPORATE COUNSEL ASSOCIATION (2018), https://www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.pdf (finding that traditional diversity tools are not effective and providing new research and toolkits for law firms and in-house departments); Women of Color Research Initiative, ABA COMMISSION ON WOMEN IN THE PROFESSION, https://www.americanbar.org/groups/diversity/women/initiatives_awards/women_of_color_research_initiative/ (last visit Apr. 11, 2019) (exploring the bias and other obstacles women of color face in the legal profession due to the intersection of their gender and their race).
report found that "as long as the data demonstrates such a pay differential, there is a compelling need to look behind the numbers to understand the factors that help explain the disparity." That is what this Resolution proposes. Each of the 15 practices outlined in this Resolution are provided as guidance to legal employers to assist them in looking behind and getting beyond the numbers in evaluating pay disparity in their organizations. These 15 recommendations are based on the ABA publications cited in this Report. This research has gone behind the numbers and created recommendations to help legal employers identify how wage disparity is created and how it can be changed. This Resolution will amplify those messages and urge legal employers to make changes.

V. Conclusion

In the research publications referenced in this report there is one common denominator: diversity and inclusion must be part of the fabric of the legal organization for the gender pay divide to close. The voice of the American Bar Association is an important part of the effort to eliminate the gender wage gap. By adopting this Resolution, which includes concrete recommendations backed by solid research, the ABA will be providing a great resource to legal employers who want to eradicate the gender wage gap in their organizations and continue to promote one of its goals in eliminating bias in the legal profession.

Respectfully submitted,

Stephanie A. Scharf
Chair, ABA Commission on Women in the Profession
August 2019

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33 Closing the Gap, supra note 1 at 13.
1. **Summary of Resolution(s).**

This Resolution urges all legal employers to implement and maintain policies and practices to close the compensation gap between similarly situated male and female lawyers. It also identifies the fifteen best practices and policies that legal employers can implement in order to eliminate the gender pay gap in their organizations.

2. **Approval by Submitting Entity.**

The ABA Commission on Women approved this policy on Friday, January 25, 2019 in Las Vegas, NV during its Midyear Business Meeting. Additional approval of substantive resolution modifications took place on Tuesday, May 28, 2019.

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 policy is consistent with prior policy supporting the prohibition of gender equality and opposing discrimination in the legal profession in 72M23A, 88A121, 95M119, 10M107, 16M10B, and 16M116.

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

N/A

6. **Status of Legislation.**

N/A

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

The policy will provide authority for the ABA to advocate and promote pay equity within the legal profession through the various mechanisms currently used by the association.
8. **Cost to the Association.** (Both direct and indirect costs)

Adoption of this Resolution would result only in minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. **Disclosure of Interest.** (If applicable) There are no known conflicts of interest.

10. **Referrals.** By copy of this form, the Report with Recommendation will be referred to the following entities:

- Law Practice Division
- Section of Civil Rights and Social Justice
- Section of Dispute Resolution
- Section of Labor and Employment Law
- Section of Litigation
- Young Lawyers Division
- Commission on Racial and Ethnic Diversity in the Legal Profession
- Commission on Sexual Orientation and Gender Identity
- Business Law Section

11. **Contact Name and Address Information.**

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges all legal employers to implement and maintain policies and practices to close the compensation gap between similarly situated male and female lawyers. It also identifies fifteen best practices and policies that legal employers can implement in order to eliminate the gender pay gap in their organizations.

2. Summary of the Issue that the Resolution Addresses

This Resolution addresses the compensation inequality that continues to exist between men and women within the legal profession. The Resolution outlines specific practices and policies based on the association’s own research and available data. By implementing the practice and policies outlined in this Resolution organizations can promote equality in compensation between male and female lawyers.

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

The proposed policy addresses the issue of compensation inequality by providing best practices and policies that legal employers can implement in order to eliminate compensation disparity.

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

None at this time.
RESOLVED: That the American Bar Association urges each state’s highest court, and those of each territory and tribe, to study and adopt proactive management-based regulatory programs appropriate for their jurisdiction, as a way to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms, and to:

a. assist lawyers, law firms, and other entities in which lawyers practice law in the development and maintenance of ethical infrastructures that help to prevent violations of applicable rules of professional conduct;

b. reduce complaints to lawyer disciplinary authorities;

c. enhance lawyers’ provision of competent and cost-effective legal services; and

d. encourage professionalism and civility in the profession.
Benjamin Franklin once advised that “an ounce of prevention is worth a pound of cure.”

The purpose of this Resolution is about – encouraging state supreme courts to consider Proactive Management-Based Regulation ("PMBR") programs tailored to their interests and needs, to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms, with the ultimate goal of helping lawyers avoid disciplinary and malpractice complaints. Such programs have already been implemented with good results. They are good for lawyers, good for clients, and good for regulators who must continue to successfully perform their disciplinary enforcement duties in the public’s interest with limited resources. Illinois and Colorado have adopted PMBR initiatives; other U.S. jurisdictions are studying them. This Report explains the background and rationale behind PMBR programs, the positive results and feedback experienced to date, and how PMBR initiatives are consistent with existingABA policy, including the ABA Model Regulatory Objectives for the Provision of Legal Services.

Based on the collaborative work of the Standing Committee on Professional Regulation ("Professional Regulation Committee") and Young Lawyers Division ("YLD"), and as a predicate to this proposal, the YLD Assembly approved an almost identical Resolution at its 2019 Midyear Meeting in Las Vegas. These two entities now request that the House of Delegates approve this Resolution urging jurisdictions’ highest courts to study and adopt jurisdictionally appropriate PMBR programs.

Realizing the potential of PMBR to enhance lawyer practice and help prevent misconduct, the Professional Regulation Committee and Center for Professional Responsibility ("the Center") have been educating and providing resources about PMBR programs to regulators, state supreme courts, bar associations, and others for several years. They have done so through PMBR Workshops and roundtables, and discussions with presentations to the Conference of Chief Justices and National Conference of Bar Presidents. The Professional Regulation Committee and the National Organization of Bar Counsel to educate regulators, the profession, and the public about PMBR through the development of web resources relating to this subject.

In 2015, the first of the three PMBR Workshops held to date took place at the Colorado Supreme Court to begin educating and energizing U.S. regulators and bar leaders about PMBR developments and the possibilities for implementing such programs in the U.S. The Colorado Supreme Court Office of Attorney Regulation and the Maurice Deane School of Law at Hofstra University cosponsored it. Regulators from the U.S., Canada, and the U.K. have adopted PMBR initiatives; other U.S. jurisdictions are studying them. This Report explains the background and rationale behind PMBR programs, the positive results and feedback experienced to date, and how PMBR initiatives are consistent with existingABA policy, including the ABA Model Regulatory Objectives for the Provision of Legal Services.

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and Australia provided participants with opportunities to discuss their experiences, as well as the possibilities and challenges associated with PMBR. Justices from the Colorado Supreme Court attended the Workshop.

The 2016 Workshop was held in Philadelphia, built on the work done at the first PMBR Workshop, and was cosponsored by the Texas A&M University Law School. There were jurisdictional updates and participants engaged in a moderated discussion designed to help them identify positive aspects of PMBR and specific challenges that have arisen or that may arise from various sectors of the legal profession. Participants discussed next steps to advance the exploration of PMBR and to facilitate continued collaboration.

In 2017, Colorado launched its voluntary PMBR program through the Colorado Supreme Court Advisory Committee. That year, the Illinois Supreme Court adopted its mandatory PMBR mechanism for lawyers without professional liability insurance. Both programs serve as complements to these jurisdictions' rules of professional conduct and effective lawyer disciplinary systems. Both demonstrate how PMBR programs are not one-size-fits-all and can be shaped to meet a jurisdiction's needs. Both programs are discussed below in more detail.

The Professional Regulation Committee and Center held the third PMBR Workshop in Illinois and Colorado. Representatives from Illinois and Colorado spoke about the minimal resources necessary to develop and launch their programs, and the positive feedback they had received about the initiatives. The Committee also presented to the National Conference of Bar Presidents on this subject at the 2018 ABA Annual Meeting in Chicago, and has kept the Conference of Chief Justices apprised of its work. Planning is underway for the 4th Workshop, which will focus on development of a PMBR toolkit for jurisdictions to use in their study and consideration of jurisdictionally appropriate PMBR programs for adoption.

The Professional Regulation Committee and YLD believe that the time is ripe for the ABA to continue to lead in this area by adopting this Resolution.

I. The Current U.S. Lawyer Regulatory System is Primarily Complaint Driven

The ABA has long supported state-based judicial regulation of the profession. This Resolution furthers that policy. The highest courts of appellate jurisdiction possess the

inherent and/or constitutional authority to regulate the legal profession. Each jurisdiction has enforceable rules of professional conduct, based upon the ABA Model Rules of Professional Conduct, that protect the public and regulate lawyer behavior. Each jurisdiction has a lawyer disciplinary entity that is responsible for investigating and prosecuting complaints alleging that lawyers have violated applicable rules of professional conduct. These entities frequently serve other frontline regulatory, as well as educational, and some preventive functions.5

Lawyer disciplinary enforcement has evolved over the years into an effective, complex, professionally staffed enterprise that must continue to be appropriately resourced to meet the core purposes of protecting the public and maintaining the integrity of the profession. Each jurisdiction’s disciplinary process operates under a sophisticated set of substantive and procedural rules.

In the U.S., much of the lawyer regulatory process remains primarily complaint driven. There are over 1.2 million lawyers with active licenses in the United States.6 In 2016, Disciplinary agencies received over 87,000 complaints that necessitated screening, referral to other agencies, investigation, and in some cases, prosecution and the imposition of discipline.7 Historically, a majority of complaints against lawyers are about what is characterized as “lesser misconduct,” including lack of communication, neglect, and similar issues.8

It is better to prevent problems than to have lawyers have to respond in the disciplinary process or via malpractice lawsuits. However, some lawyers do not have infrastructure or mentoring opportunities available to them. In addition, as noted by the YLD in the Report accompanying its Resolution before the Assembly, more law students are opening their own practices and may lack the necessary practice management and skills, as well as the ability to identify or assess where they need additional skills training and education. Programs are designed to help lawyers make those assessments, obtain additional training and education, and develop ethical infrastructures, which are generally described as “practice controls, policies and procedures related to the ethical delivery of legal services.”9

In the Professional Regulation Committee’s experience, complaints about lesser misconduct, typically those involving neglect or lack of communication, are indicative of

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5 Some disciplinary offices collect annual licensing fees and maintain the master roll of lawyers. Others act as conservators when lawyers die or abandon their practices.
7 ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G), available at https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/modrulesforlawyerdisciplinaryenforcement/rule11g.
8 Letter from Professor Susan Saab Fortney dated April 15, 2019, in response to the Professional Regulation Committee’s March 6, 2019 Comment Draft Resolution and Report. This letter is on file with the Professional Regulation Committee.
9 Letter from Professor Susan Saab Fortney dated April 15, 2019, in response to the Professional Regulation Committee’s March 6, 2019 Comment Draft Resolution and Report. This letter is on file with the Professional Regulation Committee.
practice management or other skills-related issues that can and should be remediated, and hopefully future complaints will be avoided. Consistent with ABA policy, many jurisdictions now have in place programs that allow the disciplinary counsel, upon receiving a complaint involving lesser misconduct, to refer these lawyers to alternatives to discipline, also known as diversion, programs.10 These programs are in the lawyer’s and public’s best interest. They are designed to help lawyers remediate lesser misconduct, the presumptive sanction for which would be no more severe than an admonition or reprimand.11 However, while a necessary part of a continuing effective disciplinary enforcement process, diversion programs are not designed to help lawyers reduce the risk of receiving disciplinary complaints in the first place.

In diversion programs the lawyer and disciplinary agency enter into a contract whereby the lawyer agrees to complete actions to address the alleged violations, such as educational programs or the use of a practice management monitor. It is the lawyer’s responsibility to complete the terms of the contract. The contract provides for oversight of the lawyer and reporting to the disciplinary counsel about compliance. Typically, the disciplinary matter is held in abeyance pending successful completion of the contract. If the lawyer does not successfully complete the terms of the contract, disciplinary counsel may resume disciplinary proceedings. If the lawyer does fulfill the contract, the disciplinary agency is barred from taking further action based on the allegations that led to the diversion.

II. Proactive Management-Based Regulatory Programs

A. The PMBR Concept

There are some proactive programs and regulations in the U.S., including Bridge the Gap Programs, ethics hotlines, continuing legal education programs, and other practice management solutions. While these programs can help lawyers provide better services ethically and professionally, they are ad hoc, versus systemic, in nature.12 PMBR programs offer a different paradigm, a systemic preventive approach that supplements the current lawyer disciplinary enforcement process, and helps law firms develop ethical infrastructures to improve the delivery of legal services and client relations. Unlike the alternatives to discipline/diversion concept discussed above, PMBR systems operate separate from the disciplinary process, because the purpose of PMBR is to prevent misconduct and malpractice, and to reduce complaints to lawyer disciplinary agencies and malpractice lawsuits in the courts. PMBR programs are not one-size-fits-all, as described in more detail below, and may be crafted to meet the needs of each jurisdiction.

10 Id. Research conducted by the Professional Regulation Committee indicates that at least 29 jurisdictions (each New York Judicial Department counts as one jurisdiction) have formal alternatives to discipline programs, and a pilot program was launched in 2017 by the U.S. Patent and Trademark Office.
11 Supra note 8.
Regarding the fact that PMBR programs are not one-size-fits-all, it is important to make clear at the outset what these programs and this Resolution are not. PMBR programs are intended to supplement the discipline enforcement process, which remains integral and must continue to be adequately resourced. PMBR programs are intended to supplement it and enhance compliance with applicable rules of professional conduct that exist for the public’s protection. The imposition of appropriate lawyer discipline is one of the ABA Model Regulatory Objectives for the Provision of Legal Services. PMBR is not about establishing or advocating for alternative business structures or entity regulation. To interpret the PMBR concept and this Resolution as such would be incorrect. Discussion of PMBR models below that are in jurisdictions that permit entity regulation or alternative business structures are illustrative only. They are intended to show the range of PMBR programs and that they are not one-size-fits-all in nature. The examples below are also not exhaustive.

Another beneficial effect of PMBR programs is that they change for the better the relationship between the regulator and the regulated. Historically, the relationship between regulators and the profession has been fraught; the relationship is often perceived and experienced as adversarial, especially by lawyers who are the subject of a disciplinary complaint. Under PMBR programs that have been implemented in other countries and in the U.S., the regulator and regulated have developed a different and more constructive relationship. The relationship is one where the parties work together to help the lawyer come into compliance with the PMBR program, or in jurisdictions with voluntary programs to encourage and help lawyers follow it. Noncompliance in mandatory PMBR jurisdictions is not met with an immediate invocation of the disciplinary process. Involvement of the disciplinary process is a last resort in those jurisdictions. Information shared with the regulator as part of the PMBR process, whether the program is mandatory or voluntary, must not be used by the disciplinary agency. As discussed in more detail below, it should be and is held confidential to support the preventive purpose of the program.

The Report supporting the YLD Resolution that preceded this proposal notes that PMBR’s guiding principles of prevention and better client service are particularly important for young lawyers who, in a changing and competitive services marketplace, must optimize these practice management and competency skills as early in their careers as possible. That Report noted that “PMBR can assist young lawyers with learning how to practice good habits at the outset of their careers rather than rehabilitating poor habits later. PMBR programs are also helpful from a business development perspective.”

B. PMBR in U.S. Jurisdictions: A Positive Experiment to Date and Growing

12 Supra note 2, at 2. See also Susan Saab Fortney, Promoting Public Protection Through and “Attorney Integrity” System: Lessons from the Australian Experience With Proactive Regulation of Lawyers, 23 THE PROFESSIONAL LAWYER 1, 6 (2015). Professor Fortney notes that a small number of firms in her study exceeded the minimum PMBR regulatory requirements and obtained a Quality Management Certification from the International Organizations for Standardization that they used to distinguish themselves for business development purposes.

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As noted above, the Professional Regulation Committee’s efforts to educate regulators and the bar about PMBR have contributed to the adoption of PMBR programs by two state supreme courts. Other jurisdictions have formally or informally commenced study of PMBR systems, including Utah, New Mexico, and Wisconsin. The Illinois Supreme Court and the Colorado Supreme Court adopted different types of PMBR programs in 2017 after conducting studies about it and engaging in broad outreach to the profession and public. Illinois’ program is mandatory for lawyers without malpractice insurance; Colorado’s program is voluntary. Neither involves entity regulation.

The Illinois program requires lawyers without malpractice insurance to complete a four-hour interactive, online self-assessment about their practice.14 The Chief Justice of the Illinois Supreme Court introduces the program in a video, and there are currently eight interactive modules that comprise the self-assessment program.15 The program addresses the ethics rules and lawyers’ business practices. The modules address: (1) technology and ethics; (2) conflicts of interest; (3) fees, costs, and billing practices; (4) effective client-lawyer relationships; (5) client trust accounts; (6) lawyer well-being; (7) professionalism and civility; and (8) diversity and inclusion.16 For example, the trust accounting module reinforces the proper ways to handle client funds and avoid practices that could lead to complaints about issues such as commingling, bookkeeping and accounting procedures. Lawyers may also voluntarily take the PMBR programming. CLE credit is available to all who complete it.

To allay fears about the disciplinary agency obtaining information from the self-assessment and using the data in a disciplinary context, the Illinois Supreme Court adopted rules to ensure that “[a]ll information related to the self-assessment shall be confidential, except for the fact of completion of the self-assessment, whether the information is in the possession of the Administrator or the lawyer.”17 That information is also not subject to discovery.18

Colorado’s voluntary PMBR program is called the Colorado Lawyer Self-Assessment Program, and it is also online.19 That the program is voluntary highlights how the concept of PMBR is not “one-size-fits-all.” Colorado’s program allows lawyers to earn up to three CLE credits by completing the ten self-assessments. The Colorado Supreme Court amended the Colorado Rules of Civil Procedure in 2018 to include the Self-Assessment Program, stating in Rule 256 that: “The Colorado Supreme Court additionally finds that

maintaining the confidentiality of information prepared, created, or communicated by a lawyer or by a law firm administrator, employee, or consultant acting under the direction of a lawyer, in connection with a lawyer self-assessment will enhance participation in the Colorado Lawyer Self-Assessment Program. Confidential information is defined in the Rule and the parameters for the ways in which that information cannot be used is also set forth. As of September 6, 2018, 182 Colorado lawyers had completed the program and received CLE credit, and over 400 lawyers had finished at least one part of the program. The Colorado Office of Regulation Counsel continues to actively engage in outreach about the program.

Due to the newness of both programs, no formal studies yet exist regarding about them. However, as reported in a 2018 article in the Illinois Bar Journal, “PMBR is part of the ARDC’s effort to focus on prevention over prosecution…” and it has experienced success with participation and received positive feedback on the eight current PMBR modules. As noted in the article, in addition to being asked to rate their own experience with the program, participants “are also asked whether they would recommend the PMBR courses to others. A whopping 93 percent said yes with regard to the technology and conflicts courses; 95 percent said yes about the fees, costs and billing module, as well as the trust accounts and record management module. The program is similarly viewed as a positive development by the profession in Colorado, with supportive articles appearing in bar journals, including the Colorado Trial Lawyers’ Association.

Like Illinois and Colorado, state supreme courts studying PMBR will need to consider the cost of implementing such programs. The PMBR toolkit that the Professional Regulation Committee is developing, referenced at page three of this Report, will include detailed information about the various PMBR programs in the U.S. and abroad to help courts better understand the range of PMBR options, as well as provide information relating to the costs and resourcing of these programs. The Professional Regulation Committee has found that the costs of developing and implementing PMBR programs is reasonable.

For example, Colorado developed the content for its program through a volunteer

20 Colorado Sup. Ct. R. 256. See also Susan Saab Fortney, The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms, 4 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 112, 141-46 (2014) for additional discussion about the importance of maintaining confidentiality of this information.

21 Id.


24 This article states that the program is “an invaluable resource, especially for solo and small firm lawyers, new lawyers, and lawyers practicing in the areas of plaintiffs’ personal injury, family law, criminal law, and bankruptcy.” Cecil Morris, Colorado’s New Lawyer Self-Assessment Program, COLORADO TRIAL LAWYERS ASSOCIATION (Dec./Jan., 2018), available at http://www.coloradosupremecourt.com/PSDF/AboutUs/PMBR/Morris%20Trial%20Talk%20Colorado%20Law yer%20Self%20Assessment%20Program.pdf.

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For example, Colorado developed the content for its program through a volunteer
subcommittee of the Colorado Supreme Court Advisory Committee. The volunteer nature of these members’ service kept the program economical to implement in this jurisdiction. The Colorado Office of Attorney Regulation Counsel engaged an outside vendor at a reasonable cost to work with the subcommittee to create and host the online platform. The experience in Illinois was similar. The Attorney Registration and Disciplinary Commission utilized volunteers and existing staff to develop and implement the program. A team of four staff members worked on this project, with one staff member overseeing the project’s development. The bulk of the direct costs related to contracting a multimedia and eLearning services designer who developed the eLearning modules described above and additional ADA accessible formats of these modules ($40,000).

C. PMBR Works: Models Elsewhere

As noted above, PMBR and this Resolution are distinct and unrelated to the concepts of alternative business structures or entity regulation. Nothing about this Resolution seeks to change existing ABA policy on those subjects. Discussion of PMBR models below that are in jurisdictions that permit entity regulation or alternative business structures are illustrative only, not exhaustive, and intended only to demonstrate the flexibility that PMBR affords in crafting jurisdictionally appropriate programs.

PMBR as a concept grew from a 2001 New South Wales, Australia law permitting Incorporated Legal Practices (ILP) that included lawyer and non-lawyer partners/owners. Regulators in that country wanted to maximize public protection in the context of this new construct for delivering legal services, and so each ILP had to have a Legal Practice Director and put into place “appropriate management systems.”

The legislation did not define “appropriate management systems” and so ILPs lacked guidance as to how they should comply. In response, the regulator in New South Wales, the Office of the Legal Services Commissioner (OLSC), consulted with relevant stakeholders including the bar and the professional liability insurer, and developed collaboratively with them the first PMBR program. That program consisted of a checklist of ten objectives/areas that “appropriate management systems” should address, and required each ILP to conduct a “self-assessment” to determine the ILP’s compliance with these objectives. The ILP was required to rate its level of compliance. The OLSC provided resources to help ILPs determine how to rate themselves and offered onsite provided resources to help ILPs determine how to rate themselves and offered onsite.

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\[\text{See supra note 10, at 724-725.}\]


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assistance to those who requested such help. The OLSC conducted audits of those ILPs that did not complete the self-assessment process.

The areas covered by the self-assessment checklist in New South Wales mirror and are designed to help ILPs implement systems to prevent the same types of issues that frequently give rise to disciplinary complaints and possible referral to diversion programs in the U.S. These issues include neglect, delay, lack of communication, failure to return client files, trust account and record management systems, retainer and billing practices, supervision of staff, and conflicts of interest.

In 2009, a study determined that there was a significant drop in complaints of up to two-thirds against ILPs that completed the initial self-assessment process. A second study conducted found that this drop in complaints happened because almost 75% of the firms that completed the self-assessment took steps to improve their processes due to their participation in the program. The majority of lawyers who participated in the program expressed satisfaction with the PMBR program, even those who were skeptical when the program began. Queensland, Australia implemented a similar PMBR program with the anecdotal data showing results analogous to those in New South Wales.

In December 2014, Australia adopted the Uniform National Legal Profession Act, and New South Wales implemented that national law in 2015. Self-assessments are no longer required under the new law. Instead, the designated local regulator may, if it has reasonable grounds (which may include a complaint), conduct an audit of a lawyer or law firm’s compliance with the law and any other applicable professional obligations. The regulator can provide ‘management system direction’ to the lawyer or firm if it considers it reasonable to do so after the audit to “ensure that appropriate management systems are in place.” That direction may include a requirement that the lawyer or firm provide the regulator with periodic reports of compliance. Queensland has not yet adopted the Uniform National Law. Its original PMBR program remains in effect.

Regulators in Canada have also undertaken study of and implemented PMBR programs, recognizing their benefits. In 2015 the Law Society of Ontario (formerly the Law Society of Upper Canada) created a Compliance-Based Entity Regulation Task Force to explore PMBR for lawyers and paralegals. That Task Force issued a Report asking the Law Society’s Convocation (its Board of Directors) to approve development of a regulatory

30 Supra note 12, at 725.
31 Supra note 12, at 726.
33 Supra note 27, at 156–65.
34 Id.
36 LEGAL PROFESSION UNIFORM LAW (N.S.W.) § 257(1) (2015).
37 Id. at § 257(2)(b).

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framework based on principles of compliance-based regulation. As noted on the Law Society’s website, “[c]ompliance-based regulation emphasizes a proactive approach in which the regulator identifies practice management principles and establishes goals and expectations. Lawyers and paralegals report on their compliance with these expectations, and have autonomy in deciding how to meet them.” The Task Force noted in its Report that compliance-based regulation and entity regulation do not have to be implemented together. In 2016, the Convocation approved the Task Force’s recommendations.

In May 2018, the Task Force released another Report to Convocation and the Law Society released for comment the Task Force’s draft Practice Assessment Tool. No decision has been made whether this PMBR program will be mandatory or voluntary. As of the time of the filing of this Resolution, the Law Society was accepting comments regarding the Practice Assessment Tool.

The Nova Scotia Barristers’ Society (NSBS) has adopted a new professional regulatory approach that it refers to as “Triple P Regulation.” The PMBR component is called the Management System for Ethical Legal Practice or MSLEP. It is designed to help lawyers and law firms avoid disciplinary and malpractice complaints. A pilot project was completed with approximately 50 firms from 2016 – 2017. Starting in January 2018, lawyers must complete a self-assessment based on the ten MSEL elements. The NSBS does not dictate to lawyers how to meet the MSEL, but provides guidance, and is developing and curating online resources relating to each of the ten MSEL elements. Lawyers must submit the self-assessment to the Executive Director’s Office of the NSBS. The MSEL elements are akin to the ten objectives for appropriate management systems used in New South Wales.

38 COMPLIANCE-BASED ENTITY REGULATION TASK FORCE, REPORT TO CONVOCATION (May 26, 2016), https://lawsocietyontario.azurewebsites.net/media/lso/media/legacy/pdf/c/convocation_may_2016_cber.pdf.

39 Id.

40 Id.

41 Compliance-Based Entity Regulation, LAW SOCIETY OF ONTARIO, https://lso.ca/about-/lso/initiatives/compliance-based-entity-regulation (last visited Apr. 29, 2019).

42 COMPLIANCE-BASED ENTITY REGULATION TASK FORCE, REPORT TO CONVOCATION (May 24, 2018), https://lawsocietyontario.azurewebsites.net/media/lso/media/legacy/pdf/c/convocation-compliance-basedentityregulationtaskforcereport.pdf.


44 An earlier, voluntary self-assessment tool was developed by the Canadian Bar Association, which is not a regulator. This tool was made available to its members online and includes hyperlinks to relevant resources. See Ethical Practices Self-Evaluation Tool, CBA LEGAL FUTURES INITIATIVE, http://www.cba.org/CBA-Legal-Futures-Initiative/Resources/Ethical-Practices-Self-Evaluation-Tool (last visited Apr. 28, 2018).


48 See Regulation 4.9.1 of the Nova Scotia Barristers’ Society Regulations Made Pursuant to the Legal
NSBS explains that the MSELP are intended: “To help you and everyone else: (1) be more productive, (2) be less vulnerable to complaints, (3) be less vulnerable to claims, (4) as others do the same, incur less cost over time than would otherwise be the case, (5) be less stressed, (6) be more able to serve your clients through ethical and effective practice, and (7) when the time comes, be more able to leave practice.”49 Lawyers will have to do the self-assessment every three years to ensure their management systems remain optimal. Responses to the self-assessment cannot result in a disciplinary investigation.50

The Prairie Law Societies (Saskatchewan, Alberta and Manitoba) are also exploring a more proactive approach to regulation. As noted on the Law Society of Saskatchewan website: “To determine the most meaningful way to engage with law firms through proactive regulation, the Prairie Law Societies conducted a pilot project in 2017 to test a new resource which helps firms assess the robustness of their practice management systems and firm culture. The content of the Assessment Tool is designed to help firms think about ways to best serve their clients, their lawyers and their employees. This fosters both public protection in terms of ethical, efficient practice as well as good business.”51 Generally, the Law Societies received positive feedback and made necessary changes.52 The Law Society of Saskatchewan intends to implement the program in 2019.

III. PMBR Aligns With and Furtherrs ABA Policy

This Resolution is consistent with ABA policy supporting state-based judicial regulation of the profession and continued effective and appropriate resourcing of lawyer disciplinary enforcement, including the Recommendations of the ABA Commission on Evaluation of Disciplinary Enforcement (“McKay Commission”). The McKay Commission was created in 1989 to conduct a national evaluation in lawyer disciplinary enforcement and provide a model for responsible regulation in the future. The Commission was named after its original Chair, Robert McKay, who passed away before the Commission completed its work. The Recommendations of the Commission, most of which were adopted by the House of Delegates at the February 1992 Midyear Meeting, were published as “Lawyer Regulation for a New Century.”

The McKay Commission Report recommended that state supreme courts supplement what was then a mostly prosecutorial model of lawyer regulation to one that not only


50 Id. See also Regulation 4.9.6 of the Nova Scotia Barristers’ Society Regulations Made Pursuant to the Legal Profession Act, current through January 18, 2019, available at https://nsbs.org/sites/default/files/cms/menu-pdf/CurrentRegs.PDF.


52 Id.
provides the public through continued effective lawyer disciplinary enforcement when required, but helps lawyers. That expanded system of regulation called for increased public service and accessibility, as well as the creation of programs designed to help lawyers avoid the disciplinary process.53

PMBR is the logical next step in the evolution of this expanded system of regulation. PMBR is consistent with the letter and spirit of the McKay Recommendations and Model Rule for Lawyer Disciplinary Enforcement 11(G) that sets the parameters for alternatives to discipline programs. The components of PMBR are similar to those in the alternatives to discipline programs; it is the timing of the lawyer’s participation that is different. PMBR frontloads the preventive measures which are not part of the existing disciplinary process.

PMBR is also consistent with many of the ABA Model Regulatory Objectives for the Provision of Legal Services, and inconsistent with none. The House of Delegates adopted the Model Regulatory Objectives in February 2016.54 In particular, PMBR is consistent with the following Model Regulatory Objectives: protecting the public; advancing the administration of justice and the rule of law; providing transparency about the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections; enhancing the delivery of affordable and accessible legal services; helping lawyers provide efficient, competent, and ethical legal services; protecting confidential and privileged information; advancing appropriate preventive or wellness programs55; and advancing diversity and inclusion among legal services providers.56 This Resolution is consistent also with ABA Goal II, which encourages the promotion of high quality legal education; competence, ethical conduct and professionalism; and pro bono and public service by the legal profession.57

IV. Conclusion

The Professional Regulation Committee and YLD respectfully request that the House of Delegates adopt this Resolution urging state supreme courts to study and adopt jurisdictionally appropriate PMBR programs to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms.58

53 Supra note 4, at 14 – 21.
54 ABA RESOLUTION & REPORT 105, Model Regulatory Objectives for the Provision of Legal Services (Feb. 8, 2016), https://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_105.docx.
55 Illinois and Colorado PMBR programing includes lawyer well-being.
56 Illinois and Colorado PMBR programing includes diversity and inclusion.
58 In developing this Resolution, the Professional Regulation Committee sought input and incorporated suggestions from individuals and other entities inside and outside the ABA. The Professional Regulation Committee and the YLD thank all who provided the helpful comments and suggestions that helped to shape this Resolution, which is consistent with the PMBR Resolution adopted by the YLD Assembly in January 2019.
Respectfully Submitted,

Paula J. Frederick  
Chair, ABA Standing Committee on Professional Regulation  
August 2019

Tommy D. Preston  
Chair, ABA Young Lawyers Division  
August 2019
1. **Summary of Resolution(s).**

This collaborative work of the Standing Committee on Professional Regulation and Young Lawyers Division urges each state’s highest court, and those of each territory and tribe, to study and adopt jurisdictionally appropriate proactive management-based regulatory (PMBR) programs to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms. PMBR programs offer a systemic preventive approach to help lawyers, and the entities where they practice law, develop ethical infrastructures to improve the delivery of competent and cost-effective legal services. PMBR programs operate separately from the disciplinary process. A goal of PMBR is to reduce complaints to lawyer disciplinary agencies and malpractice actions. PMBR programs encourage professionalism and civility, and change for the better the relationship between the regulator and regulated. PMBR programs are not one-size-fits-all, may be crafted to meet the needs of each jurisdiction, and are reasonable in cost.

PMBR is consistent with longstanding ABA regulatory policies, including the 1992 Report of the Commission on Evaluation of Disciplinary Enforcement (McKay Report) and the 2016 ABA Model Regulatory Objectives for the Provision of Legal Services.

2. **Approval by Submitting Entity.** April 25, 2019.

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 ABA Policies including the Model Rules of Professional Conduct, Model Rules for Lawyer Disciplinary Enforcement, Model Regulatory Objectives for the Provision of Legal Services, and the Report of the Commission on Evaluation of Disciplinary Enforcement (McKay Commission Report). These policies would not be otherwise affected 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) N/A

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the submitting entity.**
The ABA Standing Committee on Professional Regulation would commence implementation by providing notice of the adopted Resolution to state supreme courts and offering the Committee’s resources and the toolkit referenced in the Report as assistance to those court’s as they study and look to adopt jurisdictionally appropriate PMBR programs. The Committee’s longstanding successful disciplinary system consultation program will be utilized as a means of implementing the Resolution. The Committee will continue its PMBR Workshops and engage with the National Organization of Bar Counsel and state bar associations to facilitate implementation. These actions are consistent with the Committee’s and Center for Professional Responsibility’s longstanding and successful policy implementation initiatives.

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


10. Referrals. The Committee circulated a comment draft of the Resolution and Report to all ABA Sections, Divisions, Forums, Standing Committees, and Centers, and to state and local bar associations. The Association of Professional Responsibility Lawyers, Conference of Chief Justices, and National Organization of Bar Counsel received it.

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

   Ellyn S. Rosen
   Regulation and Global Initiatives Counsel
   ABA Center for Professional Responsibility
   321 North Clark Street, 29th Floor
   Chicago, IL 60654
   ellyn.rosen@americanbar.org
   312/988-5311

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

   Paula J. Frederick, Chair
   ABA Standing Committee on Professional Regulation
   State Bar of Georgia
   104 Marietta St NW
   Ste 100
   Atlanta, GA 30303-2743
   paulaf@gabar.org
   404/441-8730
EXECUTIVE SUMMARY

1. Summary of the Resolution

This collaborative work of the Standing Committee on Professional Regulation and Young Lawyers Division urges each state’s highest court, and those of each territory and tribe, to study and adopt jurisdictionally appropriate proactive management-based regulatory (PMBR) programs to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms. PMBR programs offer a systemic preventive approach to help lawyers, and the entities where they practice law, develop ethical infrastructures to improve the delivery of competent and cost-effective legal services. PMBR programs operate separately from the disciplinary process. A goal of PMBR is to reduce complaints to lawyer disciplinary agencies and malpractice actions. PMBR programs encourage professionalism and civility, and change for the better the relationship between the regulator and regulated. PMBR programs are not one-size-fits-all, may be crafted to meet the needs of each jurisdiction, and are reasonable in cost.

PMBR is consistent with longstanding ABA regulatory policies, including the 1992 Report of the Commission on Evaluation of Disciplinary Enforcement (McKay Report) and the 2016 ABA Model Regulatory Objectives for the Provision of Legal Services.

2. Summary of the Issue that the Resolution Addresses

PMBR programs provide lawyers with an array of tools, including self-assessment checklists and online programming, to help them and the entities where they practice law develop ethical infrastructures and identify where they may need additional skills, training, and education. As noted above, PMBR’s goals are also to reduce complaints to lawyer disciplinary authorities and encourage professionalism and civility in the profession.

The Professional Regulation Committee has been studying PMBR since 2015 and has watched how it has evolved and succeeded in other countries. Studies relating to those programs are included in the Report. Of note, PMBR programs are not one-size-fits all. Jurisdictions may adopt the PMBR programs that best fit the needs of and circumstances in their jurisdiction.

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

Adoption of this joint Professional Regulation and Young Lawyers Division Resolution will demonstrate the ABA’s leadership role in this arena and its value to the profession and members through its commitment to bettering lawyers’ ethical and cost-effective delivery of legal services in a publicly protective way.

This collaborative work of the Standing Committee on Professional Regulation and Young Lawyers Division urges each state’s highest court, and those of each territory and tribe, to study and adopt jurisdictionally appropriate proactive management-based regulatory (PMBR) programs to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms. PMBR programs offer a systemic preventive approach to help lawyers, and the entities where they practice law, develop ethical infrastructures to improve the delivery of competent and cost-effective legal services. PMBR programs operate separately from the disciplinary process. A goal of PMBR is to reduce complaints to lawyer disciplinary agencies and malpractice actions. PMBR programs encourage professionalism and civility, and change for the better the relationship between the regulator and regulated. PMBR programs are not one-size-fits-all, may be crafted to meet the needs of each jurisdiction, and are reasonable in cost.

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This is especially important in today's legal services marketplace where more young lawyers are entering solo or small firm practice immediately upon licensure and need the tools and support that PMBR programs provide.

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

None.
RESOLVED, That the American Bar Association reaccredits for an additional five-year term the following designated specialty certification program for lawyers:

- Child Welfare Law program of the National Association of Counsel for Children of Denver, Colorado;
- Family Trial Law program of the National Board of Trial Advocacy of Wrentham, Massachusetts; and
- Criminal Trial Law program of the National Board of Trial Advocacy of Wrentham, Massachusetts.
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, 1993.1 followed an August, 1992.2 House resolution requesting that the Association develop standards for accrediting private organizations that certify lawyers as specialists, and that the Association establish and maintain a mechanism to accredit organizations that meet those standards. The 1992 resolution affirmed that a national accreditation mechanism administered by the Association according to uniform standards would be an efficient and effective means of dealing with a multiplicity of organizations that are offering, or planning to offer, certification programs. At the 1999 Annual Meeting, the House extended the initial period of accreditation approved in the Standards from three to five years. In addition, the House lengthened the period of reaccreditation from every third year to every fifth year.

The Standing Committee on Specialization currently has pending applications for reaccreditation under the Standards from three programs: (1) the Child Welfare Law program of the National Association of Counsel for Children (NACC); and the (2) Family Trial Law and (3) Criminal Trial Law programs of the National Board of Trial Advocacy (NBTA). In evaluating any program for reaccreditation, the Standing Committee follows the procedures it adopted on March 2, 1993, as amended thereafter from time to time.

In order to insure that each of the programs continues to comply with ABA Standards, the Standing Committee requires that the following documents accompany applications for reaccreditation:

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

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

The adoption of the Standards in February, 1993.1 followed an August, 1992.2 House resolution requesting that the Association develop standards for accrediting private organizations that certify lawyers as specialists, and that the Association establish and maintain a mechanism to accredit organizations that meet those standards. The 1992 resolution affirmed that a national accreditation mechanism administered by the Association according to uniform standards would be an efficient and effective means of dealing with a multiplicity of organizations that are offering, or planning to offer, certification programs. At the 1999 Annual Meeting, the House extended the initial period of accreditation approved in the Standards from three to five years. In addition, the House lengthened the period of reaccreditation from every third year to every fifth year.

The Standing Committee on Specialization currently has pending applications for reaccreditation under the Standards from three programs: (1) the Child Welfare Law program of the National Association of Counsel for Children (NACC); and the (2) Family Trial Law and (3) Criminal Trial Law programs of the National Board of Trial Advocacy (NBTA). In evaluating any program for reaccreditation, the Standing Committee follows the procedures it adopted on March 2, 1993, as amended thereafter from time to time.

In order to insure that each of the programs continues to comply with ABA Standards, the Standing Committee requires that the following documents accompany applications for reaccreditation:

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

ii. Biographical summaries of members of the governing board, senior staff and members of advisory panels, certification committees, examination boards and like entities involved with the certification process, including specific information concerning the degree of involvement in the specialty area of persons who review and pass upon applications for certification;
iii. All materials furnished to lawyers seeking certification, including application forms, booklets or pamphlets describing the certification program, peer reference forms, rules and procedures, evaluation guides and any other information furnished to the public or the media regarding the certification process;

iv. A copy of the last examination given to applicants for specialty certification, along with a description of how the exam was developed, conducted and reviewed; a description of the grading standards; and the names of persons responsible for determining pass/fail standards. The examinations were made available, on a confidential basis, for review by a person appointed by the Standing Committee an examination reviewer.

The Standing Committee has reviewed NACC’s and NBTA’s applications for these three programs, and hereby recommends reaccreditation of each for an additional five-year term.

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

The Accreditation Review Panel members and examination reviewers for these applications were:

1. **Applicant Organization:** National Association of Counsel for Children

   **Specialty Area:** Child Welfare Law

   A non-profit entity, the NACC is the nation’s only charity dedicated specifically to enhancing legal representation in child welfare and juvenile justice cases. Among several programs that it administers is the Child Welfare Law specialist certification program. That is the only program accredited by the American Bar Association to certify attorneys as specialists in child welfare litigation. The Certification is available to attorneys serving in the role of attorney for the child, parent, or agency. NACC has certified over 800 Child Welfare Specialists since it was first accredited by the ABA in 2006.

   **Accreditation Review Panel**

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

   **Applicant Organization:** National Association of Counsel for Children

   **Specialty Area:** Child Welfare Law

   A non-profit entity, the NACC is the nation’s only charity dedicated specifically to enhancing legal representation in child welfare and juvenile justice cases. Among several programs that it administers is the Child Welfare Law specialist certification program. That is the only program accredited by the American Bar Association to certify attorneys as specialists in child welfare litigation. The Certification is available to attorneys serving in the role of attorney for the child, parent, or agency. NACC has certified over 800 Child Welfare Specialists since it was first accredited by the ABA in 2006.

   **Accreditation Review Panel**

   **Steven Lesser, Chair.** Mr. Lesser is a member of the Standing Committee on Specialization. He is a shareholder of Becker & Poliakoff in Fort Lauderdale, Florida, and Chair of its Construction Law and Litigation practice group. He is a certified specialist in Construction Law by the State Bar of Florida. Mr. Lesser is a member of the Standing Committee on Specialization.
Almeta Cooper. Ms. Cooper is a former senior vice president and general counsel of the Morehouse University School of Medicine. Ms. Cooper is a member of the Standing Committee on Specialization.

Meg Hyatt. Ms. Hyatt is the Executive Director of the National Elder Law Foundation, an organization administering the only Elder Law specialist certification program accredited by the ABA.

Examination Reviewer

Prof. Bruce Boyer. Prof. Boyer is a tenured professor of law and social justice at Loyola University Chicago’s School of Law. He is the Director of Loyola’s Civitas ChildLaw Clinic. He has also served as Chair of the American Bar Association’s Steering Committee on the Unmet Legal Needs of Children.

In addition to reviewing the applicant’s reaccreditation application materials, members of the Accreditation Review Panel considered the information on the reaccreditation evaluation forms and comments provided by the examination reviewer who evaluated the written examinations on a confidential basis. Based upon this review, the Accreditation Review Panel concluded that the applicant’s program continues to comply with the ABA Standards.

By unanimous vote at an April 26, 2019, business meeting by teleconference, the Standing Committee on Specialization accepted the Panel’s recommendation, and the Committee recommends to the House of Delegates that it reaccredit NACC’s Child Welfare Law certification program for an additional five-year term.

2. Applicant Organization: National Board of Trial Advocacy

Specialty Areas: Criminal Trial Law

Family Trial Law

The NBTA was founded in 1977 to provide board certification for attorneys. It is dedicated to bettering the quality of trial advocacy in our nation’s courtrooms and helping consumers find experienced and highly qualified trial lawyers. The NBTA was originally housed, and fully supported by the Association of Trial Lawyers of American (now American Association of Justice) until 1987 when it became an independent non-profit corporation.

The NBTA has programs accredited by the American Bar Association to certify lawyers in the specialty areas of civil trial law, criminal trial law, family trial law, civil practice law and social security disability law, and truck accident law.

Family Trial Law Accreditation Review Panel
Barbara J. Howard, Chair. Ms. Howard is a family law practitioner in Cincinnati, Ohio, where she is the founding partner of her own firm. She is certified as a specialist in Family Relations Law by the Ohio State Bar Association. Ms. Howard is Chair of the Standing Committee on Specialization.

Almeta Cooper. Ms. Cooper is a former senior vice president and general counsel of the Morehouse University School of Medicine. Ms. Cooper is a member of the Standing Committee on Specialization.

Shannon Hartsfield. Ms. Hartsfield is partner in the Tallahassee office of Holland & Knight. She is board certified in Health Law by The Florida Bar Board of Legal Specialization and Education. She is past Chair of the ABA Health Law Section's eHealth, Privacy & Security Interest Group, and is currently a member of the Standing Committee on Specialization.

Examination Reviewer

Prof. Linda Elrod. Prof. Elrod is the Richard S. Righter Distinguished Professor of Law and Director of the Washburn University School of Law Children and Family Law Center. She is past chair of the American Bar Association Family Law Section; has served on the ABA Family Law Section Council since 1988; served as co-chair of the ABA Child Custody and Adoption Pro Bono Advisory Board; and has been Editor of the Family Law Quarterly since 1992.

Criminal Trial Law Accreditation Review Panel

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

Kim Dvorachak. Ms. Dvorachak is the Executive Director of the NACC, and a practicing attorney. Ms. Dvorachak represented children and youth in delinquency court, criminal court, and on appeal. She has run her own law firm, and served as a public defender in two states.

Virginia Landry. Ms. Landry is criminal defense lawyer in Orange County, California, and certified as DUI Defense specialist by the National College for DUI Defense, for which she also serves as a College Regent

Examination Reviewer

Randall Hodgkinson. Mr. Hodgkinson is the appellate defender for the state of Kansas, and an assistant professor of law at Washburn University School of Law in Topeka. Mr. Hodgkinson is a former public defender for Sedgwick County, Kansas (Wichita).
In addition to reviewing the applicant’s reaccreditation application materials, members of the Accreditation Review Panel considered the information on the reaccreditation evaluation forms and comments provided by the examination reviewer who evaluated the written examinations on a confidential basis. The Accreditation Review Panel communicated several suggested revisions to NBTA leadership regarding the rules and procedures it has in place for reviewing and processing applications for certification. Based upon this review and its having received satisfactory revisions to NBTA rules and procedures, the Accreditation Review Panel concluded that the applicant’s programs in Family Trial Law and Criminal Trial Law continue to comply with the ABA Standards.

By unanimous vote at an April 26, 2019, business meeting by teleconference, the Standing Committee on Specialization accepted the Panel’s recommendation, and the Committee recommends to the House of Delegates that it reaccredit NBTA’s Family Trial Law and Criminal Trial certification programs for an additional five-year term.

Respectfully submitted,

Barbara Howard
Chair, Standing Committee on Specialization
August 2019
APPENDIX

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

AMERICAN BAR ASSOCIATION ACCREDITATION OF SPECIALTY CERTIFICATION PROGRAMS FOR LAWYERS

STANDARDS

SECTION 4: REQUIREMENTS FOR ACCREDITATION OF CERTIFYING ORGANIZATIONS

In order to obtain accreditation by the Association for a specialty certification program, an Applicant must demonstrate that the program operates in accordance with the following standards:

4.01 Purpose of Organization -- The Applicant shall demonstrate that the organization is dedicated to the identification of lawyers who possess an enhanced level of skill and expertise, and to the development and improvement of the professional competence of lawyers.

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

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

4.04 Uniform Applicability of Certification Requirements and Nondiscrimination

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

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

(C) Applicants shall not discriminate against any lawyers seeking certification on the basis of race, religion, gender, sexual orientation, disability, or age. This paragraph does not prohibit an Applicant from imposing reasonable experience requirements on lawyers seeking certification or re-certification.

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

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

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

(C) An Applicant shall propose to the Standing Committee a specific definition of each specialty area in which it seeks accreditation to certify lawyers as specialists. The Standing Committee shall approve, modify or reject any proposed definition and shall promptly notify the Applicant of its actions.

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

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

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

(1) Type of References -- The certification requirements shall allow lawyers seeking certification to list persons to whom reference forms could be sent, but shall also provide that the Applicant organization send out all reference forms. In addition, the organization may seek and consider reference forms from persons of the organization's own choosing.

(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.

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

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

4.09 Revocation of Certification -- The Applicant shall maintain a procedure for revocation of certification. The procedures shall require a certified lawyer to report his or her disbarment or suspension from the practice of law in any jurisdiction to the certifying organization.
SECTION 5: ACCREDITATION PERIOD AND RE-ACCREDITATION

5.01 Initial accreditation by the Association of any Applicant shall be granted for five years.

5.02 To retain Association accreditation, a certifying organization shall be required to apply for re-accreditation prior to the end of the fifth year of its initial accreditation period and every five years thereafter. The organization shall be granted re-accreditation upon a showing of continued compliance with these Standards.

SECTION 6: REVOCATION OF ACCREDITATION

6.01 A certifying organization's accreditation by the Association may be revoked upon a determination that the organization has ceased to exist, or has ceased to operate its certification program in compliance with these Standards.

SECTION 7: AUTHORITY TO IMPLEMENT STANDARDS

7.01 Consistent with these Standards, the Standing Committee shall have the authority to:

(A) Interpret these Standards;

(B) Adopt rules and procedures for implementing these Standards, and amend such rules and procedures as necessary;

(C) Adopt an appropriate fee schedule to administer these Standards;

(D) Consider applications by any certifying organization for accreditation or re-accreditation under these Standards, evaluate those requests in accordance with the Standards and recommend approval by the Association of such requests when it deems the organization has met the requirements as set forth in these Standards; and

(E) Recommend the revocation of accreditation in accordance with the provisions of Section 6.01 of these Standards.

SECTION 8: ADOPTION AND AMENDMENT

8.01 These Standards become effective upon their adoption by the House of Delegates of the Association.

8.02 The power to approve an amendment to these Standards is vested in the House of Delegates; however, the House will not act on any amendment until it
has first received and considered the advice and recommendations of the Standing Committee.

#  #  #  #  #  #  #
1. **Summary of Resolutions**

The resolution grants reaccreditation to the Child Welfare Law program of the National Association of Counsel for Children, and the Family Trial Law and Criminal Trial Law programs of the National Board of Trial Advocacy.

2. **Approval by Submitting Entity**

At its telephone meeting on April 26, 2019, the Standing Committee on Specialization voted unanimously that it submit this resolution to the House of Delegates for consideration at the 2019 Annual Meeting.

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

Yes. The five-year anniversary of the last reaccreditation of NBTA’s Family Trial Law and Criminal Trial Law programs occurred at the 2019 Midyear Meeting, but the Specialization Committee had not yet received a recommendation from the application review panels about those programs’ compliance with the Standards. The Committee thus recommended a single extension of the programs’ accreditation so that the Application Review Panel could finish its work and make a final recommendation. (Resolution MY2019 102).

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

The American Bar Association Standards for Accreditation of Specialty Certification Programs for Lawyers. They will not be affected by the adoption of this Resolution; rather, they are the policy under which any action to accredit or withhold accreditation are taken by the Association.

5. **What urgency exists which requires action at this meeting of the House?**

To comply timely and effectively with the House resolutions cited above, and the periodic requirements for reaccreditation set forth in the Standards themselves.
Prompt action is necessary in order to prevent ABA accreditation of the programs under consideration from lapsing and to continue to assist the states in regulating private certifying organizations.

6. Status of Legislation
Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates
Implementation will be self-executing if the program is reaccredited by the House of Delegates.

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

9. Disclosure of Interest
None.

10. Referrals
Commission on Youth at Risk
Family Law Section
Criminal Just Section

11. Contact Person (Prior to the Meeting)
Barbara Howard
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12. Contact Person (Who will present the Report to the House)

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EXECUTIVE SUMMARY

1. Summary of the Resolutions
   
The resolution grants reaccreditation to the Child Welfare Law program of the National Association of Counsel for Children, and the Family Trial Law and Criminal Trial Law programs of the National Board of Trial Advocacy.

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

3. Explanation of How Proposed Policy Position Will Address Issue
   
The recommendation addresses the issue by implementing previous House resolutions calling on the ABA to evaluate specialty certification organizations that apply for accreditation and reaccreditation.

4. Summary of Minority Views or Opposition
   
The Standing Committee on Specialization approved the proposed recommendation unanimously. No opposition has been identified.
RESOLVED, That the American Bar Association urges Congress and the United States Department of Education to collect data and prepare a report on: (1) how racism, poverty, and living in high crime communities psychologically impacts youth; and (2) the quality of in-school mental health services that are provided to youth experiencing mental health problems as a result of these stressors;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments and school districts to appropriate and allocate funds to in-school mental health services to identify and address mental health conditions related to racism, poverty, and living in high crime communities; and

FURTHER RESOLVED, That the American Bar Association urges local governments, school districts, boards, and commissions to review mental health policies and practices in schools to ensure that the mental health needs of youth living in poverty or high crime communities or experiencing race-based mental health illness are appropriately addressed.
I. Introduction

The purpose of this resolution is to ensure that children who live in high poverty or high crime communities, or those who experience race-based trauma or race-based traumatic stress, receive the support to maintain and restore good health. Good mental health helps to ensure that children achieve academic success and become productive members of society. Currently, schools serve about 70 percent of all children who receive mental health services, and it is imperative that these services benefit our most vulnerable population—this includes children and youth dealing with the implications of systemic racism, personal discrimination, poverty and/or neighborhood violence.

To adequately address these needs, the American Bar Association must urge Congress to collect data and prepare a specialized report that discusses how mental health is affected by racism, poverty, and/or living in high crime communities. The American Bar Association also should seek the appropriation of funds to support mental health services based upon the federal government’s findings. The funding should support hiring mental health professionals who are trained in race-based trauma, as well as training school staff to identify and properly address this type of trauma. This may also require implicit bias training for school staff and mental health professionals working with this particular population. Finally, this resolution encourages local governments and school districts to review and update mental health policies and practices as it relates to identifying or treating these types of mental health problems.

II. Racism, Poverty, or Living in High Crime Communities Can Greatly Impact the Lives of Children and Youth

Racism involves one group having the power to carry out systemic discrimination through institutional policies, while also shaping cultural beliefs and values that support those practices. 1 These discriminatory policies and practices have created inequalities in several areas of life for racial minorities. Racial minorities face structural barriers when it

1 What is Racism? Racism Defined, http://www.dismantlingracism.org/racism-defined.html (last updated December 2018); see also Ali Meghji, Critical Race Theory, https://globalsocialtheory.org/topics/critical-race-theory/ (“Central to critical race theory is that racism is much more than individual prejudice and bigotry; rather, racism is a systemic feature of social structure.”).
comes to employment, education, health care, and securing housing. Likewise, as it relates to the criminal justice system, racial minority adults are more likely than white adults to be arrested; once arrested, they are more likely to be convicted; and, once convicted, and they are more likely to experience lengthy prison sentences. Specifically, Black and Hispanic are respectively 5.9 and 3.1 times as likely to be incarcerated as whites. In 2016, Black Americans made up roughly 13 percent of the population, but comprised 27 percent of all individuals arrested in the United States. These social injustices directly impact Black children and other similarly situated racial minority youth. For example, Black children are 6 times as likely as white children to have had an imprisoned parent. Children with incarcerated parents are more likely to drop out; perform lower in school both academically and behaviorally; develop learning disabilities, and experience mental and physical health problems.

Furthermore, the rate of youth confinement has significantly declined between 2003 and 2013, the racial gap between Black and American Indian youth confinement has increased. Black and Brown youth is also more likely to have negative encounters with the police that lead to arrest, charges, and confinement. Black youth are 4.1 times as likely to be committed to secure placements as whites, American Indians are 3 times as likely, and Hispanics are 1.5 times as likely. In 2016, 45 percent of Hispanic families do.”

Whereas 71 percent of white families live in owner occupied housing, only 41 percent of black families and ethnic gaps in homeownership, housing wealth, and tax expenditures on housing are still very wide.


Black youth accounted for 15 percent of all U.S. children, yet made up 35 percent of juvenile arrests in that year. In the school setting, during the 2011-12 school year, Black student arrests and referrals to law enforcement were 31 percent of all such arrests and referrals, even though Black students made up only 16 percent of all enrolled children. For the 2009-2010 school year, Black and Hispanic students represented more than 70 percent of in-school arrests or police referrals.

In addition to institutional forms of discrimination, many children of color also experience personal discrimination as a result of their race or ethnicity. In a study analyzing data from a 2004 to 2006 review of 5,147 fifth-graders and their parents, 20 percent of Black students, 15 percent of Hispanic students, 16 percent of students that were classified as “other,” and 7 percent of white students surveyed reported experiencing racial/ethnic discrimination. 80 percent of these racial encounters were reported to have occurred at school. In addition, children who reported experiencing discrimination were more likely to have one or more of the following mental health disorders: depression, attention-deficit hyperactivity disorder, oppositional defiant disorder, and conduct disorder.

These hardships and social injustices can intensify for racial minority children who also live below the poverty line. In general, children growing up in poverty are more likely to experience mental health problems, have poor physical health, underachieve at school, feel unsafe, and experience hunger, homelessness and bullying. In the United States 33 percent of Black children, 33 percent of American Indian children, 26 percent of Hispanic or Latino children, 11 percent of white children, and 19 percent of two or more

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13 African American adults have also reported experiencing personal discrimination. Fifty-one percent reported personally experiencing racial slurs, 52 percent reported people making negative assumptions or insensitive or offensive comments about their race, 40 percent reported that people have acted afraid of them because of their race, and 42 percent have experienced racial violence.

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races live below the poverty line. With regard to crime victimization, research shows that people living below the federal poverty level have more than double the rate of violent victimization among low-income households, specifically that Black children are more likely to be victims of child abuse/neglect, robbery, and homicide. In fact, homicide is the leading cause of death among Black males between the age of 15 to 34; it is the second leading cause of death for Black females between the ages of one to four and 15-24. Further, studies show that Black and Brown children and youth witness crimes, including violent crimes, at a high rate. In a study involving seven-year-old children who lived in an inner-city, 75 percent reported having heard gunshots, 60 percent had seen drug deals, 18 percent had seen a dead body outside, and 10 percent had seen a shooting or stabbing at home. In another study cited by the National Center for Victims of Crime involving participants living in Chicago, approximately 25 percent of Black children reported witnessing a person shot and 29 percent indicated that they had seen a stabbing.

In all, it is imperative that governments and stakeholders fully appreciate the potential psychological effects living in poverty and high crime communities can have on children, along with the added stressors related to systemic and individual racism. This resolution simply calls for Congress to take the charge in researching these issues further.

III. Schools Must Be Equipped to Handle Mental Health Problems Induced by Racism, Poverty, and High Crime Communities

“Traumatic events that occur as a result of witnessing or experiencing racism, discrimination, or structural prejudice (also known as institutional racism) can have a profound impact on the mental health of individuals exposed to these events.” Racial trauma—or race-based traumatic stress—is the stressful impact or emotional pain that traumatic events that occur as a result of witnessing or experiencing racism, discrimination, or structural prejudice can have on individuals exposed to these events and is another critical layer of trauma for Black children.


24 Id.


24 Id.

results from experiencing racism and discrimination. Common traumatic stress reactions reflecting racial trauma include “increased vigilance and suspicion, increased sensitivity to threat, sense of a foreshortened future, and more maladaptive responses to stress such as aggression or substance use.” In addition, research shows for children and youth experiencing racism there was an increase in Attention Deficit Hyperactivity Disorder (by 3.2 percent), regardless of socioeconomic background, as well as anxiety and depression.

Exposure to multiple traumatic events worsen traumatic stress reactions. This is particularly concerning for youth in low-income urban communities where there is increased risk for community violence and victimization. 83 percent of inner city youth report experiencing one or more traumatic events, and 1 out of 10 children under the age of six living in a major American city report witnessing a shooting or stabbing. Notwithstanding these facts, research shows poor children and racial minority children have less access to mental health services, and the services that they do receive are more likely of poorer quality.

According to “Children’s Mental Health Needs, Disparities and School-Based Services: A Fact Sheet,” on average, only one-fourth of all children in need of mental health care receive mental health services. Roughly 70 to 80 percent of children receiving mental health services receive those services in a school setting. Unfortunately, research suggests the response to Black and Hispanic children exhibiting mental health symptoms, which can include behavioral problems, is often school punishment. Black middle and high school students are over three times more likely to attend a school with more security staff than mental health personnel, with 4.2 percent of white students and 13.1 percent of black students attending such schools. Among high schools where more than 75 percent of students were Black and Hispanic, 51 percent had a law enforcement, and 13.1 percent of black students attending such schools. Among high schools where more than 75 percent of students were Black and Hispanic, 51 percent had a law enforcement officer on campus.

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According to “Children’s Mental Health Needs, Disparities and School-Based Services: A Fact Sheet,” on average, only one-fourth of all children in need of mental health care receive mental health services. Roughly 70 to 80 percent of children receiving mental health services receive those services in a school setting. Unfortunately, research suggests the response to Black and Hispanic children exhibiting mental health symptoms, which can include behavioral problems, is often school punishment. Black middle and high school students are over three times more likely to attend a school with more security staff than mental health personnel, with 4.2 percent of white students and 13.1 percent of black students attending such schools. Among high schools where more than 75 percent of students were Black and Hispanic, 51 percent had a law enforcement officer on campus.
enforcement officer. Latinos were 1.4 times more likely than whites to attend a school without a school counselor, but with a law enforcement officer.32

Overall, many poor children and children of color experience trauma, but are not receiving the mental health services and the support that they need. Although schools can be an ideal place for children to receive services to help support learning, adequate funding, resources, and training for school staff is required.33 Consequently, this resolution calls for Congress to appropriate funding to address the needs of children experiencing mental health problems due to poverty, racism and living in high crime communities.

IV. Conclusion

The American Bar Association can and should urge stakeholders to do everything possible to ensure that these issues are thoroughly researched, and that children experiencing mental health problems due to racism, poverty, or high exposure to crime and community violence receive the in-school supports that they need.

Respectfully submitted,

Tommy D. Preston, Jr.
Chair, Young Lawyers Division
August 2019


1. Summary of Resolution
This recommendation seeks to ensure that children who live in poverty, high crime communities, or experience race-based trauma receive the in-school mental health services needed to maintain or restore good health. It further urges federal, state, local, territorial, and tribal governments and school districts to appropriate and allocate funds to support this initiative.

2. Approval by Submitting Body
The ABA Young Lawyers Division ("YLD") Assembly approved this resolution at its 2019 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?
This resolution is consistent with and expands upon policies previously adopted by the ABA, including the following:

(1) A resolution urging the development of trauma-informed, evidence-based approaches and practices on behalf of justice system-involved children and youth (14M109B);
(2) A resolution urging the adoption of policies, legislation and initiatives designed to eliminate the school-to-prison pipeline (16A115); and
(3) A resolution urging the enactment of laws and adoption of policies that prohibit the use of out-of-school suspension and expulsion of pre-kindergarten through second grade students (18A116B).

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

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

After adoption, the Young Lawyers Division will work with the Governmental Affairs Office to determine the most effective way to advocate for this Resolution.

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

None.


None.

10. Referrals:

ABA Center on Children and the Law
ABA Section on Civil Rights and Social Justice
ABA Commission on Disability Rights (confirmed supporter)
ABA Commission on Homelessness and Poverty (confirmed supporter)
ABA Criminal Justice Section
ABA Commission on Youth at Risk (confirmed supporter)
ABA Litigation Section
ABA Judicial Division
ABA Law Student Division

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

Anna M. Romanskaya
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daiquiri.steele@gmail.com
12. Contact Name and Address Information. (Who will present the Resolution with Report to the House?)

Anna M. Romanskaya
ABA YLD Representative to the ABA House of Delegates
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501 W. Broadway, Ste. 960
San Diego, CA 92101
619-338-9500
aromanskaya@starkllp.com
EXECUTIVE SUMMARY

1. Summary of Resolution.
This recommendation seeks to ensure that children who live in poverty, high crime communities, or experience race-based trauma receive the in-school mental health services needed to maintain or restore good health. It further urges federal, state, local, territorial, and tribal governments and school districts to appropriate and allocate funds to support this initiative.

2. Summary of the Issue which the Resolution addresses.
Children living in poverty and high crime communities, as well as children of color who experience racism, often encounter multiple or prolonged traumatic events. This can greatly impact a child’s academic performance, social, emotional, and behavioral health, and overall ability to be successful both in and out of school. Unfortunately, due to various factors, many of these children do not get the mental health support that they need. Furthermore, research suggest that many of these children are disproportionately punished in school when mental health services and interventions may be more appropriate.

3. An explanation of how the proposed policy position will address the issue.
Through additional research, governments and interested entities will gain a deeper appreciation of these issues, which ideally will result in evidence-informed policy decisions. This can include additional funding to train both teachers and health professionals in race-based trauma as well as in identifying symptoms of trauma. Finally, with appropriate in-school mental health services, student learning and overall-wellbeing will improve.

4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.
No minority or opposing views have been identified.
RESOLVED, That the American Bar Association supports legislation creating the establishment of a program within the U.S. Copyright Office with authority to adjudicate copyright small claims as a lower-cost, less-time-consuming alternative to federal court litigation of copyright claims, provided that participation in the program is voluntary for all parties to the dispute, the claim is limited to seeking the types of monetary relief permitted by the Copyright Act (including statutory damages, actual damages, and disgorgement of profits) and excludes injunctive relief, and the monetary relief is no more than a maximum set in accordance with the legislation ("Copyright Small Claims Program"); and

FURTHER RESOLVED, That the American Bar Association supports, in principle, that such legislation and any Copyright Small Claims Program reflect appropriate procedures and requirements, including:

(a) Requiring that adjudicators in the Copyright Small Claims Program have experience with copyright law and training in resolution of disputes;
(b) Allowing claims and responses to be submitted electronically, and to the extent a proceeding may require a hearing, using videoconference and teleconference technology, rather than requiring personal appearances; and allowing but not requiring parties to be represented by an attorney;
(c) Allowing parties to bring counterclaims in a Copyright Small Claims Program proceeding;
(d) Authorizing the Copyright Office to adopt appropriate rules and procedures to prevent abuse of the Copyright Small Claims Program;
(e) Allowing adjudicators in the Copyright Small Claims Program to consult with the Register of Copyrights on general issues of law; and
(f) Permitting the Register of Copyrights to review decisions of adjudicators in the Copyright Small Claims Program in appropriate circumstances.
I. Introduction

Copyright owners with small infringement claims essentially have a right without a remedy. The cost of bringing a federal lawsuit significantly outstrips the value of their claims, and they cannot resort to state courts, since they can pursue copyright claims only in federal court. So they must endure infringements of their work. Congress, mindful of this problem, in 2011 requested the Copyright Office to undertake a study concerning new remedies to address copyright small claims, observing that “the inability to enforce one’s rights undermines the economic incentive to continue investing in the creation of new works . . . and deprives society of the benefit of new and expressive works of authorship.” The Copyright Office Small Claims Report, issued in 2013, “documents the challenges of resolving copyright small claims in the current legal system,” observed that the problem of enforcing modest-sized copyright claims “appears to be especially acute for individual creators,” and recommended the creation of a small claims tribunal within the Copyright Office.3

Recently, bipartisan bills were introduced in both Houses of Congress to establish a Copyright Small Claims Program in the Copyright Office, with a cap on recovery of

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1 See, e.g., Songwriters Guild of America testimony before the House Small Business Committee (May 14, 2018) (fn in order to enforce our rights against infringers, songwriters literally need to “make a Federal case out of it,” at an average cost of about $350,000 to bring a lawsuit in federal court. Since only a precious few songs ever earn that much money in their entire existence, songwriters are left with no practical way to combat the theft of our works. We have a right with no remedy in the most classic sense. We simply cannot afford access to enforcement in a world of rampant infringement.

According to Representative Ted Lieu:

More than 2 million hardworking artists in the United States rely on the U.S. Copyright Office to protect their livelihoods. For too long, our legal system skewed in favor of low-volume, high-value industries. But for many independent artists, whose claims of infringement often total a few thousand dollars, it is far too expensive to sue in federal court – essentially forcing creators to forfeit their rights. The Small Claims Board is an important step toward ensuring that digital photographers, graphic artists, illustrators, and others have a way to resolve disputes quickly and affordably.


2 Letter from Lamar Smith, Chairman, U.S. House Judiciary Committee to Maria Pallante, Register of Copyrights (Oct. 11, 2011). Specifically, he requested that the Copyright Office (U/J) conduct a study to assess: 1) the extent to which authors and other copyright owners are effectively prevented from seeking relief from infringements due to constraints in the current system; and 2) furnish specific recommendations, as appropriate, for changes in administrative, regulatory and statutory authority that will improve the adjudication of small copyright claims and thereby enable all copyright owners to more fully realize the promise of exclusive rights enshrined in our Constitution. Id.

The ABA now has an opportunity to advocate in favor of a small claims program in the Copyright Office, which would provide small creators and copyright owners with effective access to justice, as well as benefits of the system intended for "the overall public good." This resolution supports the creation of a copyright small claims program for low-value copyright disputes. Specifically, it supports the establishment of such a program within the Copyright Office, where claims could be asserted and responded to by electronic means, and proceedings would be conducted via telephone or video-conference to minimize the costs of resolving a dispute. Participation would be voluntary for all parties; claims would be decided by experienced and knowledgeable attorneys; and there would be a cap on the dollar value of recovery for all claims asserted by a party in the proceeding.

Copyright law in the United States is exclusively federal law, with exclusive federal jurisdiction. Any claims for infringement must therefore be brought in federal court. But it is unrealistic, and sometimes impossible, for some copyright owners to bring suit in federal court. Many copyright owners (e.g., photographers) license their works for modest amounts of money, but manage to make a living by licensing many users. So, in addition to the risk of litigation and high cost of litigating a claim in federal court, their recovery in a successful infringement suit is likely to be only a fraction of the costs of bringing the suit. They usually endure infringement in these circumstances; for them, copyright is a right without a remedy. This problem is exacerbated by the internet, which has made it easy and efficient to copy protected works without authorization; many do so recognizing that there is no likelihood that the copyright owner will assert a claim.

The ABA has an important role to play in this area. The Association’s members have a broad perspective on the role and benefits of copyrights, as well as familiarity with copyright litigation and concerns with counseling clients who sometimes have no realistic recourse when their works are infringed. The ABA is familiar with a wide range of individual and public interests. The legislation supported by the Resolution would enable claimants to achieve a recovery for a meritorious infringement claim when they could not realistically bring an action in federal court, and would benefit defendants who may choose to participate in the Copyright Small Claims Program to minimize the cost and time of resolving the dispute and ensure that they are protected from liability for any amount over the cap on recovery in a Copyright Small Claims Program proceeding.

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5 Copyright Office Small Claims Report, at 1.

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II. The Importance of a Copyright Small Claims Program

Federal court litigation can be expensive. Such expenses frequently prevent copyright owners from protecting their intellectual property from infringement. The high cost of legal counsel, the time-consuming nature of discovery, and the high likelihood of loss when proceeding pro se have all made copyright infringement claims essentially unavailable for litigants that lack resources necessary to bring federal litigation.6

Copyright owners who cannot afford to bring claims essentially must acquiesce to continued infringement. For all intents and purposes, they lose the protections of copyright. This, in turn, hinders copyright law from fulfilling its central function of incentivizing the creation of new expressive works. A Copyright Small Claims Program would solve this problem by allowing relatively small claims to be litigated in a forum designed to keep costs down and avoid lengthy litigation, giving individuals and other small-scale creators an effective means by which to take advantage of the rights afforded them by copyright law.

A Copyright Small Claims Program also would benefit defendants in small copyright suits. By allowing for expedited adjudication of small claims, a Copyright Small Claims Program would keep legal fees significantly lower than in a federal court adjudication. This would allow defendants to litigate against claims of infringement without risk of accumulating exorbitant fees—fees that can often exceed the cost of the claim at issue. It would also limit defendants’ exposure to the amount of the cap on remedies in a Copyright Small Claims Program proceeding.

Small claims programs have worked well in other areas of the law. For example, the ICANN Uniform Domain Name Dispute Resolution Policy (“UDRP”) allows parties to resolve disputes over cybersquatting or confusingly similar domain names using a streamlined dispute resolution process. Claims are brought online and parties need not make personal appearances. Parties are still able to file suit in federal court, should they desire to do so, but the UDRP provides a low-cost and quick procedure that enables many small-scale domain name owners to successfully protect their trademark rights. While the UDRP is not entirely analogous to a Copyright Small Claims Program in that the UDRP’s authority to adjudicate claims arises from consent to UDRP policies of domain name registrars, its success nonetheless points to the benefits of creating low-cost, streamlined, and easy-to-use forums for adjudicating small claims.

III. Constitutional Issues

Article III of the U.S. Constitution potentially poses constraints on Congress’s ability to create tribunals to adjudicate civil claims when decision-makers in those tribunals are not granted lifetime appointments. Additionally, the Supreme Court has interpreted the Seventh Amendment as requiring that litigants have the option of having copyright claims heard before a jury. See Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998). See Copyright Office Small Claims Report at 27-28.

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See Copyright Office Small Claims Report, at 11-13 (particular challenges of pro se litigants).

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These constitutional constraints, however, can be addressed by requiring all parties to consent to adjudicating a claim using the Copyright Small Claims Program. Litigants are generally permitted to voluntarily waive their Article III right to have federal claims adjudicated in federal court by an Article III judge and their Seventh Amendment right to a civil jury. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848-49 (1986) ("[A]s a personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.") It is for this reason that parties may consent to have claims heard by magistrate judges. Requiring the affirmative consent of all parties would make it far more likely that the Copyright Small Claims Program would not be subject to constitutional challenges. See Copyright Office Small Claims Report, at 97-99.

IV. Details of a Copyright Small Claims Program

Any potential Copyright Small Claims Program must be carefully crafted to ensure consistency with existing copyright law. The Resolution lists some important features of any potential Copyright Small Claims Program.

**Voluntary Participation.** A Copyright Small Claims Program should require the affirmative consent of all parties. By requiring parties to opt-in, there would be no doubt that all parties find Copyright Small Claims Program adjudication acceptable, thus avoiding potential challenges to Copyright Small Claims Program decisions down the line. Furthermore, an opt-in requirement would potentially remedy the constitutional issues that a Copyright Small Claims Program might generate, as discussed above.

**Remedies.** The recently-introduced bills call for an award cap of $30,000 per Copyright Small Claims Program proceeding, which in many cases will allow a sufficient recovery to prevailing copyright holders, while lowering the potential risk to defendants. The cap would be applicable to all claims brought in a single proceeding. In its report, the Copyright Office has proposed the same cap, citing empirical evidence that a large percentage of lawyers would refuse to represent a client with a claim for $30,000 or less. See Copyright Office Small Claims Report at 110. Certainly $30,000 appears to be a reasonable and workable cap, although other limits might also be effective.

There is no reason, however, to restrict the type of monetary remedies that can be awarded in a Copyright Small Claims Program. If the program is to serve as an attractive substitute to adjudication in the federal courts, claimants should be able to recover the same types of monetary remedies they would be able to recover in federal court, including actual damages, statutory damages, and disgorgement of profits, as appropriate.

It would be ill advised to permit injunctive relief in a Copyright Small Claims Program. Injunctive relief, such as an order to destroy merchandise, might have an economic impact that far exceeds the jurisdictional cap, and the Copyright Small Claims Program adjudicators may not realistically be in a position to take evidence and properly evaluate such economic ramifications. Permitting injunctive relief might lead some parties to seek to use the Copyright Small Claims Program simply because of its streamlined
procedures. Accordingly, injunctive relief for a copyright infringement claim should be available only in federal court, which is better positioned to ensure that parties have met the high evidentiary burdens necessary to justify the remedy.

**Adjudicators.** To ensure the proper functioning of a Copyright Small Claims Program, it is important that adjudicators be experienced lawyers who are well-versed in copyright law and alternative dispute resolution techniques. Experienced adjudicators will make it more likely that the small claims process is efficient, effective, and fair, and will avoid rendering decisions that might disturb the stability and coherence of the copyright law principles that have been developed by Congress and the federal courts.

**Electronic filing.** One of the reasons that the UDRP has been successful is that its proceedings occur electronically. Accordingly, the Copyright Small Claims Program should adopt this model and allow all filings to be made electronically. If possible, oral arguments should take place via teleconference or videoconference. Adopting an exclusively electronic format will allow parties to keep costs down by avoiding expensive travel and paper printing, and will allow cases to proceed more efficiently, since scheduling in-person appearances would become unnecessary.

**Attorney representation.** The Copyright Small Claims Program should permit parties to proceed with counsel, if they so desire. While a primary goal of the Copyright Small Claims Program would be to avoid the excessive costs of federal court litigation, there are still likely situations where representation by counsel is desirable, or even necessary. For example, considering that a corporation cannot appear in federal court without counsel, it is likely that corporations will desire to be represented by counsel even in Copyright Small Claims Program adjudications. And attorney representation would likely prove helpful to the parties and the adjudicators when it comes to particularly complicated claims, thus allowing these claims to be resolved quickly and fairly.

**Counterclaims.** In the interests of fairness and efficiency, parties to a Copyright Small Claims Program proceeding should be permitted to assert counterclaims, such as those that arise from the same transaction or occurrence that is the subject of the asserted claim of infringement of section 106 or a claim of violation of section 512(f) of the Copyright Act.

**Rules to prevent abuse.** It is possible that some claimants might use the Copyright Small Claims Program on a frequent basis to pressure defendants into unreasonable settlements, just as they do in federal court. The Register of Copyrights should be empowered to issue appropriate rules and regulations to prevent abuse of the Copyright Small Claims Program.

**Review by the Register of Copyrights.** Finally, it is important that the adjudicators be authorized to consult with the Register of Copyrights on legal issues, as necessary. The Register should be able to review substantive decisions by Copyright Small Claims Program adjudicators in appropriate circumstances.

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**Review by the Register of Copyrights.** Finally, it is important that the adjudicators be authorized to consult with the Register of Copyrights on legal issues, as necessary. The Register should be able to review substantive decisions by Copyright Small Claims Program adjudicators in appropriate circumstances.
The statute under which the Copyright Royalty Board operates offers useful precedent for allowing the adjudicators to consult with the Register of Copyrights on legal issues in connection with a Copyright Small Claims Program proceeding. Under 17 U.S.C. § 802(f)(1)(B), the Copyright Royalty Judges are required to “request a decision of the Register of Copyrights, in writing, to resolve” any “novel material question of substantive law concerning an interpretation of those provisions of [the Copyright Act] that are the subject of the proceeding.” Likewise, under 17 U.S.C. § 802(f)(1)(D), the “Register of Copyrights may review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under [the Copyright Act] that underlies or is contained in a final determination of the Copyright Royalty Judges.”

V. Conclusion

As this report demonstrates, many copyright owners have no effective access to justice since the cost of lawsuits in federal courts is prohibitive, particularly when damages from an infringement are relatively small. There is a pressing need for a voluntary Copyright Small Claims Program within the Copyright Office to provide an inexpensive and efficient means of resolving copyright disputes that do not exceed a particular dollar amount. The ABA supports legislation to achieve this goal and supports appropriate procedures and requirements in connection with such a Program, such as those listed in the Resolution.

Respectfully submitted,

Mark K. Dickson
Chair, Intellectual Property Law Section
August 2019

Palmer Gene Vance II
Chair, Litigation Section
August 2019
1. Summary of Resolution

This Resolution addresses the reality that copyright owners with small infringement claims essentially have a right without a remedy and the related impact on public benefits of the copyright system. The costs of bringing a federal lawsuit significantly outstrips the value of their claims, and they cannot resort to state courts, since they can pursue copyright claims only in federal court. The Resolution supports legislation creating the establishment of a program within the U.S. Copyright Office with authority to adjudicate copyright small claims as a lower-cost, less-time-consuming alternative to federal court litigation of copyright claims, provided that participation in the program is voluntary for all parties to the dispute, the claim is limited to seeking the types of monetary relief permitted by the Copyright Act (including statutory damages, actual damages, and disgorgement of profits) and excludes injunctive relief, and the monetary relief is no more than a maximum set in accordance with the legislation ("Copyright Small Claims Program"), and supports such legislation including appropriate procedures and requirements, including those listed in the Resolution.

2. Approval by Submitting Entity:

Sponsorship of this Resolution was approved by the Section of Litigation in May 2019 and the Section of Intellectual Property Law in March 2019. This Resolution combines resolutions previously approved by the Council of the Section of Intellectual Property Law in February 2018, August 2017, December 2015, and February 2011.

3. Has this or a similar Resolution been submitted to the House of Delegates or Board of Governors previously?

No.

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

None

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

N/A

HR 2426, Copyright Alternative in Small-Claims Enforcement Act of 2019 ("CASE Act of 2019"), and its Senate companion bill, S. 1273 were introduced on May 1, 2019. HR 2426 is cosponsored by Rep. Hakeem Jeffries (D-NY), Rep. Jerry Nadler (D-NY) (Chair, House Judiciary Committee), Rep. Hank Johnson (D-GA) (Chair, Courts, IP and the Internet Subcommittee of the House Judiciary Committee), Rep. Judy Chu (D-CA), Rep. Ted Lieu (D-CA), Rep. Doug Collins (R-GA) (Ranking Member, House Judiciary Committee), Rep. Martha Roby (R-AL) (Ranking Member, Courts, IP and the Internet Subcommittee of the House Judiciary Committee), and Rep. Brian Fitzpatrick (R-PA); and S. 1273, cosponsored by Sen. John Kennedy (R-LA), Sen. Tom Tillis (R-NC) (Chair, IP Subcommittee of the Senate Judiciary Committee), Sen. Richard Durbin (D-IL), and Sen. Mazie Hirono (D-HI). A hearing was held on the House version of this bill during the previous Congressional session, and the sponsors have indicated that are hopeful that there will be a mark-up of the bill over the summer.

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

The policy would provide the basis for the Association advocating for the CASE Act of 2019 (HR 2426 and S 1273) or for other legislation establishing a Copyright Small Claims Program consistent with the Resolution.

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

None.

9. Disclosure of Interest. (If applicable)

None

10. Referrals.

The Resolution and Report have been distributed to each of the other Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee.


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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

This Resolution addresses the reality that copyright owners with small infringement claims essentially have a right without a remedy and the related impact on public benefits of the copyright system. The costs of bringing a federal lawsuit significantly outstrips the value of their claims, and they cannot resort to state courts, since they can pursue copyright claims only in federal court. The Resolution supports legislation creating the establishment of a program within the U.S. Copyright Office with authority to adjudicate copyright small claims as a lower-cost, less-time-consuming alternative to federal court litigation of copyright claims, provided that participation in the program is voluntary for all parties to the dispute, the claim is limited to seeking the types of monetary relief permitted by the Copyright Act (including statutory damages, actual damages, and disgorgement of profits) and excludes injunctive relief, and the monetary relief is no more than a maximum set in accordance with the legislation (“Copyright Small Claims Program”), and supports such legislation including appropriate procedures and requirements, including those listed in the Resolution.

2. Summary of the Issue that the Resolution Addresses

Mindful of the problems of access and the reality of a right without a remedy for copyright owners with small claims, Congress requested the Copyright Office undertake a study concerning new remedies to address small copyright claims, observing that “the inability to enforce one’s rights undermines the economic incentive to continue investing in the creation of new works. . . . and deprives society of the benefit of new and expressive works of authorship.” The resulting Copyright Office report documents “the challenges of resolving small copyright claims in the current legal system” and observes that the problem of enforcing modest-sized copyright claims “appears to be especially acute for individual creators,” and recommends the creation of a small claims tribunal within the Copyright Office.

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

The Resolution supports legislation creating the establishment of a Copyright Small Claims Program, and supports including in such legislation appropriate procedures and requirements, including those listed in the Resolution.

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

No known opposition.
RESOLVED, That the American Bar Association supports an interpretation of the phrase “where the defendant has committed acts of infringement” in the patent venue statute, 28 U.S.C. § 1400(b), for cases involving infringement under 35 U.S.C. § 271(e)(2) by submitting Abbreviated New Drug Applications (“ANDA”), that includes all of the acts (i.e., makes, uses, offers to sell, sells or imports) that would constitute patent infringement under 35 U.S.C. § 271(a); and

FURTHER RESOLVED, That the American Bar Association supports an interpretation of the phrase “where the defendant has committed acts of infringement” in 28 U.S.C. §1400(b) such that venue in a patent infringement case involving an ANDA submission under 35 U.S.C. § 271(e)(2) is proper in a district in which the defendant who filed the ANDA submission is anticipated to commit acts of infringement.
I. Introduction

This Resolution urges federal courts to interpret the clause “where the defendant has committed acts of infringement,” in 28 U.S.C. § 1400(b) when applied to Abbreviated New Drug Application (ANDA) litigation under 35 U.S.C. § 271(e)(2) to mean “districts in which the defendant who filed the ANDA submission is anticipated to commit acts of infringement.”

In patent infringement lawsuits, venue must be established according to the patent venue statute, 28 U.S.C. § 1400(b), rather than the general venue statute, 28 U.S.C. § 1391. The patent venue statute provides that venue is appropriate “in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” Until recently, a domestic corporation was considered to “reside[,]” for purposes of § 1400(b), anywhere it was subject to personal jurisdiction. In 2017, the Supreme Court of the United States held that for purposes of § 1400(b), a corporation “resides” only in the State where it is incorporated. TC Heartland LLC v. Kraft Foods Group Brands LLC, 137 S.Ct. at 1520. TC Heartland’s narrow interpretation of corporate residence has placed added emphasis on the portion of § 1400(b) which allows venue to be laid in any jurisdiction “where the defendant has committed acts of infringement and has a regular and established place of business.”

The meaning of “where the defendant has committed acts of infringement” in § 1400(b) is uniquely important in Abbreviated New Drug Application ("ANDA") litigation because of the disparity between the requirement for a defendant to have “committed acts of infringement” under Section 1400(b) and the artificial act of infringement during ANDA litigation. To establish venue under Section 1400(b), the defendant must also have a regular and established place of business in the district.

1 To establish venue under Section 1400(b), the defendant must also have a regular and established place of business in the district.
also preserving the broadest choice of forum selection for prospective plaintiffs. This Resolution therefore urges federal courts to interpret the clause “where the defendant has committed acts of infringement,” in §1400(b) to a district where the defendant who filed the ANDA submission is anticipated to commit acts of infringement.

II. Statutory and Historical Background

In patent infringement lawsuits, venue must be established according to the patent venue statute, 28 U.S.C. § 1400(b), rather than the general venue statute, 28 U.S.C. § 1391. The patent venue statute provides that venue is appropriate “in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” Until recently, a domestic corporation was considered, for purposes of § 1400(b), to “reside[]” anywhere it was subject to personal jurisdiction. In 2017, however, the Supreme Court of the United States held that for purposes of § 1400(b), a corporation “resides” only in the State where it is incorporated. TC Heartland, 137 S.Ct. at 1520.

The Supreme Court first interpreted the meaning of corporate residence for purposes of § 1400(b) in Fourco Glass Company v. Transmirra Products Corporation, 353 U.S. 222 (1957), holding that a corporation resides only in its State of incorporation. In reaching this conclusion, the Court rejected an argument that corporate residence in § 1400(b) should be interpreted in light of the definition of corporate residence set forth in § 1391(c) of the general venue statute. Congress has not amended § 1400(b) since this decision, but has twice amended the general venue statute. Congress passed the first amendment in 1988, when it revised § 1391 to state that the section applied “[f]or purposes of venue under this chapter.” In 1990, the Court of Appeals for the Federal Circuit interpreted that amendment to mean that definitions set forth under § 1391 applied to terms used in § 1400(b). VE Holding Corporation v. Johnson Gas Appliance Company, 917 F.2d 1574 (Fed. Cir. 1990). In 2011, Congress amended § 1391 to its current text to provide definitions “[f]or all venue purposes.” Subsequently, the Federal Circuit affirmed that its interpretation from VE Holding applied to the 2011 amendment.

The amendments to § 1391, as interpreted by the Federal Circuit, greatly expanded the number of states where a domestic corporation was considered to reside. Under the general venue statute, a corporation resides “in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question.” 28 U.S.C. § 1391(c) is much broader than the Supreme Court’s interpretation in Fourco that a corporation resides only in its State of incorporation. By vacating the Federal Circuit’s interpretation of corporate residence under § 1400(b) and reinstating the narrower Fourco rule, the Supreme Court in TC Heartland significantly contracted the available venues for patent infringement lawsuits.

III. Impact of the TC Heartland Decision

By holding that a corporation “resides” only in the State in which it is incorporated, TC Heartland placed added emphasis on the remaining portion of § 1400(b), which sets also preserving the broadest choice of forum selection for prospective plaintiffs. This Resolution therefore urges federal courts to interpret the clause “where the defendant has committed acts of infringement,” in §1400(b) to a district where the defendant who filed the ANDA submission is anticipated to commit acts of infringement.

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venue in any jurisdiction “where the defendant has committed acts of infringement and has a regular and established place of business.” Because most defendants will not waive their objections to venue,2 patent litigation plaintiffs must carefully consider where they will file suit in order to satisfy the statute’s requirements. If a brand drug manufacturer is uncertain about whether venue will be satisfied in a given district after the court applies TC Heartland, the manufacturer might opt to file suit in several districts at once in order to ensure that venue is satisfied in at least one of those districts to secure the 30-month stay of FDA approval for a generic competitor. E.g., Matthew Bultman, Hatch-Waxman Post-TC Heartland: What You Need To Know, Law360, https://www.law360.com/articles/1045335/hatch-waxman-post-to-heartland-what-you-need-to-know (May 24, 2018).

Moreover, it is not uncommon for more than one generic drug manufacturer to submit an ANDA for the same product. In such instances, a brand drug manufacturer may seek to sue all of the generic drug manufacturers in a single infringement suit. Before TC Heartland, a brand drug manufacturer could bring a single suit in nearly any district in the United States, because venue was coterminous with personal jurisdiction. Now, however, the opportunities to do so will be fewer. The regular course of practice may become, instead, to file infringement suits in different districts and then seek consolidation into multidistrict litigation. This could increase the burden and case load on the courts.

After the Supreme Court’s decision in TC Heartland, the Federal Circuit interpreted the term “regular and established place of business” in § 1400(b). In re Cray, Inc., 871 F.3d 1355 (Fed. Cir. 2017). The Federal Circuit read the text of “regular and established place of business” to mean that “(1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant.” Id. at 1360. By inserting these relatively vague standards into the text for venue, the Federal Circuit further increased uncertainty regarding the availability of venue in any chosen jurisdiction. This could further motivate litigants to file in more than one jurisdiction, increasing the burden on parties and the courts themselves.

IV. Split in Federal Courts and Proposed Resolution

Section 1400(b) provides that venue is appropriate “in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” The first alternative (“residence”) is

2 Unlike subject matter jurisdiction, venue objections can be waived.

2 Section 1400(b) is not relevant to venue for declaratory judgment actions. "Venue in a declaratory judgment action for patent infringement and invalidity is governed by the general venue statute, 28 U.S.C. § 1391(b) and (c), and not the special patent infringement venue statute, 28 U.S.C. § 1400(b)." U.S. Aluminum Corp. v. Kawneer Co., 694 F.2d 193, 195 (9th Cir. 1982); Horne v. Adolph Coors Co., 684 F.2d 255, 260 (10th Cir. 1982); Emerson Elec. Co. v. Black & Decker Mfg. Co., 606 F.2d 234, 238 (3rd Cir. 1979); Gen. Tire & Rubber Co. v. Watkins, 326 F.2d 926, 929 (4th Cir. 1964); Barber-Greene Co. v. Blaw-Knox Co., 239 F.2d 774, 776 (6th Cir. 1957). Venue in a declaratory judgment action in the ANDA context is governed by 21 U.S.C. § 351(j)(5)(C)(i)(II). (A civil action referred to in this subclause shall be brought in

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read much more narrowly following TC Heartland, placing more importance on the interpretation of the second alternative ("infringement"). And, as discussed above, the Federal Circuit has recently established a three-element test for the term "regular and established place of business" but courts have still applied that test inconsistently.

The meaning of the phrase "where the defendant has committed acts of infringement" takes on important meaning in the context of ANDA litigation. The issue arises from the disparity between the requirement for a defendant to have "committed acts of infringement" under Section 1400(b) and the artificial act of infringement during ANDA litigation. The cause of action in ANDA litigation, 35 U.S.C. § 271(e)(2), makes it an "act of infringement to submit" certain drug applications for approval. Following TC Heartland, federal courts are divided regarding the meaning of "committed acts of infringement" in the context of an ANDA submission. Some have held that venue is appropriate in districts where future acts of infringement by the ANDA filer are anticipated to occur. Others have read the statute more narrowly and held that venue is satisfied only where the ANDA was prepared and submitted.

An exemplary analysis of the broader, future-looking test came in one of the first cases to address the issue, Bristol-Myers Squibb Co. v. Mylan Pharmaceuticals Inc., No. 17-379-LPS, 2017 WL 3980155 (D. Del. Sept. 11, 2017) (hereinafter "BMS"). There, the District of Delaware held that "acts of infringement" an ANDA filer "has committed" include[] all of the acts that would constitute ordinary patent infringement" after FDA approval, including any intended sales of the regulated product in any domestic venue. The court justified this forward-looking conclusion by noting that the "submission of an ANDA is a stand-in that serves to move forward in time the infringement and validity challenges that otherwise would come later in time." Id. at *9-10. Other courts in the Third Circuit have subsequently followed the reasoning in BMS. See Javelin Pharms, Inc. v. Mylan Labs Ltd., 16-224-LPS, 2017 WL 5953296 (D. Del. Dec. 1, 2017); UCB, Inc. v. Mylan Techs., Inc., 17-322-LPS, 2017 WL 5985559 (D. Del. Dec. 1, 2017); Mallinckrodt IP v. B. Braun Medical, Inc., 17-365-LPS, 2017 WL 6383610 (D. Del. Dec. 14, 2017); Celgene Corp. v. Hereto Labs. Ltd., 17-3587 (ES) (MAH), 2018 WL 1155354 (D. N.J. Mar. 2, 2018). In each of those cases, the chosen jurisdiction satisfied the requirements of § 1400(b).5

the judicial district where the defendant has its principal place of business or a regular and established place of business. Carbon Black. However, the court found that reading the statute literally would result in it never being satisfied—because an ANDA always precedes acts of actual infringement by the generic drug manufacturer—and rules of statutory construction counseled against such a reading. Id. at *10. Other courts in the Third Circuit have subsequently followed the reasoning in BMS. See Javelin Pharms, Inc. v. Mylan Labs Ltd., 16-224-LPS, 2017 WL 5953296 (D. Del. Dec. 1, 2017); UCB, Inc. v. Mylan Techs., Inc., 17-322-LPS, 2017 WL 5985559 (D. Del. Dec. 1, 2017); Mallinckrodt IP v. B. Braun Medical, Inc., 17-365-LPS, 2017 WL 6383610 (D. Del. Dec. 14, 2017); Celgene Corp. v. Hereto Labs. Ltd., 17-3587 (ES) (MAH), 2018 WL 1155354 (D. N.J. Mar. 2, 2018). In each of those cases, the chosen jurisdiction satisfied the requirements of § 1400(b).5

In each case, the defendants’ motion to dismiss for lack of venue was denied without prejudice, and defendants were granted leave to conduct additional discovery on venue. See, e.g., BMS, 2017 WL 3860155 at *1.

5 The court reasoned that the same principle should apply to ANDA filers. Moreover, the court found that reading the statute literally would result in it never being satisfied—because an ANDA always precedes acts of actual infringement by the generic drug manufacturer—and rules of statutory construction counseled against such a reading. Id. at *10. Other courts in the Third Circuit have subsequently followed the reasoning in BMS. See Javelin Pharms, Inc. v. Mylan Labs Ltd., 16-224-LPS, 2017 WL 5953296 (D. Del. Dec. 1, 2017); UCB, Inc. v. Mylan Techs., Inc., 17-322-LPS, 2017 WL 5985559 (D. Del. Dec. 1, 2017); Mallinckrodt IP v. B. Braun Medical, Inc., 17-365-LPS, 2017 WL 6383610 (D. Del. Dec. 14, 2017); Celgene Corp. v. Hereto Labs. Ltd., 17-3587 (ES) (MAH), 2018 WL 1155354 (D. N.J. Mar. 2, 2018). In each of those cases, the chosen jurisdiction satisfied the requirements of § 1400(b).5
The more restrictive approach has only been adopted once, by the Northern District of Texas in Galderma Laboratories v. Teva Pharmaceuticals (USA) Inc., No. 3:17-cv-01076-M, 290 F.Supp.3d 599 (N.D. Tex. 2017). There, the court began by considering 35 U.S.C. § 271(e)(2), which makes submission of an ANDA an act of infringement. 290 F.Supp.3d at 606-7 (citing 35 U.S.C. § 271(e)(2)). Next, the court considered whether the anticipated acts of actual infringement also qualified as “committed” acts of infringement under 28 U.S.C. § 1400(b), answering that question in the negative. Id. at 607. The court considered the reasoning in BMS but found it unpersuasive based on the plain language of the venue statute. Id. at 607-08. The court also distinguished the Federal Circuit’s Acosta decision by limiting that case to issues of personal jurisdiction. Id. The Northern District of Texas thus interpreted “acts of infringement” as limited to the venues in which an ANDA was prepared and submitted. Id. at 608.

Federal courts should adopt the broader, forward-looking definition of “acts of infringement.” This approach is consistent with definition of “acts of infringement” set forth in the general patent infringement statute, 35 U.S.C. § 271(a): “makes, uses, offers to sell, or sells” and “imports.” This definition is also the common-sense definition, which is the meaning of “infringement” widely understood by attorneys, patent holders, and the public. Interpreting “infringement” in § 1400(b) consistently with the term’s well-accepted and common-sense definition will allow the federal courts to act in a predictable, understandable manner. Furthermore, this definition of “acts of infringement” will allow prospective defendants to organize their conduct so as to consistently predict where they can be hauled into federal court for ANDA infringement actions. Finally, this definition has the additional benefit (compared to the restrictive, backward-looking definition) of allowing prospective ANDA plaintiffs the most flexibility among venues in which to assert their claims. Under this definition, the generic drug can be made, used, offered for sale or sold in multiple districts; but, the ANDA application can only be submitted from a single district. Based on these benefits, the broader, forward-looking definition of “where the defendant has committed acts of infringement” is the better of the two definitions and should be adopted.

V. Consistency with Past ABA Actions

Because of the temporal mismatch between the patent venue statute and the Hatch-Waxman Act, this Resolution is consistent with ABA policy defining venue in a patent infringement cases as being proper “only in a judicial district (1) located in the state under whose laws the business entity was formed or (2) where the business entity has committed acts of infringement and has a regular and established place of business.” See 16A108C. For instance, the court in BMS notes the “temporal mismatch between § 1400(b) and the Hatch-Waxman Act.” BMS at *12. The court further notes that the entire purpose of the ANDA litigation scheme is to resolve patent disputes before a generic drug is launched. See, BMS at 13, citing E.I. du Pont de Nemours & Co. v. Medtronic, Inc., 496 U.S. 466, 661, 678 (1990). The ANDA-related litigation is not about whether the ANDA submission is unlawful, but rather about “whether a valid patent ‘will or will not’ be infringed by the manufacture, use, or sale of the new drug for which the application is submitted,’ which is effectively the same type of analysis involved in a typical patent infringement inquiry.

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In the context of Hatch-Waxman litigation, the "acts of infringement" an ANDA filer "has committed" includes all of the acts that would constitute ordinary patent infringement if, upon FDA approval, the generic drug product is launched into the market. The submission of an ANDA is a stand-in that serves to move forward in time the infringement and invalidity challenges that otherwise would come later in time, such as after approval or marketing of the ANDA drug. See Glaxo, Inc. v. Novopharm, Ltd., 110 F.3d 1562, 1569 (Fed. Cir. 1997) ("The only difference in actions brought under §271(e)(2) is that the allegedly infringing drug has not yet been marketed and therefore the question of infringement must focus on what the ANDA applicant will likely market if its application is approved, an act that has not yet occurred."). Despite the fact that the acts of infringement producing products have yet to be approved and marketed, the patent infringement inquiry concerns the real-world impact and consequences that would flow from the approval of an ANDA, the submission of which is the triggering act that allows for the infringement suit in the first instance. See Acorda, 817 F.3d at 760. Thus, an applicant submits an ANDA with full knowledge of the effect of its application and with the objective of marketing its drug product in the event that the application is approved. All of this, in the Court's view, must be taken into account in the venue analysis.

Similar to the court's view in BMS, this Resolution is based upon the rationale that an ANDA filer's anticipated acts must be included as part of the "acts of infringement" analysis for purposes of determining if venue is proper under the patent venue statute, just as those anticipated acts are included for personal jurisdiction and infringement determinations. The court's lens of analysis is fast-forwarded to the time when the ANDA product is on the market because of the artificial acceleration of the litigation under the Hatch-Waxman Act as part of the carefully constructed compromise to expedite generic entry to the market. The context of Hatch-Waxman, anticipated acts are properly considered part of the "acts of infringement" that 'the defendant has committed' within the meaning of § 1400(b)." Id. at 18. It is, therefore, submitted that this Resolution is consistent with the above-referenced ABA policy.

Because of the Supreme Court's narrow interpretation of "residence" under the first prong of the patent venue statute, 28 U.S.C. § 1400(b), in TC Heartland v. Kraft Food Groups Brands, and the artificial act of infringement that gives rise to ANDA litigation, district courts are divided and parties face uncertainty as to the meaning of "committed acts of infringement" under the second prong of the patent venue statute. The phrase "where the defendant has committed acts of infringement" under 28 U.S.C. §1400(b) should be
interpreted to mean a district in which the defendant who filed the ANDA submission is anticipated to commit acts of infringement. This broader approach provides venue predictability for parties, promotes conservation of judicial resources, and aligns with the common and statutory meaning of infringement.

Respectfully submitted,

Mark K. Dickson
Chair, Intellectual Property Law Section
August 2019
1. **Summary of Resolution**

The Resolution calls for the Association to adopt policy urging federal courts to interpret the clause "where the defendant has committed acts of infringement and has a regular and established place of business," in the patent venue statute, 28 U.S.C. § 1400(b) when applied to Abbreviated New Drug Application (ANDA) litigation under 35 U.S.C. § 271(e)(2) to mean a district in which the defendant who filed an ANDA application is anticipated to commit acts of infringement.

2. **Approval by Submitting Entity**

The Section of Intellectual Property Law Council approved the Resolution on October 3, 2018.

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

Yes, 16A108C, which concerns a general statement of venue in a patent infringement case.

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

None.

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

N/A

6. **Status of Legislation**

None.

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

The policy will provide Association support for legislation or a potential future *amicus* case addressing the issue.
8. **Cost to the Association (both direct and indirect costs).**

Adoption of the recommendations will not result in additional direct or indirect costs to the Association.

9. **Disclosure of Interest**

There are no known conflicts of interest regarding this recommendation.

10. **Referrals**

The Resolution and Report have been distributed to each of the other Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee.

11. **Contact Person (prior to meeting)**

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12. **Contact Persons (who will present the report to the House)**

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the Association to adopt policy urging federal courts to interpret the clause "where the defendant has committed acts of infringement and has a regular and established place of business," in the special venue statute, 28 U.S.C. § 1400(b) when applied to Abbreviated New Drug Application (ANDA) litigation under 35 U.S.C. § 271(e)(2) to mean a district in which the defendant who filed an ANDA application is anticipated to commit acts of infringement.

2. Summary of the Issue that the Resolution Addresses

This report addresses the question of venue for Abbreviated New Drug Application ("ANDA") litigation purposes in light of the narrowed interpretation of patent venue under 35 U.S.C. § 1400(b) when applied to Abbreviated New Drug Application (ANDA) litigation under 35 U.S.C. § 271(e)(2), in TC Heartland, LLC v. Kraft Food Group Brands, LLC, 137 S.Ct. 1514 (2017). The Supreme Court held in that case that the state where a corporation “resides” is only the state where it is incorporated. Id. at 1520. This narrow interpretation of corporate residence has placed added emphasis on the remaining portion of § 1400(b), which permits venue to be laid in any jurisdiction “where the defendant has committed acts of infringement and has a regular and established place of business.” The ANDA context presents a unique uncertainty about the meaning of this clause because ANDA infringement suits often begin before the generic drug has been produced. The ANDA cause of action, 35 U.S.C. § 271(e)(2), makes it an “act of infringement to submit” certain drug applications for approval. Following TC Heartland, courts are divided regarding the meaning of “committed acts of infringement” in the context of an ANDA submission. Some courts have held that venue is appropriate in districts where future acts of infringement are anticipated to occur. Other courts have read the statute more restrictively, holding that venue is satisfied only where the ANDA submission was prepared and submitted, which would only be known to the ANDA filer.

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

The Resolution addresses this uncertainty by urging federal courts to interpret the clause “where the defendant has committed acts of infringement and has a regular and established place of business,” in the special venue statute, 28 U.S.C. § 1400(b), when applied to Abbreviated New Drug Application (ANDA) litigation under 35 U.S.C. § 271(e)(2) to mean a district in which the defendant who filed an ANDA application is anticipated to commit acts of infringement.” The Resolution urges courts to adopt this interpretation of the venue statute to provide venue predictability for parties, promote conservation of judicial resources, and align with the common and statutory meaning of infringement.

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

We are aware of no ABA minority view or opposition.
RESOLVED, That the American Bar Association supports the principle that a patentee may recover compensatory damages under 35 U.S.C. § 284 for acts abroad that arise from domestic infringement of a patent pursuant to 35 U.S.C. § 271(f).
I. Introduction

This Resolution concerns damages in patent infringement cases. Specifically, it concerns whether a patentee may recover compensatory damages under 35 U.S.C. § 284 for acts abroad that arise from domestic infringement of a patent pursuant to 35 U.S.C. § 271(f).

Congress enacted Section 271(f) in response to Deepsouth Packing v. Laitram, where the Supreme Court held that the then-existing statute prohibiting the making and selling of patented inventions did not prohibit export of an unassembled but otherwise infringing product for assembly and use abroad.1 According to legislative history, Deepsouth was viewed as a “loophole” for avoiding patent infringement.2

Recently, the Supreme Court had another chance to address compensatory damages for acts abroad. In WesternGeco v. ION Geophysical, it was argued that compensatory damages under 35 U.S.C. § 284 for patent infringement under Section 271(f)(2) should not be available for acts abroad, based on a presumption against extraterritorial application of U.S. law.3 However, the Supreme Court concluded that the infringement under Section 271(f)(2), namely the supply of components of an infringing system from the U.S. for assembly and use abroad with a requisite intent, was a domestic act and thus that lost profits for acts abroad could be recovered.

If the Supreme Court had ruled otherwise, Section 271(f) would have lost much of its force and effect. It is difficult to contemplate how any meaningful damages would ever be available for infringements under Section 271(f) if acts abroad could not be included in the calculation. This would leave 271(f) toothless, and defy the express intent of Congress.

Accordingly, the ABA should adopt this Resolution, which is consistent with the holding of WesternGeco and could support an Association amicus curiae brief or legislative action to the extent future situations arise under Section 271(f).4 The policy may also be relevant to other situations relating to domestic patent infringement and compensatory damages for acts abroad.

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4 The Supreme Court limited its analysis to Section 271(f)(2), and so a case could arise under Section 271(f)(1), or with different types of damages (e.g., reasonable royalties under Section 284). See WesternGeco, 138 S.Ct. at 2137 n. 1 and 2. That analysis applies equally to Section 271(f)(1).
III. Relevant Law

A. Pertinent Patent Statutes Relating to Infringement and Compensatory Damages


(a) Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

(f) (1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

(f) (2) Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.


Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. Increased damages under this paragraph shall not apply to provisional rights under section 154(d).

B. Relevant Recent Precedent Prior to WesternGeco v. Ion Geophysical

Deepsouth v. Laitram Corp., 406 U.S. 518 (1972) was the impetus for 35 U.S.C. § 271(f). The Court affirmed the lower court’s determination that Deepsouth infringed Laitram’s patents in shrimp deveining machines, and that it was prohibited from making,
using or selling its deveining machines in the United States. However, the Court agreed with Deepsouth that it could not be barred from exporting components of the machine outside the United States, for assembly outside the United States, because there was no infringement act of “making” the patented invention in the United States. Deepsouth also could not be liable as a contributory infringer because combining the components outside the United States to make the patented machine was not an act of infringement, and thus there was no direct infringement. Id. at 527-28, 532.

In Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007), the Supreme Court addressed whether sending uninstalled software on a master disk from the United States aboard for subsequent copying and installation on foreign made computers was sufficient to establish liability under 35 U.S.C. § 271(f)(1). The Court first concluded that uninstalled software was akin to an abstract series of instructions or an idea embodied in intangible code, similar to a blueprint, and therefore did not qualify as a “component” within the meaning of Section 271(f)(1) that could be combined into an infringing assembly. The Court then reasoned the creation of subsequent copies aboard that could be supplied on a computer, which copies could qualify as “components,” where not components “supplied[e] … from the United States.” Hence, the mere supply of a master disk of software from the United States did not meet the statutory requirements for finding infringement under Section 271(f)(1). The Court cited the presumption against extraterritoriality to justify its conclusion. In particular, the Court noted the purpose of the presumption was to insure against the extraterritorial extension of U.S. patent law and to avoid interference with the patent policies of sovereign nations.

In RJR Nabisco, Inc. v. European Cmty., 136 S.Ct. 2090 (2016), the Supreme Court analyzed the extraterritoriality of RICO in the context of racketeering activity implicating foreign terrorist organizations. Procedurally, the District Court dismissed the complaint as impermissibly extraterritorial. On appeal, the Second Circuit vacated and remanded, finding that RICO applies extraterritorially to the same extent as the predicate acts of racketeering that underlie the alleged RICO violation, and that certain predicates alleged in the case expressly apply extraterritorially. In denying rehearing, the Second Circuit further held that RICO permits recovery for a foreign injury caused by the violation of a predicate statute that applies extraterritorially. The Supreme Court granted certiorari, reversing and remanding the Second Circuit’s decision. The Court applied the same two-step framework that it did in Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010) and Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2015). This two-step analysis requires:

(1) determining whether the presumption against extraterritoriality has been rebutted; and,
(2) if the statute is not extraterritorial, determining whether the case involves a domestic application of the statute, by analyzing the statute’s “focus.”

In applying this test, the Court found the presumption against extraterritoriality had been rebutted with respect to certain applications of the RICO statute. The Court then went on to find that § 1964 does not provide a clear indication that Congress intended to

In applying this test, the Court found the presumption against extraterritoriality had been rebutted with respect to certain applications of the RICO statute. The Court then went on to find that § 1964 does not provide a clear indication that Congress intended to
provide a private right of action for injuries suffered outside of the United States. Although § 1964 provides a cause of action to "any person injured in his business or property" by violating § 1962, neither the word "any" nor the reference to injury to "business or property" indicates extraterritorial application. The Court found that § 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries.

C. WesternGeco v. Ion Geophysical: Infringement Under Section 271(f)(2) May Lead to Lost Profits for Acts Abroad

1. Background of Technology

WesternGeco, the petitioner before the Supreme Court, owned four patents related to technologies for performing geological surveys of the ocean floor. The surveys are performed by towing miles-long cables, called "streamers," behind ships. The ships direct acoustic waves toward the ocean floor that are reflected back to the streamers which include sensors that detect the reflected waves to generate a geological underwater map. The surveys are useful in gas and oil exploration for determining where to drill wells.

The patents in suit relate to directional control systems for the streamers and to methods for generating time-lapsed surveys showing changes in the ocean floor geology. WesternGeco does not sell the streamers or related components but uses the patented technology to perform the surveys itself. It then sells the completed surveys to oil and gas companies.

ION, the respondent, manufactures components that, when assembled, embodied the surveying technology covered by the patents in suit. ION does not perform surveys but exports the components to customers aboard who assemble the completed systems and use them to perform surveys in competition with WesternGeco.

2. District Court Proceedings

Because ION exports only the unassembled components of the patented technology, WesternGeco sued ION in the district court for infringement under 35 U.S.C. § 271(f), Part 1 of Section 271(f) in relevant part defined infringement to include the supply "from the United States all or a substantial portion of the components of a patented invention … in such a manner as to actively induce the combination of such components outside the United States in a manner that would infringe the patent." Part 2 similarly defines as infringement the supply of "any component of a patented invention that is especially made or especially adapted for use in the invention … knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent."

In discussing the history of the statute, the district court acknowledged Congress passed Section 271(f) to abrogate the Supreme Court’s decision in Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972), where the Supreme Court held that export of
an unassembled, patented product did not constitute infringement under the then existing patent statutes. The legislative history of Section 271(f) indicates Congress viewed the DeepSouth holding as creating a loophole by which infringers could unjustly avoid liability. Congress sought to close the loophole by passing Section 271(f), which defines as an act of infringement the supply of components from the U.S. for assembly aboard in a manner that would infringe the patent if so assembled in the U.S.

At trial, the jury found ION liable for infringement under Section 271(f) and awarded damages under 35 U.S.C. § 284, the general patent damages statute. The damages award included lost profits for ten surveying contracts WesternGeco alleged it lost to ION’s customers who performed the surveys using ION-supplied equipment. By implication, the jury therefore also concluded that, but for ION’s infringement, WesternGeco would have earned profits from those contracts. ION filed a motion for judgment as a matter of law on the damages award, which the district court denied and which ION appealed to the Federal Circuit.

### 3. Federal Circuit Proceedings

On appeal, the Federal Circuit affirmed that ION infringed WesternGeco’s patents under Section 271(f) but, by a 2-to-1 majority, reversed the award of lost profits. The majority held that awarding lost profits based on the survey contracts that WesternGeco would have performed at sea violated the presumption against extraterritorial application of U.S. patent law. The majority stated “our patent law operates only domestically and does not extend to foreign activities.” The majority acknowledged that jury found that ION infringed under Section 271(f) which includes an extraterritorial component via the clause that prohibits the supply of components “from the United States.” However, majority felt the doctrine of extraterritoriality precluded damage awards based on the use of those components outside the United States. “Section 271(f) does not eliminate the presumption against extraterritoriality. Instead, it creates a limited exception.” The majority held that its application of the presumption against extraterritoriality in Power Integrations Inc. v. Fairchild Semiconductor Int’l, 711 F.3d 1348 (Fed. Cir. 2013) was controlling and established that losses in foreign or overseas markets were unrecoverable under the United States patent laws.

Judge Wallach dissented, believing the majority’s holding incorrectly interpreted the presumption against extraterritoriality as a categorical bar precluding any consideration of activities abroad. Judge Wallach further argued this was especially erroneous with respect to damage awards under 35 U.S.C. § 284. Damages under Section 284, Judge Wallach noted, are meant to “adequately compensate for the infringement.” He noted the statute itself does not include a territorial limit on how damages are measured. Then he analyzed a series of cases in which foreign activities were considered in formulating a damages award. Judge Wallach viewed the majority’s application of extraterritoriality in the case at bar as going against that line of precedents. Further, the majority’s holding, Judge Wallach concluded, would therefore undercompensate inventors when the infringement had both domestic and foreign consequences.

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ION appealed an unrelated holding regarding willful infringement to the Supreme Court, which vacated the Federal Circuit’s opinion and remanded the case in view of Halo Elec., Inc. v. Pulse Elec., Inc., 136 S. Ct. 1923, 579 U.S. ___ (2016). Judge Wallach renewed his dissent on extraterritoriality and lost profits in the opinion on remand, and ION petitioned the Federal Circuit for a hearing en banc, which the Federal Circuit denied. Two more judges joined Judge Wallach in his further dissent from that denial in which he additionally noted the majority’s holding was contrary to the longstanding predicate acts doctrine in copyright law that allows for recovery of damages occurring abroad if the damages arose from domestic copyright infringement. After the denial of rehearing en banc, ION filed a petition for writ of certiorari which the Supreme Court granted on the issue of whether the Federal Circuit erred in nullifying the damages award.

4. Supreme Court Proceedings

The Supreme Court ruled in favor of WesternGeco holding that a patent owner is entitled to recover foreign lost profits stemming from a domestic act of infringement. Writing for the majority, Justice Thomas started by acknowledging that, under the presumption against extraterritoriality, courts should presume U.S. statutes only apply domestically. Courts further apply the two-step framework outlined in RJR Nabisco Inc. v. European Community, 136 S.Ct. 2090, 579 U.S. ___ (2016) to determine (1) whether the statute is clearly intended to apply extraterritorially so as to rebut the presumption and (2) whether the particular application of the statute at issue is actually a domestic one. The majority resolved the case by proceeding directly to the second step.

The majority noted that the important factor to consider when determining whether a statute applies domestically or extraterritorially is the focus of the statute and what conduct it seeks to regulate. If the focus is on domestic conduct, then the statute involves a permissible domestic application of the statute.

Turning to the statutes at issue, the majority noted that although Section 284 provides for damages awards, the underlying conduct that justifies those awards is infringement of a U.S. Patent. Next, Section 271(f) defines infringement as the act of supplying from the U.S. the components of a patented invention with the intent they be combined outside the U.S. in a manner that would otherwise infringe the patent. Hence, the infringing act is the domestic act of supplying components from the U.S., and thus the focus of the statute involves domestic conduct. The majority therefore concluded the award of lost profits for domestic acts of infringement prohibited by Section 271(f) is a permissible domestic application of a damage award under Section 284.

The majority stated that the respondent’s arguments to the contrary were unpersuasive. The majority noted that just because Section 284 authorizes an award of damages does not suggest that damages are the focus of the patent statute. Instead, the focus is on the act of infringement, and not on the damages award, i.e. the permissible remedy. The majority discounted the fact that the measure of damages was based in part on overseas activities as merely incidental to the domestic act of infringement for which the damages were awarded.
The dissent started from a different section of the patent statute, Section 154, and noted the principle that U.S. patents only grant the right to exclude others from practicing the invention in the U.S. The dissent contended that, because the monopoly afforded by a patent is domestically constrained, damages should likewise be constrained. The dissent further argued that Section 271(f) only expanded the types of acts occurring domestically that would constitute infringement of a patent and did not alter the principle that use of an invention outside the U.S. does not constitute an act of infringement. Therefore, no damages could flow from the extraterritorial use of an invention. The dissent also noted comity concerns that, by extending U.S. patent law to award damages for foreign use of an invention, would encourage other countries to likewise extend the reach of their patent laws to cover conduct occurring in the U.S.

D. Other Cases Currently on Appeal

Multiple federal appeals are pending which relate to damages for acts abroad in the context of other parts of the patent infringement statute.

In Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc., 711 F.3d 1348 (Fed. Cir. 2013), the defendant Fairchild initially developed the infringing product in the United States, which constituted direct infringement under 35 U.S.C. § 271(a). Because of the finding of direct infringement, Power Integrations argued it could recover lost profits for all sales including those that were consummated in foreign markets. The jury verdict awarded Power Integrations damages that included “worldwide” damages, which the plaintiff argued were legally justified because “it was foreseeable that Fairchild’s infringement in the United States would cause Power Integrations to lose sales in foreign markets. Thus, Power Integrations argues, the law supports an award of damages for the lost foreign sales which Power Integrations would have made but for Fairchild’s domestic infringement.”

The Federal Circuit held that the jury “had clearly adopted the measure of damages posed by Power Integrations expert, Dr. Troxel’ in reaching the combined damages award of over $33 million.” Id. at 1372. The Federal Circuit held that “the district court correctly decided that the jury’s original damages award was contrary to law.” Id.

The Federal Circuit remanded the case for a new damages trial. The Supreme Court’s WesternGeco opinion issued prior to that trial and Power Integrations requested a district court address the implication of that decision on the permissible scope of damages. The district court determined that WesternGeco implicitly overruled the Federal Circuit’s opinion in the Power Integrations appeal, and found the Court’s analysis allowing for worldwide damages for infringement under to Section 271(f) was equally applicable to infringement under Section 271(a). The district court recognized its holding that worldwide damages are available for infringement under Section 271(a) involved a novel question of law over which there existed substantial difference and certified the matter for interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292. The Federal Circuit has decided to hear that appeal and the parties are in the process of briefing the matter.

The dissent further argued that Section 271(f) only expanded the types of acts occurring domestically that would constitute infringement of a patent and did not alter the principle that use of an invention outside the U.S. does not constitute an act of infringement. Therefore, no damages could flow from the extraterritorial use of an invention. The dissent also noted comity concerns that, by extending U.S. patent law to award damages for foreign use of an invention, would encourage other countries to likewise extend the reach of their patent laws to cover conduct occurring in the U.S.

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Also pending on a petition for writ of certiorari before the Supreme Court is Texas Advanced Optoelectronic Solutions, Inc. v. Renesas Elecs. America, Inc., 888 F.3d 1322 (Fed. Cir. 2018). In that case, the district court precluded the patent owner from seeking damages for a large majority of the defendant’s sales on the basis that the manufacture and physical transfer of the infringing product occurred outside the United States. The patent owner argued that the negotiations regarding the sales of the infringing products and sales orders for the infringing products were sufficiently tied to the United States to constitute domestic infringement under the “offer to sell” prong of 35 U.S.C. § 271(a). The patent owner further argued that damages attributable to those foreign product transfers should be awardable under 35 U.S.C. § 284. The Federal Circuit agreed with the district court that the mere domestic nature of the unspecific negotiations regarding future transfers of the infringing products was insufficient to constitute domestic infringement, given that the manufacture and shipment of the infringing products occurred abroad. The patent owner has petitioned the Supreme Court to decide the question of whether an “offer to sell” occurs where the offer is actually made or where the offer contemplates that the proposed sale will take place. The Supreme Court has invited the Solicitor General to file a brief on behalf to the United States on whether the petition for certiorari should be granted, which has yet to be filed.

IV. The Resolution is Consistent with the Supreme Court’s WesternGeco Holding and Reflects Good Patent Policy

The Resolution reflects the principle that a patentee may recover compensatory damages under 35 U.S.C. § 284 for acts abroad that arise from domestic infringement of a patent pursuant to 35 U.S.C. § 271(f). Congress passed Section 271(f) to reverse the Supreme Court’s decision in Deepsouth by defining a new domestic act of infringement, namely the supply of infringing components from the U.S. with the requisite intent to have those components combined abroad. Once domestic liability is established, Section 284 provides for damages “adequate to compensate for the infringement.” The Federal Circuit’s application of the presumption against extraterritoriality to preclude lost profits arising in part from the subsequent foreign activity threatened to undercompensate the patentee and thus it was proper for the Supreme Court to reverse the Federal Circuit.

Sections 271(f)(1) and (2) define an act of domestic infringement, namely supplying “from the United States any component,” “intending that such component will be combined outside of the United States.” Congress was concerned that accused infringers having an intent to infringe a U.S. patent could avoid liability through the Deepsouth loophole by exporting components overseas for assembly and use there. To close the Deepsouth loophole, Congress phrased the statute to apply to a domestic act but one that necessarily has extraterritorial implications. Section 271(f) still satisfies the presumption against extraterritoriality because the regulated conduct is domestic, i.e., supplying from the United States. Neither party argued nor did the Federal Circuit hold that Section 271(f) conflicts with the presumption.
The text of Section 284 does not explicitly indicate whether it extends to damages accruing aboard, but it does broadly aim to award damages "adequate to compensate the patentee for infringement." See Goulds Mfg. Co. v. Cowing, 105 U.S. 253 (1881); Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U.S. 641 (1915).

The text of Section 284 does not explicitly indicate whether it extends to damages accruing aboard, but it does broadly aim to award damages "adequate to compensate the patentee for infringement." See Goulds Mfg. Co. v. Cowing, 105 U.S. 253 (1881); Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U.S. 641 (1915).

The Federal Circuit erred in applying the presumption against extraterritoriality in the WesternGeco case because the presumption categorically limited damages arising from domestic infringement merely because of their connection to a foreign act. The Federal Circuit held the award of lost profits for services conducted overseas gives improper extraterritorial effect to U.S. patent laws. However, Section 271(f) sufficiently ties those foreign performed services to an initial act of domestic infringement, the supply from the U.S. of the components used to perform those services. Hence, the presumption is satisfied because the regulated conduct is domestic. Moreover, Section 284 does not preclude consideration of evidence to assess damages just because the evidence is of a foreign nature, since the prohibited conduct giving rise to those damages is still domestic.

Applying the presumption to preclude lost profits in the manner the Federal Circuit did frustrates congressional intent in two ways. First, it would reopen the Deepsouth loophole Congress sought to close through passage of Section 271(f). Second, and relatedly, it could result in under-compensating the patentee, which Congress expressly cautioned against in Section 284 by directing that damages should be "adequate to compensate for the infringement." For example, an infringer could structure a transaction so payment from its customers always remains overseas and presumably outside of the territorial scope from where damages are recoverable. This result is antithetical to the congressional intent demonstrated in both Section 271(f) and Section 284.

The Respondent in the WesternGeco case, ION, argued for application of the presumption against extraterritoriality. The arguments are unconvincing. Among other things, ION contended that the presumption against extraterritoriality must apply separately to Section 284 and, when so applied, precludes the award of lost profits where those profits have a foreign nature. However, this contention fails to recognize that Section 284 is a broadly written statute that is concerned fundamentally with the amount of damages that a court or jury should award a patentee, rather than where those damages are recoverable. This result is antithetical to the congressional intent demonstrated in both Section 271(f) and Section 284.

The Federal Circuit erred in applying the presumption against extraterritoriality in the WesternGeco case because the presumption categorically limited damages arising from domestic infringement merely because of their connection to a foreign act. The Federal Circuit held the award of lost profits for services conducted overseas gives improper extraterritorial effect to U.S. patent laws. However, Section 271(f) sufficiently ties those foreign performed services to an initial act of domestic infringement, the supply from the U.S. of the components used to perform those services. Hence, the presumption is satisfied because the regulated conduct is domestic. Moreover, Section 284 does not preclude consideration of evidence to assess damages just because the evidence is of a foreign nature, since the prohibited conduct giving rise to those damages is still domestic.

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damages accrued. This contention would also make 271(f) a cause of action without a significant remedy, defying the intent of Congress in the process.

Moreover, Respondent’s contention could exclude otherwise relevant evidence in a number of scenarios; for example, international demand for a highly successful product may no longer be admissible. In fact, Respondent’s contention would seemingly force courts and juries to undertake a hypercritical analysis whenever there is an international aspect to a damages assessment. Because of the large number of foreign parties involved in U.S. patent litigation, applying the presumption against extraterritoriality to categorically limit damages awards would complicate rather than simplify damages determinations.

Traditional doctrines of proximate causation and the like will appropriately address any policy considerations of comity and concerns about oversized damages awards and overcompensating the patentee. In some instances, subsequent or intervening foreign acts may be too remote or tenuously linked to the underlying domestic act of infringement to support a particular measure of damages. Similar causation issues arise in more traditional forms of tort damages, and there is no reason to believe that proximate causation would not provide an effective check on awards under Section 284. Thus, the presumption against extraterritoriality should not function as an absolute bar and evidence regarding foreign sales resulting from domestic infringement should be admissible and subjected to the traditional proximate causation and foreseeability analyses.

V. Conclusion

Congress enacted Section 271(f) in response to *Deepsouth Packing v. Laitram*, which was viewed as a “loophole” for avoiding patent infringement. In *WesternGeco v. ION Geophysical*, the Supreme Court concluded that Section 271(f)(2) infringement is a domestic act, and therefore that compensatory damages under Section 284 for related acts abroad was a permissible domestic application of Section 284. Had the Supreme Court ruled otherwise, Section 271(f) would have lost much of its force and effect. The Resolution is consistent with the holding of *WesternGeco* and could support an Association amicus curia brief or legislative action to the extent future situations arise under Section 271(f); or with other situations relating to patent infringement and compensatory damages for acts abroad. Because the Resolution reflects good patent policy and supports a robust system for patent enforcement, we respectfully request that the ABA adopt it.

Respectfully submitted,

Mark K. Dickson
Chair, Intellectual Property Law Section
August 2019

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1. **Summary of Resolution**

   The Resolution calls for the Association to adopt policy that supports the principle that a patentee may recover compensatory damages under 35 U.S.C. § 284 for acts abroad that arise from domestic infringement of a patent pursuant to 35 U.S.C. § 271(f).

2. **Approval by Submitting Entity**


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

   No.

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

   None.

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

   N/A

6. **Status of Legislation**

   None.

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

   The policy will provide Association support for Association amicus brief(s) or legislation relating to Section 271(f) to the extent future situations arise. The policy may also be relevant to other situations relating to patent infringement and compensatory damages for acts abroad.
8. Cost to the Association (both direct and indirect costs).

Adoption of the recommendations will not result in additional direct or indirect costs to the Association.

9. Disclosure of Interest

There are no known conflicts of interest regarding this recommendation.

10. Referrals

The Resolution and Report have been distributed to each of the other Sections, Divisions, Forums, and Standing Committees of the Association in the version accepted and numbered for the agenda by the Rules and Calendar Committee.

11. Contact Person (prior to meeting)

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12. Contact Persons (who will present the report to the House)

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EXECUTIVE SUMMARY

1. Summary of the Resolution
The Resolution calls for the Association to adopt policy that supports the principle that a patentee may recover compensatory damages under 35 U.S.C. § 284 for acts abroad that arise from domestic infringement of a patent pursuant to 35 U.S.C. § 271(f).

2. Summary of the Issue that the Resolution Addresses
Congress passed Section 271(f) to abrogate the Supreme Court's decision in *Deepsouth* by creating a new type of domestic acts of infringement. Section 271(f) regulates domestic conduct, specifically the act of supplying unassembled components from the U.S. with the requisite intent, even though the statute contemplates and expressly mentions subsequent foreign activities. Once domestic liability is established, Section 284 provides for damages "adequate to compensate for the infringement." The Federal Circuit's application of the presumption against extraterritoriality to preclude lost profits arising from the subsequent foreign activity threatens to undercompensate the patentee and thus it was proper for the Supreme Court to reverse it.

3. Please Explain How the Proposed Policy Position Will Address the Issue
The policy will provide Association support for Association amicus brief(s) or legislation relating to Section 271(f) to the extent future situations arise. The policy may also be relevant to other situations relating to patent infringement and compensatory damages for acts abroad.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
We are not aware of any ABA or non-ABA minority view or opposition.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments, and the private sector, to recognize their obligation to address climate change and take action to achieve the following goals:

- Reduce U.S. greenhouse gas emissions to net zero or below as soon as possible, consistent with the latest peer-reviewed science, and
- Contribute the U.S. fair share to holding the increase in the global average temperature to the lowest possible increase above pre-industrial levels;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation that would:

- Utilize a broad range of legal mechanisms, including but not limited to market-based mechanisms and removal of legal barriers to reduction of greenhouse gas emissions, to achieve the goals set out above.
- Utilize a broad range of legal mechanisms to encourage and enable adaptation to climate change by federal, state, local, territorial, and tribal governments, and the private sector.
- Provide for a just transition for the people and places most dependent on the carbon economy.
- Recognize and incorporate sustainable development principles in reducing greenhouse gas emissions and adapting to climate change, in order to simultaneously promote economic development, social well-being, national security, and environmental protection;

FURTHER RESOLVED, That the American Bar Association urges the United States government to: (1) engage in active and constructive international discussions under the United Nations Framework Convention on Climate Change and its progeny, and (2) remain in, negotiate, or ratify treaties and other agreements to reduce greenhouse gas emissions and adapt to climate change; and
FURTHER RESOLVED, That the American Bar Association urges lawyers to engage in pro bono activities to aid efforts to reduce greenhouse gas emissions and adapt to climate change, and to advise their clients of the risks and opportunities that climate change provides.
This resolution builds on prior House of Delegates resolutions on climate change and sustainable development, as well as ongoing activity by the American Bar Association (ABA) Board of Governors and other ABA leadership.

This resolution updates and substantially revises the climate change resolution adopted by the ABA House of Delegates on February 8, 2008. It differs from the 2008 resolution in four ways. First, that resolution urged the enactment of federal cap-and-trade legislation to fight climate change. That legislation was not adopted. This resolution instead urges the adoption of a wide range of legal measures to both reduce greenhouse gas emissions and to adapt to climate change. Second, the 2008 resolution was directed at the federal government; this resolution is addressed to federal, state, local, tribal, and territorial governments, as well as the private sector. Third, the present resolution reflects the greater urgency of climate change. In the more than a decade since the 2008 resolution, the scientific community has even stronger evidence that climate change is occurring, is mostly caused by human activities, and is already having adverse consequences. Reducing greenhouse gas (GHG) emissions and preparing for the impacts of climate change must take on even greater urgency. Finally, the present resolution recognizes the need for, and urges a greater role for lawyers in addressing climate change.

This resolution also builds on a 2011 ABA House of Delegates resolution that urged “the United States government to ensure that federally-recognized Indian tribes … may participate fully … in policy discussions on the issue of climate change domestically and in international fora.”

Climate change must be addressed in the context of sustainable development—a conceptual framework that the ABA House of Delegates has endorsed three times. In August 2013, the ABA’s House of Delegates reaffirmed its 1991 and 2003 commitments to sustainable development, and defined sustainable development as “the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations.” It also urged “all governments, lawyers, and ABA entities to act in ways that accelerate progress toward sustainability.”

4 Id.
resolution, the ABA House of Delegates agreed to “promote the principles of sustainable development in relevant fields of law.”

With these resolutions as a foundation, on November 9, 2018, the ABA Board of Governors approved the Mission Statement of the ABA Representative to the United Nations. One of the purposes of this representative is to “[e]nhance globally the reputation of the ABA as a trusted partner of the United Nations and advocate for the Rule of Law, access to justice, defender of human rights and implementation of the UN’s Sustainable Development Goals.” The Sustainable Development Goals are more specific expressions of the meaning of sustainable development, and were adopted in 2015. One of the goals is to “take urgent action to combat climate change and its impacts.” This is precisely the objective of this resolution.

Climate change presents significant risks to this and future generations. Climate change presents environmental risks, to be sure, but it also presents security, economic, and social risks. At the same time, the national and international response to climate change provides major opportunities for improving environmental quality, fostering economic growth and job creation, and enhancing domestic and global security. To foster sustainable development, the United States should play a leadership role in addressing climate change.

I. Scientific Evidence and Consequences

According to the National Aeronautics and Space Administration (NASA), the past five years (2014-2018) are, together, “the warmest years in the modern record.” In 2018, average surface temperatures around the world were 1.5 degrees Fahrenheit (0.83 degrees Celsius) warmer than they were about 40 to 70 years ago. NASA also found five years (2014-2018) are, together, “the warmest years in the modern record.” In 2018, average surface temperatures around the world were 1.5 degrees Fahrenheit (0.83 degrees Celsius) warmer than they were about 40 to 70 years ago. NASA also found

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that Earth’s global surface temperatures in 2018 ranked as the fourth warmest since 1880.10

Increased atmospheric concentrations of GHGs, the Intergovernmental Panel on Climate Change (IPCC) concluded in 2014, “are extremely likely to have been the dominant cause of the observed warming since the mid-20th century.”11 The IPCC also concluded that further emission increases will have significant adverse effects. “Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems.”12

The 2018 IPCC report13 makes clear that the scientific evidence of the magnitude, speed, and consequences of climate change is becoming increasingly urgent. According to this and other IPCC reports and those of the U.S. National Academy of Sciences and all other major national academy of science reports, climate change is occurring, human activities contribute to it, and climate change will have adverse effects on the United States and the rest of the world. While there remain some uncertainties about its magnitude, the evidence of climate change easily passes the certainty tests that are used to make decisions in other relevant areas of law and policy.

In 2009, after detailed analysis of the science and consideration of extensive public comment, the U.S. Environmental Protection Agency (EPA) made a formal finding that “six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations.”14 For public health, EPA “has considered how elevated concentrations of the well-mixed greenhouse gases and associated climate change affect public health by evaluating the risks associated with changes in air quality, increases in temperatures, changes in extreme weather events, increases in food- and water-borne pathogens, and changes in aeroallergens.”15 For public welfare, a term defined under the Clean Air Act (CAA) to include a wide variety of non-health-related impacts,16 EPA considered “numerous and far-ranging risks to food production and

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12 Id. at 8.
agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure, and settlements, and ecosystems and wildlife. 17

The endangerment finding was then challenged before the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, which unanimously upheld the finding. 18 The U.S. Supreme Court took jurisdiction over another part of this case, and reversed the D.C. Circuit’s decision on that part of the case, but did not take jurisdiction over the endangerment finding decision. 19 The present Administration has not taken any action to date to modify or overturn the endangerment finding.

The endangerment finding is not the last word on the actual and likely impacts of climate change on the United States. The U.S. Global Change Research Program, which was authorized by the U.S. Congress in 1990, issued the first portion of its fourth climate change assessment in 2017. 20 Concentrations of CO₂ in the atmosphere, the report said, are now more than 400 ppm [parts per million], “a level that last occurred about 3 million years ago, when both global average temperature and sea level were significantly higher than today.” 21 “Global annually averaged surface air temperature has increased by about 1.8°F (1°C) over the last 115 years (1901–2016).” 22 In addition, “over the next few decades (2021–2050), annual average temperatures are expected to rise by about 2.5°F for the United States, relative to the recent past (average from 1976–2005), under all plausible future climate scenarios.” 23 Finally, global annual average temperatures “could reach 9°F (5°C) or more by the end of this century” relative to pre-industrial times if the world continues on a business-as-usual pathway. 24 It projected sea-level rise by 2100 at one to four feet, and said that a rise of eight feet “cannot be ruled out.” 25 Already, U.S. Global Change Research Program explained, rainfall intensity is increasing, the incidence of forest fires is greater, the ocean is acidifying, and glaciers are melting. 26

All of these things cause or contribute to adverse effects on human rights in the United States and the rest of the world. 27 Extreme weather events, “their causes and consequences, raise questions of justice and human rights. Climate change affects
effects on economic values and on personal comfort and well-being, whether caused by
transformation, conversion, or combination with other air pollutants.

17 74 Fed. Reg. at 66498.
19 Id.
21 Id. at 11.
22 Id. at 10.
23 Id. at 11.
24 Id. at 10-11.
25 Id. at 10.
26 Id. at 10-11.
27 INTERNATIONAL BAR ASSOCIATION CLIMATE CHANGE JUSTICE AND HUMAN RIGHTS TASK FORCE, ACHIEVING JUSTICE AND HUMAN RIGHTS IN AN ERA OF CLIMATE DISRUPTION (2014).

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everyone, but it disproportionately strikes those who have contributed least to it and who are also, for a variety of reasons, least well placed to respond.28 “Climate justice seeks to combine the climate change discussion with human rights in a way that is equitable for the most climate-vulnerable groups.”29 The adverse effects of climate change, particularly those in low-lying island countries and those in already hot regions, could potentially be catastrophic. For example, it may not be possible to even survive without air-conditioning in some very hot regions during the hottest months as temperatures increase.30

The evolving climate science indicates that adverse effects will be much lower if the temperature increase is as low as possible, and if emissions are reduced to net zero or lower as soon as possible. A review article comprehensively synthesizing recent research, for example, determined that climate disruption from GHG pollution would cause additional and more severe adverse impacts than those identified in EPA’s 2009 endangerment finding.31 The resolution links the GHG emissions reduction timetable to the latest peer-reviewed science.

The resolution also indicates that the U.S. should contribute its fair share to reducing global greenhouse gas emissions, recognizing that, while responsibility for growing concentrations of greenhouse gas emissions is shared among many countries, the U.S. has a large historical responsibility for those concentrations, and that it should reduce its emissions accordingly.

II. International Framework

The United States participated actively in the negotiations that led to the United Nations Framework Convention on Climate Change (Convention),22 and played a major role in shaping it. The United States signed the Convention on June 12, 1992, at the United Nations Conference on Environment and Development in Rio de Janeiro. The Senate gave its advice and consent on October 7, 1992.33 Less than a week later, on October 13, President George H.W. Bush signed the instrument of ratification and transmitted it to the Convention Secretariat,34 making the U.S. the fourth country in the world to ratify the Convention. The Convention took effect in 1994, and now has 197 parties—196 countries plus the European Union.35
As its name indicates, the Convention creates an international legal framework, including reporting, scientific and technological research, and annual meetings of the conference of the parties, to address climate change. The Convention does not contain any binding commitments to reduce GHG emissions by a certain amount by a date certain. The Convention treats developed countries and developing countries differently. As the Convention’s preamble states, developed countries have contributed the largest share of historical and current global emissions of greenhouse gases, and have higher per capita emissions levels than developing countries. Thus, in ratifying the Convention, developed countries agreed to adopt policies and measures that will demonstrate that they “are taking the lead” in addressing climate change.

On December 12, 2015, in Paris, France, the Parties to the Convention agreed to a goal of net zero GHG emissions by no later than the second half of this century. The zero emissions target in the Paris Agreement is framed in terms of “a balance between anthropogenic [human caused] emissions by sources and removals by sinks.…”. The term “net zero” derives from U.N. Convention. Carbon dioxide, the most important climate change pollutant, can be removed from the atmosphere by a variety of natural and other processes that are collectively defined as sinks. The “balance” of emissions and removals by sinks means net zero emissions.

The Paris Agreement, as it is called, marks the first time since the Convention was opened for signature in 1992 that all Parties have agreed to such a goal. It was also the first time that all Parties agreed to take actions to reduce their GHG emissions. The Kyoto Protocol did not contain an overall emissions reduction goal, and only limited developed countries’ emissions.


Parties aim to reach global peak greenhouse gas emissions as soon as possible . . . and to undertake rapid reductions thereafter . . . so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.

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The Paris Agreement was designed to achieve the objective of the Convention on Climate Change, which is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." The world’s understanding of what that level means is evolving in the direction of lower concentrations of GHGs and thus lower emissions. Prior to Paris, the most frequently stated goal was to hold the global increase in temperatures to 2°C (or 3.6°F) above pre-industrial levels. The Paris Agreement, however, aims to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C (3.7°F) above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change. As indicated above, subsequently published scientific reports indicate that much greater and more rapid reductions may be required.

In June 2017, the current President announced his intention to withdraw the United States from the Paris Agreement. Under the Paris Agreement, no country can withdraw from the agreement for a period of three years after the agreement enters into force. That withdrawal, in turn, is effective one year later. Because the Paris Agreement achieves the sufficient number of ratifications and other approvals to enter into force on November 4, 2016, the earliest that the United States can actually withdraw is November 4, 2020, which is one day after the 2020 U.S. presidential election.

III. Current Efforts

A. State, Territorial, and Local Governments

State, territorial, and local governments are playing a leading role in addressing climate change in the United States. State efforts to compel action by the federal government in response to the current administration's deregulatory agenda have been enhanced by Massachusetts v. EPA, which held that the federal government is required to issue regulations to ensure the ability of states to demonstrate standing in lawsuits against the federal government. State Attorneys General have been aggressive in recent litigation against the federal government.

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State, territorial, and local governments are playing a leading role in addressing climate change in the United States. State efforts to compel action by the federal government in response to the current administration's deregulatory agenda have been enhanced by Massachusetts v. EPA, which held that the federal government is required to issue regulations to ensure the ability of states to demonstrate standing in lawsuits against the federal government. State Attorneys General have been aggressive in recent litigation against the federal government.
Many states are employing a planning process that involves a GHG reduction goal and implementation of a suite of legal and policy measures to achieve that goal. Others are acting without quantifiable reduction goals, but are nonetheless employing a suite of tools. These tools include, but are not limited to, renewable electricity portfolio standards, net metering, carbon dioxide limits on new power plants, energy efficiency provisions in building codes, public funding or benefit programs for renewable energy, tax credits, and registries for early GHG reductions. In addition to reducing GHG emissions, these tools reduce negative external costs of energy generation, require energy conservation activities whose benefits exceed their costs, and use the market to reduce net emissions. They also limit and even lower energy costs for the poor, and create employment and economic growth. Use of these tools can also reduce emissions of other air pollutants, including sulfur dioxide and nitrogen oxides.

A growing number of states are acting on a regional basis. The most prominent of these is the Regional Greenhouse Gas Initiative (RGGI). RGGI is a cooperative effort among the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire (New England), Rhode Island, and Vermont to cap and reduce CO2 emissions from the power sector.53 New Jersey is preparing to join RGGI and Virginia has proposed regulations that would allow trading with RGGI states.54 The nine-state RGGI program has put a descending cap on GHG from the power sector, and provides for trading of allowances.55 Another trading initiative involves the state of California and the provinces of Quebec and Ontario. The California-Quebec-Ontario program creates an economy-wide cap and trade program that covers all major GHG emission sources and further requires that distributors of fossil fuels and electricity importers surrender allowances equal to the emissions created by combustion of the fuels or generation of the imported electricity.56 At the local level, 1,060 U.S. municipalities have signed the Mayors Climate Protection Agreement, under which they promise to meet or exceed the Kyoto Protocol goal of a seven percent reduction in GHG emissions from 1990 levels by 2012.57 Ten states, 281 cities and counties, nine tribes, and more than 2,000 businesses and investors have joined the “We Are Still In” coalition to advance the goals of the Paris Climate Agreement.58 “We Are Still In” signatories represent a constituency of more than half of all Americans, and taken together, they represent $6.2 trillion, a bigger economy.

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54 The State has published a proposed regulation that mirrors the RGGI program and would allow trading even without Virginia joining RGGI. 9VAC5-140. Regulation for Emissions Trading Programs (adding 9VAC5-140-60/10 through 9VAC5-140-6430), 34 VA. Reg. 924 (Jan. 8, 2018). See also, Darrell Proctor, Virginia Moves to Join RGGI Carbon-trading Market, PowrWit (Nov. 15, 2017), http://www.powrmag.com/virginia-moves-to-join-raggi-carbon-trading-market/.

8
B. Tribal Governments

There are 573 federally recognized American Indian and Alaska Native tribes, many of which have direct experience in coping with the impacts of climate change. The Fourth National Climate Assessment devotes a chapter to tribes and other indigenous peoples. Drawing on an extensive amount of published studies as well as meetings with tribal representatives and others with relevant expertise, that chapter presents some observations regarding the wide range of climate change impacts being experienced by Indian and Alaska Native tribes, including:

"...Though they may be affected by climate change in ways that are similar to others in the United States, Indigenous peoples can also be affected uniquely and disproportionately. Many Indigenous peoples have lived in particular areas for hundreds if not thousands of years, and their cultures, spiritual practices, and economies have evolved to be adaptive to local seasonal and interannual environmental changes. ..."63

"Most Indigenous peoples across all regions of the United States pursue a mix of traditional subsistence and commercial sector activities that include agriculture, hunting and gathering, fisheries, forestry, energy, recreation, and tourism enterprises. Observed and projected changes of increased wildfire, diminished snowpack, pervasive drought, flooding, ocean acidification, and sea level rise threaten the viability of each of these enterprises. ..."64

Over the last decade, many American Indian and Alaska Native tribes have begun aggressive efforts to understand climate change impacts on their tribal communities, and to plan for adaptation action to reduce those impacts on their tribal members and on the built environment. Several key actions taken include comprehensive climate action and adaptation planning, strategic energy planning, and climate action assessments. More than 35 tribes have developed climate action assessment and adaptation plans – most of which include distributed renewable energy projects as key components to adapting to climate change. These tribes have been supported by the Pacific Northwest Tribal Climate Change Research Program) at 572-603, https://nca2018.globalchange.gov/chapter/tribes.62

Id. at 575.63

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63 Id. at 575.
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The National Congress of American Indians (NCAI) recently launched a pair of intertribal initiatives to deal with climate change. Established in 1944, NCAI is the oldest, largest and most representative national organization made up of American Indian and Alaska Native tribal governments and their citizens. Since at least 2006, NCAI has expressed concern over the unique effects climate change has had on tribal nations and the need to create a national, mandatory program to reduce climate change within a timeframe that prevents irreparable and irreversible harm to human health, the economy and environment. Building on the expressed desires of NCAI’s voting membership (which includes tribal nations and individual citizens of tribal nations), in February 2019, at the NCAI Executive Council Winter Session, NCAI President Jefferson Keel announced the launch of the NCAI Climate Action Resource Center and the pending establishment of the NCAI Climate Action Task Force (CATF). These two initiatives represent a commitment by tribal nations not only to the importance of this issue, but also to share creative ways in which tribal nations, as front line communities, are leading initiatives to combat climate change.

As governments exercising inherent sovereignty within their reservations, tribes can make valuable contributions to the utilization of a wide range of legal mechanisms to reduce greenhouse gas emissions and to adapt to climate change. It should be noted, however, that tribes are different from state and local governments in certain ways, and some of the policy tools referred to in this report may require some modification to render them useful by tribes.

C. U.S. Government

The United States has no overall goal for reducing GHG emissions, although there are disparate legal mechanisms that can help reduce these emissions to a limited extent. Nor does the United States appear to be prepared to adapt to the consequences of climate change.

As a result, U.S. GHG emissions are about the same as they were in 1990. In 2017, net GHG emissions in the United States were 14.1% lower than they were in 2007 just

65University of Oregon, Tribal Climate Change Project, https://tribalclimate.uoregon.edu/ (last visited Apr. 27, 2019).
66 Northern Arizona University, Tribal Adaptation Plans, Toolkits, Planning Guides http://www7.nau.edu/tec/mapn/co/MinSync/TribalAdaptationPlans (last visited Apr. 27, 2019).
69 University of Oregon, Tribal Climate Change Project, https://tribalclimate.uoregon.edu/ (last visited Apr. 27, 2019).
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before the recession, but 1.6% greater than they were in 1990. The United States is the second-largest emitter of GHGs in the world (after China). U.S. CO₂ emissions per capita are among the highest in the world. After three years in which U.S. carbon dioxide emissions declined, emissions rose by 3.4% in 2018, according to preliminary estimates by the Rhodium Group.

The United States has had laws for several decades that support energy efficiency and conservation. The U.S. also has laws fostering the use of renewable energy. Finally, the U.S. Supreme Court decided in Massachusetts v. EPA that GHGs are pollutants under the Clean Air Act, thus providing the federal government with the ability to use the Clean Air Act to reduce greenhouse gas emissions. Federal efforts to address climate change intensified during the previous Administration, which used this decision to adopt the endangerment finding described in Section I of this report. Perhaps the most publicly visible and politically controversial manifestation of that was the Clean Power Plan, which was intended to reduce GHGs from electric power-generating facilities by 32% from 2005 levels by 2030.

On the other hand, the present Administration, seeing the climate change issue through the lenses of reducing government regulation and trying to revive the coal industry, has expressed skepticism about the basic science of climate change and initiated proceedings to roll back many previous Administration initiatives on climate change, including the Clean Power Plan.

D. Private Sector

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The U.S. business community is disadvantaged in implementing reductions by the absence of a comprehensive federal program, national flip-flopping on climate policy between Presidential Administrations, the proliferation of inconsistent state and regional regulations, and litigation that is intended to force (or substitute for) federal regulation. The lack of a federal program also makes capital expenditure for carbon reduction planning very difficult, inhibits research and development, robs businesses of economies of scale and of markets for climate-friendly technologies and products, and puts them at a disadvantage compared to companies in countries that have ratified the Kyoto Protocol, are working toward achievement of the goals in the Paris Agreement, or both.

The function of many other public climate change mitigation laws can be served—at least to some degree—by some form of private governance. This does not mean that private governance is necessarily of equal effectiveness to public governance, but it does mean “that there are more options available to decision makers than traditionally believed.” This is no small thing. Private corporate greenhouse gas emissions reductions could be as high as one-half billion tons of CO2 equivalent, which is “equal to a regulatory approach that would reduce the emissions of the U.S. transportation sector by one-third.” In 2017, the World Wildlife Fund and others issued a report stating that “nearly half of the companies in the 2016 Fortune 500 have set targets to reduce greenhouse gases (GHG), improve energy efficiency, and/or increase renewable energy sourcing.” The Fortune 500 is comprised entirely of U.S. corporations.


Reducing U.S. GHGs to net zero or below 2050 or earlier, or even to 20% of 1990 levels by 2050, is often referred to as “deep decarbonization”—“deep” because it requires systemic changes to the energy economy. More than a thousand legal tools are available to federal, state, tribal, territorial, and local governments, as well as the private sector, to get the job done.

Deep decarbonization applies not only to reductions in carbon dioxide, but also other GHG pollutants, such as methane and nitrous oxide. “Deep decarbonization” refers to the reduction of greenhouse gas (GHG) emissions over time to a level consistent with limiting global warming to 2°C or less, based on the scientific consensus that higher levels of warming pose an unacceptable risk of dangerous climate change.”


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Two reports by the Deep Decarbonization Pathways Project (DDPP) outline a basic approach for deep decarbonization in the United States. The DDPP, which is led by the Sustainable Development Solutions Network84 and the Institute for Sustainable Development and International Relations (IDDRI),85 is the principal international effort to devise pathways to decarbonize the global economy.86

The two DDPP reports, taken together, make remarkably clear the gap that exists between current law and the laws that are needed to achieve deep decarbonization. Perhaps the DDPP’s “most important finding is that it is technically feasible for the U.S. to reduce [carbon dioxide] emissions from fossil fuel combustion” to 85% below 1990 levels by 2050.87 If the United States did that, the report states, it could reduce its overall greenhouse gas emissions to 80% below 1990 levels by 2050.88 The overall cost to the U.S. economy in 2050, DDPP says, is about 0.8% of the expected GDP for 2050.89 The reports do not calculate the considerable public health, safety, security, economic, environmental and other benefits.

According to the reports, enormous changes would be required to achieve this level of reduction. The U.S. would more than double the efficiency with which energy is used. Nearly all electricity would be carbon free or use carbon capture and sequestration. Electricity production would also double because gasoline and diesel fuel for transportation would be mostly replaced by electricity.90 Significantly, the reports do not identify a single approach to deep decarbonization. Instead, they show four different pathways or scenarios—a high renewables scenario, a high nuclear energy scenario, a high carbon capture and sequestration scenario, and a mixed scenario involving a balanced combination of all three.

But how is this level of reduction to be accomplished? Ultimately, deep decarbonization is not likely to occur unless general policies are translated into proposed laws, enacted, and then implemented. More than 1,000 legal tools are available to achieve deep decarbonization in the United States, according to a newly published book, Legal

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Pathways to Deep Decarbonization in the United States. These legal tools are available to federal, state, tribal, territorial, and local governments, as well as to the private sector.

These legal tools fall into a dozen categories or types. The tools are not just the usual suspects (additional regulation, market-leveraging approaches, tradable permits or allowances), but also include reduction or removal of legal barriers to clean energy and removal of incentives for fossil fuel use. Additionally, they include information/persuasion, facilities and operations, infrastructure development, research and development, insurance, property rights, and social equity. The latter is particularly important for individuals and communities dependent on the carbon economy. The term "just transition" is used in the resolution to indicate a range of tools and measures to ensure that the benefits and effects of the clean energy economy are equitably shared.

The wide range of legal tools has important consequences for lawyers. It means that lawyers in diverse fields in addition to energy and environment could help build a consensus for reducing and removing legal barriers to addressing climate change. Lawyers with expertise in finance, corporate law, municipal, procurement, contracting, real estate, and other areas bring vital skills for responding to climate change and fulfilling the duty of lawyers to serve justice.

Lawyers already engage in activities to reduce greenhouse gas emissions. Many lawyers already advise their clients to reduce the risks and maximize the opportunities that climate change raises. Other lawyers are working to address climate change in a variety of pro bono activities, including drafting model statutory, regulatory, or transactional language for the recommendations contained in *Legal Pathways.* The need for additional legal work is enormous.

V. Conclusion: Urgent Need for Serious Action

The United States' history of leadership on key international issues, including several involving international environmental law, provides an opportunity for leadership on climate change, regardless of the administration in power. As in many other areas of law and policy, the United States' ability to influence other countries to reduce greenhouse gas emissions would be aided if we led by example. This is particularly true because of the historic contribution of developed countries to greenhouse gas emissions, and their superior financial and technological resources, as acknowledged by the Convention to which the U.S. is a party. Moreover, it is widely acknowledged that negative climate change effects will occur disproportionately in developing countries that are most vulnerable to climate change and that lack the resources to adapt effectively. The many

91 The book is published in two forms. One is *LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES: SUMMARY AND KEY RECOMMENDATIONS* (Michael B. Gerrard and John C. Dernbach eds. 2018). The other is *LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES* (Michael B. Gerrard and John C. Dernbach eds. 2019) [*LEGAL PATHWAYS*].
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strengths of the United States—including its technological capacity, economic strength, comprehensive educational system, commitment to innovation, and legal institutions—give this country a unique and unparalleled opportunity to play a significant and constructive role in addressing climate change. The United States should resume its leading role in international environmental law, and take domestic actions to help the world lower its greenhouse gas emissions and prepare for the impacts of climate change.

Respectfully Submitted,

Amy L. Edwards
Chair, Environment, Energy, and Resources Section
August 2019
1. **Summary of Resolution.**

The American Bar Association urges federal, state, local, territorial, and tribal governments, and the private sector, to recognize their obligation to address climate change and take action to reduce U.S. greenhouse gas emissions to net zero or below as soon as possible, consistent with the latest peer-reviewed science, and to contribute the U.S. fair share to holding the increase in the global average temperature to the lowest possible increase above pre-industrial levels; urges the United States Government, state, territorial, and tribal governments, local governments, and the private sector to take a leadership role in addressing the issue of climate change; urges Congress to enact appropriate climate change legislation; urges the United States Government to engage in active international discussions to address climate change; urges lawyers to engage in pro bono activities to address climate change and urges them to advise their clients about the risks and opportunities in addressing climate change.

2. **Approval by Submitting Entities.**

Approved by the Section of Environment, Energy and Resources Council on April 26, 2019; by the Law Student Division Council on March 25, 2019; by the Section of International Law Council on April 9, 2019; and by the Section of Science & Technology Law Council on May 6, 2019.

3. **Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?**

In 2008, the House of Delegates adopted a resolution (HOD Resolution No. 08M 109) (American Bar Association House of Delegates Resolution 109 (Feb. 11, 2008), https://www.americanbar.org/content/dam/aba/directories/policy/2008_my_109.pdf) urging the adoption of national legislation to address climate change. This is a substantial revision to, and update of, that resolution.

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

As indicated above, this resolution is a substantially updated and revised version of HOD Resolution 109 adopted in 2008. This resolution also builds on a 2011 ABA House of Delegates resolution that urged “the United States government to ensure that federally-recognized Indian tribes … may participate fully … in policy discussions on the issue of climate change domestically and in international fora.” (American Bar Association House of Delegates Resolution 112 (Aug. 8-9, 2011), https://www.americanbar.org/content/dam/aba/directories/policy/2008_my_109.pdf)
The House of Delegates has also endorsed sustainable development, the conceptual framework for addressing climate change, in 2013 (American Bar Association House of Delegates Resolution 105 (Aug. 12-13, 2013), https://www.americanbar.org/content/dam/aba/administrative/office_president/2013_hod_annual_meeting_105.authcheckdam.pdf.). 2003 (American Bar Association House of Delegates Resolution 105 (Aug. 11-12, 2003), https://www.americanbar.org/content/dam/aba/administrative/policy/2003_am_108.pdf.), and 1991 (American Bar Association House of Delegates Resolution 10-B (Aug. 1991)). In the 2013 resolution, the House of Delegates reaffirmed its 1991 and 2003 commitments to sustainable development, defined sustainable development as “the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations, and urged ‘all governments, lawyers, and ABA entities to act in ways that accelerate progress toward sustainability.’” The 2003 resolution encouraged governments, businesses and nongovernmental entities to promote sustainable development, and recognized that good governance and the rule of law are essential to achieving sustainable development. In 2018, the Board of Governors approved the Mission Statement for the ABA Representative to the United Nations. One of the purposes of this representative is to support the U.N. Sustainable Development Goals, and one of the goals is to take “urgent action to combat climate change and its impacts.”

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

Status of Legislation. (If applicable.)
A variety of different bills to address some aspect of climate change have been proposed in Congress. Among the more prominent bills is H.R. 763, the proposed Energy Innovation and Carbon Dividend Act (2019). The resolution endorses no particular bill or legislative proposal, however.

Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The sponsoring entities intend to host a series of educational programs (webinars, podcasts, and a one day conference in February 2020) about the current state of knowledge about climate change, mechanisms for adaptation, legal tools for deep decarbonization, and discuss other ways in which lawyers and their clients can get involved in this issue. They will also prepare white papers and make their attorneys available as resources to federal, state, local, territorial, and tribal governments interested in adopting legislation to reduce greenhouse gas emissions.

Cost to the Association. (Both direct and indirect costs.)
This resolution does not impose costs on the Association beyond those already being incurred to advance the Rule of Law (Goal IV).

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Cost to the Association. (Both direct and indirect costs.)
This resolution does not impose costs on the Association beyond those already being incurred to advance the Rule of Law (Goal IV).
9. **Disclosure of Interest.** (If applicable.)
The cosponsoring entities engage in activities that address climate change legal issues, including CLE programming, providing information of ABA activities to governments, NGOs and others as well as development of policy resolutions. No individual associated with this resolution will benefit personally from adoption of the resolution.

10. **Referrals.** (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)
As it was being developed, this Report with Recommendations was circulated to representatives of:

- Business Law Section
- Infrastructure and Regulated Industries Section
- Law Student Division
- Section of Administrative Law and Regulatory Practice
- Section of Civil Rights and Social Justice
- Section of International Law
- Section of Science & Technology Law
- Section of State and Local Government Law
- Young Lawyers Division

11. **Contact Name and Address Information.**
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EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution urges federal, state, local, territorial, and tribal governments, and the private sector, to recognize their obligation to address climate change and take action to reduce U.S. greenhouse gas emissions to net zero or below as soon as possible, consistent with the latest peer-reviewed science, and to contribute the U.S. fair share to holding the increase in the global average temperature to the lowest possible increase above pre-industrial levels; urges the United States Government, state, territorial, and tribal governments, local governments, and the private sector to take a leadership role in addressing the issue of climate change; urges Congress to enact appropriate climate change legislation; urges the United States Government to engage in active international discussions to address climate change; urges lawyers to engage in pro bono activities to address climate change and urges them to advise their clients about the risks and opportunities in addressing climate change.

2. Summary of the issue which the Resolution Addresses.

Humans are contributing to climate change through emissions of greenhouse gases, principally carbon dioxide. Climate change presents significant risks to this and future generations. Climate change presents environmental risks, to be sure, but it also presents security, economic, and social risks. At the same time, the national and international response to climate change provides major opportunities for improving environmental quality, fostering economic growth and job creation, and enhancing domestic and global security. There is growing bipartisan agreement that climate change is a serious issue that requires further legal action at all levels of government and in private governance.


The proposed policy contained in the resolution will address this issue in four ways. First, it recommends that federal, state, local, territorial, and tribal governments, and the private sector, recognize their obligation to address climate change and to take action to reduce U.S. greenhouse gas emissions to net zero or below as soon as possible, consistent with the latest peer-reviewed science, and to contribute the U.S. fair share to holding the increase in the global average temperature to the lowest possible increase above pre-industrial levels. Second, the resolution recommends that Congress adopt appropriate climate change legislation. Third, it urges the United States Government to engage in active international discussions to address climate change. Fourth, the resolution encourages lawyers to engage in pro bono activities to address climate change and to advise their clients about the risks and opportunities in addressing climate change.
4. A summary of any minority views or opposition which have been identified.
None.
RESOLVED, That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.
I. PURPOSE OF THIS RESOLUTION AND REPORT

Lawyers increasingly are using artificial intelligence ("AI") in their practices to improve the efficiency and accuracy of legal services offered to their clients. But while AI offers cutting-edge advantages and benefits, it also raises complicated questions implicating professional ethics.

The purpose of this resolution and report is to urge courts and lawyers to address the emerging legal and ethical issues related to the usage of AI. Courts and lawyers must be aware of the issues involved in using (and not using) AI, and they should address situations where their usage of AI may be flawed or biased.

In order to assist courts and lawyers in addressing these AI issues, we will be exploring the establishment of a working group to, in part, define guidelines for legal and ethical AI usage, and potentially develop a model standard that could come to the American Bar Association House of Delegates for adoption.

Section II of this report provides an overview of AI and the different AI tools used in the practice of law. Section III, in turn, analyzes a lawyer’s ethical duties in connection with AI technology. Section IV explores how bias can affect AI and the importance of using diverse teams when developing AI technology. Section V discusses questions to ask when adopting an AI solution or engaging an AI vendor. And finally, the report concludes with Section VI.

II. OVERVIEW OF HOW ARTIFICIAL INTELLIGENCE IS CHANGING THE LAW

Artificial intelligence promises to change not only the practice of law but our economy as a whole. We clearly are on the cusp of an AI revolution. But what does all this mean, as a practical matter, for lawyers? What is AI? And how is it being used in the practice of law?

A. Defining AI.

Artificial intelligence has been defined as “the capability of a machine to imitate intelligent human behavior.”3 Others have defined it as “cognitive computing” or “machine learning.”3 Although there are many descriptive terms used, AI at its core encompasses...
tools that are trained rather than programmed. It involves teaching computers how to perform tasks that typically require human intelligence such as perception, pattern recognition, and decision-making. A.

B. How AI Is Being Used In The Practice Of Law

There are many different ways that lawyers today are using AI to improve productivity and provide better legal services to their clients. Below are several of the main examples. As AI becomes even more advanced in the coming years, it fundamentally will transform the practice of law. Lawyers who do not adopt AI will be left behind.

1. Electronic Discovery/Predictive Coding.

Lawyers, predictably, use AI for electronic discovery. The process involves an attorney training the computer how to categorize documents in a case. Through a method of predictive coding, AI technology is able to classify documents as relevant or irrelevant, among other classifications, after extrapolating data gathered from a sample of documents classified by the attorney. B.

2. Litigation Analysis/Predictive Analysis.

AI also is being used to predict the outcome of litigation through the method of predictive analytics. AI tools utilize case law, public records, dockets, and jury verdicts to identify patterns in past and current data. B AI then analyzes the facts of a lawyer’s case to provide an intelligent prediction of the outcome. C.


AI tools are being used by lawyers to assist with contract management. This is particularly valuable to inside counsel who quickly need to identify important information in contracts. For example, AI tools can flag termination dates and alert the lawyer about deadlines for sending a notice of renewal. AI tools also can identify important provisions in contracts, such as most favored nation clauses, indemnification obligations, and choice of law provisions, among others. D.

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C. Supra, note 3.

D. Id.

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4. Due Diligence Reviews.

AI is being used to assist in automated due diligence review for corporate transactions to reduce the burden of reviewing large numbers of documents. Similar to contract management, due diligence review involves the computer identifying and summarizing key clauses from contracts.

5. “Wrong Doing” Detection.

AI is being used to search company records to detect bad behavior preemptively. AI is able to see beyond attempts to disguise wrongdoing and identify code words. AI can also review employee emails to determine morale, which may lead to identification of wrongdoing. For example, in one test using emails of Enron executives, AI was able to detect tension amongst employees that was correlated with a questionable business deal.

6. Legal Research.

AI traditionally has been used to assist with legal research, but it increasingly is becoming more sophisticated. With AI, lawyers can rely on natural language queries—rather than simple Boolean queries—to return more meaningful and more insightful results. AI also can be used to produce basic legal memos. One AI program called Ross Intelligence, which uses IBM’s Watson AI technology, can produce a brief legal memo in response to a lawyer’s legal question. Over time, such AI technology will become more and more powerful.

7. AI to Detect Deception.

Finally, as AI becomes more advanced, it will be used by lawyers to detect deception. Researchers, for example, are working on developing AI that can detect deception in the courtroom. In one test run, an AI system performed with 92 percent accuracy, which the

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9 Id.
13 Id.
14 Supra, note 3.
researchers described as “significantly better” than humans.\textsuperscript{17} While AI is still being developed for use in courtrooms, it already is being deployed outside the practice of law. For example, the United States, Canada, and European Union have run pilot programs using deception-detecting kiosks for border security.\textsuperscript{18}

C. It is Essential for Lawyers to be Aware of AI.

The bottom line is that it is essential for lawyers to be aware of how AI can be used in their practices to the extent they have not done so yet. AI allows lawyers to provide better, faster, and more efficient legal services to companies and organizations. The end result is that lawyers using AI are better counselors for their clients. In the next few years, the use of AI by lawyers will be no different than the use of email by lawyers—an indispensable part of the practice law.\textsuperscript{19}

Not surprisingly, given its benefits, more and more business leaders are embracing AI, and they naturally will expect both their in-house lawyers and outside counsel to embrace it as well. Lawyers who already are experienced users of AI technology will have an advantage and will be viewed as more valuable to their organizations and clients. From a professional development standpoint, lawyers need to stay ahead of the curve when it comes to AI. But even apart from the business dynamics, professional ethics requires lawyers to be aware of AI and how it can be used to deliver client services. As explored next, a number of ethical rules apply to lawyers’ use and non-use of AI.

III. THE LEGAL ETHICS OF AI.

Given the transformative nature of AI, it is important for courts and lawyers to understand how existing and well established ethical rules may apply to the use of AI.

A. Several Ethics Rules Apply To Lawyer’s Use (And Non-Use) of AI.

There are a number of ethical duties that apply to the use of (and non-use of) AI by lawyers, including the duties of: (1) competence (and diligence), (2) communication, (3) confidentiality, and (4) supervision. These duties as applied to AI technology are discussed below.

1. Duty of Competence

Under Rule 1.1 of the ABA Model Rules, a lawyer must provide competent representation to his or her client. The rule states that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the

\textsuperscript{17} Id.
\textsuperscript{19} Supra, note 3.

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\textsuperscript{19} Supra, note 3.
representation."20 The duty of competence requires lawyers to be informed, and up to date, on current technology. In 2012, this was made clear when the ABA adopted Comment 8 to Rule 1.1 which states that "[t]o maintain the requisite knowledge and skill, lawyers should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ."21

As one author points out, there does not appear to be any instance "in which AI represents the standard of care in an area of legal practice, such that its use is necessary."22 Nonetheless, lawyers generally must understand the technology available to improve the legal services they provide to clients. Lawyers have a duty to identify the technology that is needed to effectively represent the client, as well as determine if the use of such technology will improve service to the client.23

Under Rule 1.1, lawyers also must have a basic understanding of how AI tools operate. While lawyers cannot be expected to know all the technical intricacies of AI systems, they are required to understand how AI technology produces results. As one legal commentator notes, "[f]or a lawyer uses a tool that suggests answers to legal questions, he must understand the capabilities and limitations of the tool, and the risks and benefits of those answers."24

2. Duty to Communicate

ABA Model Rule 1.4 governs a lawyer’s duty to communicate with clients and requires a lawyer to "reasonably consult with the client about the means by which the client’s objectives are to be accomplished."25 A lawyer’s duty of communication under Rule 1.4 includes discussing with his or her client the decision to use AI in providing legal services. A lawyer should obtain approval from the client before using AI, and this consent must be informed. The discussion should include the risks and limitations of the AI tool.26 In certain circumstances, a lawyer’s decision not to use AI also may need to be communicated to the client if using AI would benefit the client.27 Indeed, the lawyer’s failure to use AI could implicate ABA Model Rule 1.5, which requires lawyer’s fees to be

20 ABA Model Rule 1.1
23 Supra, note 4.
25 ABA Model Rule 1.4.
26 Supra, note 4.
27 Id.

20 ABA Model Rule 1.1
23 Supra, note 4.
25 ABA Model Rule 1.4.
26 Supra, note 4.
27 Id.
reasonable. Failing to use AI technology that materially reduces the costs of providing legal services arguably could result in a lawyer charging an unreasonable fee to a client.  

3. Duty of Confidentiality

Under ABA Model Rule 1.6, lawyers owe their clients a generally duty of confidentiality. This duty specifically requires a lawyer to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” The use of some AI tools may require client confidences to be “shared” with third-party vendors. As a result, lawyers must take appropriate steps to ensure that their clients’ information appropriately is safeguarded. Appropriate communication with the client also is necessary.

To minimize the risks of using AI, a lawyer should discuss with third-party AI providers the confidentiality safeguards in place. A lawyer should inquire about “what type of information is going to be provided, how the information will be stored, what security measures are in place with respect to the storage of the information, and who is going to have access to the information.” AI should not be used in the representation unless the lawyer is confident that the client’s confidential information will be secure.

4. Duty to Supervise

Under ABA Model Rules 5.1 and 5.3, lawyers have an ethical obligation to supervise lawyers and nonlawyers who are assisting lawyers in the provision of legal services to ensure that their conduct complies with the Rules of Professional Conduct. In 2012, the title of Model Rule 5.3 was changed from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance.” The change clarified that the scope of Rule 5.3 encompasses nonlawyers whether human or not. Under Rules 5.1 and 5.3, lawyers are obligated to supervise the work of AI utilized in the provision of legal services, and understand the technology well enough to ensure compliance with the lawyer’s ethical duties. This includes making sure that the work product produced by AI is accurate and complete and does not create a risk of disclosing client confidential information.

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29 ABA Model Rule 1.6.
30 Supra, note 4.
31 Id.
32 Id.
33 Id.
35 Supra, note 4.
37 ABA Model Rule 1.6.
38 Supra, note 4.
39 Id.
40 Id.
42 Supra, note 4.
There are some tasks that should not be handled by today’s AI technology, and a lawyer must know where to draw the line. At the same time, lawyers should avoid underutilizing AI, which could cause them to serve their clients less efficiently. Ultimately, it's a balancing act. Given that many lawyers are focused on detail and control over their matter, it is easy to see why “the greater danger might very well be underutilization of, rather than overreliance upon, artificial intelligence.”

B. Key Practical Takeaways Relating To The Ethics of AI.

There clearly are a number of ethical rules that apply to lawyers’ use and non-use of AI technology, and they have real-world application. Lawyers must be informed about AI’s ability to deliver efficient and accurate legal services to clients while keeping in mind the ethical requirements and limitations. Ultimately, lawyers must exercise independent judgment, communicate with clients, and supervise the worked performed by AI. In many ways, the ethical issues raised by AI are simply a permutation of ethical issues that lawyers have faced before with regard to other technology. It shows that the legal ethics rules are adaptable to new technologies, and AI is no exception.

IV. BIAS AND TRANSPARENCY IN THE AI CONTEXT.

There is a final, often overlooked consideration in a lawyer’s use of AI technology, and that is the problem of bias. For all the advantages that AI offers for lawyers, there also is a genuine concern that AI technology may reflect the biases and prejudices of its developers and trainers, which in turn may lead to skewed results. It is critical for lawyers using AI to understand and address how bias can impact AI results.

The problem of bias in the development and use of AI potentially implicates professional ethics. In August 2016, the ABA adopted Model Rule 8.4(g), which prohibits harassment and discrimination by lawyers against eleven protected classes. Rule 8.4(g) states that it is professional misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” About 20 states already have some variation of ABA Model Rule 8.4 on the books, and several other states are considering whether to adopt ABA’s new expansive rule. Lawyers in jurisdictions that have adopted some form of Rule 8.4 must consider whether their use of AI is consistent with the rule. Moreover, even in jurisdictions that have not adopted some form of Rule 8.4, lawyers must consider how bias in the use of AI could create risks for clients.

36 Supra, note 22.
37 Id.
39 ABA Model Rule 8.4(g).

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36 Supra, note 22.
37 Id.
39 ABA Model Rule 8.4(g).
Bias in AI technology stems from the nature of AI tools, which involve machine training rather than programming. If the data used for training is biased, the AI tool will produce a biased result. For example, one major company recently launched an AI tool that could have text-based conversations with individuals. The tool continuously learned how to respond in conversations based on previous conversations. Unfortunately, the tool began to mimic the discriminatory viewpoints of the people it previously engaged in conversation.

As yet another example, the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) software used by some courts to predict the likelihood of recidivism in criminal defendants has been shown by studies to be biased against African-Americans. For these reasons, it is important to have diverse teams developing AI to ensure that biases are minimized. The data used for training AI should also be carefully reviewed in order to prevent bias.

In the AI world, there has been a movement away from “black box” AI, in which an AI model is not able to explain how it generated its output based on the input. The preferred model is now “explainable AI,” which is able to provide the reasoning for how decisions are reached. The importance of transparency in the use of AI is being recognized by governments. New York City, for example, recently passed a law that requires creation of a task force that monitors algorithms used by its government, such as those used to assign children to public schools. One of the task force’s responsibilities is to determine how to share with the public the factors that go into the algorithms.

There are also industry specific laws that prohibit bias and require transparency which may cover AI decision making. Competent counsel should understand these laws and their AI context as well. For example, under the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 et seq., financial institutions that use a credit report or another type of consumer report to deny a consumer’s application for credit, insurance, or employment – or to take another adverse action against the consumer – must tell the consumer, and must give the consumer the name, address, and phone number of the agency that provided the information. Upon the request of a consumer, the agency must promptly provide all information in the consumer’s file at the agency with respect to the consumer. Under both the FCRA and competing state laws, for example, the New York Safe Credit Act (NYSCLC § 1561 et seq.), any financial institution that uses a credit report or another type of consumer report to deny a consumer’s application for credit, insurance, or employment – or to take another adverse action against the consumer – must tell the consumer, and must give the consumer the name, address, and phone number of the agency that provided the information. Upon the request of a consumer, the agency must promptly provide all information in the consumer’s file at the agency with respect to the consumer. For example, one major company recently launched an AI tool that could have text-based conversations with individuals. The tool continuously learned how to respond in conversations based on previous conversations. Unfortunately, the tool began to mimic the discriminatory viewpoints of the people it previously engaged in conversation.

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37 Id.
38 Id.
43 Id.
consumer for a credit score, a consumer reporting agency shall supply to the consumer a statement and notice that includes "all of the key factors that adversely affected the credit score of the consumer in the model used," and any consumer reporting agency shall provide trained personnel to explain to the consumer any information required to be furnished to the consumer under the Act (15 U.S.C. § 1681m for requirements of adverse action notices). And the Equal Credit Opportunity Act ("ECOA"); 15 U.S.C. § 1691 et seq. states:

(a) ACTIVITIES CONSTITUTING DISCRIMINATION It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

Ultimately, the need for lawyers to understand how AI generates outputs is important for combating bias and providing good counsel to clients. And it may be required by legal ethics. As detailed above, lawyers have a duty to communicate with clients, and explaining why AI generates a particular outcome may be included as part of that duty. The good news is that while AI has the potential to be biased, AI is much more predictable than humans. It is easier to remedy bias in machines than it is in humans. Given their role as officers of the court, it is critical for lawyers to be on the forefront of understanding how bias in the use of AI can impact outcomes achieved by the legal profession and society as a whole.

V. QUESTIONS TO ASK WHEN ADOPTING AN AI SOLUTION OR ENGAGING AN AI VENDOR

Lawyers and courts will most likely adopt AI though their third party vendors. Before adopting such solutions, lawyers and courts should ask their vendors the following questions and ensure the vendors understand the following issues:

i. AI Bias, Explainability, and Transparency

- Before using AI, the technology should be determined not to have built-in bias due to its programming or its data.
- The lawyer and court should ensure that AI vendors providing the tool to the lawyer and court are aware of and take into account the potential for bias, including disparate impact.

Questions to ask:
Can the result of the AI’s decision be explained in a meaningful and lawful way to affected stakeholders, where appropriate?
Can the training set examined to minimize potential of data bias?
Do the AI’s data and machine-learning operations reinforce bias? Do the operations fail to or give poor performance for certain segments of the population due to age, gender, race, ethnicity, etc.?
Does the AI identify itself as AI where appropriate or required by law?

Ethical and Beneficial

AI, its production, and deployment should be beneficial (or at least not detrimental) to the lawyer, the court, clients, and society in general.
Deployment of AI should take into account the needs and viewpoints of the lawyer's and court's various stakeholders (e.g., clients, plaintiffs, defendants).
The use of AI should take into account accessibility for those with disabilities, both enhancing access where possible and minimizing impacts on the disabled (for example, an online chatbot provided by a court might also have a voice interface, or vice versa).
The use of AI should align with the ethical codes and principles.

Questions to ask:
Does AI promote civil activities, where appropriate (e.g., AI tools that do not hinder freedom of speech or assembly)?
Depending on the industry, does AI accommodate diverse populations?

Monitoring, Accountability, Controls, and Oversight

The lawyer and court should have control and oversight of AI vendors and what AI does and how it operates.

The use of AI should be monitored for potential legal and ethical issues.
AI should be designed to retain records and to allow for the re-creation of decision-making steps or processes, especially when accidents might occur.
Legal counsel should be part of the process of accountability, controls, and oversight in order to protect the attorney-client privilege as well as to ensure legal compliance.
AI and its usage should be audited and auditable.

Questions to ask:
Is there a single lawyer, staff person, or officer, such as a Chief Artificial Intelligence Officer, who oversees the AI program?
Does the lawyer or court understand AI and its risks?
  o Is the AI semi-autonomous or fully autonomous?
  o Does the AI incorporate machine learning or is it static?
Are people interacting directly with AI, and how?

- How does the lawyer or court know if the AI is operating properly?
- Is the keeping of AI data and decisions part of the lawyer’s or court’s records retention policy and obligations?

VI. CONCLUSION

This resolution, if adopted, will urge lawyers and courts to address the emerging ethical and legal issues related to the usage of artificial intelligence as described in this report.

Respectfully submitted,

William B. Baker
Chair, Science & Technology Law Section
August 2019
1. **Summary of Recommendation(s).**
   The American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence (“AI”) including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.

2. **Approval by Submitting Entity.**
   Approved by Science & Technology Law Section on May 6, 2019.

3. **Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?**
   No

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**
   In August 2012, the ABA amended Model Rule 1.1 of the Model Rules of Professional Conduct to add Comment 6, which states that a lawyer has a responsibility to keep abreast of the benefits and risks associated with using relevant technology.46 This resolution urges action related to a specific type of technology, AI, that is or will become increasingly used in business and by lawyers.47

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.**

46 See generally https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/.

The Section of Science & Technology Law intends to study with interested ABA entities a possible model standard for legal and ethical usage of AI by courts and lawyers. This resolution could also be used by the ABA, as well as by ABA members to promote continuing legal education related to AI.

8. Cost to the Association. (Both direct and indirect costs.)
Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to arranging teleconference calls for Section members and other interested persons, as part of the staff members’ overall substantive responsibilities.

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

10. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)
This Report with Recommendations was circulated to the leadership of the ABA Section of Civil Rights and Social Justice, Innovation Center, Litigation, CPR, Judicial Division, GP Solo, and Law and National Security.

11. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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EXECUTIVE SUMMARY

1. **Summary of the Recommendation.**

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- (1) bias, explainability, and transparency of automated decisions made by AI;
- (2) ethical and beneficial usage of AI; and
- (3) controls and oversight of AI and the vendors that provide AI.

2. **Summary of the issue which the Recommendation addresses.**

Artificial intelligence promises to change the practice of law. There are many different ways that lawyers today are using AI to improve productivity and provide better legal services to their clients, and the usage of AI tools in the legal profession will only increase. It is essential for lawyers to be aware of:
- (a) how AI can be used in their practices, including who their ethical duties apply to the use of AI,
- (b) the problem of bias in the development and use of AI, and
- (c) proper control and oversight of the use of AI by lawyers and their vendors.

3. **An explanation of how the proposed policy position will address the issue.**

The proposed policy position will increase understanding in the legal profession of the legal and ethical issues posed by the usage of AI.

4. **A summary of any minority views or opposition which have been identified.**

N/A

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4. **A summary of any minority views or opposition which have been identified.**

N/A
In September 2011, the Center for Human Rights launched the global Justice Defenders Program, which supports human rights defenders (lawyers, advocates, and journalists) suffering governmental reprisal for their human rights advocacy. Funded by a grant from U.S. State Department, to date the Justice Defenders Program has helped more than 1,000 advocates in more than 60 countries, and leveraged more than $3 million in pro bono assistance.

In February 2012, at the Center’s behest, the ABA House of Delegates endorsed the United Nations Guiding Principles on Business and Human Rights (UNGP) globally. Guided by a diverse, multi-disciplinary and multi-sectoral advisory board comprised of experts from across the globe, one of the project’s primary aims is to enhance the private sector’s ability and willingness to confront and resist governmental corruption in developing countries.

To the benefit of this ABA work on human rights defenders and business and human rights, an important new analytical and operational framework has been developed in the report, “Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders: Guidance for Companies” (hereafter “Shared Space”), published jointly in September 2018 by the Business & Human Rights Resource Centre and the International Service for Human Rights.

As its title implies, Shared Space posits that the private sector benefits from the work of human rights defenders (HRDs) and therefore should lend its collective weight and influence to supporting that work, for the sakes of both HRDs and business:

Business and civil society operate in and benefit from a “shared space” defined by common, fundamental elements. The rule of law and freedom of expression, association and assembly are essential to the realization of all human rights, to good governance and accountable institutions. These elements are also critical to good governance and accountable institutions. These elements are also critical to protect human rights (Pillar I); business enterprises have a responsibility to respect human rights by conducting due diligence to prevent or mitigate harmful impacts (Pillar II); and both government and business have a responsibility to provide a reliable remedy for such harms (Pillar III).

Upon adoption of that policy, the Center established its Business and Human Rights Project to help effectuate the policy and promote implementation of the UNGPs globally. Guided by a diverse, multi-disciplinary and multi-sectoral advisory board comprised of experts from across the globe, one of the project’s primary aims is to enhance the private sector’s ability and willingness to confront and resist governmental corruption in developing countries.

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stable, profitable and sustainable business environments in which companies thrive and economies prosper.²

Yet this shared space is as much an ideal as it is a reality. The strength of the shared space is tested by a history and legacy of mistrust between elements of civil society and business, especially between multinational corporations in certain industries and local communities in the Global South. This mistrust reflects actions, whether intentional or inadvertent, by individual companies and even entire industries to undermine civic freedoms and to undercut human rights defenders (HRDs). It persists in episodic conflicts and confrontations in almost every region. Yet standards and practices have evolved over the last two decades to encourage or require companies to respect human rights – however incompletely and inconsistently. Moreover, company engagement and consultation with local communities and stakeholders is overcoming conflict and confrontation in places and ways that encourage further progress.³

Shared Space seizes upon this growing moment of “overcoming conflict and confrontation” to provide an analytical framework by which companies can more systematically weigh the risks, benefits, means, and methods of supporting the work of HRDs and realizing its long-term economic benefits. In the process, such deeper supportive engagement by business would advance the purposes of the UNGPs, on which Shared Space is largely based.⁴

As illuminated further below, the ABA’s endorsement of the Shared Space framework will enable relevant ABA entities to encourage implementation of the Shared Space guidance by the private-sector, and thereby leverage the considerable influence of the legal profession throughout the work of business to protect HRDs (as does the Justice Defenders Program) and thus advance human rights and a just rule of law for all.

The Guidance

The guidance set forth in Shared Space is premised on three conceptual “contexts”: the normative framework; the business case; and a moral choice. The remainder of this

³ Shared Space, supra n.2, at 6.
⁴ Indeed, while acknowledged as the global standard by which the private sector should conduct its activities in relation to human rights, the UNGPs are voluntary and so do not carry the force of law (though they might acquire the status of customary international law and, as such, become enforceable). The private sector’s voluntary participation in having developed and now implementing the UNGPs therefore is critical to realizing the business community’s enormous potential to advance human rights while also thriving in the marketplace. Shared Space offers practical and potentially profitable means of extending the private sector’s voluntary support of the UNGPs beyond the due diligence standards set forth therein.

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report draws heavily on Shared Space itself to elucidate these contexts, and closes with a suggested framework for corporate decision-making within them.

1. The Normative Framework

Governments must be the primary guarantors of civic freedoms and protectors of HRDs. But governments are also usually those who initiate pressures on civic freedoms and perpetrate attacks on HRDs, even as companies may be sometimes complicit or even directly responsible.

The Shared Space normative framework therefore centers on the second pillar of the UNGPs, clarifying the company responsibility to respect human rights. The responsibility to respect sets the clear expectation that companies should avoid causing or contributing to adverse impacts connected to their business operations or relationships; exercise due diligence to identify, prevent, mitigate and account for how they address such adverse impacts; and provide for or cooperate with remediation when necessary.

Yet there is an emerging view in the business and human rights community that the responsibility to respect human rights can extend beyond cases where companies may cause, contribute, or are linked to a human rights harm per the UNGPs. Indeed, while there is a clear normative responsibility for companies to respect human rights as set forth in the UNGPs, companies have a discretionary opportunity to go above and beyond these defined responsibilities and expectations. In fact, a growing number of companies are taking certain actions that demonstrate that they interpret their responsibility to respect human rights in ways that can be seen as promoting and even in some circumstances protecting human rights – especially in recent responses to threats to civic freedoms and human rights defenders.

Companies therefore should follow first and foremost this overall normative framework (anchored in the UNGPs), and reinforced by other international, regional and national standards. They should also be informed by evolving expectations that the corporate responsibility to respect human rights can extend to promoting and even protecting human rights in certain circumstances.

5 See Shared Space at 29-30 (internal citations omitted). “The UN Declaration on Human Rights Defenders recognizes that everyone ‘has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.’” Further, the UNGPs have been incorporated in the 2011 revision of the OECD Guidelines for Multinational Enterprises and in the revisions to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Importantly, the 2018 OECD Due Diligence Guidance for Responsible Business Conduct makes specific references to reprisals against civil society and human rights defenders who document, speak out about, or otherwise raise potential and actual human rights impacts associated with company operations. It also mentions HRDs and CSOs as relevant stakeholders for engagement.

6 Id. at 30 (internal citations omitted). An example of this is found in the UN Sustainable Development Goals (SDGs), which set forth 17 global social and economic development objectives and have attracted consistent support from governments and businesses alike.

5 See Shared Space at 29-30 (internal citations omitted). “The UN Declaration on Human Rights Defenders recognizes that everyone ‘has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.’” Further, the UNGPs have been incorporated in the 2011 revision of the OECD Guidelines for Multinational Enterprises and in the revisions to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Importantly, the 2018 OECD Due Diligence Guidance for Responsible Business Conduct makes specific references to reprisals against civil society and human rights defenders who document, speak out about, or otherwise raise potential and actual human rights impacts associated with company operations. It also mentions HRDs and CSOs as relevant stakeholders for engagement.
2. The Business Case

The business case should be subordinated to the determination of whether there is a normative responsibility to act based on the UNGPs. But if there is not such a clear responsibility, there is a compelling business case for companies to support civic freedoms and HRDs based on the premise that companies and civil society alike depend on the shared space of accountable governance; and that HRDs play critical roles in protecting and expanding civic freedoms which benefit both companies and individuals.

Companies need transparency, accountability, and predictability to enable sustainable and profitable growth and to encourage entrepreneurship and innovation. For these foundational elements of the shared space to survive and thrive, companies should support and defend civic freedoms and human rights. Moreover, such support can help companies manage operational and reputational risk; to build competitive advantage with increasingly conscious consumers, investors and employees; to overcome legacies of mistrust; and to secure the social license to operate both locally and globally.

The business case also considers the risks of inaction in contrast to the risks of action in preserving this shared space.

3. A Moral Choice

Moral objectives are of course embedded in the normative responsibility to act consistent with the UNGPs, which are in turn anchored in the Universal Declaration of Human Rights. But as with the business case, they are salient – indeed essential – for companies to consider as they decide whether to act on issues and in situations where they have a discretionary opportunity rather than that normative responsibility.

The moral choice challenges companies to act in accordance with the two corollary principles of “do no harm” anywhere and “do good” when possible. These moral considerations are rooted in centuries of religious theology and moral philosophy which inform both commonplace ethics and contemporary jurisprudence.

The “do no harm” principle implies a moral obligation to avoid perpetrating damaging actions or supporting those by others, including legal, legislative or regulatory efforts by governments that undermine civic freedoms and HRDs. The “Good Samaritan” principle goes further, recognizing a duty to protect the civil society space – including specific civic freedoms and certain HRDs – against attacks. These corollary principles challenge companies to make moral choices at both the organizational and individual levels: individuals cannot act unilaterally within companies except in rare circumstances; but they can contribute to the development of ethical and accountable corporate cultures.

significant commitment and action on the part of both states and major companies around the world since their launch in 2015. SDG 16 is “dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. Protection of civic freedoms and human rights defenders are critical elements for meeting SDG16.
Further, the “do no harm” principle is reinforced by jurisprudence in which omission or inaction may be equated with complicity. Therefore, consistent with their normative responsibility to respect human rights established by the UNGPs, companies are expected to make certain moral choices to “do no harm.” Such expectations include ensuring that their business operations and public policy positions do not contribute to the erosion of the civic freedoms on which their shared space with civil society depends—or to the endangerment of individual HRDs or local communities.7

The corollary of the “do no harm” anywhere principle is “do good when possible” derived from the age-old “Good Samaritan” principle. The principle, however, is not categorical: companies will be held accountable only if acting would not expose them to unreasonable risk. Such a situation would arise when companies use leverage or deploy resources to assist HRDs in the face of attack or hardship in instances where acting imposes little or no serious risk to their own personnel. (However, if the adverse human rights impact in question is linked to the company through its business relationships, it has a responsibility to respect human rights under the UNGPs, and it will be expected to seek to prevent or mitigate the impact.) Decisions to act in these ways may also serve to further the company’s external reputation, thus demonstrating alignment between the business case and a moral choice.

4. Decision-making Framework

The decision framework offered in Shared Space is both analytical and operational: analytical to assess the critical factors useful to make such determinations; operational to evaluate the spectrum of actions that companies can take in various circumstances. The framework is not designed necessarily to result in an affirmative determination to act in any or all circumstances; indeed, it identifies a range of risks related to company action as well as to inaction. But it supports the conclusion that in many circumstances, companies can and should act to protect civil society space and/or to defend HRDs or organizations against government attacks and repression.

Again, there are two rationales leading to company action on behalf of civic freedoms and HRDs:

- A normative responsibility to act consistently with the UNGPs if the company has caused, contributed or is linked to a human rights harm or adverse impact through its direct operations or relationships; and
- A discretionary opportunity to act, even if one of these factors pertaining to the UNGPs do not apply, by drawing on the business case, weighing the costs of action versus inaction, and making a moral choice.

7 Id. at 35-36.
Thus, the four steps outlined below set forth a logical progression of factors that companies can evaluate in making the determination whether to engage:8

i. Establish the reality and severity of the harm threatened to the civic freedom or human rights defender, including the veracity of the allegations and the credibility of their source.

As companies determine whether to act – as a normative responsibility or a discretionary opportunity – they should first focus on the facts of the issue or situation. They will often be aware of an issue or situation through the media and/or be approached by a CSO/NGO, HRD or trade union to address it. Most important and urgent is an assessment of the reality and severity of the risk, threat or allegation. The UNGPs set forth a due diligence framework that should inform company assessments of these factors

ii. Establish the degree of company involvement – cause, contribution or other linkage to the threat or the harm (consistent with UN Guiding Principle 13).

The first concern for a company when faced with an attack on civic freedoms or HRDs is establishing a normative basis for a response. Under international human rights law, as reaffirmed by the UNGPs, the primary duty to protect human rights lies with governments. Yet as outlined in the normative framework, companies have the scope to act when governments fail to uphold their duty to protect the rights of their citizens or commitments human rights violations directly. Moreover, if the companies’ own actions or omissions cause or contribute to the harm or impact, or if they are directly linked via business relationships, the UNGPs establish that they have a responsibility to act.

iii. Identify the form(s) of company action, taking into account its leverage, that maximize the potential positive impact on civic freedoms and/or HRDs.

As outlined in UN Guiding Principle 19, if a company has caused or may cause a negative human rights impact, the company should take necessary steps to stop or prevent the impact. Furthermore, if a company either contributes or is linked to a negative human rights impact, the company should use its leverage to mitigate the negative impact as much as possible. In other words, “[i]f the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it.”

iv. Identify the relative risks of action and inaction to the civil society/rights holders and to the company relative to the issue or situation.

If direct “cause, contribute” or other direct linkage between a company and the threat or harm cannot be established in relation to an issue or situation, companies still have the discretionary opportunity to act based on the business case and a moral choice.

8 Shared Space at 39-40. The first three steps pertain to actions compelled by the normative responsibility of companies in certain circumstances. The first, third and fourth steps pertain to actions encouraged by the discretionary opportunity of companies in certain circumstances. The Guidance goes on to apply the proposed decision-making framework in various illustrative, real-world scenarios.
The last step in making such a determination of whether – and if so how – to engage is to consider the range of risks for the company itself as well as for the civil society, local community and/or HRDs for which they are considering support. While companies will understandably be inclined to consider the risks of action first, they should also consider just as carefully the risks of inaction.

Both individuals and law firms providing counsel to business on human rights issues – and company decision-makers themselves – consider many of the risks cited when some argue for inaction are more perceived than material. Such perceived risk can have a chilling effect, as key decision-makers in companies tend to err on the side of caution – and overlook the corollary risks of inaction. Nonetheless, responsible companies should give careful consideration to both the risks of action and inaction. Realistic perception of the risks is improved through consultation with various civil society stakeholders, as well as home country government embassies, to provide context for the company’s actions. Building relationships with local community service organizations and HRDs can lead to better information sharing between civil society and company decision-makers.

Conclusion

As more companies are coming to appreciate, the civil society space is the basis of sustainable and profitable business. Governments and leaders come and go: authoritarian regimes may become democratic; democracies may become illiberal. But communities – physical and digital – endure for the long run. People remember who does what to help or hurt them as nations and governments rise and fall.

Companies cannot expect to operate sustainably and profitably without some degree of support from civil society in the face of growing pressures and expectations for transparency and accountability, reinforced by standards and regulations. Companies must command the support of their employees and shareholders, their customers and users; they must protect their brands and reputations. All are at risk if they undermine or violate the shared civil society space.

Multinational corporations – above all – know that they are both powerful and vulnerable in the 21st century world of geopolitical as well as technological disruption. Now they need to understand that the global and local civil society space is their business environment as much as any government jurisdiction. Now they must also recognize that the shared space is under pressure, threat and even attack around the world. The challenge for companies is not to pick fights with governments in whose countries they operate, but neither to avoid action when they have a clear responsibility or opportunity. The challenge is to take stands – carefully but deliberately – when the shared civil society space is under pressure, threat or attack. The opportunity for companies is to support and defend that shared space when it is imperiled and can no longer be taken for granted.

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ã Shared Space at 53.

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Lawyers, therefore – whether in-house or external counsel – are key players in this analytical and operational framework to protect the space that their corporate clients share with HRDs, and to create the better future that all seek. As the national representative of the legal profession in the United States, enjoying global reach and influence, the American Bar Association should back this process in both word and deed.

Respectfully submitted,

Hon. Bernice B. Donald
Chair, Center for Human Rights
August 2019

The analytical and operational framework referenced in the resolution provides guidance to business enterprises in using their influence to protect the civic space they share with human rights defenders and, in so doing, to strengthen the political, social, economic, and legal climate in which they operate, thereby enhancing their own business operations. The key elements of the framework are 1) the existence of a relevant normative framework (applicable international standards either compel or strongly urge action by the enterprise); 2) the business case (international standards may be agnostic or silent on the question, but it makes good business sense for the enterprise to act); and 3) moral choice, where neither 1 nor 2 above are compelling but the enterprise chooses to take a moral stand on behalf of the human rights defender(s). Thus, the framework rests on either a normative responsibility to act or a discretionary opportunity to act.

A companion analysis to the framework outlines four steps that set forth a logical progression of factors that companies can evaluate in making the determination whether to engage: 1) Establish the reality and severity of the harm threatened to the civic freedom or human rights defender, including the veracity of the allegations and the credibility of their source; 2) establish the degree of company involvement – cause, contribution, or other linkage to the threat or the harm (consistent with UN Guiding Principle 13); 3) identify the form(s) of company action, considering its leverage, that maximize the potential positive impact on civic freedoms and/or human rights defenders; and iv) identify the relative risks of action and inaction to the civic society/rights holders and to the company relative to the issue or situation.

2. **Approval by Submitting Entity.** The resolution was approved by the CHR Board in April 2019.

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 supports the 2012 policy endorsing the United Nations Guiding Principles on Business and Human Rights.
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. CHR will promote the Shared Space Guidance among private-sector audiences and urge its implementation as appropriate.

8. Cost to the Association. (Both direct and indirect costs) No additional direct or indirect costs to the Association are anticipated.

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

10. Referrals. The Resolution with Report has been referred to the Business Law Section, the Section of Civil Rights and Social Justice, the Health Law Section, the Section of International Law, the Section of Labor and Employment Law, and the Section of Litigation, as well as the Center for Public Interest Law and the Commission on Domestic & Sexual Violence, the Commission on Immigration, and the Commission on Sexual Orientation and Gender Identity.

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

   Michael Pates, CHR Director
   American Bar Association
   1050 Connecticut Ave, NW, Fourth Floor
   Washington, DC 20036
   202/662-1025
   michael.pates@americanbar.org

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

   Hon. Bernice B. Donald, CHR Chair
   American Bar Association
   1050 Connecticut Ave, NW, Fourth Floor
   Washington, DC 20036
   240/476-1870 (CHR Director)
   Amy.Robinson@ca6.uscourts.gov (assistant)
1. **Summary of the Resolution**


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

Business enterprises have tremendous potential both to advance developing economies and, in the process, to harm affected populations, particularly to the extent that business practices support corrupt governments directly or indirectly. This often means that business also has the influence and the opportunity to support human rights defenders who confront those governments and promote greater adherence to the rule of law. The Guidance that is the subject of the resolution provides an analytical and operational framework by which business, including legal counsel, can provide such support and, in so doing, enhance the human rights of affected populations while improving the overall business climate.

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

Building on February 2012 ABA policy endorsing the United Nations Guiding Principles on Business and Human Rights, the resolution endorses a framework for decision-making by business enterprises to support human rights defenders working to improve the rule of law "space" they share with business.

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

None received thus far.
RESOLVED, That the American Bar Association affirms that human dignity — the inherent, equal, and inalienable worth of every person — is foundational to a just rule of law; and

FURTHER RESOLVED, That the American Bar Association urges governments to ensure that “dignity rights” — the principle that human dignity is fundamental to all areas of law and policy — be reflected in the exercise of their legislative, executive, and judicial functions.
All human beings are born free and equal in dignity and rights. Universal Declaration of Human Rights (1948)

Human dignity stands for the simple and undeniable proposition that all human beings have worth that is equal, inherent, and inalienable. In the aftermath of World War II, it was universally recognized as "the foundation of freedom, justice and peace in the world." Since then, it has been recognized in more than 10 international human rights treaties, in the constitutions of nearly 160 nations, and innumerable domestic laws. It has also been instrumental in thousands of juridical decisions from international and regional tribunals and from domestic courts on every continent, including at the national and subnational level in the United States.

The U.S. Supreme Court has for decades invoked dignity as foundational to rights protected under the Eighth Amendment, the Due Process and Equal Protection Clauses, and in respecting rights of the accused, the infirm, the transient, and the dispossessed under other constitutional provisions.

The right of every person, everywhere to have his/her dignity respected is the very purpose of human rights, justice, and democratic rule of law. The ABA therefore should formally embrace "dignity rights" as such in advocating for human rights and a just rule of law domestically and internationally. Indeed, ABA recognition and reflection of dignity rights would bring the ABA and its members closer to the worldwide standard for human rights and strengthen its positioning as a leader within the United States in matters of justice, democracy, and rule of law.

The resolution would have the immediate effect of strengthening the ABA's work in several ways. First, it would ensure that the ABA is on solid policy ground when it condemns practices, such as torture, humiliation and invidious discrimination. Second, it would provide support for ABA activities that are designed to advance human dignity, policies and practices that promote rule of law, democratic and political rights, and other civil rights. Third, it would provide a vocabulary for defending liberty and pursuing justice. Fourth, it would serve as a unifying principal to reflect what matters most to Association: "Defending liberty and pursuing justice."

This report has three parts: Part I elucidates the concept of dignity rights and describes its evolution; Part II details the extent to which dignity rights already undergird U.S. law; and Part III examines the growing recognition of dignity rights in constitutions and courts around the globe.

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I. Dignity Rights Overview

The concept of human dignity means, quite simply, that every person has inalienable equal worth. This incontrovertible but profound concept has three elements. First, every member of the human race has value; no one can be dismissed, ignored, mistreated, or abused as if their humanity does not matter. Moreover, every human being has a right to agency, to self-development, to choose one’s life course. Second, each person’s worth is equal to every other person’s. No one’s life is more important than any other person’s. Each person’s right to human flourishing, is the same as every other’s. Notwithstanding our myriad individual differences, dignity is what unites us: in our humanity, we are all the same. Third, each person’s worth is inherent and inalienable; human dignity exists whether or not governments recognize it, and powers public and private must be held to respect and promote it.

Over the last century, dignity increasingly has been recognized as a legal right in the United States and throughout the world, particularly since the creation of the United Nations and the adoption of the Universal Declaration of Human Rights (UDHR). The Charter of the United Nations explains that its very purpose is to protect human dignity. The UDHR recognizes that “the inherent dignity … of all members of the human family is the foundation of freedom, justice and peace in the world,” and that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Advancing human dignity also is a central feature of both the International Covenant on Civil and Political Rights (which the United States has ratified), and the International Covenant on Social, Economic and Cultural Rights (which it has not). Together, these instruments are binding on almost all nations of the world.

Moreover, human dignity serves as a central feature of other human rights instruments, such as the UN Convention on the Rights of the Child, the Stockholm Declaration on the Human Environment, and the UN Sustainable Development


7 Convention on the Rights of the Child, UNDRIP. The United States is a signatory to the former.

8 “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.” http://www.un-documents.net/unhodec.htm

I. Dignity Rights Overview

The concept of human dignity means, quite simply, that every person has inalienable equal worth. This incontrovertible but profound concept has three elements. First, every member of the human race has value; no one can be dismissed, ignored, mistreated, or abused as if their humanity does not matter. Moreover, every human being has a right to agency, to self-development, to choose one’s life course. Second, each person’s worth is equal to every other person’s. No one’s life is more important than any other person’s. Each person’s right to human flourishing, is the same as every other’s. Notwithstanding our myriad individual differences, dignity is what unites us: in our humanity, we are all the same. Third, each person’s worth is inherent and inalienable; human dignity exists whether or not governments recognize it, and powers public and private must be held to respect and promote it.

Over the last century, dignity increasingly has been recognized as a legal right in the United States and throughout the world, particularly since the creation of the United Nations and the adoption of the Universal Declaration of Human Rights (UDHR). The Charter of the United Nations explains that its very purpose is to protect human dignity. The UDHR recognizes that “the inherent dignity … of all members of the human family is the foundation of freedom, justice and peace in the world,” and that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Advancing human dignity also is a central feature of both the International Covenant on Civil and Political Rights (which the United States has ratified), and the International Covenant on Social, Economic and Cultural Rights (which it has not). Together, these instruments are binding on almost all nations of the world.

Moreover, human dignity serves as a central feature of other human rights instruments, such as the UN Convention on the Rights of the Child, the Stockholm Declaration on the Human Environment, and the UN Sustainable Development


7 Convention on the Rights of the Child, UNDRIP. The United States is a signatory to the former.

8 “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.” http://www.un-documents.net/unhodec.htm
Goals (SDGs). Human dignity also is a constitutional guarantee in nearly 160 countries.10

II. Dignity Rights in the United States

Dignity increasingly is impacting U.S. law. The U.S. Supreme Court has invoked dignity in upholding basic civil and political rights, such as to citizenship ("[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man"),11 to equal treatment (the "Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens,"12 to treatment when subject to criminal arrest ("[t]he constitutional foundation underlying respect a government – state or federal – must accord to the dignity and integrity of its citizens"),13 to fairness in treatment of the poor ("[f]rom its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders,"14 and to dignity in administration of the death penalty ("The [Constitution] sets forth, and rests upon, innovative principles original to the American experience [and includes] broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity."15

The concept of dignity has been attached to constitutional protections in other ways as well. In the early 1960s, Justice William O. Douglas applied the constitutional right of dignity to "suspect minorities."16 In the 1970s the Supreme Court invoked human dignity as a basis for recognizing rights of aliens,17 and in the 1980s, of women,18 older Americans,19 and people with disabilities.20 This trend has continued (and grown) into the present. In 2017, the Supreme Court invalidated a citizenship law creating different standards for unwed mothers and fathers. In that case, Justice Ginsburg held that the disparity in the criteria for the different genders "cannot withstand inspection under a Constitution that requires

8 Adopted by all UN member states in 2015, the SDGs "envisage a world of universal respect for human rights and human dignity," recognize "that the dignity of the human person is fundamental," and establishes a goal to "ensure that all human beings can fulfill their potential in dignity and equality and in a healthy environment." https://sustainabledevelopment.un.org/?menu=1300
9 https://delawarelaw.widener.edu/prospective-students/jd-program/jd-academics/signature-programs/dignity-rights-project/dignity-rights/
the Government to respect the equal dignity and stature of its male and female citizens."

In First Amendment jurisprudence, dignity operates both as a sword (assuring the right to express oneself freely and the right to information to make such expression meaningful) and as a shield (protecting against defamatory and other harmful speech). Thus defamation laws, as well as laws suppressing hate speech, fighting words, and other speech "which by its very utterance inflicts injury" might in fact promote individual dignity. The free speech case of Cohen v. California braided together ideas of political discourse, individual autonomy and human dignity, holding that the First Amendment puts "the decision as to what views shall be voiced largely into the hands of each of us, ... in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." 

In substantive due process cases, the Supreme Court has shifted its privacy jurisprudence toward a more textually grounded concept of liberty, undergirded by the recognition of human dignity. A plurality in Planned Parenthood of Southeastern Pennsylvania v. Casey decided that the right to choose to terminate a pregnancy was a choice "central to personal dignity and autonomy" and constitutionally protected because "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life..." And more recently, in Obergefell v. Hodges, the Supreme Court observed that the liberties protected under the due process clauses "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs" and therefore include the choice to marry a person of the same gender. These cases demonstrate the Court's profound commitment to restoring the substantive right to liberty on a foundation of individual human dignity.

Relying on these cases, plaintiffs in the U.S. are beginning to embrace, and advocate, the recognition of their own dignity in enforcing other legal rights. The notion of dignity as the development of one's identity and the ability to make personal choices directing one's life path has been invoked by the so-called "Dreamers" to maintain the Deferred Action for Childhood Arrivals (DACA) policy. The argument is that DACA allows its recipients "to live their lives with the same dignity and liberty that others have: to be gainfully employed and free to be with

25 Obergefell v. Hodges, 576 U.S. 116 (2016). See also Masterpiece Cakeshop v Colorado Civil Rights Commission, 584 U.S. ___ (2018) ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.").
family and friends and to form the other enduring attachments of normal life.\textsuperscript{26} In a case originally brought against President Obama in 2015, a group of child plaintiffs make the claim that their dignity is harmed by the potentially catastrophic effects of climate change and the government’s failure to take action to mitigate it.\textsuperscript{27} Plaintiffs are beginning to recognize that dignity connects them to legal issues in a way they can understand and ‘own’ and can bolster their arguments when invoking a specific right.\textsuperscript{28}

Dignity rights are also a feature of subnational constitutions, including in Montana (“The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws\textsuperscript{29}”) and Puerto Rico (“The dignity of the human being is inviolable\textsuperscript{30}”).

III. Dignity Rights around the Globe

Dignity rights have been recognized in the constitutions of nearly 160 countries in all regions of the world.\textsuperscript{31} Dignity is becoming a universally recognized constitutional value, transcending geographic, cultural, and political boundaries. Today, few constitutions are adopted or meaningfully amended without adding a reference to human dignity, and most protect human dignity in a variety of ways.\textsuperscript{32}

Indeed, promoting human dignity often serves as the very basis for national existence, as is expressed in the Constitution of Peru, which states, “The defense of the human person and respect for his/her dignity are the supreme purpose of the society and the State.”\textsuperscript{33} The Constitution of India includes, as one of its fundamental aims, to assure “the dignity of the individual.”\textsuperscript{34} In the more recent constitution of Tunisia, dignity is an element of the republic’s motto as well as an enforceable right.\textsuperscript{35}

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The constitutions of many nations, moreover, assert that dignity is an independent, enforceable, and substantive right. For example, the German Basic Law of 1949 provides that, “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”36 Such constitutional ‘inviolability’ of human dignity is increasingly common.37 Constitutions also protect human dignity in a way that reinforces or animates other rights. The 1948 Constitution of Italy states, “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.”38 The 2011 Constitution of Morocco states, “No one may inflict on others, under whatever pretext there may be, cruel, inhuman, [or] degrading treatments or infringements of human dignity.”39 Constitutions also sometimes recognize the dignity of certain vulnerable segments of the population, including women, children, the elderly, and prisoners. Often, dignity animates several aspects of a single constitution, as in South Africa, Kenya, Colombia, and other countries, where it is recognized as a fundamental value as well as one or more enforceable rights.40

Because of these provisions, and of the global movement to appreciate the fundamental role that recognition of dignity plays in the application of human rights, more and more cases are being brought before courts around the world demanding the protection of human dignity. And jurists are increasingly embracing the opportunity to give meaning to dignity, even in cases where it is not absolutely needed for the resolution of the case; that is, they are choosing to address the human dignity dimensions of the claims, just as the U.S. Supreme Court has done in cases such as those cited above.

In the last few decades, dignity rights have been invoked, interpreted, and applied by courts in thousands of cases and in a wide variety of factual settings. Notable examples include: Argentina, where dignity is the foundation of speech and right of association;41 South Africa, where civic dignity protects voting rights and other rights associated with the political process;42 Israel, where it is a “mother right” whose “daughters” include the right of family unity as well as the right of prisoners to be treated humanely, among many other rights;43 Colombia, where dignity is a measure of the state’s obligation to provide health care;44 Germany, where the level of pension benefits must allow a person to live...

These cases reveal that human dignity – while an intrinsic and universal human quality – is also a right that governments are bound to respect and that courts are bound to enforce. They show that dignity is a concept that has a defined meaning in law to strengthen democratic institutions while empowering individuals to demarcate the limits of governmental power and expand their own liberty. Courts have used dignity to elucidate when rights are violated and to remedy personal harms. Recognizing dignity does not mean that plaintiffs always win, of course; yet it draws attention to the what is at stake in these cases, provides a framework for addressing competing values, and ultimately improves the prospects of achieving justice. Overall, the cases align closely with the ABA’s motto of “Defending Liberty, Pursuing Justice.”

Conclusion

Human dignity is the foundation of human-rights protection in the twenty-first century. Because it recognizes and reflects that every person is equal in his or her human worth, and attaches to every person equally – regardless of gender, race, social or political status, talents, merit, or any other differentiator — it represents the commitment to equality and non-discrimination that is fundamental to American law and to a just rule of law anywhere in the world. Because it recognizes and reflects that every person has worth that must be respected, it also represents the law’s affirmation that every person must be treated fairly and justifies the law’s commitment to due process.

More nearly than any other human or legal right, dignity expresses the human experience, as human beings experience it. People may not think in terms of which rights have been violated; but they know when their dignity has been violated, when a government has allowed conditions that make them feel less than in dignity. Nigeria and Ireland, where the right to live with dignity includes the right to a clean and stable environment; Pakistan, where the concept of dignity includes climate and water justice; and India, where dignity guarantees the right to travel.

These cases reveal that human dignity – while an intrinsic and universal human quality – is also a right that governments are bound to respect and that courts are bound to enforce. They show that dignity is a concept that has a defined meaning in law to strengthen democratic institutions while empowering individuals to demarcate the limits of governmental power and expand their own liberty. Courts have used dignity to elucidate when rights are violated and to remedy personal harms. Recognizing dignity does not mean that plaintiffs always win, of course; yet it draws attention to the what is at stake in these cases, provides a framework for addressing competing values, and ultimately improves the prospects of achieving justice. Overall, the cases align closely with the ABA’s motto of “Defending Liberty, Pursuing Justice.”

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equally human or impair their right to full self-development. By focusing on what matters most to people – being treated as a person of equal worth – the law of dignity rights reminds us of what is really at stake. The focus of dignity rights on worth reminds us that every person matters; its focus on equality reminds us that every person matters equally; and its focus on inalienability reminds us that no authority has the power to diminish a person’s dignity.

The ABA’s affirmation of human dignity as the foundation of a just rule of law, democracy, and the advancement of human rights in the United States would mark an important milestone in the annals of the American legal profession.

Respectfully submitted,
Hon. Bernice B. Donald
Chair, Center for Human Rights
August 2019


Violent extremist groups continue to grow from the sense of injustice, futility, and betrayal that stems from predatory state behavior. A comprehensive countering strategy needs to focus squarely on the relationship between citizens and their state by creating leverage for citizens to exercise their democratic power and authority.

Id. Linda Bishai is Director of Research, Evaluation, and Learning at the ABA Rule of Law Initiative.
1. Summary of Resolution(s).

This resolution recognizes the inseparability of human dignity in all areas of law and policy (and not only those typically characterized as discrete “human rights” concerns), and urges governments to carry out their various functions in a manner consistent with this “dignity rights” principle.

2. Approval by Submitting Entity. The resolution was approved by the CHR Board in April 2019.

3. Has this or a similar resolution been submitted to the House or Board previously? No. There have been numerous human rights policies, of course, but none on “dignity rights” specifically.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution supports virtually all the Association’s prior human rights policies by recognizing the core principle underlying each of them, and prioritizing that principle in Association advocacy.

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

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

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. This resolution will reaffirm and enhance the Association’s commitment to human dignity as the animating principle undergirding its range of advocacy on issues.

8. Cost to the Association. (Both direct and indirect costs) No additional direct or indirect costs to the Association are anticipated.

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

10. Referrals. The Resolution with Report has been referred to the:

Business Law Section
Section of Civil Rights and Social Justice
113B
Health Law Section
Section of International Law
Section of Labor and Employment Law
Section of Litigation
Center for Public Interest Law
Commission on Domestic & Sexual Violence
Commission on Immigration
Commission on Sexual Orientation and Gender Identity

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

Michael Pates, CHR Director
American Bar Association
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202/662-1025
michael.pates@americanbar.org

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Hon. Bernice B. Donald, CHR Chair
American Bar Association
1050 Connecticut Ave, NW, Fourth Floor
Washington, DC 20036
240/476-1870 (CHR Director)
Amy_Robinson@ca6.uscourts.gov (assistant)
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution recognizes the inseparability of human dignity in all areas of law and policy (and not only those typically characterized as discrete “human rights” concerns), and urges governments to carry out their various functions in a manner consistent with this “dignity rights” principle.

2. Summary of the Issue that the Resolution Addresses

As with “national security” or “fiscal policy” or myriad other areas of public concern, “human rights” often is thought of as a discrete set of legal and policy issues to be weighed against others. Properly understood, however, human rights forms the foundation of a just rule of law on which all other areas of democratic law- and policy-making are premised. The resolution therefore corrects the misperception by affirming the principle of “dignity rights,” which recognizes human dignity as a fundamental principle underlying a democratic rule of law across all areas of legal and policy concern.

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

Human dignity has existed since human beings have existed. What has changed in the decades since the end of World War II is the irrefutable and irreversible awareness that just laws do and must reflect human dignity. The ABA’s affirmation of human dignity as the foundation of rule of law, democracy, and the advancement of human rights in the United States would mark an important milestone in the ability of Americans to advocate for themselves — in the relationship between attorneys and their clients, in the language in which judges issue rulings, and in the foundation of constitutional rights.

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

None received thus far.

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None received thus far.
RESOLVED, That the American Bar Association urges the United States Government to enforce fully and consistently the Arms Export Control Act and the Foreign Assistance Act, particularly the human rights provisions thereof;

FURTHER RESOLVED, That the American Bar Association urges the United States Government to impose sanctions and other appropriate punitive measures against every person directly or indirectly responsible for the murder of journalist Jamal Khashoggi, and to seek their prosecution in proceedings that are consistent with international law; and

FURTHER RESOLVED, That the American Bar Association urges the Financial Action Task Force (FATF) to require that the Kingdom of Saudi Arabia address and resolve fully FATF’s concerns regarding the Kingdom’s failure to end terrorist financing emanating therefrom and the misuse of its anti-terrorism laws against non-terrorists, including lawyers, and that the Kingdom release all persons it has wrongfully detained, prior to granting the Kingdom membership in FATF.
The murder of the Saudi journalist, Jamal Khashoggi, in the Saudi consulate in Turkey, has drawn renewed attention to the Kingdom of Saudi Arabia’s poor human rights record. The Kingdom has a longstanding reputation as one of the world’s worst human rights abusers, including systematic misuse of its justice system to torture, imprison and execute those who advocate for democratic governance and the rule of law, including a number of lawyers.1

In addition to these concerns, over the last three years the Kingdom has been accused of routine indiscriminate attacks against civilians during hostilities in Yemen, where the Kingdom is trying to restore a regime that it considers a bulwark against Iranian influence.2 A de facto blockade of Yemen by the Saudi-led coalition has contributed to the world’s worst humanitarian disaster, which has forced 12 million Yemenis to the brink of famine.3

In response to these developments, the U.S. Congress has held several unprecedented votes over the last two years, aimed at curbing U.S. support for the Saudi-led coalition’s bombing of Yemen. The Obama administration authorized the sale of more than $100 billion in military equipment and services to the Kingdom before suspending the sale of precision guided munitions due to concerns about unlawful airstrikes.4 The Trump administration has continued negotiations for the sale of another $100 billion in defense articles and services.5 The ranking member of the Senate Foreign Relations Committee, Sen. Menendez, placed a hold on the sale of additional precision guided munitions, which have been used in numerous air strikes that the UN Panel of Experts found to be inconsistent with the laws of armed conflict.6


In response to a congressionally mandated reporting requirement, Secretary of State Michael Pompeo certified that the Saudi-led coalition was taking adequate measures to prevent civilian causalities in Yemen, but acknowledged that the coalition has violated end-use agreements regulating the use of U.S.-origin military equipment. He did not, however, suspend further sales, as required by Section 3 of the Arms Export Control Act for an end-use violation.

A bipartisan group of senators has questioned the veracity of Secretary Pompeo’s certification. In the previous Congress, Sen. Menendez introduced a bipartisan bill that would, inter alia, suspend the sale of certain military equipment, require the Government Accountability Office to review the Pompeo certification, and mandate a State Department report pursuant to Section 502B of the Foreign Assistance Act on whether the Kingdom has engaged in a consistent pattern of gross violations of internationally recognized human rights. Further, Sens. Feinstein and Graham introduced a resolution that would have expressed “the sense of the Senate that Crown Prince Mohammed bin Salman bin Abdulaziz Al Saud of Saudi Arabia be held accountable for contributing to the humanitarian crisis in Yemen, preventing a resolution to the blockade of Qatar, the jailing and torture of dissidents and activists inside the Kingdom of Saudi Arabia, the use of force to intimidate rivals, and the abhorrent and unjustified murder of journalist Jamal Khashoggi.” The full U.S. House and Senate, meanwhile, voted for the first time to adopt a War Powers Resolution to end U.S. participation in the conflict.

ABA Actions to Date

For several years, the ABA Center for Human Rights has been documenting gross human rights violations against human rights advocates wrongly imprisoned in Saudi prisons, including one lawyer who was sentenced to prison for his work on a human rights case.

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for 15 years by a specialized counterterrorism court. The Center has documented significant fair trial violations in the court, including nearly exclusive reliance on torture-derived evidence. It has presented evidence that the specialized court is diverting counterterrorism resources to spurious cases and not effectively investigating terrorism cases. This information was presented to the U.S. Treasury Department as well as the Financial Action Task Force (FATF), a multilateral body charged with monitoring implementation of counterterrorism financing laws.

The Task Force issued an evaluation of Saudi Arabia that confirmed that the Kingdom is relying almost exclusively on confessions in its counterterrorism prosecutions and is likely diverting resources to spurious cases. It further found that the Kingdom has “not yet tackled” the problem of third-party terrorist financing, especially with regard to terrorism outside the Middle East. These findings raise serious concerns about whether the Kingdom has addressed the issues that contributed to the financing of those involved in the 9/11 attacks. In response to these findings, the UN Special Rapporteur on Promoting Human Rights While Countering Terrorism and former U.S. Sen. Bob Graham (who chaired the congressional Joint Inquiry into the 9/11 attacks) have called on FATF not to admit the Kingdom to the Task Force – a step that would open-up financial markets for the Kingdom – until Saudi Arabia has tackled the issue of third-party financing of global terrorism and taken steps to bring its counterterrorism law and prosecutions into compliance with international law.

As to the situation in Yemen, the ABA sent a letter to Sen. Murphy in 2016 noting that ongoing sales of weapons to Saudi Arabia in the face of the misuse of such equipment in Yemen violated Section 502B of the Foreign Assistance Act, which prohibits the provisions of weapons to countries engaged in a consistent


pattern of gross human rights violations. The Center subsequently requested a legal opinion on the matter from Prof. Michael Newton (LTC, U.S. Army ret.). Prof. Newton concluded that, in addition to violating Section 502B, ongoing sales also violate Section 3 of the Arms Export Control Act.

In sum, the Kingdom of Saudi Arabia’s unrelenting history of human rights abuse is intensifying, which demands a response both consistent and compliant with U.S. and international law. The U.S. Government has unique leverage with the Saudi Government, which it should exercise in defense of human rights and promotion of the rule of law. To the extent the ABA might influence the U.S. Government to undertake such action, it should do so.

Respectfully submitted,
Hon. Bernice B. Donald
Chair, Center for Human Rights
August 2019
**1. Summary of Resolution(s).**

RESOLVED, That the American Bar Association urges the United States Government to enforce fully and consistently the Arms Export Control Act and the Foreign Assistance Act, particularly the human rights provisions thereof;

FURTHER RESOLVED, That the American Bar Association urges the United States Government to impose sanctions and other appropriate punitive measures against any and every person directly or indirectly responsible for the murder of journalist Jamal Khashoggi, and to seek their prosecution in proceedings that are consistent with international law;

FURTHER RESOLVED, That the American Bar Association urges the Financial Action Task Force (FATF) to require that the Kingdom of Saudi Arabia address and resolve fully FATF’s concerns regarding the Kingdom’s failure to end terrorist financing emanating therefrom and the misuse of its anti-terrorism laws against non-terrorists, and that the Kingdom release all persons it has wrongfully detained, prior to granting the Kingdom membership in FATF.

This resolution addresses specific legal and policy issues that bear on recent human rights abuses committed by the Kingdom of Saudi Arabia as part of its long record of such abuses. The resolutions urges actions that will address these recent abuses directly and, if implemented, carry significant potential impact on Saudi interests, which may have the effect of curbing the Kingdom’s malign behavior.

2. Approval by Submitting Entity. The resolution was approved by the CHR Board in April 2019.

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 will support and demonstrate the Association’s longstanding commitments to various international human rights instruments and to human rights defenders.

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 president recently vetoed a resolution addressing many of the issues covered in the resolution. It appears Congress will continue its efforts on these issues.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Working with the Governmental Affairs Office, CHR will advocate the resolution before relevant governmental bodies.

8. Cost to the Association. (Both direct and indirect costs) No additional direct or indirect costs to the Association are anticipated.

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

10. Referrals. The Resolution with Report has been referred to the Business Law Section, the Section of Civil Rights and Social Justice, the Health Law Section, the Section of International Law, the Section of Labor and Employment Law, and the Section of Litigation, as well as the Center for Public Interest Law and the Commission on Domestic & Sexual Violence, the Commission on Immigration, and the Commission on Sexual Orientation and Gender Identity.

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

RESOLVED, That the American Bar Association urges the United States Government to enforce fully and consistently the Arms Export Control Act and the Foreign Assistance Act, particularly the human rights provisions thereof;

FURTHER RESOLVED, That the American Bar Association urges the United States Government to impose sanctions and other appropriate punitive measures against any and every person directly or indirectly responsible for the murder of journalist Jamal Khashoggi, and to seek their prosecution in proceedings that are consistent with international law;

FURTHER RESOLVED, That the American Bar Association urges the Financial Action Task Force (FATF) to require that the Kingdom of Saudi Arabia address and resolve fully FATF’s concerns regarding the Kingdom’s failure to end terrorist financing emanating therefrom and the misuse of its anti-terrorism laws against non-terrorists, and that the Kingdom release all persons it has wrongfully detained, prior to granting the Kingdom membership in FATF.

This resolution addresses specific legal and policy issues that bear on recent human rights abuses committed by the Kingdom of Saudi Arabia as part of its long record of such abuses. The resolutions urges actions that will address these recent abuses directly and, if implemented, carry significant potential impact on Saudi interests, which may have the effect of curbing the Kingdom’s malign behavior.

2. Summary of the Issue that the Resolution Addresses

The murder of the Saudi journalist, Jamal Khashoggi, in the Saudi consulate in Turkey, has drawn renewed attention to the Kingdom of Saudi Arabia’s poor human rights record. The Kingdom has a longstanding reputation as one of the world’s worst human rights abusers, including systematic misuse of its justice system to torture, imprison and execute those who advocate for democratic governance and the rule of law, including a number of lawyers.

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

The Kingdom of Saudi Arabia’s history of human rights abuse is intensifying, which demands a response both consistent and compliant with U.S. and international law. The U.S. Government has unique leverage with the Saudi Government, which it should exercise in defense of human rights and promotion of the rule of law. To the extent the ABA might influence the U.S. Government to undertake such action, it should do so.

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

None received thus far.
RESOLVED, That the American Bar Association urges legislatures and courts to define consent in sexual assault cases as the assent of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, to provide that consent is expressed by words or action in the context of all the circumstances, and to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance.
Given the ongoing and contemporary discussions around sexual violence and consent in our society, the recognition that consent to sexual activity may not be assumed or premised is long past due. The time has come to expressly reject the “traditional premise in the law...that individuals are presumed to be sexually available and willing to have intercourse—with anyone, at any time, at any place—in the absence of clear indications to the contrary.” This traditional premise of willingness condones, and encourages, sexual intrusion regardless of the fact that such intimacy was entirely unwanted. This premise is manifested in the enormous number of victims subjected to unwanted sexual intimacy whose experience has been documented in the #MeToo Movement. The proposed definition of consent rejects any traditional premise of willingness, and requires words or action considered in the context of the totality of the circumstances to express a person’s willingness to engage in sexual activity.

As noted by Stephen J. Schulhofer and Erin Murphy, the Reporters for the American Law Institute’s Model Penal Code Sexual Assault Offenses Revision Project, “[t]he decision to share sexual intimacy with another person is a core feature of our humanity and personhood and thus should always be a matter of actual individual choice.” Survivors of sexual violence experience profound violations of their autonomy that shatter the “very foundation of their identity.”

II. Our history, and legal trend

As originally defined under the law, rape prohibited only “[c]arnal knowledge of a woman forcibly and against her will” outside of a marital relationship with her husband and was considered a crime perpetrated against the property of fathers and husbands. Historically, the law imposed unique obstacles upon rape victims that other crime victims did not have to overcome.

Derived from English common law and applicable in most jurisdictions until the mid to late 1970s, these formal rules embodied presumptions against women who complained of having been raped. These rules included absolute exemptions from criminal liability for men who raped their wives. They included requirements that the victim establish that she resisted her attacker to the utmost, freshly complained of having been raped, and corroborated her testimony with other evidence.

3 DEER, supra note 1, at xvi–xvii.
Courts routinely failed to prohibit the use of force or threats by perpetrators and placed the burden of resistance on female victims before they could secure the law's protections—which they often could not. [C]ercive, aggressive, overbearing and even frightening actions, if not physically brutal, were legally permissible. This left countless victims unprotected by criminal law over the centuries and created an appalling norm that allowed sexual aggression to go unchecked in the majority of cases.

As a product of its time, it is not surprising that the 1962 Model Penal Code (MPC) on Sexual Assault and Related Offenses codified this distancing history and continued legal burdens on rape victims of demonstrating more than “token initial resistance.” A significant number of jurisdictions followed the example of the MPC and “require at least ‘reasonable resistance.’”

Fortunately, in reaction to the horrific history of rape law, the recent trend in the states has been clearly and consistently in the direction of requiring words or actions to establish consent except as a defense for persons “who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.” Wis. Stat. §940.225(4). California defines consent as “positive cooperation in act or attitude pursuant to an exercise of free will.” Cal. Penal Code, §281.6.

III. The Position of the ALI Reporters and Council.

In 2012, the American Law Institute (“ALI”) undertook the revision of its Model Penal Code (“MPC”) on Sexual Assault and Related Offenses, which has not been updated since 1962. The related May 14, 2012 Prospectus for a Project Revision recounted the reasons for this revision:

When drafted in the 1950s, Article 213 of the Model Penal Code was a forward-looking document, well ahead of its time. Yet shortly after the ALI approved it in 1962, dramatic social and cultural changes quickly overtook its once-progressive formulations, rendering them outdated and in some instances even offensive to new sensibilities. A half-century has passed since the adoption of Article 213. Much of it no longer reflects American law or the best thinking about the desirable

4 In an 1880 case, the Wisconsin Supreme Court reversed a rape conviction despite the complainant’s testimony that “He had my hands tight, and my feet tight and I couldn’t move . . . . I got so tired out. I tried to save me as much as I could, but . . . he held me, and . . . I worked so much as I could, and I gave up.” The court reversed the conviction, holding that “she ought to have continued [resisting] to the last . . . . [T]he testimony does not show that the threat of personal violence overpowered her will.” Whittaker v. State, 50 Wis. 519, 520, 522 (1880). In a similar 1906 case, typical for the period, the court reversed a rape conviction because the victim had failed to make “the most vehement exercise of every physical means or faculty within the woman’s power.” Brown v. State, 127 Wis. 193, 199 (1906); id. at 199–200 (explaining “[a] woman is equipped to interpose most effective obstacles by means of hands and feet and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insurmountable in the absence of more than the usual relative disproportion of age and strength between man and woman.”).


7 Id. (citing Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. ILL. L. REV. 953, 966 (1998)).
shape of a penal code applicable to sexual offenses. As a result, that Article 213 no longer serves as a reliable guide for legislatures and courts confronting contemporary legal issues in this arena.

On April 22, 2013, Columbia Law School Dean Lance Liebman acknowledged within the ALI Discussion Draft’s Foreword that “[f]or some time experts have told us that this portion of the MPC needed to be rewritten to fit with contemporary knowledge and values”.5 To lead this revision effort, the ALI selected NYU Law School Professors Stephen Schulhofer and Erin Murphy.

After considering the current state of the law, societal attitudes, advances in neurobiology, and harm from violations of sexual autonomy, in 2014, the ALI Reporters proposed revising the Model Penal Code. The ALI engaged in rigorous debate over a period of several years to determine the best way to define consent. The ALI revision of the MPC is not yet final.

The ALI review has explored territory that scholars have pondered for some time. Compare, e.g., Lani A. Remick, Read Her Lips: An Argument for a Verbal Consent Standard in Rape, 141 U. PA. L. REV. 1103, 1130 (1993) (arguing for an affirmative consent requirement) with Vivian Berger, Not So Simple Rape, 7 CRIM. JUST. ETHICS 69, 75–76 (Winter-Spring 1988) (arguing that an express consent requirement patronizes and over-protects women).

IV. A Definition Requiring Consent By Words or Action Considered in the Totality of the Circumstances is Supported by Current Research on the Neurobiology of Trauma.

The ALI Reporters highlighted the significance of recent studies recognizing the ‘well-documented phenomenon of ‘frozen fright’: a person confronted by an unexpectedly aggressive partner or stranger succumbs to panic, becomes paralyzed by anxiety, or fears that resistance will engender even greater danger.”9 “Frozen fright” has been well-documented by researchers in the neurobiology of trauma.

Researchers such as Dr. Judith Herman and Dr. Jim Hopper of Harvard Medical School, as well as Dr. Rebecca Campbell of Michigan State University11, are among the nationally recognized experts writing about the neurobiology of trauma as it relates to sexual violence. This body of work can be simplified as identifying three common states of “inaction” that can affect victims: (1) Dissociation, (2) Tonic Immobility, and (3) Collapsed Immobility.

7 Id. at 108.
10 Id. at 108.
Dissociation is a state of “profound passivity in which the victim relinquishes all initiative and struggle” to mentally disconnect from the trauma experienced by the body. Tonic Immobility, which is commonly referred to as “frozen fright,” leaves a victim temporarily paralyzed. Collapsed Immobility has a more sudden onset than tonic immobility, but more gradual offset, and it is hallmarked by an extreme drop in heart rate and blood pressure to create faintness, “sleepiness,” or loss of consciousness. As described by researchers:

The fear-induced psychophysical states that impact a victim’s ability to react at the onset of or during a sexual assault are not unique to any one type of victim. They are seen in situations of extreme fear and (perceived) inescapable danger ranging from rape to combat. Nor are these reflexive reactions unique to humans. The deer in the headlights is the paradigm of Freeze… These psychophysical states are automatic, uncontrollable responses, the purpose of which is self-preservation. They have been repeatedly studied, described, and discussed in the professional literature, and are fully accepted in the field as required by the Frye test.

Law enforcement professionals, including police, prosecutors, and judges, now receive training on the neurobiology of trauma to better understand the response of victims to sexual violence. The consent rule must recognize the significance of modern understandings of the neurobiological impact of trauma on victims and avoids the dangers inherent in a consent standard that assumes consent absent expressions of unwillingness. As the ALI Reporters noted, “[t]o permit an inference of consent in these circumstances, when that person’s actual desires are relatively easy to clarify, is to expose individuals at risk to severe and readily avoidable danger.” Inherent in the consent definition is that “passivity cannot be equated with willingness.” In the face of passivity due to frozen fright (dissociation, tonic immobility, or collapsed immobility), inaction does not and should not imply the passive person’s desire to engage in sexual activity. As the ALI Reporters recognized, “evolving social standards around sexual behavior have increasingly favored more open and honest expressions of sexual needs and stressed the importance, in ambiguous circumstances, of discouraging sexual intimacy without first seeking greater clarity.”

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14 See, e.g., David Baldwin, Primitive mechanisms of trauma response: an evolutionary perspective on trauma-related disorders, 37 NEUROSCI. & BIOBEHAVIORAL REV. 1549 (2013).
In a 2015 Henry Kaiser Family Foundation/Washington Post poll, students aged 17 to 26 overwhelmingly understood that the absence of a “no” did not equate to consent and that consenting to some sexual activity does not give consent to other sexual activity. This proposed definition is part of the next generation’s understanding of sexual autonomy.

This resolution urges several steps to define consent so that the focus is on the willingness of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact. It makes clear that there should be no requirement that a victim resist, verbally or physically, to demonstrate unwillingness to engage in sexual activity. It recognizes that it is important to consider the totality of the behavior of both a defendant and a victim in the context of all the circumstances.

Conclusion

A history of sexual violence, and of the status of women as the sexual property of men, still informs the law governing sexual assault, and that should stop. The proposed definition is a step in that direction. The ABA should recognize the inherent right of sexual autonomy and lead the way toward the implementation in legal codes in every jurisdiction of requiring words or action to express consent to sexual activity.

Respectfully submitted,

Mark I. Schickman
Chair, Commission on Domestic & Sexual Violence

Lucian Dervan
Chair, Criminal Justice Section

August 2019

1. **Summary of Resolution(s).** The ABA urges legislatures and courts to define consent in sexual assault cases as the assent of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, to provide that consent is expressed by words or action in the context of all the circumstances, and to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance. Furthermore, the ABA urges all legislatures and courts to enact legislation or to adopt court rules that require judges in sexual assault cases in which consent is a disputed issue to specifically instruct juries that "the fact that a person did not resist, verbally or physically, to a specific act of sexual penetration, oral sex, or sexual contact does not mean that the person consented to that act."

2. **Approval by Submitting Entity.** The Commission on Domestic and Sexual Violence approved sponsorship of the Resolution on April 2, 2019.

The Criminal Justice Section approved sponsorship of this resolution on April 5, 2019.

The Council of the Section of Civil Rights and Social Justice approved sponsorship of this resolution on April 13, 2019.

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

   n/a

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** ABA Policy 115 (MY 2019) states that the American Bar Association opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches.19 This policy relates to the present resolution as it opposes the imposition of a legal burden of resistance upon sexual assault victims. This parallels with the current resolution as it expands on it to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance. Furthermore, it expands on policy 115 to state that consent is expressed by words or action in the context of all the circumstances. The new resolution updates existing ABA policy to include the inherent right of sexual autonomy and explicitly recognize how consent is expressed.

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

   n/a

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19 ABA Policy 115 (MY 2019)
114

6. Status of Legislation. Various legislatures and code bodies are considering changes to the Model Penal Code, and this resolution will make the ABA’s views known.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Passing this resolution will allow the ABA to recognize the inherent right of sexual autonomy, and urge code bodies, legislatures and courts towards the implementation in legal codes in every jurisdiction of requiring words or action to express consent to sexual activity.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) n/a

10. Referrals.
- Center for Human Rights
- Coalition on Racial and Ethnic Justice
- Commission on Sexual Orientation and Gender Identity
- Commission on Women in the Profession
- Section on Health Law
- Section of State and Local Government Law
- Government and Public Sector Lawyers Division
- Law Student Division
- Young Lawyers Division
- Judicial Division

11. Contact Name and Address Information. (Prior to House of delegates)

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**
   
The ABA urges legislatures and courts to define consent in sexual assault cases as the consent of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, and provide that consent is expressed by words or action in the context of all the circumstances, and to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance. Furthermore, the ABA urges all legislatures and courts to enact legislation or to adopt court rules that require judges in sexual assault cases in which consent is a disputed issue to specifically instruct juries that “the fact that a person did not resist, verbally or physically, to a specific act of sexual penetration, oral sex, or sexual contact does not mean that the person consented to that act.”

2. **Summary of the Issue that the Resolution Addresses**
   
   Some jurisdictions and codes still assume a willingness to engage in sexual activity, even without any indication of consent absent significant resistance. The proposed definition of consent rejects that premise of willingness, and requires words or action to express a person’s willingness to engage in sexual activity.

3. **Please Explain How the Proposed Policy Position Will Address the Issue**
   
   The proposed policy proposition addresses this issue by supporting a definition of consent that requires words or action to express a person’s willingness to engage in sexual activity, and cautions that the absence of verbal or physical resistance does not mean that the victim consented to the sexual act.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**
   
n/a
RESOLVED, That the American Bar Association urges Congress to ensure that the health care delivered by the Indian Health Service ("IHS") is exempt from government shutdowns and federal budget sequestrations on par with the exemptions provided to the Veterans Health Administration;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact advance appropriations legislation that would stabilize funding for IHS and provide funding that becomes available one year or more after the year of the appropriations act in which it is provided; and

FURTHER RESOLVED, That the American Bar Association encourages and supports legislation that:

1. addresses threats to the health and well-being of American Indian and Alaska Native people who tend to live in the most geographically remote and medically underserved parts of the United States;
2. avoids short-term continuing resolutions to fund the IHS budget;
3. ameliorates the harmful effects of federal budget sequestrations on IHS;
4. contributes to the fulfillment of the United States' historic and unique federal trust responsibility owed to Indian tribes; and
5. provides sufficient, consistent, and predictable funding to support the basic health care needs of American Indian and Alaska Native people.
I. Introduction

This Resolution urges Congress to enact the Indian Programs Advanced Appropriations Act (H.R. 1128 and S. 229) and the Indian Health Service Advance Appropriations Act of 2019 (H.R. 1135), or similar legislation, and in addition, legislation that would exempt the Indian Health Service from federal budget sequestrations. The Indian Programs Advanced Appropriations Act and the Indian Health Service Advance Appropriations Act of 2019 would both authorize advance appropriations for the Indian Health Service (IHS). Legislation exempting IHS from federal budget sequestrations would safeguard IHS from funding reductions caused by automatic cuts to federal government spending.

IHS is a division within the U.S. Department of Health and Human Services that receives an annual appropriation from Congress to provide direct medical and health services to over 2 million American Indian and Alaska Native people in the United States. IHS provides services directly through a network of hospitals, clinics, and health stations operated by IHS, and also funds services provided at tribally operated health facilities. IHS’s mission is to raise the physical, mental, social, and spiritual health of American Indian and Alaska Native people to the highest level. IHS has the goal of assuring that comprehensive and culturally acceptable health services are available and accessible to American Indian and Alaska Native people.

The IHS organizational structure includes a headquarters office in Rockville, MD, and 12 area offices that work with a unique group of Indian tribes on a day-to-day basis through a network of hospitals, clinics, and health stations. As reported in 2017, facilities directly managed by IHS consisted of 26 hospitals, 59 health centers, and 32 health stations. IHS employs over 15,000 individuals, which include approximately 2,400 nurses, 730 physicians, 750 pharmacists, 270 dentists, 130 physician assistants, and 130 environmental health and sanitarians. The Urban Indian Health Program comprises of 41 different programs across the country. During 2017, the IHS system had more than 39,367 hospital admissions and nearly 13.8 million outpatient medical care visits.

As a result of treaties entered into between the United States federal government and Indian tribes, a unique government-to-government relationship exists between Indian tribes and the federal government. Consistent with this government-to-government relationship and statutory authority, IHS is committed to ensuring that comprehensive and culturally appropriate health services are available and accessible to American Indian and Alaska Native people. Over 60 percent of the IHS appropriation is administered by Indian tribes, primarily through self-determination contracts and self-governance compacts. IHS retains the remaining funds and delivers health services directly to Indian tribes that choose to have IHS administer health programs. IHS also works closely with Indian tribes as they assume a greater role in improving health care in their own communities.

Advance appropriations refer to federal funding that becomes available one year or more after the year of the appropriation is provided. To obtain an advance appropriation for a...
federal program, legislation authorizing an advance appropriation for the program must first be enacted by Congress. Importantly, advance appropriations allow federal programs to prevent funding gaps from occurring until regular appropriations are completed or the fiscal year ends.

Sequestration refers to the process of automatic and largely across-the-board spending reductions under which budgetary resources are permanently canceled to enforce certain budget policy goals. When sequestration occurs, all nonexempt federal programs must be reduced by a uniform percentage. Congress may pass legislation to exempt certain federal programs from sequestrations and special rules to govern the sequestration of federal programs. Special rules adopted by Congress may provide that sequestrations can only reduce funding appropriated by a certain percentage.

For several years, Indian tribes and tribal organizations have urged Congress to enact legislation providing IHS with advance appropriations to facilitate improved planning and provide for more efficient spending. Legislation authorizing advance appropriations for IHS would prevent federal funding gaps and avoid uncertainties associated with receiving funds through the enactment of short-term continuing resolutions. In addition, the enactment of legislation exempting IHS from federal budget sequestrations and legislation authorizing advance appropriations would provide equivalent status to IHS that currently is afforded to the Veterans Health Administration.

II. Provide Equivalent Status to IHS as is Afforded to the Veterans Health Administration

The Veterans Health Administration provides direct medical care to eligible and enrolled veterans in the United States. In 2009, Congress enacted the Veterans Health Care and Budget Reform and Transparency Act of 2009 (Pub. L. No. 111-81) authorizing advance appropriations for three accounts that comprise the Veterans Health Administration: (1) Medical Services, (2) Medical Support and Compliance, and (3) Medical Facilities. The Veterans Health Care and Budget Reform and Transparency Act of 2009 also requires the Department of Veterans Affairs to submit a request for advance appropriations for the Veterans Health Administration with its budget request each year. Congress first provided advance appropriations for the three Veterans Health Administration accounts in FY 2010 and has continued to provide advance appropriations to the Veterans Health Administration accounts in each subsequent fiscal year. Additionally, Congress has enacted legislation that exempts programs administered by the Veterans Health Administration from sequestrations, including the Medical Care account.

The fact that Congress has enacted and implemented advance appropriations for medical accounts within the Veterans Health Administration provides a compelling reason for Congress to enact legislation that would authorize advance appropriations for medical accounts within IHS. Specifically, both the Veterans Health Administration and IHS provide direct medical care to specific segments of the United States population as a result of federal policy. Further, just as veterans organizations were alarmed of the impact...
of delayed funding upon the provision of health care services to veterans and the ability of the Veterans Health Administration to properly plan and manage its resources, Indian tribes and tribal organizations continue to have these same concerns about the IHS system. Ultimately, the fact that Congress has authorized advance appropriations to the Veterans Health Administration and exempted the Veterans Health Administration from federal budget sequestrations should justify the enactment of legislation to provide equivalent treatment to IHS.

III. Benefits of Advance Appropriations for IHS and the Exemption of IHS from Federal Budget Sequestrations

The enactment of the Indian Programs Advanced Appropriations Act and the Indian Health Service Advance Appropriations Act of 2019, and separate legislation to exempt IHS from federal sequestrations is needed for a variety of reasons, including:

(1) Fulfillment of the federal government’s trust responsibility owed to Indian tribes. Through treaties between Indian tribes and the federal government, a trust responsibility was established in which the federal government promised the right of Indian tribes to govern themselves, and to enable Indian tribes to deliver essential services and provide adequate resources to do so effectively. Although the trust responsibility requires the federal government to provide for the health and welfare of Indian tribes, IHS remains highly underfunded, and American Indian and Alaska Native people continue to experience lower life expectancy and disproportionate disease rates compared with other Americans. Fulfillment of the federal government’s historic and unique federal trust responsibility owed to Indian tribes mandates that sufficient, consistent, and predictable funding is available to support the basic health care needs of American Indian and Alaska Native people.

(2) Avoiding the threat and effects of government shutdowns such as the recent 35-day government shutdown. The recent 35-day government shutdown, which took place December 22, 2018 to January 25, 2019, destabilized tribal health care delivery and access to health care providers within Indian Country. During this shutdown, Indian tribes and urban Indian centers across the United States were forced to ration health care services. Numerous facilities faced closure. In addition, the recent government shutdown caused doctors and medical staff to work without pay. Tribes are among the worst impacted by shutdowns because it affects the day-to-day operation of their health clinics and hospitals.

1 Jessica Farb, Indian Health Service: Spending Levels and Characteristics of IHS and Three Other Federal Health Care Programs, U.S. Government Accountability Office (Dec. 10, 2018), https://www.gao.gov/assets/7099856871.pdf (comparing funding levels between IHS, the Veterans Health Administration, Medicare, and Medicaid. This GAO report noted that in 2016, IHS health care expenditures per person were only $2,834, compared to $9,990 per person for federal health care spending nationwide.)


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The enactment of the Indian Programs Advanced Appropriations Act and the Indian Health Service Advance Appropriations Act of 2019, and separate legislation to exempt IHS from federal sequestrations is needed for a variety of reasons, including:

(1) Fulfillment of the federal government’s trust responsibility owed to Indian tribes. Through treaties between Indian tribes and the federal government, a trust responsibility was established in which the federal government promised the right of Indian tribes to govern themselves, and to enable Indian tribes to deliver essential services and provide adequate resources to do so effectively. Although the trust responsibility requires the federal government to provide for the health and welfare of Indian tribes, IHS remains highly underfunded, and American Indian and Alaska Native people continue to experience lower life expectancy and disproportionate disease rates compared with other Americans. Fulfillment of the federal government’s historic and unique federal trust responsibility owed to Indian tribes mandates that sufficient, consistent, and predictable funding is available to support the basic health care needs of American Indian and Alaska Native people.

(2) Avoiding the threat and effects of government shutdowns such as the recent 35-day government shutdown. The recent 35-day government shutdown, which took place December 22, 2018 to January 25, 2019, destabilized tribal health care delivery and access to health care providers within Indian Country. During this shutdown, Indian tribes and urban Indian centers across the United States were forced to ration health care services. Numerous facilities faced closure. In addition, the recent government shutdown caused doctors and medical staff to work without pay. Tribes are among the worst impacted by shutdowns because it affects the day-to-day operation of their health clinics and hospitals.

1 Jessica Farb, Indian Health Service: Spending Levels and Characteristics of IHS and Three Other Federal Health Care Programs, U.S. Government Accountability Office (Dec. 10, 2018), https://www.gao.gov/assets/7099856871.pdf (comparing funding levels between IHS, the Veterans Health Administration, Medicare, and Medicaid. This GAO report noted that in 2016, IHS health care expenditures per person were only $2,834, compared to $9,990 per person for federal health care spending nationwide.)

For the Sault Ste. Marie Tribe, the government shutdown cost about $100,000, every day, of federal money that did not arrive to keep health clinics staffed, food pantry shelves full, and employees paid. In San Jose, California four IHS facilities serving 25,000 Native American patients per year experienced a lack in funding due to the shutdown. In San Diego County neighbors 18 federally recognized tribes, and Indian Health Centers in the area provide services for thousands of tribal members. In Navajo Nation, a 68-year-old

(3) Avoiding the constant need to enact short-term continuing resolutions to fund the IHS budget. During virtually the entire last 20 years, short-term continuing resolutions have been enacted to fund the IHS budget while Congress works to pass an annual appropriations act. The constant enactment of short-term continuing resolutions to fund IHS results in periods of budget uncertainty and prohibits IHS providers from initiating new activities and projects intended to improve health care delivery services for American Indian and Alaska Native people. The enactment of legislation authorizing advance appropriations to the IHS budget would significantly mitigate the funding uncertainty and disruption to the delivery of health care services caused by the enactment of short-term continuing resolutions to fund the IHS budget.

(4) Addressing the harmful effects of federal budget sequestrations. In FY 2013, the federal budget sequestration resulted in a loss of over $219 million to the IHS budget, which translated into a reduction of primary health care and disease prevention services for American Indian and Alaska Native people. Federal budget sequestration and the impacts of the cancellation of budgetary resources continue to be a concern for Indian tribes and tribal organizations. Legislation exempting IHS from federal budget sequestrations is needed to allow IHS providers to do the best job possible in planning, decision-making, and administering health care programs.

(5) Improve the ability of IHS providers to budget, recruit, retain, provide services, maintain facilities, and perform necessary construction efforts. In general, IHS hospitals and tribal health care facilities are located in the most geographically remote and

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(5) Improve the ability of IHS providers to budget, recruit, retain, provide services, maintain facilities, and perform necessary construction efforts. In general, IHS hospitals and tribal health care facilities are located in the most geographically remote and


medically underserved parts of the United States. These IHS and tribal health care providers face significant challenges recruiting and retaining qualified health professionals, which is exacerbated by inconsistent and uncertain federal funding for the IHS budget. The threat of inconsistent and uncertain funding for the IHS budget means that health care providers cannot budget with certainty, recruit and retain health professionals, and deliver health care services that American Indian and Alaska Native people need. Advance appropriations and the exemption of IHS from federal budget sequestrations would allow IHS and tribal health care providers to improve budgeting and better attract and retain medical professionals to work in remote and medically underserved areas within the United States.

IV. Supportive ABA Policy

The ABA has an extensive history of supporting comprehensive access to healthcare for American Indians and Alaska Natives, specifically through equitable and efficient funding streams.

In 2004, in 2004 MM 103C, the ABA called for addressing the various areas where health care for American Indians and Alaska Natives is deficient, including through the reauthorization of the Indian Health Care Improvement Act. The resolution specifically supports federal policy that encourages the administration of health care to Indian and Alaska Natives, and

"urges Congress to exercise oversight to assure that the Indian Health Service continues to carry out its responsibilities based upon the federal policies of tribal self-determination and self-governance."

This resolution is a natural extension of this broader policy to support Native access to healthcare.

In January 2019, the ABA acknowledged and condemned the devastating impact of the December 22, 2018 to January 25, 2019 federal government shutdown, 2019 MM 10B, particularly in the federal judiciary and the rule of law.

This resolution is also part of extensive ABA policy in support of access to health care generally. 1994 MM 105 reaffirms support from 1990 and 1972 resolutions, calling for access to quality health care for all Americans, regardless of income. 2009 AM 10A extended those calls, while broadening the call to not necessarily be restricted by the existence of a single-payer system. Notably, 2013 AM 101 calls for parity in coverage for mental health and substance use disorder treatment services with other health benefits coverage. 1997 AM 113 supports the provision of comprehensive health care for children 18 years of age and younger, and prenatal care for pregnant women.

The ABA has specifically recognized the importance of reliable and consistent healthcare funding to ensure continuity and quality of care. In 2017, resolution 2017 MM 116 called for broadening the scope of Medicare coverage from "medical necessity" to include medically underserved parts of the United States. These IHS and tribal health care providers face significant challenges recruiting and retaining qualified health professionals, which is exacerbated by inconsistent and uncertain federal funding for the IHS budget. The threat of inconsistent and uncertain funding for the IHS budget means that health care providers cannot budget with certainty, recruit and retain health professionals, and deliver health care services that American Indian and Alaska Native people need. Advance appropriations and the exemption of IHS from federal budget sequestrations would allow IHS and tribal health care providers to improve budgeting and better attract and retain medical professionals to work in remote and medically underserved areas within the United States.

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reasonable and necessary prognostic tests, so as to cover items and services for the prevention of disease, not just diagnose and treatment. 2016 MM 300 sought to relieve administrative billing barriers against advanced practice providers as a means to increase productive and focus on patient-centric responsibilities. 2014 MM 110 similarly calls for recognizing outpatient observation care services in a hospital as billable under Medicare Part A. 2007 AM 122 calls for continuity in Medicaid funding for persons newly released from custody. 2005 AM 113B specifically highlights the shared legal obligation that the federal, state, and territorial governments have to provide a comprehensive set of benefits to all individuals who meet Medicaid eligibility criteria.

The ABA has additionally long taken a stance supporting Native peoples, including upholding the federal responsibility to Natives. In 1980, the ABA adopted 1980 MM 110, urging strict adherence to Indian treaty obligations. The report to the resolution notes:

The trust responsibility imposes on the United States an important standard of conduct. In Seminole Nation v. United States, 316 U.S. 298 (1942), the Supreme Court stated that the United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians should therefore be judged by the most exacting fiduciary standards." Id. at 297. ... Under the trust responsibility to Indian tribes, specifically recognized by Congress and the courts and secured by the treaties, statutes, and 150 years of judicial precedent, Indian tribes should be able to look to the future confident that the federal government will approach its obligation to Indian tribes in a manner consistent with its duty of protection.

2015 AM 113, which adopts the recommendations contained in the 2014 U.S. Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence report. In Recommendation 4.5, calling for periodic training in culturally adapted trauma-informed interventions and cultural competency for the Indian Health Service (IHS), the report notes that IHS is woefully under-resourced, noting that "IHS continues to operate at 62 percent of need and mental health and substance abuse services are funded at an appalling 7 percent of need."7

The ABA has previously sought parity in funding access for tribes. In 2001, the ABA adopted 2001 AM 105C, calling on Congress to amend Title IV-E of the Social Security Act to provide direct tribal access to federal Title IV-E foster care and adoption funding for children under tribal court jurisdiction. This was reiterated 2013 AM 111A, which called for the "increased use of federal Title IV-E cooperative agreements and memoranda of

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understanding between states and Tribes to enable Tribes to operate their own child protection programs.” 2008 AM 117A urged long-term funding for tribal justice systems, noting “the effective operation of tribal courts is essential to promote the sovereignty and self-governance of the Indian tribes.” In adopting the Indian Law and Order Commission Report of 2010 in 2015 MM 111A, the ABA recognized immense deficiencies in federal funding for tribes.

V. Conclusion

The American Bar Association strongly supports and encourages the enactment of legislation that would bring stability and certainty to the IHS budget by changing its funding to advance appropriations and providing an exemption from federal budget sequestrations. This is what Congress has authorized for the medical accounts of the Veterans Health Administration, and comparable treatment should be authorized for IHS to promote to the highest level, the health, safety, and welfare of American Indian and Alaska Native people in the United States.

Respectfully submitted,

Wilson Adam Schooley
Chair, Section of Civil Rights & Social Justice
August 2019

Respectfully submitted,

Wilson Adam Schooley
Chair, Section of Civil Rights & Social Justice
August 2019
GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wilson A. Schooley, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution(s). This resolution urges Congress to ensure that the health care delivered by the Indian Health Service (IHS) is exempt from government shutdowns and federal budget sequestrations on par with the exemptions provided to the Veterans Health Administration, and to enact advance appropriations legislation that would stabilize funding for IHS and provide for advance appropriations.


The National Native American Bar Association approved co-sponsorship of this policy on May 6, 2019.

The Commission on Homelessness and Poverty approved co-sponsorship of this policy on May 3, 2019.

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? Over several decades, the ABA has adopted policies supporting comprehensive access to healthcare for American Indians and Alaska Natives. The ABA called for addressing the various areas where health care for American Indians and Alaska Natives is deficient, including through the reauthorization of the Indian Health Care Improvement Act. (ABA Report and Recommendation 2004M103C, available at https://www.americanbar.org/content/dam/aba/directories/policy/2004_m_103c.authcheck.pdf) This resolution is a natural extension of this broader policy to support Native access to healthcare. The ABA also acknowledged and condemned the devastating impact of the December 2018 federal government shutdown upon the federal judiciary and the rule of law. (ABA Report and Recommendation 2019M10B, available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2018-10b-midyear-2019.pdf) This resolution is also part of the ABA’s long tradition of advocating for access to healthcare. (See ABA Report and Recommendation 1994M105, available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-1994-105-midyear-1994.pdf) This resolution is also part of the ABA’s long tradition of advocating for access to health care. (See ABA Report and Recommendation 2009A10A, available at https://www.americanbar.org/content/dam/aba/directories/policy/2009_am_10a.pdf, ABA Report and Recommendation 1997A113, available at https://www.americanbar.org/content/dam/aba/directories/policy/1997_am_113.authcheck.pdf.) This resolution is a natural extension of this broader policy to support Native access to healthcare. The ABA also acknowledged and condemned the devastating impact of the December 2018 federal government shutdown upon the federal judiciary and the rule of law. (ABA Report and Recommendation 2019M10B, available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2018-10b-midyear-2019.pdf) This resolution is also part of the ABA’s long tradition of advocating for access to healthcare. (See ABA Report and Recommendation 1994M105, available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-1994-105-midyear-1994.pdf) This resolution is also part of the ABA’s long tradition of advocating for access to health care. (See ABA Report and Recommendation 2009A10A, available at https://www.americanbar.org/content/dam/aba/directories/policy/2009_am_10a.pdf, ABA Report and Recommendation 1997A113, available at https://www.americanbar.org/content/dam/aba/directories/policy/1997_am_113.authcheck.pdf.)
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. Three bills have been introduced in the House and Senate on this issue— the Indian Programs Advanced Appropriations Act (H.R. 1128 and S. 229) and the Indian Health Service Advance Appropriations Act of 2019 (H.R. 1135). S. 229 was introduced on Jan. 25th, 2019 and read twice and referred to the

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Committee on the Budget the same day. H.R. 1128 was introduced Feb. 8th, 2019 and referred to the Subcommittee on Indigenous Peoples of the United States the same day. H.R. 1135 was introduced on Feb 8, 2019 and referred to the Subcommittee on Indigenous Peoples of the United States on March 13, 2019.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The ABA will urge Congress to enact the Indian Programs Advanced Appropriations Act (H.R. 1128 and S. 229) and the Indian Health Service Advance Appropriations Act of 2019 (H.R. 1135), or similar legislation that accomplishes the goals of the policy, and in addition, legislation that would exempt the Indian Health Service from federal budget sequestrations.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. Disclosure of Interest. There are no known conflicts of interest.

10. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:

- Health Law Section
- Commission on Law and Aging
- Section of Administrative Law and Regulatory Practice
- Commission on Legal Problems of the Elderly
- Senior Lawyers Division
- Young Lawyers Division
- Law Student Division
- Standing Committee on Legal Aid and Indigent Defendants
- Judicial Division
- Tribal Court Council
- Center for Human Rights
- Coalition on Racial and Ethnic Justice
- Commission on Disability Rights
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Sexual Orientation and Gender Identity
- Commission on Domestic and Sexual Violence
- Commission on Racial and Ethnic Diversity in the Profession
- Commission on Women in the Profession
- Section of State and Local Government Law
- Government and Public Sector Division

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

Estelle H. Rogers, CRSJ Section Delegate
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EXECUTIVE SUMMARY

1. Summary of the Resolution
This resolution urges Congress to ensure that the health care delivered by the Indian Health Service (IHS) is exempt from government shutdowns and federal budget sequestrations on par with the exemptions provided to the Veterans Health Administration, and to enact advance appropriations legislation that would stabilize funding for IHS and provide for advance appropriations.

2. Summary of the Issue that the Resolution Addresses
IHS is a division within the U.S. DHHS that receives an annual appropriation from Congress to provide direct medical and health services to over 2 million American Indian and Alaska Native people in the United States. IHS provides services directly through a network of hospitals, clinics, and health stations operated by IHS, and funds services provided at tribally operated health facilities.

This resolution seeks advance appropriations to allow federal programs to avert funding gaps and avoid short-term continuing resolutions that are enacted to prevent a funding gap from occurring until regular appropriations are completed or the fiscal year ends. When sequestration occurs, all nonexempt federal programs must be reduced by a uniform percentage. Congress may pass legislation to exempt certain federal programs from sequestrations and special rules to govern the sequestration of federal programs.

For several years, Indian tribes and tribal organizations have urged Congress to enact legislation providing IHS with advance appropriations to facilitate improved planning and provide for more efficient spending. Legislation authorizing advance appropriations for IHS would prevent federal funding gaps and avoid uncertainties associated with receiving funds through the enactment of short-term continuing resolutions. In addition, the enactment of legislation exempting IHS from federal budget sequestrations and legislation authorizing advance appropriations would provide equivalent status to IHS that currently is afforded to the Veterans Health Administration.

3. Please Explain How the Proposed Policy Position Will Address the Issue
This policy supports and encourages the enactment of legislation that would bring stability and certainty to the IHS budget by changing its funding to advance appropriations and providing an exemption from federal budget sequestrations. By adopting this Resolution, the ABA can promote the health, safety, and welfare of American Indian and Alaska Native people in the United States to the highest level.

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.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation that:

1. Requires equal pay rates for employees of a different sex (which includes sexual orientation, gender identity, and gender expression), race or ethnicity who perform substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions;

2. Requires that a "bona fide factor other than sex" relied upon by an employer for pay disparities be job-related and consistent with business necessity;

3. Requires that any reasonable legitimate factor(s) relied upon by an employer for pay disparities account for the entire pay differential;

4. Requires employers to supply pay scales upon the request of an applicant;

5. Prohibits employers from seeking or relying upon an applicant’s salary history information;

6. Ensures the right of employees to discuss or inquire about their own or their co-workers’ wages;

7. Prohibits retaliation against employees who are claimants of, or witnesses to, an equal pay violation.
The ABA has a long history of supporting protections against unequal pay and other forms of discrimination in the workplace. This Resolution builds upon longstanding ABA precedent, and proposes that all jurisdictions follow the trend among states to take stated practical legislative steps necessary to achieve gender and racial pay equity.

I. Persistence of The Gender and Race-Based Wage Gap

In enacting the Equal Pay Act (EPA), Congress recognized in 1963 that unjustified wage differentials between men and women "depress[] wages and living standards for employees necessary for their health and efficiency." More than 55 years later, women continue to earn less than their male counterparts in virtually every industry and occupation in this country. The pay gap persists across industries, occupations, and education levels. Women's median earnings are lower than men's in almost all occupations, whether they are predominantly performed by women, by men, or have an even mix of men and women. For women of color, disparities in earnings are greater.

In 1965 the ABA adopted a policy of not discriminating against someone on the basis of race, color, creed or national origin. In 1988, the Association recognized that the persistence of overt and subtle barriers denies women the opportunity to achieve full integration and equal participation in the work responsibilities and rewards of the legal profession. In 2007, the House of Delegates adopted a resolution urging Congress to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-5(e), and federal age or disability employment discrimination laws to ensure that in claims involving compensation discrimination, the statute of limitations runs from each payment reflecting the claimed unlawful disparity. A 2010 Resolution urged enactment of federal legislation to enhance remedies and procedures to better protect people against pay discrimination. Most recently, in 2019, the ABA officially supported the Paycheck Fairness Act (as introduced in February 2019), H.R. 7, which would strengthen the federal Equal Pay Act consistent with many provisions in the current resolution.

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A woman employed full time, year-round in the United States is typically paid 80 cents for every dollar paid to a man. This amounts to a typical loss of $10,086 per year for a working woman or $403,440 over a 40-year career. National Women’s Law Center, America’s Women and the Wage Gap (April 2019), http://www.nationalpartnership.org/our-work/resources/workplace/fair-pay/americas-women-and-the-wage-gap.pdf.

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At the current rate, the gap between men and women’s earnings will not close until 2106. Collectively, women nationwide will lose nearly $900 billion to the wage gap in 2019. This lost income limits women’s spending power and their ability to support their families, who increasingly depend on women’s wages. Eliminating the gender wage gap would reduce the poverty rates of working women and their families by more than half. These income disparities (referred to as the wage gap) compound and widen over the course of a woman’s lifetime, which impacts her Social Security and retirement, and contributes to the gender and racial wealth gap, which is even larger than the wage or income gap.

The persistence of gender and race-based wage gaps affects women, families, and the overall economy and requires legislation that supplements existing law and addresses the factors that contribute to and perpetuate the pay gap.

II. Contributors to the Gender and Race-Based Pay Gap

Discrimination

Even when controlling for factors such as occupation, education, experience, and hours worked, 38 percent of the gender gap is left unexplained. Researchers attribute this unexplained portion to gender discrimination. Although research shows that the unexplained portion of the gender pay gap decreased dramatically in the 1980’s, it has since remained at its 1989 level.

Reliance on prior salary perpetuates wage discrimination

Research shows that women earn less than men starting just one year out of college,
even when controlling for factors such as college major, occupation, and hours worked. This same holds true for female graduates of business school, who start at lower salaries than men with MBAs despite having “similar career paths, performance and education.”

Women who start with lower salaries continue to earn less than their male counterparts when employers pay based on prior salaries. This is especially true for women who begin their careers in lower-paid, female-dominated occupations. The Equal Employment Opportunities Commission (EEOC) therefore advises employers to avoid basing salary decisions on prior salary and recognizes that such a practice would perpetuate “inequality in compensation among genders.” Similarly, The Society for Human Resource Management (SHRM), the industry’s professional arm, advocates that salary history should not be a factor in setting compensation. Compensation decisions should be based on the value of the position to the organization, competition in the market and other bona fide business factors.

In recognition of the fact that employer inquiry into and reliance on prior salary perpetuates and compounds the wage gap, a growing number of states and localities have enacted legislation prohibiting employers from asking about or relying on applicants’ prior salary. Many companies have announced the voluntary elimination of this practice, including Amazon, American Express, Bank of America, Cisco Systems, Facebook, Google, GoDaddy, Progressive, Starbucks, Wells Fargo, Salesforce and The Gap. Research confirms that the wage gap is smaller in states where employers cannot inquire about salary history than in states where the practice is permissible. For these reasons, even when controlling for factors such as college major, occupation, and hours worked, the same holds true for female graduates of business school, who start at lower salaries than men with MBAs despite having “similar career paths, performance and education.”

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legislative prohibitions on employer inquiry into and/or reliance on a prospective employee’s wage history (unless it is voluntarily provided) are important. It is equally important to require employers to make available the salary ranges for a given position so that prospective and/or current employees are aware of this information in negotiating pay.

**Pay Secrecy and Lack Of Transparency**

According to the Institute for Women’s Policy Research, approximately half of workers nationwide are prohibited or strongly discouraged from disclosing their wages to other employees.27 When employees are unable to discuss their wages with their counterparts, it is difficult to determine if they are making less than their colleagues. Research shows that in states where pay secrecy is banned, the wages of both men and women are higher than those of their counterparts in states where pay secrecy is not banned.28 Pay transparency also correlates with increased productivity of workers.29

**III. Emerging Efforts to Advance Pay Equity**

**Equal Pay Legislation in the States**

California has set an example of legislation to more effectively combat the gender and race-based wage gap. In 2016, the state enacted SB 358, the California Fair Pay Act, which amended the California Equal Pay Act in several ways, including: requiring equal pay for employees performing “substantially similar” work; eliminating the “same establishment” requirement; narrowing the catch-all “bona fide factor other than sex” to ensure disparities in pay are justified by a business necessity that is related to the job; requiring employers to show that the factor(s) relied upon as a defense account for the entire pay differential; and prohibiting retaliation or discrimination against employees who disclose, discuss, or inquire about their own or co-workers’ wages. In 2018, California enacted AB 168, which prohibits employers from inquiring about an applicant’s prior salary and requires employers to provide the pay range for a given position upon reasonable request. In 2019, the state enacted AB 2282, which prohibits an employer from relying on prior salary at all to justify a wage differential under the CA Equal Pay Act.

Other states have also taken steps to pass or strengthen equal pay laws. To date, 19 states, including the District of Columbia, prohibit employers from retaliating against employees.27 When employees are unable to discuss their wages with their counterparts, it is difficult to determine if they are making less than their colleagues. Research shows that in states where pay secrecy is banned, the wages of both men and women are higher than those of their counterparts in states where pay secrecy is not banned.28 Pay transparency also correlates with increased productivity of workers.29

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employees who discuss or disclose their wages. Eight states prohibit the use of salary history when hiring and 22 states use the comparable work or substantially similar standard in their equal pay legislation. In 2018 alone, 10 states had passed at least four new equal pay laws and 38 states had considered new equal pay legislation. Yet, many states lack adequate equal pay policies and policy reforms are needed to combat the wage gap.

Pending Federal Legislation: The Paycheck Fairness Act (H.R. 7)


- prohibits retaliation against workers for discussing or disclosing wages.
- prohibits employers from relying on salary history in determining future pay, so that prior pay discrimination does not follow workers from job to job.
- ensures that pay disparities are justified by job related business necessity
- provides women with the same remedies for sex-based pay discrimination as those available to victims of discrimination based on race and ethnicity.

This resolution is in keeping with the best trend in the law, and current ABA policy.

IV. Conclusion

The ABA has long recognized that gender-based and race-based wage gaps take a toll on women, families and the overall economy; that the wage gap persists, compounding the harm to women, particularly women of color, and their families; and that there should be more effective protections and remedies to eliminate pay discrimination.

This resolution supports the practical steps implemented by many jurisdictions, and passed by the House of Representat[ives, to actually narrow that gap. Truly requiring equal pay for equal work, limiting disparity justifications to jobrelated factors which support the gap, eliminating reliance upon past salary, and requiring employer pay transparency can help turn policy into reality.

This resolution is in keeping with the best trend in the law, and current ABA policy.
Respectfully submitted,

Wilson A. Schooley,
Chair, Section of Civil Rights and Social Justice
August 2019
1. Summary of Resolution(s). This resolution urges the enactment of legislation that would provide greater protections to those subjected to pay discrimination on the basis of sex, race and ethnicity in order to overcome the obstacles that exist to achieving equal pay, which contribute to sex and race-based wage gaps.


The Commission on Women in the Profession approved support of this policy on May 28, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously? A resolution related to equal pay was submitted to the House of Delegates in February 2010, urging enactment of federal legislation to enhance remedies and procedures under the federal Equal Pay Act to better protect people against pay discrimination. This current proposed resolution expands upon the 2010 resolution.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA has a long history of supporting policies that enforce stronger protection against discrimination. In 1965 the ABA adopted a policy of not discriminating against someone on the basis of race, color, creed or national origin. In 1968, the Association recognized that the persistence of overt and subtle barriers denies women the opportunity to achieve full integration and equal participation in the work, responsibilities and rewards of the legal profession. In 2007, the House of Delegates adopted a resolution urging Congress to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-5(e), and federal age or disability employment discrimination laws to ensure that in claims involving discrimination in compensation, the statute of limitations runs from each payment reflecting the claimed unlawful disparity. Based on existing ABA Policy, in 2019, the ABA officially supported the Paycheck Fairness Act (as introduced in February 2019), which would strengthen the federal Equal Pay Act, which prohibits pay discrimination on the basis of sex. This Resolution is in line with, and builds upon, prior ABA policy, helping the ABA continue to support reforms necessary to achieve gender and racial pay equity (Dennis J. Drasco, Report and Resolution #104B: Federal Shield Law for Journalists, Am. Bar Assoc. (August 8–9, 2005), https://www.americanbar.org/content/dam/aba/directories/policy/2005_am_104b.authcheckdam.pdf.).

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.** States nationwide have passed legislation to strengthen their equal protection laws. California was one of the first states to do so in 2015 when they passed the Fair Pay Act (SB 358) which amended the California Equal Pay Act, requiring equal pay for employees performing “substantially similar” work; eliminating the “same establishment” requirement; narrowing the catch-all “bona fide factor other than sex” to ensure disparities in pay are justified by a business necessity that is related to the job; requiring employers show that the factor(s) relied upon as a defense account for the entire pay differential; and prohibiting retaliation or discrimination against employees who disclose, discuss, or inquire about their own or co-workers’ wage. Then in 2018, California enacted AB 168, which prohibits employers from inquiring about or relying on an applicant’s prior salary and requires employers to provide the pay range for a given position upon reasonable request. In 2019, the state enacted AB 2282, which prohibits an employer from relying on prior salary at all to justify a wage differential under the CA Equal Pay Act. In addition to California, 19 other states and the District of Columbia, have passed legislation to create greater protections against pay discrimination.34 At the federal level, on March 27, 2019, the U.S. House of Representatives passed the Paycheck Fairness Act,35 which contains many of the provisions reflected in this current Resolution ([https://www.congress.gov/bill/116th-congress/house-bill/7/text?q=%7B%22search%22%3A%5B%22hr%7E22%22%5D%7D&r=1&s=2](https://www.congress.gov/bill/116th-congress/house-bill/7/text?q=%7B%22search%22%3A%5B%22hr%7E22%22%5D%7D&r=1&s=2)).

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Passing this resolution will allow the ABA to support more federal and state initiatives to be more comprehensive in pursuing greater protections against pay discrimination on the basis of sex, race and ethnicity.

8. **Cost to the Association.** (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

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

10. **Referrals.**
    - Section of Labor and Employment Law
    - Coalition on Racial and Ethnic Justice
    - Commission on Sexual Orientation and Gender Identity
    - Commission on Women in the Profession
    - Section of State and Local Government Law
    - Commission on Domestic & Sexual Violence

35 The Paycheck Fairness Act (H.R. 7).
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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Paula Shapiro, Acting Section Director
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E-mail: Paula.Shapiro@americanbar.org
12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The Resolution urges Congress, the states, and territories to enact legislation that would provide stronger remedies and protections against pay discrimination on the basis of sex (including gender, gender identity, and gender expression), race and ethnicity to help overcome the persistent barriers that continue to impede the achievement of pay equity.

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

   Despite the fact that the federal Equal Pay Act (and many state equal pay laws) have been on the books for over 50 years, pay discrimination and the overall gender wage gap continue to persist, taking a tremendous toll on women, families, and communities as a whole. For women of color, who experience intersecting forms of discrimination, the pay gap is even worse. The lost income from the pay gap means that women and people of color are less able to build assets, which contributes to the equally dismal gender and racial wealth gap and higher rates of poverty. It is therefore critical that legislation be passed, and existing laws strengthened, to better address the many contributors to the gender and race wage gaps that continue to persist.

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

   As set forth in the companion report, the proposed policy urges enactment of laws which provides important protections that go beyond existing federal and, in many cases, state equal pay laws.

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

   None identified.
RESOLVED, That the American Bar Association recognizes the constitutionality of the Indian Child Welfare Act, 25 U.S.C. §§1901-63 ("ICWA") and its accompanying regulations, specifically that:

1. ICWA establishes a political, not racial, classification that serves a compelling governmental interest.
2. ICWA does not violate the non-delegation doctrine, because tribes retain their authority to regulate child welfare.
3. ICWA does not commandeer the states, because it is permissible to impose obligations on state courts to enforce federal prescriptions; and

FURTHER RESOLVED, That the American Bar Association recognizes both the unique government-to-government relationship between the United States and tribes and the trust responsibility owed by the United States to tribes.
In 1978, after more than four years of hearings, testimony, and debate, Congress enacted the Indian Child Welfare Act (hereinafter “ICWA”) in response to the “alarmingly high percentage of Indian families ... broken up by the removal, often unwarranted, of their children by nontribal public and private agencies.” Congress noted “that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.” In 2016, the Bureau of Indian Affairs (“BIA”) released comprehensive regulations for ICWA.

In 2013, the American Bar Association (“ABA”) declared its support for the ICWA, urging for its full implementation and compliance in 2013 AM 111A. Implicit in that resolution was the endorsement that ICWA was constitutionally enacted. On October 4, 2018, for the first time in its forty-year history, a federal court in the Northern District of Texas found ICWA and its corresponding regulations to be unconstitutional. The court held ICWA and its corresponding regulations (“Final Rule”) unconstitutional, based on the following holdings:

1. ICWA violates the Fifth Amendment’s guarantee of equal protection under the law.
2. ICWA is unconstitutional because it delegates congressional power to Indian tribes in violation of the non-delegation doctrine outlined in Article 1 of the Constitution.
3. ICWA violates the Tenth Amendment of the Constitution by commandeering State courts and agencies.

This report tracks the district court’s decision in *Brackeen v. Zinke* (appealed to the Fifth Circuit as *Brackeen, et, al. v. Bernhardt, et. al.*) as basis for the ABA to confirm a formal policy in support of ICWA’s constitutionality.

The ABA has long-standing policy endorsing both ICWA and tribes operating within the child welfare field. In addition to 2013 AM 111A supporting ICWA as child welfare policy, the ABA Section of Family Law publishes a legal guide to ICWA called the *Indian Child Welfare Act: 1*
Welfare Act Handbook. In August 2001, the ABA House of Delegates adopted 2001 AM 105C calling on Congress to amend Title IV-E of the Social Security Act to provide direct tribal access to federal Title IV-E foster care and adoption funding for children under tribal court jurisdiction. In August of 2008, the Commission on Youth at Risk’s policy on Addressing Racial Disparities in the Child Welfare System was adopted, calling on Congress to:

1. broaden federal reviews of the child welfare system to address racial and ethnic disproportionality and fund reporting, analysis and corrective action responses;
2. help racial and ethnic minority families have ready access to services to prevent removals from home in both state and tribal systems;
3. provide relevant cultural competence training;
4. provide for a racially and ethnically diverse legal and judicial workforce, and
5. make changes in law and policy to help decrease disproportionality by subsidizing permanent relative guardianships, giving relative caregivers financial support no less than non-relative caregivers, providing relative caregiver housing support and giving flexibility in having separate licensing and approval standards for kinship placements.

These policy recommendations mirror many of the goals of ICWA, including addressing the disproportionate number of AI/AN youth in the child welfare system, encouraging maintenance of the tribal kinship networks, and recognizing the need for a separate set of standards for identifying appropriate placements and interventions for AI/AN children and youth. They additionally support the ABA’s premise that federal legislation regarding both child welfare and American Indians/Alaska Natives are constitutional.

I. ICWA Does Not Violate Equal Protection

ICWA applies to proceedings involving an “Indian child”—which the statute defines as “either (a) a member of an Indian tribe or (b) [a person who] is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” ICWA and the Final Rule do not violate the Fifth Amendment’s equal protection guarantee. ICWA establishes a political, not racial, classification, which is subject to rational-basis review. Even were it race-based, the classification survives strict scrutiny.

A. ICWA is based on a political classification.

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4 ABA Commission on Youth at Risk (Report Nos. 105C). 2008 AM 107 https://www.americanbar.org/groups/youth_at_risk/attorneys/racial_disparitiesinchildwelfareinterventions/
5 U.S. Code § 1903(4) https://www.law.cornell.edu/uscode/42/26/1903
6 U.S. Code § 1903(4) https://www.law.cornell.edu/uscode/42/26/1903
The Supreme Court has consistently held that legislation giving special treatment to "Indians" is based on a political classification subject to rational-basis review. The seminal case Morton v. Mancari upheld a policy of the BIA that gave hiring preferences to tribal Indians over non-Indians. 11 The Court explained that this issue "turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress ... to legislate on behalf of federally recognized Indian tribes."12 The Indian Commerce Clause "singles Indians out as a proper subject for separate legislation."13 The Court noted that if legislation providing special treatment to Indians "were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased."14

The Court found that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasisovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."15 The Court explained that "[t]he preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature."16 This was so even though the definition of "Indian" required "one-fourth or more degree Indian blood."17 The Court concluded that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."18 Federal regulation of Indian affairs is "rooted in the unique status of Indians as a separate people with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'"19 Courts generally use the rational-basis standard when (as here) the power of Congress is plenary. See, e.g., Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (rational basis review over "exclusion of foreign nationals"); Harris v. Rosario, 446 U.S. 851, 851-52 (1980) (Territories Clause).20

Consistent with Mancari, under ICWA "Indian child" is a political, not racial, classification. "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."21 "Indian tribe" is limited to federally recognized tribes, such as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasisovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. The Court explained that the preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of federally recognized tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature. This was so even though the definition of ‘Indian’ required ‘one-fourth or more degree Indian blood.’ The Court concluded that ‘[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.’ Federal regulation of Indian affairs is ‘rooted in the unique status of Indians as a separate people with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a ‘racial’ group consisting of ‘Indians.’’ Courts generally use the rational-basis standard when (as here) the power of Congress is plenary. See, e.g., Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (rational basis review over ‘exclusion of foreign nationals’); Harris v. Rosario, 446 U.S. 851, 851-52 (1980) (Territories Clause). Consistent with Mancari, under ICWA ‘Indian child’ is a political, not racial, classification. ‘Indian child’ is defined as ‘any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.’ ‘Indian tribe’ is limited to federally recognized tribes, such as

12 Id. at 552.
13 Id.
14 Id. at 553.
15 Id. at 554.
16 Id. at 553 n.24.
17 Id.
18 Id. at 555.
19 Id. at 646.
23 Id.
24 Id.

recognized tribes. ICWA thus applies only when a child (1) is already a citizen of a federally recognized tribe or (2) has a parent who is a citizen of a federally recognized tribe and herself is eligible to become a citizen. In short, the statute is triggered by political affiliation: enrolled membership (or eligibility for it) in a sovereign nation—not race—is the basis for application of ICWA. This can include children who are tribal members without Indian blood, and can exclude children who are racially Indian but are not eligible for enrollment and children with affiliations with non-federally recognized tribes. Unlike race, tribal membership is a voluntary status, see Duro v. Reina, 495 U.S. 676, 694 (1990), and, like U.S. citizenship, see 8 U.S.C. § 1484, can be renounced. The contention that ICWA is premised on a race-based classification is simply in error.

B. ICWA serves a compelling governmental interest.

Even if ICWA is race-based, it is still constitutional because it survives strict scrutiny. To survive strict scrutiny, "racial classifications ... must serve a compelling governmental interest, and must be narrowly tailored to further that interest." The government has a compelling interest based on the "trust relationship between the United States and the Indian people," under which the United States "has charged itself with moral obligations of the highest responsibility and trust." Pursuant to those obligations, the federal government is responsible "for the protection and preservation of Indian tribes." The protection of Indian children is essential to protecting tribes. Therefore, it is the public policy of the United States to protect the best interests of Indian children and tribes. Indeed, Congress documented the large-scale and unwarranted removal of Indian children from their families and tribes, a problem states had failed to correct.

C. ABA Policy Supporting Tribes as Political Entities

The Braakeen court’s conclusion that ICWA is a racial classification conflicts with ABA policy which specifically recognizes the law as a statute applying to Indian children and tribes. ICWA serves a compelling governmental interest. Even if ICWA is race-based, it is still constitutional because it survives strict scrutiny. To survive strict scrutiny, "racial classifications ... must serve a compelling governmental interest, and must be narrowly tailored to further that interest." Pursuant to those obligations, the federal government is responsible "for the protection and preservation of Indian tribes." The protection of Indian children is essential to protecting tribes. Therefore, it is the public policy of the United States to protect the best interests of Indian children and tribes. Indeed, Congress documented the large-scale and unwarranted removal of Indian children from their families and tribes, a problem states had failed to correct.

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families because of their unique political status and the federal government’s unique responsibility because of that status.33

The report in support of the 2013 resolution, states that “ICWA recognizes the government-to-government relationship between the United States and Tribes, and affirms the political status of tribal members—ICWA is not based on either race or ethnicity.”34 In fact, “[s]tate courts should not be allowed to impose their own subjective values in determining what constitutes American Indian culture and who is an American Indian.”35 This determination must be left to the tribes, as it is not a racial classification. “The long-standing clash between Indian tribal values and those of Anglo-American culture is the very problem ICWA was designed to address.”36

While the Brackeen holding directly threatens the ICWA, to hold eligibility for tribal membership as an impermissible race-based classification is to threaten a tribe’s ability to self-determine and self-govern. The ABA has a long policy history of supporting tribes, and by extension Indian people, as separate sovereigns with the rights to self-determination and self-government.

2015 MM 111A adopted the recommendations contained in the Indian Law and Order Commission’s Nov. 2013 Report, noting “tribes, as sovereign, should have the option to fully or partially opt out of [the] jurisdictional maze.”37 2012 AM 301 urged Congress to strengthen tribal jurisdiction to address crimes of gender-based violence committed on tribal lands in the reauthorization of the Violence Against Women Act.38 These two resolutions called for the expansion of tribal criminal jurisdiction to include non-Indians. Like ICWA, this recognition of tribal sovereignty extends beyond enrolled members.

2008 AM 117A urged for long-term funding for tribal justice systems, noting “the effective operation of tribal courts is essential to promote the sovereignty and self-governance of the Indian tribes.” As the Supreme Court has recognized: ‘Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.”39

34 ABA 2013 AM 111A at 4
35 Id. at 9.
36 Id. at 4.
38 ABA 2012 AM 301 https://www.americanbar.org/content/dam/aba/administrative/crj/committee/eug-12-violence-against-women.authcheckdam.pdf

The report in support of the 2013 resolution, states that “ICWA recognizes the government-to-government relationship between the United States and Tribes, and affirms the political status of tribal members—ICWA is not based on either race or ethnicity.”34 In fact, “[s]tate courts should not be allowed to impose their own subjective values in determining what constitutes American Indian culture and who is an American Indian.”35 This determination must be left to the tribes, as it is not a racial classification. “The long-standing clash between Indian tribal values and those of Anglo-American culture is the very problem ICWA was designed to address.”36

While the Brackeen holding directly threatens the ICWA, to hold eligibility for tribal membership as an impermissible race-based classification is to threaten a tribe’s ability to self-determine and self-govern. The ABA has a long policy history of supporting tribes, and by extension Indian people, as separate sovereigns with the rights to self-determination and self-government.

2015 MM 111A adopted the recommendations contained in the Indian Law and Order Commission’s Nov. 2013 Report, noting “tribes, as sovereign, should have the option to fully or partially opt out of [the] jurisdictional maze.”37 2012 AM 301 urged Congress to strengthen tribal jurisdiction to address crimes of gender-based violence committed on tribal lands in the reauthorization of the Violence Against Women Act.38 These two resolutions called for the expansion of tribal criminal jurisdiction to include non-Indians. Like ICWA, this recognition of tribal sovereignty extends beyond enrolled members.

2008 AM 117A urged for long-term funding for tribal justice systems, noting “the effective operation of tribal courts is essential to promote the sovereignty and self-governance of the Indian tribes.” As the Supreme Court has recognized: ‘Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.”39

34 ABA 2013 AM 111A at 4
35 Id. at 9.
36 Id. at 4.
38 ABA 2012 AM 301 https://www.americanbar.org/content/dam/aba/administrative/crj/committee/eug-12-violence-against-women.authcheckdam.pdf
Recognizing tribes as political sovereigns impacts their government-to-government relationship with the United States, and the federal government’s authority to legislate regarding tribes and Indian peoples, such as the ICWA. Notably, in 1980, the ABA adopted resolution 110, urging strict adherence to Indian treaty obligations. The report to the resolution notes:

The internal powers of self-government were retained by the tribes, however, subject only to the power of Congress … The authority of Congress over Indians derives, for the most part from the Treaty and Commerce clauses of the Constitution. Apart from the Constitution, however, an independent source of power derives from the federal relationship with Indians. In Cherokee Nation v. Georgia, supra. in attempting to define the relationship between the United States and the Cherokee nation, Chief Justice John Marshall characterized it as resembling that of a guardian and ward. Subsequently, the Supreme Court found that, from the Indians’ status as wards of the government, ‘there arises the duty of protection, and with it the power.’ United States v. Kagama 118 U.S. 375, 385 (1886).40

Under the trust responsibility to Indian tribes, specifically recognized by Congress and the courts and secured by the treaties, statutes, and 150 year of judicial precedent, Indian tribes should be able to look to the future confident that the federal government will approach its obligation to Indian tribes in a manner consistent with its duty of protection.41

The Treaty and Indian Commerce clauses of the Constitution, in addition to the federal trust responsibility to Indian tribes all support the federal authority to enact the ICWA.

II. Section 1915 Does Not Violate the Non-Delegation Doctrine.

A. Section 1915 Does Not Violate the Non-Delegation Doctrine.

Section 1915 of ICWA sets default placement preferences for children. However, Congress also recognized that because of factors unique to each tribe, flexibility is essential. Congress expressly mandated that placements must be made with consideration of “the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.”42 ICWA therefore permits a tribe—exercising

41 Id.

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Before the founding of the United States, “tribes were self-governing sovereign political communities.44 Today tribes “remain separate sovereigns ... [and] unless and until Congress acts, the tribes retain their historic sovereign authority.45 Moreover, the Court has confirmed that Indian tribes fully “retain their inherent power ... to regulate domestic relations among members.”46; see Fisher v. District Court, 424 U.S. 382, 390 (1976) (holding that tribe had exclusive jurisdiction in child-custody proceedings)47; Cohen’s Handbook of Federal Indian Law 216 (2012 ed.) (“One area of extensive tribal power is domestic relations among tribal members.”). Section 1915(c) is properly viewed as congressional confirmation of inherent tribal power over the proper placement of Indian children and, at most, “relax[es] restrictions on the bounds of the inherent tribal authority.”48

Even if Congress did delegate federal authority to tribes, it is permissible to do so. In United States v. Mazurie, 419 U.S. 544 (1975), the Court upheld Congress’s delegation to an Indian tribe to control the introduction of alcoholic beverages into the tribal community.49 The Court held that “the independent tribal authority is quite sufficient to protect Congress’ decision to vest in tribal councils this portion of its own authority.”50

B. ABA Policy Supporting Tribal Independent Sovereign Authority to Legislate Child Welfare

The ICWA does not delegate any legislative function to tribes to reorder the placement preferences established by Congress. Rather, Congress recognizes that tribes possess independent sovereign authority, including law-making authority. In recognition of this inherent sovereignty, Congress affirmed that foster care and adoptive placement of a child (who is a tribal citizen or has a parent who is a tribal citizen and the child is eligible for citizenship) is at the core of a tribe’s inherent authority.51 Congress has the authority

48 id. at 557.
49 Id.

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48 id. at 557.
49 Id.
III. ICWA Does Not Unconstitutionally Commandeer the States

A. ICWA Does Not Unconstitutionally Commandeer the States

"[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."56 But the anticommandeering principle has a significant exception: it does not restrict federal dictates to state courts. Printz explained that "the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."57 ICWA and the Final Rule impose obligations on state courts and, therefore, are immune from a commandeering challenge. Each of the challenged provisions of ICWA is directed at procedural rules applied by state courts, or apply evenhandedly to both state agencies and private parties.

ICWA additionally is not an intrusion into state child-welfare courts. Federal law imposes numerous mandates on state courts in the context of adoption and custody. See 52

52 Supra note 39.
54 Supra note 36.
55 ABA 111A MM 2015 at 1 (emphasis added).
56 ABA 111A MM 2015 at 1 (emphasis added).
58 Id. at 907

IIIC

B. ICWA Does Not Unconstitutionally Commandeer the States

In ABA 1980 MM 110 urging for the full implementation of tribal treaties, the ABA has long recognized the inherent sovereignty of tribes. In ABA Resolution 111A (Feb. 2015) (adopting the recommendations contained in the Indian Law and Order Commission’s Nov. 2013 Report), the ABA recognized Congressional plenary power over Indian affairs and supported the Congressional reaffirmation of tribal criminal jurisdiction, arguably a much larger “delegation” than that alleged in ICWA.54 Recommendation 1.1 of the Indian Law and Order Commission report notes that “[u]pon a Tribe’s exercise of opting out, Congress would immediately recognize the Tribe’s inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe’s lands….”55 Like supporting the call to lift congressionally-imposed limitations on tribal authority to prosecute, the ABA has also expressed support for the congressional relaxation of tribe’s sovereign authority to determine placement preferences for its youth in supporting ICWA.

To the extent the tribal placement preferences of ICWA is a delegation at all, instead of merely recognizing the inherent power of tribes, it is permissible for Congress to delegate federal authority to tribes because of their sovereign status.53 The ABA has long recognized the inherent sovereignty of tribes. In ABA Resolution 111A (Feb. 2015) (adopting the recommendations contained in the Indian Law and Order Commission’s Nov. 2013 Report), the ABA recognized Congressional plenary power over Indian affairs and supported the Congressional reaffirmation of tribal criminal jurisdiction, arguably a much larger “delegation” than that alleged in ICWA.54 Recommendation 1.1 of the Indian Law and Order Commission report notes that “[u]pon a Tribe’s exercise of opting out, Congress would immediately recognize the Tribe’s inherent criminal jurisdiction over all persons within the exterior boundaries of the Tribe’s lands….”55 Like supporting the call to lift congressionally-imposed limitations on tribal authority to prosecute, the ABA has also expressed support for the congressional relaxation of tribal’s sovereign authority to determine placement preferences for its youth in supporting ICWA.

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52 Supra note 39.
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55 ABA 111A MM 2015 at 1 (emphasis added).
56 ABA 111A MM 2015 at 1 (emphasis added).
58 Id. at 907
B. Supportive ABA Policy

While states may exert extensive authority over domestic relations, that authority is limited when it overlaps with areas of federal power. This prominently includes Indian affairs, including Indian child welfare. Congress has plenary power over Indian affairs, dating back to the foundation of the country. ABA Resolution 110 (1980) urged strict adherence to Indian treaty obligations. The resolution states that the ABA "urges the federal government to continue to recognize the special relationship between the United States and the American Indian tribes and their members and the federal responsibility to Indian people." The report to the resolution notes "tribal sovereignty exists only at the sufferance of Congress and is subject to complete defeasance." This policy has been restated and reinforced by subsequent ABA policy supporting federal legislation regarding Indian affairs, including 111A AM 2013 (urging the implementation of and compliance with ICWA).

Further, the ICWA is far from the only federal child welfare law that might directly regulate states. See e.g. ABA Family Law policy positions (page 66). For example, Congress established uniform national standards for the assertion of child-custody jurisdiction in the Parental Kidnapping Prevention Act, supported by ABA Resolution of 1988, urging Congress to confirm that District Courts have the power to resolve the issue of conflicting state claims based on the Federal Parental Kidnapping Prevention Act (Aug. 1988).

In 2015, the ABA adopted Resolution 113 (2015), urging the prompt implementation of certain recommendations of the U.S. Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence report. It includes recommendation 2.1, calling for ICWA compliance. The report calls for both the legislative

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61 Supra note 39.


63 Supra note 33.

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Conclusion

The Indian Child Welfare Act remains an important effort to preserve and protect American Indian/Alaska Native families. The *Brackeen* holding conflicts with numerous other similarly-situated cases that have found ICWA to be not only constitutional, but have referred to it as the gold standard of child welfare policy. In addition to its broad negative implications for the child welfare legal field, the *Brackeen* holding also threatens the foundation of Indian law by calling into doubt the legal status of tribes and Indian peoples as distinct political entities, and thereby their ability to self-govern. The ABA has supported ICWA and its implementation, and tribal sovereignty, for more than two decades. An ABA policy reaffirming ICWA’s constitutionality would allow for a neutral third party to share its voice in support of ICWA and its stated goals.

Respectfully submitted,

Wilson Adam Schooley  
Chair, Section of Civil Rights and Social Justice  
August 2019

© ABA Resolution 113 (2015)  
1. **Summary of Resolution.** This resolution calls for the American Bar Association to reaffirm the constitutionality of the Indian Child Welfare Act (ICWA), specifically in reference to *Brackeen v. Zinke* (appealed to the Fifth Circuit as *Brackeen, et. al. v. Bernhardt, et. al.*). The *Brackeen et. al. v. Zinke, et. al.* decision ruled that ICWA and its regulations of “Final Rules” were unconstitutional. Due to such a ruling, it sets dangerous precedent for tribes to not have legal authority in protecting American Indians/Alaska Natives children and their families. Additionally, this will further disavow tribes’ independent status and ability to rule as political entities.

2. **Approval by Submitting Entity.** The Council of the Section of Civil Rights and Social Justice approved sponsorship of the Resolution during its Spring Meeting on April 12, 2019.

   The Commission on Domestic and Sexual Violence approved cosponsorship of this resolution on April 11, 2019.

   The Center on Children and the Law approved sponsorship of the Resolution on May 7, 2019.

   The Commission on Youth at Risk approved sponsorship of the Resolution on May 7, 2019.

   The National Native American Bar Association approved cosponsorship of this resolution on May 6, 2019.

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 Commission on Homelessness and Poverty sponsored ABA Policy 2001 AM 105C calling for congressional action to grant Title IV-E foster care funds access to Tribes.

5. **What Urgency exists which requires action at this meeting of the House?**

   In light of the October 4, 2018 ruling of a Judge in the Northern District of Texas in the case, *Brackeen, et. al. v. Zinke, et. al.*, 04:17-cv-00868 (October 4, 2018), there is immediate need for the ABA to reaffirm its policy in support of the constitutionality
of the Indian Child Welfare Act. The decision has the likely and potential effect of severely eroding the stated purpose and intent of the Act.

6. Status of Legislation. N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
   If adopted, the ABA would be supporting this resolution in the effort to endorse the constitutionality of ICWA despite the Brakeen, et. al. v. Zinke, et. al. decision. The ABA supporting such a resolution would encourage Congress to further recognize tribal sovereignty and tribes inherit powers in regards to child welfare.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) None

10. Referrals.
    - ABA Judicial Division, Tribal Court Council
    - Center for Human Rights
    - Family Law Section
    - Criminal Justice Section
    - Commission on Youth at Risk
    - Coalition on Racial and Ethnic Justice
    - Commission on Disability Rights
    - Commission on Hispanic Legal Rights and Responsibilities
    - Commission on Sexual Orientation and Gender Identity
    - Commission on Domestic and Sexual Violence
    - Commission on Racial and Ethnic Diversity in the Profession
    - Commission on Women in the Profession
    - Commission on Immigration
    - Commission on Homelessness and Poverty
    - National Native American Bar Association
    - Center on Children and the Law
    - Coalition on Racial and Ethnic Justice
    - Center for Public Interest Law
    - Standing Committee on Pro Bono and Public Interest
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115C

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    - Section on State and Local Government Law
    - Section of Litigation
11 Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12 Contact Name and Address Information (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution supports the constitutionality of the Indian Child Welfare Act (ICWA), specifically in reference to *Brackeen v. Zinke* (appealed to the Fifth Circuit as *Brackeen, et. al. v. Bernhardt, et. al.*).

2. Summary of the Issue that the Resolution Addresses

The *Brackeen et. al. v. Zinke, et. al.* decision ruled that ICWA and its regulations of "Final Rules" were unconstitutional. Due to such a ruling, it sets dangerous precedent for tribes to not have legal authority in protecting American Indians/Alaska Natives children and their families. Additionally, this will further disavow tribes' independent status and ability to rule as political entities.

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

The proposed policy proposition will allow the ABA to act in support of ICWA, which would extend to tribal jurisdiction over a stronger child welfare system and its goals for recognizing ethnic disproportionality.

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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No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges the U.S. Department of Justice to retain—as a minimum threshold—existing policy protections, as codified at 28 C.F.R. § 50.10 (2016), that limit federal law enforcement in obtaining information from, or records of, members of the news media, and that limit federal law enforcement in questioning, arresting, or indicting members of the news media.
REPORT

I. Introduction

"Because freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news," U.S. Department of Justice (DOJ) policy limits the use of certain law enforcement tools “that might unreasonably impair newsgathering activities.” The current DOJ policy, adopted in 2013, revised in 2015, and codified at 28 C.F.R. § 50.10 (2016), treats the use of those tools against members of the news media as “extraordinary measures.” Accordingly, the policy establishes high standards for the use of subpoenas, court orders, and warrants to obtain information from or about members of the news media, requiring approval by the Attorney General and notice to the targeted parties, with carefully curtailed exceptions. These requirements represent a careful effort to balance the needs of law enforcement with the right of the press to inform civil society; protecting national security with fostering government accountability; and administering justice with promoting open public debate. Any attempts to loosen these requirements would upset this balance, undermining the news media’s ability to gather information from confidential sources and chilling their newsgathering efforts in covering topics of public concern.

II. Development of the DOJ’s Current News Media Policy

Initially introduced in 1980, the DOJ’s news media policy has long sought to balance the rule of law and freedom of the press. Under the 1980 policy, however, members of the news media were subject to the government’s relatively unrestricted use of subpoenas and other investigative tools. The 1980 policy significantly improved upon the previous lack of guidance by requiring that “[a]ll reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena,” and requiring the Attorney General’s express permission to issue indictments or arrest warrants to members of the news media. But it nonetheless afforded the Attorney General great flexibility in deciding whether to negotiate with members of the news media.

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2 Id. § 50.10(c)(4)(iv)(A) & (e)(3)(i) (stating that the government will pursue negotiations with and give notice to the affected journalist or media organization, “unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm”).
3 While roughly 30 states have enacted shield laws, there is no federal shield law on the books despite many attempts to pass one. See Jonathan Peters, Shield Laws and Journalist’s Privilege: The Basics Every Reporter Should Know, Colum. Journalism Rev. (Aug. 22, 2016), https://www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php. The Court has recognized only a qualified privilege for journalists under the First Amendment. See Branzburg v. Hayes, 408 U.S. 665 (1972).
4 28 C.F.R. § 50.10(b) (2010).
5 Id. § 50.10(i)–(k); but see id. § 50.10(l) (allowing for arrest or questioning without the Attorney General’s authorization if the circumstances warranted an exception to the prior authorization requirement).
or provide them with notice of a forthcoming subpoena. Following public outcry over two incidents in which the government obtained journalists’ records without notice in the early 2010s—underscoring the need to strengthen protections for the news media—the DOJ issued a new policy in 2013, and revised it in 2015.

The 2013 policy introduced significant protections for members of the news media:

(a) Advance negotiation and notice requirement. The 1980 policy required negotiation with the news media prior to the issuance of a subpoena and notice once the subpoena was issued, but only when the Attorney General determined “that such negotiations would not pose a substantial threat to the investigation.” The 2013 policy significantly strengthened the negotiation and notice requirements, providing that negotiations must be pursued and notice must be provided unless “the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.” The 2013 policy thus placed the burden on the government to identify compelling reasons for refusing notice, rather than reasons for providing notice.

(b) Requiring Attorney General approval for search warrants. The 1980 policy required approval of the Attorney General for the issuance of subpoenas, indictments, and arrest warrants to members of the news media, but not for search warrants and orders issued under 28 U.S.C. § 2703(d) for cell phone communications or other customer records. The 2013 policy requires the Attorney General to approve issuing search warrants and orders issued under 28 U.S.C. § 2703(d).

(c) A News Media Review Committee. Under the 2013 policy, the DOJ committed to the creation of a standing committee to review requests for authorization of subpoenas and other investigative tools and to submit their recommendations to the Attorney General.

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(a) Advance negotiation and notice requirement. The 1980 policy required negotiation with the news media prior to the issuance of a subpoena and notice once the subpoena was issued, but only when the Attorney General determined “that such negotiations would not pose a substantial threat to the investigation.” The 2013 policy significantly strengthened the negotiation and notice requirements, providing that negotiations must be pursued and notice must be provided unless “the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.” The 2013 policy thus placed the burden on the government to identify compelling reasons for refusing notice, rather than reasons for providing notice.

(b) Requiring Attorney General approval for search warrants. The 1980 policy required approval of the Attorney General for the issuance of subpoenas, indictments, and arrest warrants to members of the news media, but not for search warrants and orders issued under 28 U.S.C. § 2703(d) for cell phone communications or other customer records. The 2013 policy requires the Attorney General to approve issuing search warrants and orders issued under 28 U.S.C. § 2703(d).

(c) A News Media Review Committee. Under the 2013 policy, the DOJ committed to the creation of a standing committee to review requests for authorization of subpoenas and other investigative tools and to submit their recommendations to the Attorney General.
The 2015 revisions to the policy further extended these protections:

(a) “[N]ewsgathering activities.” The 2013 policy applied only to the use of “law enforcement tools . . . that might reasonably impair ordinary newsgathering activities.” In 2015, the DOJ revised the guidelines to apply to all “newsgathering activities,” whether ordinary or not. This language was appropriately changed in response to objections from news organizations, who viewed it as a way for the DOJ to control which “newsgathering activities” came under the existing policy.14

(b) Mandatory consultation with the Criminal Division. Additionally, the 2015 update required law enforcement to consult with members of the Criminal Division on questions of fact associated with the policy before issuing any subpoenas, applying for a search warrant, or questioning, arresting, or charging a member of the news media. This requirement created another layer of review to help ensure compliance with the policy and the limitations it imposes on law enforcement’s efforts to obtain information from or about members of the news media.

The DOJ’s 2013 and 2015 revisions to its policy thus establish important threshold protections against government investigations that would unduly burden freedom of the press. As the New York Times acknowledged (while urging that Congress continue to work toward passing a shield law), “the new guidelines, if followed, would make it more difficult to secretly review a media organization’s e-mails, phone or business records or other communications.” Moreover, as the Reporters Committee for Freedom of the Press has emphasized, “[t]he new guidelines reflect a great deal of good-faith discussion between news media and . . . the Department of Justice,” and they “carefully balance the need to enforce the law and protect national security with the value of a free press that can hold the government accountable to the people.” Accounting for the interests of the news media, law enforcement, and the broader public, the current policy safeguards the press’s ability to investigate and publish on topics of public concern and fulfill its core democratic function, while preserving DOJ’s ability to obtain relevant information when truly necessary to the national security.

III. Proposed Changes to the DOJ’s News Media Policy


The DOJ’s 2013 and 2015 revisions to its policy thus establish important threshold protections against government investigations that would unduly burden freedom of the press. As the New York Times acknowledged (while urging that Congress continue to work toward passing a shield law), “the new guidelines, if followed, would make it more difficult to secretly review a media organization’s e-mails, phone or business records or other communications.” Moreover, as the Reporters Committee for Freedom of the Press has emphasized, “[t]he new guidelines reflect a great deal of good-faith discussion between news media and . . . the Department of Justice,” and they “carefully balance the need to enforce the law and protect national security with the value of a free press that can hold the government accountable to the people.” Accounting for the interests of the news media, law enforcement, and the broader public, the current policy safeguards the press’s ability to investigate and publish on topics of public concern and fulfill its core democratic function, while preserving DOJ’s ability to obtain relevant information when truly necessary to the national security.

III. Proposed Changes to the DOJ’s News Media Policy

In 2017, the DOJ announced that it was considering drastic changes to the news media policy. Expressing concern with leaks from the intelligence community, then-Attorney General Jeff Sessions stated that the DOJ would revisit the policy: "We respect the important role that the press plays, and we'll give them respect, but it is not unlimited . . . . We must balance the press' role with protecting our national security and the lives of those who serve in the intelligence community, the armed forces and all law-abiding Americans." Furthermore, Sessions and his successor, Attorney General William Barr, have abandoned vows made by President Obama and former Attorney General Eric Holder not to jail journalists for doing their work. A source within the DOJ has questioned whether investigations of the press should be subject to a different standard under the Constitution: "The view is all men and woman were created equal and that becoming a journalist shouldn’t suddenly change that equilibrium."  

According to news reports, the DOJ is still considering loosening the policy's notice requirements, citing investigation delays and national security leaks. A January 2019 article in The Hill reported that DOJ "quietly has been working on a revision to its guidelines" for months. It is unclear whether the DOJ will actually change the news media policy, and if so, what changes it will make, but recent reports indicate that the DOJ is considering (1) lowering the standards prosecutors must meet before requesting a subpoena of news media records; and (2) loosening or eliminating the notification and notice requirements. Each of these changes would chill core First Amendment-protected activities by members of the media.

As press freedom and First Amendment organizations have explained, "[w]eakening the current rules that protect reporters—as well as their sources—would undermine freedom of the press and endanger activities at the heart of the First Amendment." These concerns echo in Supreme Court precedent dating back decades. Concurring in the Court's decision holding unconstitutional a prior restraint on the publication of the Pentagon Papers, Justice Black explained: "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role of guarding "[w]eakening the current rules that protect reporters—as well as their sources—would undermine freedom of the press and endanger activities at the heart of the First Amendment." These concerns echo in Supreme Court precedent dating back decades. Concurring in the Court's decision holding unconstitutional a prior restraint on the publication of the Pentagon Papers, Justice Black explained: "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role of guarding...
role in our democracy. The press was to serve the governed, not the governors.”

Any changes to the news media policy that would diminish press protections would undermine the media’s ability to fulfill its democratic role and raise First Amendment concerns.

V. Conclusion

The ABA has previously supported resolutions to strengthen First Amendment protections for members of the news media. In 2005, the ABA called for the enactment of federal shield law that would balance the needs of law enforcement with the public interest in the free flow of information, and protect journalists from having to divulge their sources. The current DOJ policy helps to achieve this balance, establishing threshold First Amendment protections for members of the news media that the ABA has already endorsed.

The DOJ’s current news media policy preserves a precarious balance between the rights of the press and the duties of law enforcement. The ABA encourages the DOJ to retain its current policy as a threshold protection for members of the news media from unreasonable burdens on their newsgathering activities, consistent with the First Amendment.

Respectfully submitted,

Wilson Adam Schooley
Chair, Civil Rights & Social Justice Section
August 2019

27 Dennis J. Drasco, Report and Resolution #104B: Federal Shield Law for Journalists, ABA (August 8–9, 2005),
GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wilson A. Schooley, Chair, Section of Civil Rights and Social Justice

1. Summary of Resolution(s). This resolution urges the Department of Justice to retain—
as a minimum threshold—existing policy protections, as codified at 28 C.F.R. § 50.10 (2016), that limit federal law enforcement in obtaining information from, or records of,
members of the news media, and that limit federal law enforcement in questioning,
arresting, or indicting members of the news media.

2. Approval by Submitting Entity. The Council of the Section of Civil Rights and Social
Justice approved sponsorship of the Resolution during its Spring Meeting on April
12, 2019.

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

4. What existing Association policies are relevant to this Resolution and how would they
be affected by its adoption? The ABA has previously supported resolutions to
strengthen First Amendment protections for members of the news media. In 2005,
ABA called for addressing the enactment of federal shield in which prior to subjecting
a journalist to a subpoena, the government must demonstrate that the information
sought is essential to a critical issue in the matter, that all reasonable alternative
sources for the information have been exhausted, and that the need for the information
clearly outweighs the public interest in protecting the free flow of information. (Dennis
(August 8–9, 2005), https://www.americanbar.org/content/dam/aba/directories/policy/2005_am_104b.authcheckd
am.pdf.) This resolution is a natural extension of this policy to support First Amendment
protections for members of the news media.

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

6. Status of Legislation. The DOJ’s news media policy was initially introduced in 1980.
Following public outcry over two incidents in which the government obtained
journalists’ records without notice in the early 2010s, the DOJ made substantial
changes to the policy in 2013, and revised it again in 2015. In 2017, the DOJ
announced that it was considering rolling back protections for news media under the
policy. It is unclear whether the DOJ will actually change the news media policy, and
if so, what changes it will make, but recent reports indicate that the DOJ quietly has
been working on a revision to its guidelines for months.

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the House? N/A

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Following public outcry over two incidents in which the government obtained
journalists’ records without notice in the early 2010s, the DOJ made substantial
changes to the policy in 2013, and revised it again in 2015. In 2017, the DOJ
announced that it was considering rolling back protections for news media under the
policy. It is unclear whether the DOJ will actually change the news media policy, and
if so, what changes it will make, but recent reports indicate that the DOJ quietly has
been working on a revision to its guidelines for months.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. ABA will encourage the DOJ to retain its current news media policy as a threshold protection for members of the news media from unreasonable burdens on their newsgathering activities, consistent with the First Amendment.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

10. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:

- Center for Human Rights
- Standing Committee on Legal Aid and Indigent Defendants
- Coalition on Racial and Ethnic Justice
- Commission on Disability Rights
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Sexual Orientation and Gender Identity
- Commission on Domestic and Sexual Violence
- Commission on Racial and Ethnic Diversity in the Profession
- Government and Public Sector Lawyers Division
- Section of Administrative Law and Regulatory Practice
- Section of State and Local Government Law
- Forum on Communications Law
- Public Education Division
- Criminal Justice Section
- Infrastructure and Regulated Industries Section
- General Practice, Solo and Small Firm Section
- Judicial Division
- Section of Litigation
- Rule of Law Initiative
- Young Lawyers Division
- Task Force on Cyber Security
- Standing Committee on Law and National Security

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

Carrie DeCell, Vice Chair
Knight First Amendment Institute at Columbia University
475 Riverside Dr., Ste. 302
New York, NY 10115
12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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Tel.: (415) 541-0200
Email: schickman@freelandlaw.com
This resolution urges the U.S. Department of Justice to retain—as a minimum threshold—existing policy protections, as codified at 28 C.F.R. § 50.10 (2016), that limit federal law enforcement in obtaining information from, or records of, members of the news media, and that limit federal law enforcement in questioning, arresting, or indicting members of the news media.

The current DOJ news media policy, adopted in 2013, revised in 2015, and codified at 28 C.F.R. § 50.10 (2016), treats the use of certain law enforcement tools against members of the news media as “extraordinary measures.” Accordingly, the policy establishes high standards for the use of subpoenas, court orders, and warrants to obtain information from or about members of the news media, requiring approval by the Attorney General and notice to the targeted parties, with carefully curtailed exceptions. These requirements represent a careful effort to balance the needs of law enforcement with the right of the press to inform civil society; protecting national security with fostering government accountability; and administering justice with promoting open public debate. Any attempts to loosen these requirements would upset this balance, undermining the news media’s ability to gather information from confidential sources and chilling their newsgathering efforts in covering topics of public concern.

In 2017, the DOJ announced that it was considering drastic changes to the news media policy. According to recent news reports, the DOJ is still considering loosening the policy’s notice requirements, citing investigation delays and national security leaks. The DOJ has quietly been working on a revision to its guidelines and is considering (1) lowering the standards prosecutors must meet before requesting a subpoena of news media records; and (2) loosening or eliminating the negotiation and notice requirements. Each of these changes would chill core First Amendment-protected activities by members of the media.

Adoption of this policy will allow the ABA to urge the Department of Justice to retain—as a minimum threshold—existing news media policy protections, as codified at 28 C.F.R. § 50.10 (2016).
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, except for the new Department of Justice policy to which the resolution is addressed.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation or regulations that require all law enforcement entities to meet training standards related to sexual orientation and gender identity similar to those developed by California’s Commission on Police Officer Standards and Training (POST) under California’s AB 2504 (September 30, 2018).
Introduction

The American Bar Association (ABA) adopts this Resolution to support legislation like AB 2504, requiring that police officers be trained about sexual orientation and gender identity (SOGI) minorities to improve law enforcement culture and effectiveness in serving the LGBTQ community. This report will describe the current state of law regarding hate crime, rising tensions between police officers and the LGBTQ community, and legislation adopted by other municipalities requiring SOGI training for law enforcement.

The ABA has adopted policies consistent with this Resolution condemning discrimination on the basis of SOGI in the justice system. The ABA recognized LGBTQ rights as basic human rights condemning laws, regulations, rules and practices that discriminate against individuals based on LGBT status. In 1996, the ABA passed a resolution urging state, territory and local bar associations to study bias against gays and lesbians in the legal profession and the justice system in their community, and make appropriate recommendations to eliminate such bias. In addition, the ABA also urged enactment of legislation to curtail the ‘gay panic’ and ‘trans panic’ defenses, requiring courts to instruct juries that neither non-violent sexual advance, nor the discovery of a person’s gender/sexual identity constitutes legally adequate provocation to mitigate the severity of non-capital crime. In 2017, the call for implicit bias training urges courts to develop plans of action to make anti-bias training an important part of both initial judicial training and continuing judicial education. Understanding implicit bias is the first step in implementing de-biasing strategies in law enforcement training.

Existing policies support the initiative recognizing LGBTQ rights and de-stigmatizing their status, especially within the judicial process. This Resolution will stress the importance of educating law enforcement about SOGI, and how this will serve the community. With the rate of hate crimes increasing, minorities must feel protected by their local police force. For law enforcement officers to accomplish this, and change the discriminatory culture toward LGBTQ individuals, they must appreciate their differences and understand how to appropriately serve them.

Background

California Governor Jerry Brown signed AB 2504 into law on September 30, 2018. Under AB 2504, police officers are required to undergo training on SOGI. POST requires

1 ABA Resolution, 14A114B, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/legislativeissueslist.pdf
3 ABA Resolution 13A113A, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/legislativeissueslist.pdf
4 ABA Resolution 17A121, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/legislativeissueslist.pdf

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3 ABA Resolution 13A113A, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/legislativeissueslist.pdf
4 ABA Resolution 17A121, https://www.americanbar.org/content/dam/aba/uncategorized/GAO/legislativeissueslist.pdf
consultation with SOGI members of law enforcement, as well as those in their community with expertise regarding these issues, including at least one male member, one female member, and one transgender member. The training must include: (1) understanding the differences between sexual orientation and gender identity; (2) the vocabulary used to identify and describe sexual orientation and gender identity; (3) how to create an inclusive workplace within law enforcement for LGBTQ individuals; (4) important milestones in history relating to SOGI minorities and law enforcement, and (5) how law enforcement can effectively respond to domestic violence and hate crimes involving SOGI minorities.5

Hate Crime
A hate or a bias-related crime occurs when the criminal act intentionally targets a victim because of who the victim is. Under the Bias-Related Crimes Act of 1989, a hate crime is defined as “one that demonstrates an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance sexual orientation, gender identity or expression, family responsibility, homelessness, disability, marital status, educational attainment, or political affiliation of a victim.” While violent crime is detrimental, prejudice-based acts have a strong impact because they intend to send a threatening message targeting one community.

Statistical information has shown that lesbian, gay, bisexual and transgender people are attacked more often than heterosexuals in the United States. In a report by the Human Rights Watch, based on data from the Federal Bureau of Investigation (FBI), evidence shows that since 1991, more than 100,000 hate crime offenses have been reported. In 2007, 1,265 LGB-biased hate crimes were reported to the FBI, which is a 6-percent increase from 2006. The 2017 FBI statistics state 7,175 hate crimes were reported, 1,130 of which were based on sexual orientation bias, and 119 on gender identity bias, demonstrating an increase in reports of hate crimes related to SOGI.7 These statistics highlight the larger issue of violence against marginalized communities.

Police Officers and LGBT Community
It is important for marginalized groups, like the LGBTQ community, to feel protected and adequately served by police officers. Yet, police have targeted LGBTQ individuals and the places they congregate. In a Lambda Legal survey, it was reported among respondents that more than one in eight respondents (14%) had police contact in the past five years reported verbal assault by police, while, 3% reported sexual harassment and 2% reported physical assault. Of respondents who complained about police misconduct, 71% said their complaint was not fully addressed by those they reported to.6

9 Lambda Legal, “Protected and Served? Survey of LGBT/HIV Contact with Police, Prisons, Courts and Schools” (2014), factsheet with preliminary findings on file with authors.

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9 Lambda Legal, “Protected and Served? Survey of LGBT/HIV Contact with Police, Prisons, Courts and Schools” (2014), factsheet with preliminary findings on file with authors.
In a 2016 study by the National Coalition of Anti Violence Programs, on police response to survivors affected by hate crime within the LGBTQ community, it was reported, of those who interacted with the police, 35% of survivors said police officers were indifferent. 31% said the police were hostile. 52 survivors reported police misconduct after the initial incident of violence, including excessive force, unjustified arrest, and entrapment. Black survivors were 2.8 times more likely to experience excessive force.9

Wagoner v. City of Portland (2014)

In 2014, Ms. Wagoner, a lesbian woman filed suit against the city of Portland, Oregon for false arrests and excessive force. According to Wagoner, she was a passenger in a vehicle leaving a well-known LGBT center. A police car began to follow them from a nearby gas station and turned on its head lights after they turned off their vehicle. The officer alleged Wagoner was not wearing a seat belt despite her stating she was, until the vehicle was stopped. During the arrest, Wagoner alleged that the officer slammed her to the ground which “caused her to chip her tooth and caused bruising and swelling to her wrists” and when being handcuffed the police officer “threatened to use pepper spray or a Taser on Wagoner if she continued to resist,” however decided against using either.10 When she asked for a female officer to search her, the male officer refused and pulled up her shirt and pulled down her pants to search her. Once in the station, it was reported by Wagoner that officers placed her in a hazardous holding cell, took photographs of her while crying and handcuffed, causing her severe emotional distress.11 All charges against her were later dismissed.

Incident: Gay Staten Island man says cops beat him outside of home, shouting homophobic slur.

On June 19, 2015, Louis Falcone, a gay man living in Staten Island, was confronted by four police officers at his home. He was arguing with his brother, so neighbors called police about the noise. When they arrived, Falcon asked why they were asking him to come outside. Falcone was yanked outside by police while shooing away his barking dog. Falcone said, the police officers threw him to the concrete in front of his house, smashed his face to the ground and yelled homophobic slurs.12 Falcone had recently had surgery on his foot and was wearing a boot, but the officers continued to step on him. According to Falcone, the attack left him with a broken nose, two black eyes, cuts to his face and body, and more foot surgery. Falcone’s version was confirmed by a video shot by his neighbor. He is suing the NYPD for violating his civil rights, and for the injuries he suffered.

The ABA also advocates that police violence towards the LGBTQ community be addressed with a comprehensive training program on cultural competency and the proper

11 Id at 11.
use of force. While AB 2504 legislates standards for adequate training of police officers, it does not address how to remedy police violence toward the LGBTQ community. The ABA recommends rigorous practical training about how police officers can control their use of force, emphasizing de-escalation, and alternatives to arrest or summonses when appropriate.\textsuperscript{13} Also, to further decrease the excessive use of force, mandatory cultural competency training about issues of importance to the LGBTQ community must be implemented. Because police officers hold such powerful roles in the rule of law, they must be trained on how to counter biases against those they are not familiar with. Race, sexual orientation, gender identity and other distinguishing characteristics should not be factors in whether, or how a person is protected and served. Most importantly, trainings should be in a nonjudgmental space where police officers can share inappropriate force used against LGBTQ and other marginalized people, in order to evaluate mistakes and prevent them from recurring.

### Federal Legislation

Only recently has the federal government expanded civil rights protections to include victims of bias-motivated crimes based on their actual or perceived gender, sexual orientation and gender identity. In 2009, the Matthew Shepard Hate Crimes Prevention Act was signed into law by President Barack Obama. This gives the "Justice Department the power to investigate and prosecute bias-motivated violence by providing the Justice Department with jurisdiction over crimes of violence where a perpetrator has selected a victim because of the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability."\textsuperscript{14} The Department of Justice (DOJ) published a guide for police officers to recognize and address biases, assumptions, and stereotypes about victims. Although not a requirement, it is a basis for developing trainings, protocols, and improved supervision, and can be especially useful to law enforcement when engaging with LGBT survivors, who may not feel safe coming forward to report violence in their relationships. Despite these advances, bias toward and violence against the LGBTQ community still happens, triggering initiatives that enforce stricter protection.

As recent racial and religious profiling incidents have garnered national attention, profiling LGBTQ individuals continues to be a problem, particularly for transgender people of color. The End Racial and Religious Profiling Act was introduced in the Senate by Sen. Ben Cardin (D-MD) on February 16, 2017 and in the House of Representatives by Rep. John Conyers (D-MI) on March 10, 2017, as the End Racial Profiling Act (ERPA). This requires law enforcement to maintain adequate policies and procedures to eliminate profiling, including increased data collection to accurately assess the extent of the problem. The bill also requires training for law enforcement officials on profiling, and mandates procedures for "receiving, investigating, and responding to complaints of alleged 115E


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profiling". Police misconduct, when not checked, impacts the culture of the agency, and fosters mistrust between the community and police.

Local Legislation

Several major metropolitan police departments have set internal policies regarding police interaction with the transgender community. They establish standards for recognizing identity, proper pronoun usage, appropriate housing, and search and seizure. These cities include Boston, Los Angeles, Denver, Washington D.C., Philadelphia, New Orleans and even West Hartford. In Los Angeles, the LAPD requires "officers to refer to transgender individuals by the name and gender they prefer. Officers would not be allowed to search such individuals simply to determine their anatomical gender, and must ask if they prefer to be searched by a male or female officer, among other similar directives...". By building policies from the inside, they are more likely to be implemented and respected. Additionally, it creates a positive collaboration between law enforcement and the LGBTQ community by seeking their input and guidance. This is especially true for those directly impacted by discriminatory policing.

An increasing number of cities have added to their police department policy handbook, how officers should best engage with the LGBTQ community. A challenge for LGBTQ individuals is being discriminated against in the legal process by their SOGI being used against them. In 2012, the Chicago Police Department implemented guidelines to make clear that law enforcement should respect a person’s self-identified gender and use their preferred name and pronoun. In addition, gender identity alone cannot provoke reasonable suspicion of criminal activity. Given the high rates of harassment by police officers towards LGBTQ and individuals, officer training is crucial.

Ensuring the safety of transgender inmates goes beyond whether they are placed appropriately, based on birth sex or lived gender, so county and city jails across the country developed policies addressing the broader needs of these inmates. In San Francisco County, California, transgender inmates are placed according to their stated placement preference in collaboration with a review committee. In Cumberland County, Maine, a Transgender Review Committee assesses housing placement, and other services. Additionally, transgender inmates may dress and use the names and pronouns consistent with their gender identity. These policies are vital for the safety of transgender people since the question, whether their basic needs will be met, is constant. Not only will it aid incarcerated transgender individuals, but it will also show a greater respect from police officers, cultivating better relationships between law enforcement and the LGBTQ community.

18 Id. at 17.
Positive Impact

The D.C. Gay and Lesbian Liaison Unit (GLLU) provides outreach to the gay community, educates its police officers, and actively participates in regular crime fighting and prevention. As of August 2005, they investigated over 300 domestic violence cases. More MPD officers were trained to understand the dynamics of same-sex relationships, and the assignment of a GLLU officer to guide the victims through the criminal justice system. In addition, the presence of reliable sources within the gay community resulted in a homicide case closure rate within the GLLU exceeding 95%. The program's most compelling report suggested that much of the city's gay community now views the D.C. Metropolitan Police as a trusted ally.19

Conclusion

For law enforcement officers to effectively serve the LGBTQ community, there should be proper training and education about their unique differences. By supporting regulations similar to those within the POST, the ABA can cultivate a culture change within law enforcement, but also an elimination in bias.

Respectfully submitted,

Wilson A. Schooley
Chair, Civil Rights and Social Justice Section
August 2019

GENERAL INFORMATION FORM

Submitting Entity: ABA Civil Rights and Social Justice Section

Submitted By: Wilson A. Schooley, Chair, Civil Rights and Social Justice Section

1. Summary of Resolution(s).

This resolution urges the enactment of legislation or regulations that require all law enforcement entities to meet training standards similar to those set by the Commission on Police Officer and Standard Training (POST).

2. Approval by Submitting Entity.

The Council of the Section of Civil Rights and Social Justice approved sponsorship of the resolution on April 11, 2019.

The Commission on Sexual Orientation and Gender Identity approved sponsorship of this resolution on April 24, 2019.

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

No.

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

The ABA has a long history condemning discrimination on the basis of sexual orientation and gender identity to provide better access to justice. In LGBT Rights, the ABA recognizes the rights of LGBTQ individuals as basic human rights, and condemns laws, regulations, rules and practices that discriminate against individuals on the basis of LGBTQ status.20 Sexual Orientation, urges state, territorial and local bar associations to study bias in their community against gays and lesbians within the legal profession, and the justice system, and to make appropriate recommendations to eliminate such bias.21 The enactment of Gay Panic Defense in the effort to curtail the "gay panic" and "trans panic" defenses, including requiring courts to instruct juries that neither non-violent sexual advance nor the discovery of person’s gender/sexual identity constitute legally adequate provocation to mitigate severity of non-capital crime.22

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

20 Id. at 1.
21 Id. at 2.
22 Id. at 3.

Assembly Bill 2504 was passed in the Senate. The Bill is authored by Assembly member Evan Low (D-Silicon Valley), Chair of the California Legislative LGBT Caucus. It was then approved by Governor Jerry Brown and Chaptered by Secretary of State - Chapter 969, Statutes of 2018.

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

An American Bar Association policy urging legislative bodies to adopt regulations similar to the standards set by the Commission on Police Officer and Standard Training (POST) and to California’s AB 2504, will be highly persuasive and offer law enforcement opportunities to improve the public perception regarding their fairness toward the LGBTQ community. It will elevate the standards of conduct of law enforcement and help the LGBTQ community to feel safe and protected.

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

Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable)

There is no known conflict of interest.

10. Referrals.

- Criminal Justice Section
- Standing Committee on Legal Aid and Indigent Defendants
- Section of State and Local Government Law
- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Youth at Risk
- Commission on Hispanic Legal Rights and Responsibilities
- Center on Children and the Law
- Commission on Homelessness and Poverty
- Coalition on Racial and Ethnic Justice
- Section of Alternative Dispute Resolution
- Commission on Racial and Ethnic Diversity in the Profession
- Commission on Women in the Profession
- Section of Litigation
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Mark I. Schickman, CRSJ Section Delegate
Freeland Cooper & Foreman LLP
150 Spear Street, Suite 1800
San Francisco, CA
Tel.: (415) 541-0200
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Paula Shapiro, Acting Director
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Tel: (202) 662-1029
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Skip Harsch, SOGI Director
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321 North Clark Street
Chicago, IL 60654
Tel: (312) 988.5137
E-mail: Skip.Harsch@americanbar.org

Diana Flynn, SOGI Commissioner
Lambda Legal
1776 K Street, N.W., 7th Floor
Washington, DC 20006
Tel: (202) 815-3531
E-mail: dkf@aya.yale.edu

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Mark I. Schickman, CRSJ Section Delegate
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1. **Summary of the Resolution**

   This Resolution advocates for the requirement of all law enforcement agencies to adopt regulations similar to the standards set by the Commission on Police Officer and Standard Training (POST).

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

   This Resolution seeks to elevate standards of training for law enforcement agencies to preserve their function of upholding fairness and equality in providing protection for all. In the effort to do so, police officers should be required to receive specific training on sexual orientation and gender identity to adequately serve their role of providing support and protection for all communities.

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

   This resolution will be used by the ABA in its advocacy efforts, and by ABA members who wish to engage with members of Congress and other legislative bodies to support the interests expressed in this resolution, in coordination with the Governmental Affairs Office.

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

   None identified
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments not to impose upon medical facilities and healthcare providers that offer reproductive health services to women, licensing or other regulatory requirements that are not medically necessary or that have the purpose or effect of burdening women’s access to such services.
Overview

The right to bodily autonomy and to make personal decisions about one’s family have long been recognized by the Supreme Court of the United States.1 These rights are effectuated through a patient’s right to choose and access reproductive healthcare. For women,2 the right to make personal decisions about reproductive healthcare is under threat. The increase in legislative activity at the state and federal level, coupled with the prospect of further Supreme Court consideration of reproductive health-related laws and regulations, makes the threat imminent and real.

In the first quarter of 2019 alone, over 300 restrictive reproductive healthcare bills affecting contraception, family planning, and abortion were introduced in state legislatures.3 As of 2017, states had already enacted close to a thousand bills restricting access to reproductive healthcare.4 These laws are often passed in the guise of protecting women but have the effect of shutting down medical facilities and making reproductive healthcare more difficult and expensive to obtain.

Laws and Regulations Impeding Reproductive Healthcare

The myriad restrictive bills, passed in the name of protecting women’s health, run the gamut, requiring:

• unnecessary services, such as ultrasounds, when not medically indicated;

1. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing family decisions protected by the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that married women have the right to contraception under the Fourteenth Amendment); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (expanding the right to contraception to all women, whether married or single); Roe v. Wade, 410 U.S. 113, 120 (1973) (recognizing the right to abortion under the Fourteenth Amendment); Carey v. Population Servs., Int’l, 431 U.S. 678, 684 (1977) (striking down the presumption that only pharmacists could dispense nonprescription contraceptives); Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 848 (1992) (affirming the right to abortion and forbidding regulations that impose an undue burden on pre- viability abortion); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974) (upholding that personal choice in matters of family life, in this case to procreate, is a liberty that the Fourteenth Amendment protects); Cruzan v. Dir., Missouri Dep’t of Health, 497 U.S. 261, 279 (1990) (recognizing the right to refuse unwanted medical treatment); Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing constitutional protections for intimate personal decisions and protecting same-sex conduct, along with private sexual activity more broadly). Most recently, in Obergefell v. Hodges, the Court held that the right to marry is a person of the same sex; “[i]ke choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution[,]” is protected by the Fourteenth Amendment. 135 S. Ct. 2564, 2688 (2015).

2. Throughout the report, “women” is used for ease and consistency, but it is recognized that not all people seeking reproductive healthcare, including pregnant people, identify as women.

3. These 300-plus bills seek to restrict access to contraception or abortion, to defund providers of comprehensive reproductive healthcare, or to support faith-based crisis pregnancy centers that do not provide medical care.


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As noted, the proponents of many of these state restrictions have justified them under the guise of protecting women’s health and safety. For example, some states require providers to gain hospital admitting privileges even though they do not practice at hospitals—overregulation that is contrary to modern medical standards and to which both the American Medical Association (AMA) and the American College of Obstetricians and Gynecologists (ACOG) are publicly opposed. Requiring providers to have admitting privileges is unnecessary and puts many providers in an impossible situation. Hospitals often require a minimum number of admissions each year in order to maintain privileges. Nine out of ten abortions take place during the first trimester, and because abortion is so safe, less than 0.06% of these patients experience a complication requiring hospitalization. Providers therefore cannot meet admission minimums, are denied privileges, and can no longer serve the women these laws claim to protect.

One particular type of restrictive bill, which has been introduced with great frequency in recent years, imposes onerous and medically unnecessary regulations on the physical plant of reproductive health clinics. These laws are based upon the pretext that reproductive care is inherently dangerous, and facilities must mimic hospitals in order to be safe. Nothing could be further from the truth.

Reproductive healthcare is extremely safe. Contraception is well established to be safe and effective at reducing unintended pregnancy, and has been called by the Centers for Disease Control (“CDC”) one of the ten greatest public health achievements of the

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twentieth century. In addition, as the CDC has observed: “Access to family planning and contraceptive services has altered social and economic roles of women. Family planning has provided health benefits such as smaller family size and longer intervals between the birth of children; increased opportunities for preconceptional (sic) counseling and screening; fewer infant, child, and maternal deaths; and the use of barrier contraceptives to prevent pregnancy and transmission of human immunodeficiency virus and other STDs.”

Abortion is likewise, in the recent words of the Supreme Court surveying the medical evidence, “extremely safe.” The risk of death in childbirth is 14 times higher than for abortion procedures. In fact, there are dozens of common medical procedures that are considered to be very safe but that are more risky than abortion. The mortality rates are higher for gallbladder removal, knee replacement surgery, bariatric surgery, and hernia surgery. According to the former president of the American College of Obstetricians and Gynecologists, the mortality rate of colonoscopy is 40 times greater than of abortion.

Research also demonstrates that states that have passed 10 or more reproductive healthcare restrictions also tend to be states where women and children have worse health outcomes than states with fewer restrictions on access to reproductive healthcare. According to the Guttmacher Institute, a leading research and policy organization in reproductive healthcare, despite exceptionally low complication rates for patients undergoing abortion, “24 states have laws or policies that regulate abortion providers [in ways that] go beyond what is necessary to ensure patients’ safety.” These laws have not improved the abortion procedure, but rather have made it more difficult to access not only abortion, but also other basic preventative care co-located in some clinics, including breast exams, cholesterol screening, diabetes screening, flu shots, employment and sports physicals, pregnancy care, menopause testing and treatment, and cervical cancer screenings.
At the federal level, there have been similar efforts to thwart access to a spectrum of reproductive health services. In one of his first acts as president, Donald Trump reinstated and expanded the Global Gag Rule, a destructive policy that restricts access to all abortion services for women worldwide. The rule dictates that overseas groups receiving any health funds from the U.S. — not just family planning funding — may not use U.S. funds or even their own funds from other sources to provide safe and legal abortion services, provide information about or referrals for abortion, or provide funds to any groups that provide or discuss abortion. Multiple academic studies have found that the Global Gag Rule decreases healthcare services, including the dissemination of contraception, and thus, ironically, that it is associated with an increase in abortions.16

Similarly, the administration’s recent regulation governing the Title X family planning program implements a “Domestic Gag Rule” that prohibits entities receiving Title X funding from providing referrals for or information about abortion. For example, Title X-funded health centers serve more than 4 million people and provide a critical entry point into the health care system for many low-income, uninsured, and underserved clients.17 In fact, six in ten women receiving Title X services reported that a Title X-funded health center was their usual source of medical care,18 and four in ten reported it was their only source of care.19

The “Domestic Gag Rule” also requires physical and financial separation between Title X services and abortion care and imposes strict limitations on the use of Title X funds. According to research by the Kaiser Family Foundation, the total cost for bringing organizations into compliance would equal $68.25 million, a quarter of the Title X program’s annual budget.20 Reallocation of these monies for compliance translates into reductions in quality of care and services for millions of women and their families.21 Many Title X funded health centers may also stop providing abortion services altogether.22 As

19 Id.
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a result, it will hamper a patient’s ability to receive accurate information from her medical provider about the full range of reproductive healthcare and limit her ability to make informed decisions and access services.\textsuperscript{23}

Finally, under recent Title X regulations, grantees no longer need to follow evidence-based family planning protocols; Title X funds have been awarded even if a clinic does not offer contraception.\textsuperscript{24} The Domestic Gag Rule would block the availability of Title X funds to some grantees, redirect funds to faith-based organizations disseminating religious messages, and eliminate the requirement that providers offer information about the full range of available reproductive healthcare. These changes will shrink the network of participating healthcare providers and have major repercussions for women across the country who rely on them.

Currently, more than 80 cases in state and federal courts are being litigated to protect access to a spectrum of reproductive health services that range from access to contraception, funding for medical providers offering contraceptive services, and access to abortion care. Passage of this resolution would put the ABA on record as opposed to medically unwarranted laws and regulations that are intended to make or have the effect of making access to reproductive healthcare more difficult.

**ABA Policy Relevant to the Proposed Resolution**

The ABA has adopted several policies that are consistent with this resolution and that strongly oppose restrictions that would burden women’s access to reproductive health services. The ABA has a long record of supporting personal autonomy in healthcare decision-making and opposing regulations that interfere with access to treatment and quality of care. In 1991, in anticipation of \textit{Rust v. Sullivan} going to the Supreme Court, the ABA passed Resolution 91A10H, which expressed the association’s opposition to unreasonable government-imposed restrictions on professional relationships [and] governmental intrusion into sensitive and confidential areas of healthcare.\textsuperscript{25} In 1992, the ABA recognized individual liberty and bodily autonomy in making personal reproductive health choices with the passage of Resolution 92A12. The Resolution opposes state and federal legislation that would restrict the rights of women to terminate their pregnancies before viability, or after that point when necessary to protect the life or health of the woman.

In 2005, the ABA responded to passage of the Weldon Amendment, which prohibited federal agencies and state or local governments from “discriminating” against any health


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care entities for refusing to provide, pay for, provide coverage of, or make referrals for abortions under penalty of losing federal funds under the Consolidated Appropriations Act. At this time, the ABA adopted Resolution 05M104, reaffirming and expanding its 1991 policy, and adding that medical providers must give relevant and medically accurate information for fully informed decision making “whether or not the provider chooses to offer such care.” With the passage of ABA Resolution 93M104, the association also opposed the use of government funding programs to suppress or discourage speech activities by grantees based on the government’s viewpoint. In adopting resolutions 91A10H, 01A118, 05M104 and 93M104, the ABA has made clear its support for the right of patients to receive full and adequate medical advice and referrals for all reproductive health options, and the correlative right of healthcare professionals to advise their patients in accordance with their best medical judgment and professional ethics.

The ABA has also supported the right to access quality reproductive health services irrespective of income and free from discrimination. Resolutions 90M108 and 94M105 support every American’s right to access quality health care regardless of the person’s income and describes the various characteristics required for such access and quality of care. In adopting ABA Resolution 18104C, the association also recognized that the prohibition of sex discrimination by covered health programs or activities includes, by definition, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, childbirth and related medical conditions.

The ABA has in the past adopted resolutions that are similar to and consistent with the resolution accompanying this report. The instant resolution is being proposed to apply principles that the ABA previously endorsed to a wave of reproductive healthcare restrictions of a particular type: limitations that purport to be “women-protective” but are medically unnecessary and have the purpose or effect of reducing access to healthcare.

**Challenges to Statutes Limiting Reproductive Health Care**

Despite long-standing Supreme Court precedent supporting access to reproductive healthcare, including Roe v. Wade, Planned Parenthood of Southeastern Pa. v. Casey, and Whole Woman’s Health v. Hellerstedt, legislatures continue to pass restrictive regulations on medical facilities and healthcare providers that do not improve a woman’s reproductive health outcomes but rather burden her access to information and services.

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28 See ABA House of Delegates Resolution 90M108 (adopted Feb. 1990); ABA House of Delegates Resolution 94M105 (adopted Feb. 1994) (providing for every American to have access to quality healthcare regardless of the person’s income and describing the various characteristics required for access and quality care).
29 The stated purpose of protecting women with these restrictions is belied by the safety of abortion. In Whole Woman’s Health v. Hellerstedt, Texas defended these laws as an effort to improve abortion safety. But when the Texas Senate passed the law, the Texas Lieutenant Governor celebrated on Twitter with a map of clinic closures. The map was captioned “If SB5 passes, it would essentially ban abortion statewide,” and the Lieutenant Governor posted “We fought to pass SB5 through the Senate last night, this is why!”
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The landmark 2016 decision in Whole Woman’s Health v. Hellerstedt struck down two parts of the omnibus 2013 Texas law known as HB2: the “admitting privileges” provision requiring abortion providers to obtain local hospital admitting privileges, and the “ambulatory surgical center” provision requiring every licensed abortion facility to meet hospital-like building standards. The decision preserved access to healthcare for millions of Texas women, and signaled that laws like Louisiana’s Act 620 are also unconstitutional.

The decision reaffirmed that when courts assess benefits, they need to apply heightened scrutiny to the state’s claims about whether and how a law actually advances a valid state interest. The Court held that both the hospital admitting privileges requirement and the ambulatory surgical center requirement imposed undue burdens on abortion access by placing substantial obstacles in the paths of women attempting to obtain legal abortion. Both of these requirements offered little to no health benefits while increasing the difficulty in receiving care, and reducing the quality of care at the clinics that remain open.

A Louisiana law targeting the regulation of abortion providers, identical to the Texas admitting privileges law determined to be unconstitutional in Whole Woman’s Health v. Hellerstedt, is the subject of a petition for certiorari in the Supreme Court. June Medical Services v. Russo, U.S. No. 18-1163 (June 20, 2019). A Louisiana law targeting the regulation of abortion providers, identical to the Texas admitting privileges law determined to be unconstitutional in Whole Woman’s Health v. Hellerstedt, is the subject of a petition for certiorari in the Supreme Court. June Medical Services v. Russo, U.S. No. 18-1163 (June 20, 2019).

The Court’s application of the undue burden test in Whole Woman’s Health is not limited to a particular type of abortion restriction, state, or set of facts. Instead, it instructs what courts need to do each time they apply the undue burden test to evaluate a law that limits women’s fundamental right to choose an abortion. It is important for legislatures as well as courts to apply this precedent. Once clinics close, they face obstacles to reopening and often do not reopen — even if a lawsuit is ultimately successful. Despite the Supreme Court’s ruling in Whole Woman’s Health, Texas still has just half the number of facilities it had before the law was passed in July 2013, which means it is still affecting access to abortion care and other reproductive health services in Texas today.

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Services v. Gee is a challenge to Louisiana Act 620, which would require any physician providing abortion services in Louisiana to have admitting privileges at a hospital within 30 miles of the procedure. Originally filed in 2014, the case was heard before the Fifth Circuit in 2018. The Fifth Circuit reversed the lower court, holding the law could go into effect, and refused a request for rehearing en banc. In his dissent, Judge Stephen Higginson stated the Fifth Circuit’s decision was issued with blatant disregard for the precedent set in Whole Woman’s Health v. Hellerstedt. Judge Higginson wrote that he is “unconvinced that any Justice of the Supreme Court who decided Whole Woman’s Health would endorse our opinion.” On February 7, 2019, the Supreme Court granted an emergency stay, and on April 17, 2019, a petition of certiorari was filed. The law will remain blocked until the disposition of this petition. Should this law go into effect, it is possible that two of the three remaining clinics in Louisiana will close.

Legislation Supporting Reproductive Care

Though this report has discussed a number of restrictions on reproductive healthcare, there are also legislators and advocates seeking to expand access to care. At the federal level, the Women’s Health Protection Act (WHPA) is a bill that would prohibit states from imposing restrictions on abortion that apply to no similar medical care, interfere with patient’s personal decision making, and block access to safe, legal abortion care. WHPA was first introduced by Sen. Richard Blumenthal (CT) and Rep. Judy Chu (CA) in November 2013; it has since been reintroduced in each session of Congress. Sen. Tammy Baldwin (WI) is a lead cosponsor in the Senate, and Rep. Marcia Fudge (OH) and Rep. Lois Frankel (FL) are lead cosponsors in the House of Representatives.

At the state level, lawmakers in 12 states introduced a Whole Woman’s Health Act before their state legislatures. Bills were introduced in 17 states to codify the birth control benefits of the Affordable Care Act, and those measures passed in Connecticut, Delaware, Maryland, Rhode Island, Washington, and Washington, D.C. Missouri and Kentucky considered legislation to repeal their mandatory delay requirements, allowing patients to receive abortion care more quickly, and the Arizona legislature considered a bill to repeal the state’s ban on using telemedicine to administer abortions.

Conclusion

The ABA should continue its proud history of support for women’s privacy in making the most intimate decisions about their own healthcare. Passage of this resolution would allow the ABA to speak, whether through legislative advocacy or amicus briefs, against restricting access to care.

Protest Defense Extend: State of the States

The ABA should continue its proud history of support for women’s privacy in making the most intimate decisions about their own healthcare. Passage of this resolution would allow the ABA to speak, whether through legislative advocacy or amicus briefs, against restricting access to care.

35 June Medical Services, L.L.C. v. Gee, 913 F.3d 573, 585 (9th Cir. 2019) (Higginson, J., dissenting).
36 June Medical Services, L.L.C. v. Gee, 139 S. Ct. 603; see also June Medical Services v. Gee, CTR. FOR REPRODUCTIVE RIGHTS (Mar. 14, 2019), https://www.reproductiverights.org/case/june-medical-services-v-gee-2014 (detailing the path of the case to date).
38 Id. at 21-23.
39 Id. at 21-23.
laws and regulations that use women’s health as a pretext for constraining women’s rights, and to endorse laws that reaffirm the right to privacy in medical decision making.

Respectfully submitted,

Wilson A. Schooley
Chair, Civil Rights & Social Justice
Section
August 2019
GENERAL INFORMATION FORM

Submitting Entity: Civil Rights & Social Justice Section

Submitted By: Wilson A. Schooley

1. Summary of Resolution(s). The ABA urges federal, state, local, territorial, and tribal governments to refrain from imposing upon reproductive healthcare providers requirements that are not medically necessary or have the purpose or effect of burdening women’s access to such services.

2. Approval by Submitting Entity. The Council of the Section of Civil Rights and Social Justice approved sponsorship of this resolution on April 12, 2019.

The Commission on Women in the Profession approved cosponsorship of this resolution on May 28, 2019.

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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? ABA Resolution 91A10H (1991) expresses the association’s opposition to “unreasonable government-imposed restrictions on professional relationships [and] governmental intrusion into sensitive and confidential areas of healthcare.” 40 ABA Resolution 92A12 (1992) recognizes individual liberty and bodily autonomy in making personal reproductive health choices and opposes state and federal legislation that would restrict the rights of women to terminate their pregnancies before viability, or after that point when necessary to protect the life or health of the woman. ABA Resolution 05M104 reaffirms and expands on its 1991 policy and adds that medical providers must give relevant and medically accurate information for fully informed decision making “whether or not the provider chooses to offer such care.” 41 ABA Resolution 93M104 opposed the use of government funding programs to suppress or discourage speech activities by grantees based on the government’s viewpoint. 42 These adopted resolutions demonstrate the ABA’s support for the right of patients to receive full and adequate medical advice and referrals for all reproductive health options, and the correlative right of healthcare professionals to advise their patients in accordance with their best medical judgment and professional ethics.

In addition, Resolutions 90M108 and 94M105 support every American’s right to access quality health care regardless of the person’s income and describe the various characteristics required for such access and quality of care. ABA Resolution 18104C recognizes that the prohibition of sex discrimination by covered health programs or activities includes, by definition, discrimination based on pregnancy, false pregnancy, pregnancy before viability, or after that point when necessary to protect the life or health of the woman. ABA Resolution 05M104 reaffirms and expands on its 1991 policy and adds that medical providers must give relevant and medically accurate information for fully informed decision making “whether or not the provider chooses to offer such care.” 41 ABA Resolution 93M104 opposed the use of government funding programs to suppress or discourage speech activities by grantees based on the government’s viewpoint. 42 These adopted resolutions demonstrate the ABA’s support for the right of patients to receive full and adequate medical advice and referrals for all reproductive health options, and the correlative right of healthcare professionals to advise their patients in accordance with their best medical judgment and professional ethics.

termination of pregnancy, childbirth and related medical conditions.

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

6. Status of Legislation. (If applicable) A number of bills relevant to this resolution are pending in state legislatures. For example, Oklahoma Senate Bill 857, introduced in February 2019, would require all abortion clinics to be licensed by the State Department of Health. Under this bill, the Commissioner of Health would be empowered to create standards for physical facilities, equipment, personnel, medical screening, and recovery rooms. Note that all of these licensing requirements would be in addition to requirements already applicable to other medical facilities. The bill would allow any Department of Health official to conduct warrantless inspections. All the State Commissioner of Health needs is “reasonable cause” to believe that the facility is not in compliance, which may lead to an action suspending or revoking a clinic’s license to operate.

Louisiana House Bill 484 would require physicians, medical staff—including medical directors and administrators—and owners of abortion facilities to designate one custodian of records for the clinic. The custodian is required to obtain and maintain medical records for each patient who has had an abortion at that facility. Medical records must be retained for at least seven years, longer for minors. The clinic’s record retention policy must be approved by the state department of health. The penalty for violating this law would be $1,000 or “imprison[ment] for not more than two years with or without hard labor, or both.” Physicians may also face professional disciplinary actions such as permanent disqualification from providing abortions.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Passing this resolution will allow the ABA to advocate for the passage of reasonable laws and regulations protecting reproductive health facilities and against onerous and burdensome laws and regulations that have no legitimate medical purpose. It will also allow the filing of amicus briefs in litigation challenging such laws that is sure to come before the U. S. Supreme Court and state appellate courts.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

10. Referrals. The Report with Recommendation will be referred to the following entities:
   - Center for Human Rights
   - Coalition on Racial and Ethnic Justice
11. Contact Name and Address Information.

Estelle H. Rogers, CRSJ Section Delegate
111 Marigold Ln
Forestville, CA 95436-9321
Tel.: (202) 337-3332 (cell)
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E-mail: paula.shapiro@americanbar.org

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**
The ABA urges federal, state, local, territorial, and tribal governments to refrain from imposing upon reproductive healthcare providers requirements that are not medically necessary or have the purpose or effect of burdening women’s access to such services.

2. **Summary of the Issue that the Resolution Addresses**
The resolution addresses the obstacles that women face in obtaining reproductive health services due to restrictive and unnecessary requirements. Increasingly, states have enacted laws and regulations that make it more difficult to access services on the pretext of protecting women’s health, while scientific data does not support the health-related rationale for these restrictions.

3. **Please Explain How the Proposed Policy Position Will Address the Issue**
This proposed policy would address this issue by allowing the ABA to lobby in opposition to unnecessary requirements that serve no medical purpose but make it unduly burdensome for women seeking reproductive health care and to file amicus briefs in litigation on the same subject.

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.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to adopt and enforce fair lending laws and other federal and state laws targeting unfair or deceptive acts or practices to address discrimination in vehicle sales and financing markets;

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the Equal Credit Opportunity Act, 15 U.S.C 1691, to require documentation and collection of the applicant’s race, gender and national origin for vehicle credit transactions, through applicant voluntary self-identification using disaggregated racial and ethnic categories, made available through a Demographic Information Addendum, or some equivalent measurement;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal legislatures and governmental agencies to adopt laws and policies that promote the adoption of an enhanced nondiscrimination compliance system for a vehicle loan, or reduce dealer discretion by placing limits on dealer markup, or eliminate dealer discretion to mark up interest rates by using a different method of dealer compensation, such as a flat fee for each transaction;

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to adopt legislation requiring the timely notice and disclosure of pricing of add-on products by dealers on each vehicle through reasonable means, such as a pricing sheet and/or website prominently displayed and available at its location, before a consumer negotiates to purchase a vehicle; and

FURTHER RESOLVED, That the American Bar Association encourages state, local, territorial and tribal bar associations to offer educational programming and materials to lawyers and consumers to help them understand and navigate purchases and financing of vehicles, and understand consumers’ legal rights with respect to such purchases and loans.
This resolution addresses some highly discriminatory practices in auto lending and the sale of auto add-on products and their impact on many consumers because of race, gender, national origin, and income that follow. Consumers are burdened with interest-rate markups on loans that have no relation to their credit risk, but rather often relate to prejudice and discrimination. The resolution also addresses the issue of insufficient data available on credit applicants to identify and quantify potential discriminatory impact. Finally, the resolution addresses the lack of transparency in the auto lending market.

More than 90% of American households own or lease a vehicle1, with a vehicle being the lifeline to the American consumer in securing employment, accessing healthcare, and pursuing educational opportunities. As noted in a recent Consumer Financial Protection Bureau (CFPB) report, today there are almost 100 million auto loans outstanding, totaling more than one trillion dollars.2 Auto loan debt represents the third largest type of consumer debt in America, trailing behind only mortgage and student debt.3 For consumers who do not own a home, as is the case for many low-income consumers, auto loan debt can be the largest debt they carry.4

The CFPB's Quarterly Consumer Credit Trends Report, “Growth in Longer-Term Auto Loans”, issued in November 2017,5 provides that longer-term loans (defined as six or more years) increased from 26 percent of auto loans originated in 2009 to 42 percent of 2017 originations.6 Longer-term loans also result in higher loan balances, rising from $20,100 for a five-year loan, compared to $25,300 for a six-year loan.7

The National Consumer Law Center ("NCLC") issued a report in May 2016 on "New Ways to Understand the Impact of Auto Finance on Low-Income Families," that looks at loan origination as the time when abuses occur or unnecessary costs are incurred.8 The report data for 2014 (the most recent time for student debt data at the time of the report) shows that "there were almost three times as many families originating auto finance as borrowers that “there were almost three times as many families originating auto finance as borrowers pursuing educational opportunities. As noted in a recent Consumer Financial Protection Bureau (CFPB) report, today there are almost 100 million auto loans outstanding, totaling more than one trillion dollars.2 Auto loan debt represents the third largest type of consumer debt in America, trailing behind only mortgage and student debt.3 For consumers who do not own a home, as is the case for many low-income consumers, auto loan debt can be the largest debt they carry.4

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originating student loans, and more than three times the number of auto finance originations as mortgage originations.\(^9\)

In analyzing the data, there is an indication that individuals with lower credit scores are at greatest risk for abusive loans and sale practices. Data on loan originations is not publicly available for mortgage and auto loans based on race or family income. However, consumer credit scores are available and earlier studies by the NCLC reflect a strong correlation between credit scores and applicant’s race, income, educational levels and other characteristics.\(^9\) By extrapolating the originations to the credit risk scores, the NCLC report observes that of “struggling consumers with High-Risk scores, more than 1.5 million (1,551,292) bought and financed a car, while just 100,439 bought a house.”\(^{11,11}\)

The Washington Post, in a February 7, 2019, article, noted that the Federal Reserve Bank of New York reported that a record seven (7) million Americans are 90 days or more behind on their auto loan payments, which is even more than during the financial crisis.\(^{12}\) The New York Fed in its report said there were a million more “troubled borrowers, at the end of 2018 than there were in 2010, when unemployment hit 10% and the auto loan delinquency rate peaked.”\(^{13,13}\)

**ISSUES**

1. **ENFORCEMENT OF DISCRIMINATION LAWS**

The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. This is evident in the Association’s adoption of policies that call upon federal, state and local lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding, and in seeking to eliminate such discrimination in all aspects of the legal profession.\(^{14}\) The ABA’s fundamental position condemning such discrimination is based

\(^9\) Id. at 5.
\(^{10}\) Id. at 6.
\(^{11}\) Id. at 8.
\(^{12}\) The Washington Post, “A record 7 million Americans are 3 months behind on their car payments, a red flag for the economy,” by Heather Long, February 12, 2019, available at: https://www.washingtonpost.com/business/2019/02/12/record-million-americans-are-months-behind-their-car-payments-red-flag-economy/?utm_term=.a72dca7a3795

\(^{13}\) Id.

\(^{14}\) ABA House of Delegates, Resolution and Report, e.g., resolutions adopted 8/65 (addressing race, color, creed, national origin); 8/76 (race); 8/72, 2/74, 2/78, 8/74, 8/75, 8/80, 8/84 (gender); 8/86 (race and gender); 2/72 (sex, religion, race, national origin); 8/77 (handicap); 8/77 (condemning hate crimes related to race, religion, sexual orientation, or minority status); 8/89 (urging prohibition of sexual orientation discrimination in employment, housing and public accommodation); 9/91 (urging study and elimination of judicial bias based on race, ethnicity, gender, age, sexual orientation and disability); 2/92 (opposing penalization of schools that prohibit on-campus recruiting by employers discriminating on the basis of sexual orientation); 8/94 (requiring law schools to provide equal educational and employment opportunities regardless of race, color, religion, national origin, sex or sexual orientation), archived policies noted at

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on its underlying commitment to the ideal of equal opportunity and advancement of human rights. These two principles united in August 2013, when the ABA adopted policy to urge governments to “promote the human right to adequate housing for all” and to “prevent infringement of that right.” In furtherance of that right, the Association in August 2017 also urged governments to “enact legislation prohibiting discrimination on the basis of lawful source of income.”

History of Discrimination in Auto Lending

The Equal Credit Opportunity Act (ECOA) makes it illegal for a ”creditor” to discriminate in any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, age, receipt of income from any public assistance program, or the exercise, in good faith, of a right under the Consumer Credit Protection Act. As set forth in the Congressional Report, the ECOA is intended to ensure that “…no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness.”

Numerous research studies document an extensive history of discrimination in car lending and sale practices, particularly in relation to non-white consumers and low-income consumers. Yale Law Professor Ian Ayres conducted groundbreaking research in his seminal article Fair Driving: Gender and Race Discrimination in Retail Car Negotiations in the Harvard Law Review. The 1991 study documented that testers, employing a uniform negotiating strategy for buying a new car in Chicago dealerships, would receive different treatment by auto retailers on dealer markups for auto loans when buyers differed solely because of race or gender. The study showed black male testers had to pay more than twice the markup price paid by white male testers. White women testers paid more than 40% over white men, and black women testers paid more than three times the markup paid by white male testers.

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A 2018 investigative report by the National Fair Housing Alliance (NFHA) describes the early history of discrimination in auto lending and documents continuing current discriminatory practices. The report discusses the 2003 study by Vanderbilt University Business Professor Mark A. Cohen, which investigated more than 1.5 million General Motors Acceptance Corporation ("GMAC") loans made between 1999 and 2003, noting that “Black customers were three times as likely as equally qualified White customers to be charged an interest rate markup on their loans financed by GMAC.”

A separate 2004 abridged report prepared by Dr. Cohen in the Matter of Terry Willis, et al. v. American Honda Finance Corporation (AHFC), found that African-American borrowers paid more than two times the subjective markup that white borrowers paid. Dr. Cohen notes that “My analysis in this case, as well as analysis I have conducted on other auto lenders including GMAC, NMAC and FMCC, provides strong evidence that the industry-wide practice of subjective credit pricing results in a disparate impact on minorities.”

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Another recent investigation conducted by the NFHA during the Fall of 2016 and Spring of 2017 utilized a widely accepted testing methodology that has been used in various contexts including enforcement, public policy, and compliance monitoring. The use of fair housing testing evidence has been uniformly adopted by the courts, including the U.S. Supreme Court. This testing was conducted at new and used car dealerships throughout Eastern Virginia. The findings of the eight tests conducted, in which non-white testers were always more creditworthy than their white counterparts, resulted in five tests where “the Non-White testers received more total overall payment quotes, paying on average $2,062.56 more than the White testers over the course of the loan, despite being more qualified.”

2. AMEND THE EQUAL CREDIT OPPORTUNITY ACT – COLLECTION OF DATA

Under current law, Regulation B, implementing the ECOA, generally prohibits non-mortgage lenders from asking about or documenting characteristics such as a consumer’s race or national origin. Mandatory data collection by lenders applies only to

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24 Id. at 7. See also Mark A. Cohen, Report on the Racial Impact of GMAC’s Finance Charge Markup Policy, 2003.


26 Rice and Schwartz, id. at 12.

27 Id. at 12. See e.g. Havens Realty Corp. v. Coleman, 455 U.S.363, 373-374 (1982).

28 Id. at 15.

29 12 C.F.R. Sec. 1002.5(b) 12 C.F.R. Sec. 12(a), (b).
mortgage lenders under the Home Mortgage Disclosure Act (HMDA) and certain business lenders under Section 1071 of the 2010 Dodd-Frank Reform Act, which covers applications for women-owned, minority-owned and small businesses. The National Consumer Law Center (NCLC), in the context of car loans, recently noted the irony that in prohibiting non-mortgage lenders from asking about or documenting characteristics it has made it very difficult to determine if discrimination occurs. And this is a long-standing problem. NCLC, in a 2008 letter to then-Congressman Mel Watt noted that “the problem is that without access to data similar in nature and type to that made available through the HMDA (Home Mortgage Disclosure Act) for mortgage transactions, no one will have an easy time coding an aggregate pool of information sufficient to prove the case of disparate impact discrimination as a matter of law under the ECOA.” A letter to the U.S. Government Accountability Office has also noted that requiring lenders to collect and report such data could actually assist in stopping discrimination.

Professor Winnie Taylor from Brooklyn Law School, in a Review of Banking and Finance Law journal article, addresses the question of whether the ECOA data collection should be expanded to cover nonmortgage lenders, and if so, should it cover all nonmortgage lenders or only a subset? It answers the first question in the affirmative due to the heavy evidentiary burden of establishing a prima facie case of racial discrimination in lawsuits against nonmortgage lenders, as well as the difficulty in getting courts to accept proxies to such data, such as through general population statistics, census tract data, or zip codes.

Taylor’s article answers the second question by suggesting limiting the collection of data on nonmortgage lenders by exempting smaller lenders, as happens in other banking regulations, due to cost considerations. It also proposes to limit collection of data to certain types of loans, based on several factors, “particularly the extent to which there is evidence of potential discrimination in a particular market.” However, Professor Taylor specifically includes automobile loans as needing the collection of data based on the car markets’ important structural aspects, public and private ECOA litigation, legal commentary and expert witnesses in ECOA cases regarding dealer mark-ups.

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contrast, she does not propose to expand data collection and reporting for race and gender data in the credit card industry.39

The article first sets forth the challenges both in litigation for ECOA plaintiffs and in enforcement for ECOA agencies due to the lack of collection of race data. As noted in the Policy Statement on Discrimination in Lending,40 produced by a group of fair lending regulators, ECOA plaintiffs can prove lending discrimination in three ways: 1) overt discrimination; 2) disparate treatment; and 3) disparate impact.41

First, overt discrimination claims require an applicant and borrower to provide overt evidence, such as a written policy instructing loan officers to give minority borrowers lower credit limits than nonminority borrowers.42 Today, overt evidence of racial discrimination is rare; plaintiffs and enforcement agencies usually rely upon disparate treatment and disparate impact claims.43 Second, when lenders intentionally treat some applicants or borrowers more favorably than others on an ECOA-prohibited basis, even though all are similarly creditworthy, disparate treatment occurs.44 Third, “disparate impact occurs when a neutral credit practice equally to all credit applicants, but the practice has a disproportionately adverse effect on applicants or borrowers from ECOA-protected groups.”45 As distinguished from disparate treatment cases, the plaintiff does not have to prove the discriminatory practices are intentional or result from prohibited criteria; rather the focus is on the harm the victim experiences.46

On May 4, 2017, the National Consumer Law Center (on behalf of its low-income clients), the NAACP, the Leadership Conference on Civil and Human Rights, the Center for Responsible Lending, and a dozen other leading consumer advocacy groups, sent a comment letter in response to CFPB 2017-0009. The comment letter was in regard to proposed amendments to ECOA Regulation B on ethnicity and race information collection. It urged the Bureau to amend Regulation B to remove the prohibition on data collection for auto finance loans and require the collection, maintenance, reporting and public dissemination of such data, to “further the ECOA’s goal of promoting the availability of credit to all creditworthy applicants on a non-discriminatory basis.”47

The comment letter stresses the need to collect such information for a number of reasons, in part based on the size of the auto loan market as the third largest consumer debt, and the fact that there are almost three times as many auto borrowers as there are borrowers taking out student loans, and almost three times the number of auto finance originations as mortgage originations.46 In addition, presently the data is basically unavailable, much of it is proprietary, and if available, it is prohibitively expensive or requires extensive analysis.47 Further, the direct collection of data would answer the critics who question the use of proxy analysis in enforcement actions.50

In the Fall, 2018, CFPB Rulemaking Agenda, the CFPB indicated, consistent with comments made earlier in May, 2018, that it was reexamining the requirements of the ECOA concerning the disparate impact doctrine in light of recent Supreme Court cases, presumably the 2015 Texas Department of Housing and Human Affairs v. the Inclusive Communities Project51 as well as the passage of Public Law 115-172, wherein Congress invoked the Congressional Review Act to disapprove the CFPB Bulletin 2013-02 (March 21, 2013), relating to “Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act.”52 The response from U.S. Senators and State Attorneys General has been swift.

On September 5, 2018, fourteen (14) State Attorneys General, in jurisdictions representing a total of 125 million Americans,53 wrote to Acting Director Mick Mulvaney, Consumer Financial Protection Bureau, in response to his statement that the CFPB “will be reexamining the requirements” of the ECOA.44 They noted particular concern due to the State Attorneys General sharing authority with CFPB under 12 U.S.C. Section 5552, enacted under the Dodd-Frank Reform Act, and because many of their antidiscrimination statutes, such as the Maryland Equal Credit Opportunity Act,55 are modeled on ECOA. The letter emphasizes the critical importance of disparate impact liability in antidiscrimination law and the reliance of State Attorneys General upon such theories to "combat lending discrimination and ensure greater equality of opportunity."56

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In the Fall, 2018, CFPB Rulemaking Agenda, the CFPB indicated, consistent with comments made earlier in May, 2018, that it was reexamining the requirements of the ECOA concerning the disparate impact doctrine in light of recent Supreme Court cases, presumably the 2015 Texas Department of Housing and Human Affairs v. the Inclusive Communities Project51 as well as the passage of Public Law 115-172, wherein Congress invoked the Congressional Review Act to disapprove the CFPB Bulletin 2013-02 (March 21, 2013), relating to “Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act.”52 The response from U.S. Senators and State Attorneys General has been swift.

On September 5, 2018, fourteen (14) State Attorneys General, in jurisdictions representing a total of 125 million Americans,53 wrote to Acting Director Mick Mulvaney, Consumer Financial Protection Bureau, in response to his statement that the CFPB “will be reexamining the requirements” of the ECOA.44 They noted particular concern due to the State Attorneys General sharing authority with CFPB under 12 U.S.C. Section 5552, enacted under the Dodd-Frank Reform Act, and because many of their antidiscrimination statutes, such as the Maryland Equal Credit Opportunity Act,55 are modeled on ECOA. The letter emphasizes the critical importance of disparate impact liability in antidiscrimination law and the reliance of State Attorneys General upon such theories to "combat lending discrimination and ensure greater equality of opportunity."56
Finally, the State Attorneys General express their trust that the CFPB reexamination will determine that ECOA provides for disparate impact liability, but in any event, they note in closing that the “Attorneys General will not hesitate to uphold the law if CFPB acts in a manner contrary to law with respect to interpreting ECOA or to fulfilling its Congressional charge to ensure nondiscriminatory lending to the residents of our states.” Auto lending is one of the primary concerns of the State Attorneys General.

The critical importance of loan data reporting to combat discrimination and predatory lending is highlighted by the recent introduction in February 2019, of proposed legislation in the U.S. Senate and the House of Representatives. The Home Loan Quality Transparency Act, introduced in the Senate by Sen. Catherine Cortez Masto (NV), and its companion bill (H.R. 963) in the U.S. House of Representatives, introduced by Congresswoman Nydia M. Velazquez (NY), Chairwoman of the House Small Business Committee, restate Dodd-Frank reporting requirements that were repealed last year. At that time, Congress voted to roll back reform measures and exempted 85% of all banks and credit unions from reporting loan characteristics vital to ensuring lending fairness, and relied upon by consumers, advocates and regulators in addressing discriminatory and unfair lending practices. In addition to Senator Cortez Masto (NV), thirteen other U.S. Senators joined in introducing the legislation.57

Absent timely action at the federal level for mortgage lending discrimination documentation, at least one state, Connecticut, has passed recent legislation to collect data from sales finance companies pertaining to the ethnicity, race and sex of applicants, effective October 1, 2018.58

This resolution follows the notice published by the Consumer Financial Protection Bureau, pursuant to the ECOA, concerning the new Uniform Residential Loan Application and the collection of expanded HMDA Act Information about ethnicity and race in 2017.59 It seeks to gather similar information in the vehicle sales market through voluntary self-

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58 H.R. 963 was also cosponsored by Carolyn Maloney (NY), Al Green (TX), and Jackson Lee (TX). See also H. R. 963, available at https://www.congress.gov/bill/116th-congress/house-bill/963/text?q=%7B%22search%22%3A%5B%22ickle+cell%22%5D%7D

59 Section 26a-S47 of the 2016 Supplement to the General Statutes, as Amended by Section 97 of Public Act 18-173, available at https://www.ct.gov.cn/content/dam/aba/publications/supreme_court_preview/Briefs/2018PA-00173-R00HB-05490-PA.pdf
identification, using disaggregated racial and ethnic categories, made available through a Demographic Information Addendum. The resolution further acknowledges that some other equivalent measurement of discrimination can also be adopted, such as the Bayesian Improved Surname Geocoding (BISG) methodology, or other generally agreed upon research-focused methodology pertaining to vehicle transactions.

3. ADDRESSING DISCRIMINATION IN DEALER MARKUPS

A common practice in the auto lending market that lacks a great deal of transparency and that has a long history of discriminatory impact is a “dealer markup”, which compensates auto dealers for originating automobile loans by allowing interest rate markups. As noted in CFPB Bulletin 2013-02, “[if] the dealer charges the consumer a higher interest rate than the lender’s buy rate, the lender may pay the dealer what is typically referred to as “reserve” (or ‘participation’) compensation, based upon the difference in interest rate revenues between the buy rate and the actual note rate charged to the consumer in the installment sale contract executed with the dealer.” Many studies have documented the discriminatory impact of large public settlements initiated by the CFPB and the Department of Justice in recent years have resulted in restitution and fines to lenders in excess of $150 million to settle claims of discrimination.

The allegations of discrimination noted in the public settlements indicate a pattern or practice of conduct in violation of the Equal Credit Opportunity Act, 15 U.S.C. Sections 1691-1691(f), whereby dealers charge higher interest rates to consumer auto loan borrowers on the basis of race and national origin. Parties have challenged the CFPB Bulletin on the basis of whether the discrimination that may result from dealer markups is intentional by dealers, or have challenged the bulletin on the basis that the CFPB exceeded its agency authority in issuing the bulletin. The General Accountability Office concluded in December 2017 that CFPB Bulletin 2013-02 did qualify as a rule, and thus was subject to the little-used Congressional Review Act because it served as a general statement of policy. As noted earlier, Congress disapproved CFPB Bulletin 2013-02 (March 21, 2013), through passage of Public Law 115-17 (May 21, 2018).

On August 23, 2018, the New York State Department of Financial Services provided guidance to Indirect Automobile Lenders to ensure compliance with New York State’s Fair Lending Law, Section 296-a of the Executive Law (“Fair Lending Law”), by supervised


institutions that engage in indirect automobile lending. The guidance reiterates that New York’s Fair Lending Law prohibits discrimination in, among other things, the granting, withholding, extending, or renewing, or in the fixing of the rates, terms, or conditions of any form of credit on the basis of race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status. N.Y. Exec. Law Section 296-a(1)(b). The guidance sets forth a list of actions that lenders should take to develop a fair lending compliance program for indirect automobile lending.

Moreover, the guidance specifically addresses the liability of lenders for discrimination resulting from dealer markup and compensation policies. Since dealer markup is part of the credit transaction, it must be charged non-discriminatory to comply with the Fair Lending Law. The guidance states that lenders that permit dealers to markup the buy rate, who are potentially liable for prohibited pricing disparities. The guidance identifies specific compliance actions. Item 4 states “the lender should consider reducing dealer discretion by placing limits on dealer markup or eliminating dealer discretion to markup interest rates by using a different method for dealer compensation, such as a flat fee for each transaction, that does not potentially result in discrimination. Limits on markup do not, however, guarantee protection from fair lending liability.”

U.S. Senator Kirsten Gillibrand (NY), and six other Senators, in a December 6, 2018 letter to Chairman Joseph Simons, Federal Trade Commission (“FTC”), expressed grave concerns about how minority car purchasers are harmed by discriminatory and predatory practices through dealer markups. The letter acknowledged the FTC’s authority over the business practices of automobile dealers, and requested a detailed explanation of how the FTC plans to uphold its responsibility and enforce ECOA in indirect automobile lending. The letter specifically identified the issues of documented discrimination in studies alluded to elsewhere in this resolution relating to dealer markups and the pricing and disparity of add-on products, as well as the prices of cars.

The fundamental issue this resolution addresses is the significant risk that currently exists in today’s auto lending market: that pricing disparities may exist between auto lending customers with equal lending risk, on the basis of race, national origin, and potentially other prohibited bases. One remedy to this problem that was offered in CFPB 2013-02, now repealed, and in the September 2018 New York Guidance on Fair Lending Law, and supported by other commentators, is that of eliminating the discretion of dealers in dealer


65 Id. at 3.

66 Id. at 3.


68 Ayres, supra, note 20; Rice, et al., supra, note 23; and Cohen, supra, note 24.
markup buy rates. Compensating dealers fairly with another mechanism, such as a flat percentage fee of the auto loan amount, will not lead to discrimination and will promote economic justice and civil rights for all consumers.

The promotion of an enhanced nondiscrimination compliance system, as voluntarily promoted in the Fair Credit Compliance Policy & Program through the National Association of Minority Automobile Dealers (NAMAD), the National Automobile Dealers Association (NADA), and the American International Automobile Dealers, can be an effective way to ensure a rigorous review of exceptions to a flat-percentage fee in order to provide robust processes for fair pricing of dealer markups to all consumers in a nondiscriminatory manner. The program is predicated on and incorporates the ECOA compliance framework spelled out by the Justice Department in a series of consent orders to resolve claims of disparate impact discrimination. One of the consent orders is publicly available. It is important to note that this consent order to a specific dealer was issued in 2007 and was effective for a limited five-year period.

4. TRANSPARENCY OF PRICING ADD-ON PRODUCTS

Add-on products, like service contracts, guaranteed asset protection, and window etching, significantly increase the price of the overall auto purchase and have vastly inconsistent pricing between consumers purchasing the same product with the same dealer. The pricing disparities, exacerbated by the lack of transparency, result in excessive pricing for consumers and discriminatory markups of auto add-ons.

In October 2017, the NCLC issued a report, “Auto Add-Ons Add Up, How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing.” This report is based on an analysis of almost 3 million add-on products from September 2009 through June 2015 based on a nationwide data set of 1.8 million car sale transactions involving over 3,000 car dealers.

Service contracts typically cover an item not covered under a typical manufacturer warranty, or they extend the warranty for a longer duration. Guaranteed asset protection (GAP) contracts, are designed to cover the “gap” between the debt on the car and what the car is worth, also referred to as “negative-equity” or “under-water.” Finally, window etching (Etch) products are where dealers will etch in the vehicle identification number (VIN) on one or multiple windows to deter theft or aid in finding a stolen car.

The insidious effects of the wide disparities in car loan pricing are evident when compared to insurance products, which have similar characteristics and are also not tangible in

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nature. However, while insurance pricing is often reviewed by state regulators, pricing discretion is not given to the selling agent, and the insurance agent’s commission is not based on charging different consumers a different price for the same product, as is the case with dealers selling add-ons.76

It is very significant to note that the finding of the NCLC data set was that “looking collectively at service contracts, GAP products and etch products, the combined average rate of markup was 170%.”77 To put it in perspective, car dealer markups on autos for new cars in a 2015 National Association of Automobile Dealers Association Report reflect 3.4% markup for new cars and 8.6% markup for used cars.78

It is also important to look at add-on pricing markups in comparison to commissions independent insurance agents receive when they sell insurance to consumers. The equivalent markup for insurance agents is 11% to 18%.79 In 2012, the average dealer markup for Etch sales in the data set was 325%, the average for GAP was 151%, and the average dealer markup for service contracts was 83%.79

Vehicle Identification Number (Window) Etching pricing by dealers in theory should be consistent in price because the cost to the dealer for Etch products generally does not vary by the price of the car, whether a car is new or used, or other characteristics that vary from car to car.80

The NCLC Report identified a subset in 2012 that sold Etch products that had just one dealer cost for every Etch product they sold and thus represented an excellent review of pricing disparity. The report noted that “only 19 of those 105 dealers sold the Etch product to each of their customers for the same price. These extreme pricing inconsistencies cannot be explained by different costs to the dealer, different products being sold, or different time periods.”81

The NCLC data set reflected wide variations on pricing unrelated to the cost of the service contracts and different pricing methodologies, such as a set fixed add-on price to cost (markup), a set fixed sales price unrelated to cost of the service contract, and at widely varying pricing based on the dealers’ whim.82

New York City in 2015 successfully implemented a new rule that requires the price of both the car and any add-on products offered with the car to be posted on each car offered for sale.83 3.4% markup for new cars and 8.6% markup for used cars.77

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New York City in 2015 successfully implemented a new rule that requires the price of both the car and any add-on products offered with the car to be posted on each car offered for sale.
sale by a used car dealer in the city. Additionally, New York City proposed in early 2018 new rules under Local Laws 197 and 198 in 2017 on second-hand car dealers that would benefit consumers by, among other provisions, providing for a Consumer Bill of Rights. The Bill informs the consumer he or she has the right to receive an itemized price for each add-on product, has the right to refuse any add-on product by the dealer, and further that they have the right to be free from discrimination when applying for credit.

In December 2018, the National Consumer Law Center published the Model "Transparent and Consistent Pricing of Motor Vehicle Add-Ons Act." The Model looks to many current statutes or ordinances currently being used to achieve consistent and transparent pricing, such as Conn. Gen. Stat. Ann. Section 14-99h, ME. Rev. Stat. Ann. Tit. 10 Section 1174(3)(E) N.Y.C Admin Code Section 20-271, and others cited within the commentary to the Model Law.

The legislative intent of the statute is to make the pricing of add-on products transparent and consistent to protect consumers from paying arbitrary and discriminatory prices for add-on products. The definition used in the Model Act, "seeks to cover any service or product sold either before or after the vehicle is sold, provided the product is sold in conjunction with the auto sale, which is similar to New York City’s requirement under N.Y.C. Admin. Code Section 20-264 that the product be "offered with" the vehicle."

Requirements for posted pricing for many retail items already exist in many states. For new cars, federal law requires that cars have a manufacturer suggested retail price (MSRP) sticker on each car. 15 U.S.C. Section 1232. It is not a posted price, "but it does give consumers some idea of where a reasonable price might start. New York City has extended this idea to pricing add-ons. N.Y.C. Admin. Code Section 20-271.

The Model Law Section 104(2), which prohibits charging different prices for different customers, is an extension of Maine’s protection to consumers. In Maine, a prohibition on charging some car buyers different prices from others exists for the protection of dealers

69 Amendments to Subchapter K of Chapter 2 of Title 6 of the Rules of the City of New York.
70 After completing the required public hearing, notice of adoption of the new rules to implement Local Laws 197 and 198 of 2017, was effective on June 24, 2018, and notice of adoption to amend the fixed penalties was effective on July 30, 2018. New York City Rules, Recently Adopted Rules, available at http://rules.cityofnewyork.us/adopted-rules
72 Id. at 2-7
73 Id. at Section 101, Short Title and Declaration of Purpose, 2.
74 Id. at Section 102 Definitions, Comment.
76 Id. at Section 104, Transparent and Consistent Pricing, Comment.
77 Id. at Section 101, Short Title and Declaration of Purpose, 2.
78 Id. at Section 102 Definitions, Comment.
80 Id. at Section 104, Transparent and Consistent Pricing, Comment.

The mandate to provide a pricing schedule to the Attorney General in Model Law Section 104(1) and (2) is based in part on Connecticut’s pricing requirements for vehicle identification number etching.93 Connecticut Gen. Stat. Ann. Section 14-99h, requires dealers to submit prices for the add-on of etching and to submit an amended rate schedule for price changes. Further, the comment notes that regulators, researchers and consumer advocates will be able to see the prices from dealer to dealer for add-ons and will provide for healthy competition.94

The Model Act requirement under Section 104(5) that vehicle add-ons be optional, and that that fact is disclosed, will aid in deterring discriminatory practices. Citing earlier research, the Comment notes that “African American and Latino consumers, for example, are about three times more likely to be told that add-ons are mandatory compared with white consumers.”95 Under the Model Law, Section 106(2), a violation of the Act is a violation of the state unfair and deceptive practices statute (UDAP).96

Recent enforcement actions in add-on products further highlight the need for greater consumer protections. A recent important study by law professors Prentiss Cox, Amy Widman and Mark Totten, on UPAD enforcement, “Strategies of Public UDAP Enforcement,” is helpful in understanding the varied operation of UDAP rules, which exist in every state97 and at the federal level with the FTC and the CFPB.98 The implications of the study by support the observation that robust enforcement of UDAP laws is lacking or insufficient in many jurisdictions, either due to lack of prioritization, funding, or effective enforcement strategy, among other reasons. Even in jurisdictions where large dollar amount settlements have been achieved, the authors question: “Should state enforcers focus on larger targets? If so, what happens to the fraud and deception furthered by individuals and small entities that states characterized as “street cops” target?”99

5. EDUCATION OF LAWYERS AND CONSUMERS

Consumer protections would be strengthened by enhancing educational opportunities for consumers, guided by members of the Bar100, so they can identify and effectively address

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92 Id. at Section 104, Transparent and Consistent Pricing, Comment.
93 Id. at Section 104, Transparent and Consistent Pricing, Comment.
94 Id. at Section 104, Transparent and Consistent Pricing, Comment.
95 Id. at Section 104, Transparent and Consistent Pricing, Comment.
96 Id. at Section 106(2), Enforcement.
99 Cox, et al., supra note 97 at 103.
101 Cox, et al., supra note 97 at 103.
102 Id. at Section 104, Transparent and Consistent Pricing, Comment.
103 Id. at Section 104, Transparent and Consistent Pricing, Comment.
104 Id. at Section 104, Transparent and Consistent Pricing, Comment.
105 Id. at Section 104, Transparent and Consistent Pricing, Comment.
106 Id. at Section 104, Transparent and Consistent Pricing, Comment.
107 Id. at Section 106(2), Enforcement.
110 Cox, et al., supra note 97 at 103.
the issues they face in auto lending and sale practices. The magnitude of over 100 million transactions and the substantial economic harm inflicted upon millions of low- and moderate-income consumers, many of whom count the automobile as their single largest debt, makes it imperative that the Association vigorously address the need to facilitate consumer protection.

Finally, bar associations should help all citizens to understand their legal rights and address situations where those rights are violated. A starting point is communicating a model "Consumer Bill of Rights" so that all consumers are aware of their rights to receive an auto loan free of discrimination, based solely on their credit risk, and full pricing transparency prior to entering into negotiations for an auto purchase.

Conclusion

This resolution will affirm the ABA’s commitment to actively opposing discrimination on the basis of protected classifications as articulated in the ECOA, will strengthen consumer protections for all, and will promote economic justice. Adoption of this resolution will advance the work of consumer advocates, legislators, and attorneys who seek justice and fairness for consumers, particularly low-income consumers and consumers who suffer discrimination on the basis of race, gender, national origin, or income.

Respectfully submitted,

Wilson A. Schooley
Chair, Civil Rights and Social Justice Section
August 2019
GENERAL INFORMATION FORM

Submitting Entity: Civil Rights and Social Justice Section

Submitted By: Wilson A. Schooley, Chair, Civil Rights and Social Justice Section

1. Summary of Resolution(s): The resolution urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant’s race, gender or national origin for non-mortgage credit transactions specifically for vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require an enhanced nondiscrimination compliance system for a vehicle loan or consider reducing dealer discretion by placing limits on dealer markup and to adopt legislation requiring the timely notice and disclosure of pricing of add-on products by dealers on each vehicle through reasonable means before a consumer negotiates to purchase a vehicle; and encourages education of lawyers and consumers about purchases and financing of vehicles and consumers’ legal rights in such purchases and loans.


The Council of the Section of State and Local Government Law approved sponsorship of the amended resolution during its Spring Business Meeting on Sunday, April 14, 2019.

The Commission on Homelessness and Poverty approved co-sponsorship of the resolution on May 6, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously? Yes. A version was submitted for the 2018 Annual Meeting and but withdrawn to collaborate with other entities.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption? The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, sexual orientation, and gender identity and expression. The Association has adopted policies calling upon local, state, and federal lawmakers to prohibit such discrimination in housing, as well as in public accommodations, credit, education, and public funding and has sought to eliminate such discrimination in all aspects of the legal profession. The ABA’s fundamental position condemning such discrimination is based on its underlying commitment to the ideal of equal opportunity and advancement of human rights, which would be bolstered 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. In February 2019, fourteen U.S. Senators joined in introducing the Home Loan Quality Transparency Act, which calls for the reinstatement of reforms mandated by the Dodd-Frank Act for reporting of data collection requirements in the home mortgage market, which were relied upon by consumers, advocates and regulators in addressing discriminatory and unfair lending practices. Van Hollen, Democratic Colleagues Introduce Legislation to Help Prevent Housing Discrimination, Press Release, Feb 5, 2019. Introduced in the Senate by U.S. Senators: Chris Van Hollen (MD), Catherine Cortez Masto (NV), Richard J. Durbin (IL), Cory Booker (NJ), Maria Cantwell (WA), Tammy Duckworth (IL), Diane Feinstein (CA), Kristen Gillibrand (NY), Kamala D. Harris (CA), Robert Menendez (NJ), Tina Smith (MN), Elizabeth Warren (MA), and Ron Wyden (OR), available at https://www.vanhollen.senate.gov/news/press-releases/van-hollen-democratic-colleagues-introduce-legislation-to-help-prevent-housing-discrimination-. H.R. 963 was also cosponsored by Carolyn Maloney (NY), Al Green (TX), and Jackson Lee (TX). See also H.R. 963, available at https://www.congress.gov/bill/116th-congress/house-bill/963/text?q=%7B%22search%22%3A%5B%22sickle%22%5D%7D. The restatement was introduced because Congress voted to roll back the Dodd-Frank reform measures and exempted 85% of all banks and credit unions from reporting loan characteristics vital to ensuring lending fairness. A companion Bill, H.R. 963, February 2019, was introduced in the U.S. House of Representatives, by Congresswoman Nydia M. Velazquez, Chairwoman of the House Small Business Committee Van Hollen, Democratic Colleagues Introduce Legislation to Help Prevent Housing Discrimination, Press Release, Feb 5, 2019. Introduced in the Senate by U.S. Senators: Chris Van Hollen (MD), Catherine Cortez Masto (NV), Richard J. Durbin (IL), Cory Booker (NJ), Maria Cantwell (WA), Tammy Duckworth (IL), Diane Feinstein (CA), Kristen Gillibrand (NY), Kamala Harris (CA), Robert Menendez (NJ), Tina Smith (MN), Elizabeth Warren (MA), and Ron Wyden (OR), available at https://www.vanhollen.senate.gov/news/press-releases/van-hollen-democratic-colleagues-introduce-legislation-to-help-prevent-housing-discrimination-. H.R. 963 was also cosponsored by Carolyn Maloney (NY), Al Green (TX), and Jackson Lee (TX). See also H.R. 963, available at https://www.congress.gov/bill/116th-congress/house-bill/963/text?q=%7B%22search%22%3A%5B%22sickle%22%5D%7D. The restatement was introduced because Congress voted to roll back the Dodd-Frank reform measures and exempted 85% of all banks and credit unions from reporting loan characteristics vital to ensuring lending fairness. A companion Bill, H.R. 963, February 2019, was introduced in the U.S. House of Representatives, by Congresswoman Nydia M. Velazquez, Chairwoman of the House Small Business Committee Van Hollen, Democratic Colleagues Introduce Legislation to Help Prevent Housing Discrimination, Press Release, Feb 5, 2019. Introduced in the Senate by U.S. Senators: Chris Van Hollen (MD), Catherine Cortez Masto (NV), Richard J. Durbin (IL), Cory Booker (NJ), Maria Cantwell (WA), Tammy Duckworth (IL), Diane Feinstein (CA), Kristen Gillibrand (NY), Kamala Harris (CA), Robert Menendez (NJ), Tina Smith (MN), Elizabeth Warren (MA), and Ron Wyden (OR), available at https://www.vanhollen.senate.gov/news/press-releases/van-hollen-democratic-colleagues-introduce-legislation-to-help-prevent-housing-discrimination-. H.R. 963 was also cosponsored by Carolyn Maloney (NY), Al Green (TX), and Jackson Lee (TX). See also H.R. 963, available at https://www.congress.gov/bill/116th-congress/house-bill/963/text?q=%7B%22search%22%3A%5B%22sickle%22%5D%7D.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. Cost to the Association. (direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.
9. Disclosure of Interest. There are no known conflicts of interest.

10. Referrals. By copy of this form, the Resolution and Report with Recommendation will be referred to the following entities:

- Section of Business Law
- Section of Infrastructure and Regulated Industries Section
- Section of Public Contract Law
- Section of Taxation
- Section of State and Local Government Law
- Section of Tort Trial and Insurance Practice Section
- Section of Litigation
- Section of Administrative Law and Regulatory Practice
- Government and Public-Sector Lawyers Division
- Commission of Racial and Ethnic Diversity in the Profession
- Commission of Hispanic Legal Rights and Responsibilities
- Coalition on Racial and Ethnic Justice
- Commission on Disability Rights
- Standing Committee on Public Education
- Law Student Division
- Young Lawyers Division
- Senior Lawyers Division
- Commission on Sexual Orientation and Gender Identity
- Solo, Small Firm and General Practice Division
- Center for Public Interest entities.

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges Congress to amend the Equal Credit Opportunity Act to require documentation and collection of the applicant’s race, gender or national origin for non-mortgage credit transactions specifically for vehicle transactions; it urges Congress and all state, local, territorial, and tribal legislative bodies and governmental agencies to adopt laws and policies that require an enhanced nondiscrimination compliance system for a vehicle loan or consider reducing dealer discretion by placing limits on dealer markup and to adopt legislation requiring the timely notice and disclosure of pricing of add-on products by dealers on each vehicle through reasonable means before a consumer negotiates to purchase a vehicle; and encourages education of lawyers and consumers about purchases and financing of vehicles and consumers’ legal rights to such purchases and loans.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the highly discriminatory practices and impacts to many consumers of color, gender, national origin, and low-income, that arise in auto lending and sale of auto add-on products. Consumers are burdened with interest-rate markups on loans that have no relation to their credit-risk, and often relate to prejudices and discriminatory actions. The resolution also addresses the issue of insufficient data available on credit applicants to identify potential discriminatory impact. Such data is currently collected in the home mortgage market and this resolution would place the one trillion-dollar auto lending market on similar footing. Finally, the resolution addresses the lack of timely notice and transparency in the auto lending market, particularly in the pricing of add-on products, which is unacceptable when it represents the third largest consumer debt in America.

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

This policy will reaffirm the ABA’s commitment to ensuring the enforcement of fair lending laws to protect against discrimination, strengthen consumer protections in the auto lending and sale market, and promote economic justice. It will assist the work of consumer advocates, lawmakers, and public and private attorneys who diligently work to provide a fair and transparent economic market for all consumers, regardless of race, color, gender, national origin, or economic position.

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

At the federal level, various legislators have taken opposing viewpoints on the powers of the Consumer Protection Financial Bureau and whether expressions of policy articulated by the CFPB should be subject to congressional rule making.
authority. As noted in the report, Congress approved Public Law 115-172, May 21, 2018, which invoked the Congressional Review Act to disapprove CFPB Bulletin 2013-02 (March 21, 2013), which provided guidance on the use of discretion in dealer interest markup rates. The CFPB Rulemaking Agenda, Fall 2018, indicates that the CFPB is reexamining the requirements of the ECOA concerning the disparate impact doctrine in light of recent supreme court cases.

Internal to the ABA, the Business Law Section has indicated it does not support the resolution.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation recognizing and promoting the human right to a basic income; and

FURTHER RESOLVED, That the American Bar Association urges all levels of government to recognize in both policy and resource allocation the human right to a basic income.
One of the ABA’s stated goals is to advocate “for just laws, including human rights . . . .”\(^1\) The ABA has demonstrated its commitment to this goal through its consistent creation of, and advocacy for, key human rights policies. For example, the ABA House of Delegates has approved resolutions supporting:

- The right to adequate food and nutrition;\(^2\)
- The right to adequate housing;\(^3\) and
- The funding of income assistance programs at a level required to meet the need for the basic essentials of life.\(^4\)

This resolution and report asks the ABA to build upon these existing policies by urging all levels of government to recognize and promote the human right to a basic income. We define “basic income” as the income needed for a person to afford housing, food, healthcare where not publicly provided, and other fundamental life necessities. Similarly, the Universal Declaration of Human Rights includes the human right to an “adequate standard of living for the health and wellness of himself and his family . . . .”\(^5\) Yet over 70 years later, these human rights have not been realized for many Americans.

The United States has long struggled to establish a decent standard of living for all. In Franklin D. Roosevelt’s 1944 State of the Union address, he recognized the need for a “Second Bill of Rights” to address economic security.\(^6\) In the President’s words, “We cannot be content . . . if some fraction of our people — whether it be one-third or one-fifth or one-tenth — is ill-fed, ill-clothed, ill-housed, and insecure.”\(^7\) The Second Bill of Rights included “[t]he right to earn enough to provide adequate food and clothing and recreation . . . .”\(^8\)

Simply put, working households in the United States are not immune from poverty.\(^9\) Workers in the bottom fifty percent have not experienced a real raise since 1980.\(^10\) Crafting legislation and creating programs to advance a basic income is a necessary step so that individuals can afford necessities like food, clothing, and shelter for themselves

\(^2\) ABA House Report 14M107; ABA House Report 86A116A.
\(^3\) ABA House Report 13A117.
\(^4\) ABA House Report 92A122.
\(^6\) Franklin D. Roosevelt, State of the Union Message to Congress (Jan. 11, 1944).
\(^7\) Id.
\(^8\) Id.
and their families. The ABA can advocate on a national scale for implementation of legislation and programs that promote the human right to a basic income.

This report will summarize several ways for government to promote a basic income as defined above. The intent is to outline several methods to realize the human right of basic income for all. The ABA is not being asked to endorse these options. They are merely illustrative of the kinds of devices that may be employed to achieve the goal of basic income. This report does not find any one option determinative and acknowledges that it will likely be a combination of two or more of these strategies, or others yet to be devised, that will achieve this goal. First, the report will discuss federal, state, and local minimum wage laws. Next, it will discuss the related concept of a living wage. Finally, the report will delve into the trending topics of a “universal basic income” and federal job guarantees.

I. Minimum wages and living wages

The minimum wage is one tool governments may utilize to promote a basic income. This section of the report will briefly summarize the development of minimum wage laws in the United States, discuss current legislation, and address challenges faced.

A. The development of minimum wage laws

When President Franklin D. Roosevelt entered office, he promised Americans a new way of life in the form of the New Deal. One area of domestic policy he addressed was fair labor and wage practices through the Fair Labor Standards Act of 1938 (the “FLSA”). The FLSA banned oppressive child labor laws and set the minimum hourly wage at 25 cents and the maximum work week at 44 hours. In addition to establishing the first federal minimum wage, the FLSA also mandated overtime pay and recordkeeping requirements. Forty-five states, the District of Columbia, Guam, the Virgin Islands, and Puerto Rico have implemented their own minimum wages. In jurisdictions where there is a state and a federal minimum wage, the higher of the two applies. The District of Columbia currently has the highest minimum wage at $13.25 per hour. As of the time of this report’s submission, there were more than 700 bills pending in state legislatures to increase state minimum wages. In the past several years, counties and municipalities have also become

12 Id.
15 Id.
laboratories for minimum wage policy. According to the U.C. Berkeley Labor Center, before 2012, only five localities had minimum wage laws, but now more than 40.16

B. Challenges faced

The growing interest in minimum wage legislation on the local level is likely due to the modest minimum wage increases on the federal level. It is widely recognized that the U.S. federal minimum wage has failed to keep pace with inflation.17 The last federal minimum wage hike occurred in 2009 when Congress increased the minimum wage from $6.55 to $7.25. Although the real value of today’s minimum wage is less than what it was from 1961 to 1981, any increase helps stimulate the economy.18 The latest federal minimum wage increase boosted consumer spending by $8.6 billion during the 2009 recession, when the economy needed it most.19

A full-time minimum-wage worker earns about $15,000, which is close to the already artificially low poverty threshold for a family of two.20 A 2016 Congressional Budget Office report revealed that a bump in the federal minimum wage from $7.25 to $10.10 could have a significant impact on low-income families.21 This increase would raise average family incomes below the formal poverty line by 2.8 percent and would cut the number of people living in “official” poverty by 900,000.22 Given that this increase would still not constitute a living wage and, in most places, would fail to pull a family out of poverty, an even stronger approach would be to index the minimum wage to wages, so as workers in the overall economy gain, so do the lowest-wage workers.23

Opponents of minimum wage increases argue that an increase nationally could result in a decrease in jobs because employers might demand less labor.24 Moreover, less labor could result in an increase in the cost of goods.25 While there is significant evidence refuting these positions, the more important point is that sub-poverty jobs violate basic human rights guarantees and should never be tolerated in any democracy.26

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19 Id. at 23.
20 Id. at 24.
22 Id. at 23.
23 Filion, supra note 18, at 24.
24 Stone, supra note 21; Pollin & Luce, supra note 17, at 11.
25 Stone, supra note 21; Pollin & Luce, supra note 17, at 11–12.
It is worth noting as well that once a wage floor is set and properly enforced, it is no longer a market disadvantage to meet that standard, given that all business competitors are doing so. This eliminated market disadvantage also applies to the increased cost of goods. And if a business is not able to run despite the lack of a market disadvantage, then our policy must be that it cannot continue to exist at the cost of systemic human rights violations and impoverishment of people in the United States.

The greater challenge is when states engage in a race to the bottom to create market disadvantages for sister states, which argues in favor of a federal floor. Even in those instances, however, the evidence suggests state residents fail to benefit in the longer term from exploitive business practices and the overall local economy suffers.27 Other arguments for a global race to the bottom have no merit, given that other countries’ markets pay comparative wages that are so low that any real effort to undercut or meet them is unquestionably absurd. Yet, despite, for example, Mexico’s degraded labor conditions in the tomato industry and very low wages (far under the U.S. minimum wage), Florida tomato growers – a sector that pays one of the highest wages in farm work and has the best conditions due to the Fair Food Program – is competitive.28 In practice, the “race to the bottom” arguments have not been borne out.

As of the submission date of this report, there were nine bills pending in Congress to increase the federal minimum wage.

C. What is a “living wage?”

The concept of a “living wage” is often intertwined with discussions of federal, state, and city minimum wage legislation. The fundamental premise of a living wage is that anyone who works for a living should not have to raise a family in poverty and should be able to meet their basic needs.29 Arguments against a living wage often echo the debate over legislated minimum wages—namely, employment effects. Critics raise the same concerns about the new wage floor pricing unskilled workers out of the market in which they are competing for jobs.30 Despite these concerns, firms also receive benefits when they pay their employees a living wage. For instance, the firm will likely experience reduced turnover, improved work quality, better cooperation with management, more flexibility in the operations of the business, and higher morale overall.31
Of course, the direct benefits to the worker are numerous. A true living wage provides a low-income family increased spending power, access to better health care, and reduced reliance on government subsidies. A living wage also provides greater access to bank loans and other forms of credit. In addition, there is the incalculable benefit of the dignity that a person experiences when earning a dollar of income rather than being granted a dollar of government subsidies. Higher incomes for low-wage workers and their families can also prompt community spillover effects, such as more spending at local businesses, increased homeownership rates, and opportunities for business investments by residents. In terms of future benefits, studies consistently show that the conditions into which a child is born are highly determinative of his or her future economic well-being, and in fact in the immediate term higher income reduces child neglect significantly.

Finally, a living wage has significant public health impacts and therefore also protects the right to health. Not only does it reduce unmet medical needs, studies show that increases in wages up to a living wage also reduce smoking, decrease low birth weight babies, lower teen alcohol abuse and teen pregnancy rates, and decrease premature death. (Possibly up to 1 in 12 such deaths could be avoided with decent wages, according to a New York City based study). Alleviating grinding poverty has a multitude of positive human rights impacts. For all of these reasons, a living wage for American families will unquestionably have benefits for generations to come and has the promise of rescuing our country from the current crisis of confidence in the fairness and basic legitimacy of our economic and social systems.

II. Universal basic income

A universal basic income is yet another tool that, if properly implemented, could help eradicate poverty. A “universal basic income” differs from a minimum wage or a living wage. A universal basic income has the following features: (1) is not based upon employment, income, or means; (2) directly transfers money on an individual basis; (3) is issued consistently over a long period of time; (4) is sufficient to cover basic needs and expenses; and (5) is issued to everyone within the jurisdiction of the issuer. The following sections of the report will discuss the history behind universal basic income and offer some examples of contemporary programs.

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A. The history of universal basic income programs

While never implemented as a permanent program in the United States, advocacy for a system of universal unconditional cash transfer and universal basic income has roots in the founding era of the nation and has evolved and continued throughout the history of the country, finding support from people across the political spectrum. Thomas Paine, author of Common Sense and a powerful proponent of the American Revolution and democracy, first advocated for a “national fund,” from which every person would receive 15 pounds upon his or her twenty-first birthday, and ten pounds per year to every person 50 years and older, “as a compensation in part, for the loss of his or her natural inheritance, by the introduction of the system of landed property.”

Paine suggested this fund be created from a form of inheritance tax, as it puts the least imposition on the late and current property owner. Paine’s idea was an early inspiration for the Social Security system.

Martin Luther King, Jr. also advocated for a “guaranteed annual income” as a tool to fight poverty and disparities in wealth between the white community, which held disproportionately high amounts of wealth, and communities of color, which held—and still hold—disproportionately lower amounts of wealth. King believed a guaranteed income would allow the economy to grow, and that poverty would cease to exist if guaranteed income could be implemented in the United States. King spoke on the psychological benefits of such a program, noting, “The dignity of the individual will flourish when the decisions concerning his life are in his own hands, when he has the assurance that his income is stable and certain, and when he knows that he has the means to seek self-improvement.”

President Richard Nixon, in his first year as president, pursued passage of a bill that would provide families of four with $1,600 (or about $11,000 in 2019 dollars) per year. Prior to attempted bill passage, various jurisdictions across America ran studies and trials to test the effects and feasibility of such programs (Notable among them were Seattle and Denver, the effects of which will be explored later in this report). These trials reported that decrease in work was small among families receiving guaranteed income, and that similar programs were sufficiently affordable as to be effective and solvent. Unlike modern conceptions of universal basic income, however, Nixon’s proposal was need-

42 Martin Luther King, Jr., Where Do We Go From Here?, Address at the Eleventh Annual SCLC Convention (Aug. 16, 1967) (transcript available at http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/where_do_we_go_from_here_deliver ed_at_the_11th_annual_sclc_convention.1.html).
43 Id.
44 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id.
62 Id.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
based, and required any beneficiaries currently unemployed to register with the U.S. Department of Labor. The plan received support from adviser (and future U.S. Senator) Daniel Patrick Moynihan, and from over 1,000 economists, including the renowned John Kennedy, the former written by Galbraith, James Tobin, Robert Lampman, Paul Samuelson, and Harold Watts. Though the bill passed in the House, it failed in the Senate and was never enacted.

B. Universal basic income programs today

In recent years, universal basic income has seen a resurgence of popularity in political discussion and popular opinion, finding support across the ideological spectrum. Progressives and Libertarians alike have voiced support of universal basic income, as have activists, intellectuals, and even the technological entrepreneurs of California’s Silicon Valley. The State of Hawaii has enacted legislation to create a study on the effects of universal basic income, and Stockton, California Mayor Michael Tubbs has launched a universal basic income there to study the effectiveness of guaranteed income in combating job loss and economic stagnation. On the national level, universal basic income has gained traction among elected officials and candidates for office. Given its resurgence in popularity and serious consideration by officeholders and candidates, it appears likely that universal basic income will remain a focal point in public policy and legislation for years to come.

Though no nation, locality, or jurisdiction has implemented a program that has met all universal basic income program criteria, several partial or temporary programs have been implemented. Most notable among these are the Alaska Permanent Fund, the Eastern-Band Cherokee casino funded dividend program, and the Seattle and Denver tests conducted in the mid-twentieth century to examine viability of a nationwide universal basic income. Alaska’s fund, which draws funds from state investment in oil extraction revenues, provides a yearly stipend to all those residing in Alaska, but falls far short of

**References**

50 Id.
51 Id.
53 though the bill passed in the house, it failed in the senate and was never enacted.
58 Id.
59 Id.
60 Id.
61 Id.
63 though the bill passed in the house, it failed in the senate and was never enacted.
covering an individual’s basic needs, providing only $2,072 per person per year at its peak. The Seattle and Denver test programs were structured to provide enough to cover basic living expenses (a baseline of $3,600 annually in 1971 U.S. dollars), but the programs targeted only low-income families who were selected randomly and continued over only five years. With larger payments, but on a smaller scale, the Eastern Band Cherokee dividend program utilized revenue from a newly opened casino to provide monetary payments to all tribal members beginning in the early 1990’s. These payments have increased over time as the casino operation expanded, starting from $6,000 at the program’s inception to around $12,000 per year in 2016. Studies have shown that the casino payments had significantly benefited tribal youth, both in mental health and education metrics. Recent universal basic income experiments have been instituted in multiple locations, including Kenya and Finland. A recent experiment in Kenya has been met with interest and hope from universal basic income enthusiasts, who hope the privately funded effort to provide Kenyans with approximately $22 per month will prove the economic success and political viability of universal basic income in the twenty-first century. Finland’s experiment, focusing expressly on jobless individuals and originally hoped to be a precursor to a universal basic income program, has faced criticism for poor implementation and a scale-back as less sympathetic political parties came into the majority. Other nations, including the Netherlands and Canada, are in the early phases of experimentation.

C. Universal basic income’s potential effects on employment

Some critics of universal basic income say that a guaranteed minimum income will create a disincentive to work. However, studies of universal basic income implementation show no, or a slight decline, in total work among recipients. A Roosevelt Institute study examining the effects of the Alaska Permanent Fund, Seattle/Denver Income Experiment (SIME/DIME), and the Eastern Band of Cherokee’s casino-funded dividend program possibly导致工作

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found that there was no statistically significant effect on employment in either the Alaska or Cherokee program.70

The SIME/DIME experiment, which only targeted randomly selected low-income individuals, and therefore was not truly “universal” in nature, was the only program to sufficiently cover basic needs. Under the SIME/DIME experiment, there was a 4-4.6% reduction in employment, and a 7.4% drop in earnings for recipients, which could be significant if the program were implemented nationwide.71 With automation poised to cut workers from the job market, a universal basic income could provide needed protection. It is worth noting as well that a universal basic income can also be a tool to recognize unpaid work. Unpaid work, often caretaking work, disproportionately falls to women.72 Caretakers unable to participate in formal employment because they are providing childcare, eldercare, or attending the sick and disabled in their families and communities, are in fact working. A universal basic income has the potential to alleviate the unjust nature of work roles that are assigned largely by gender and remain uncompensated in the formal economy.

D. Preservation of workers’ rights and human employment

Many economists, business leaders, and labor advocates forecast an impending change in the dynamics of labor and employment in America. The increase in independent contracting and emergence of the “gig economy” lead many labor advocates to fear the undermining of workers’ rights.73 The increasing use of artificial intelligence and machine learning has caused some economists and business leaders to predict a break from past cycles of automation and instead lead to automation of large percentages of work in middle-income and mid-quality jobs.74 Some fear that 47% of all American jobs face “high risk” of automation.75 While automation may create some new, better jobs, some fear this will lead to rising unemployment, as well as negative economic and social fallout.76

In response to these threats, some advocates have suggested unconventional methods of protecting workers’ rights and incentivizing human employment. One such method is reducing the cost of human employment through shifting the responsibility to provide certain worker benefits from employers to a larger source, namely, governments.77 Universal basic income could serve in this capacity to shift the costs of minimum wage increases from employers by ensuring that every worker’s basic living expenses are

70 MARINESCU, supra note 40, at 6.
71 Id.
75 Id. at 38.
76 ESTLUND, supra note 73, at 18.
77 Id. at 14.
covered through a universal basic income program. This, or alternatives including a guaranteed minimum income, would both serve to ensure businesses could not skirt minimum wage regulations through contracting, and lower the cost of employing humans rather than machines.78


The civil rights movement recognized the centrality of a federal jobs guarantee to racial and other equality, calling for a guarantee in 1966 in the Freedom Budget.79 Today, major think tanks have explored and embraced some form of this option including the Center for American Progress,80 Brookings Institution,81 and the Levy Economics Institute.82 A federal jobs guarantee that assures every U.S. resident a job at a fair wage with decent benefits is a simple, elegant solution to many problems. It would effectively set a wage floor for private-sector jobs as well as raise the floor on decent working conditions.83 It would simultaneously address the enforcement crisis in low-wage work places described below.84 And a federal jobs guarantee could help address ongoing discrimination in access to jobs, including by eliminating barriers for those with criminal records.85

Jobs are the primary way people generate basic income for themselves and their families. They also enable many of us to participate in work that contributes to our communities and society. While all labor has dignity, not all jobs offer dignified conditions or a decent wage. Most alarmingly, the spread of precarious low-wage work in our country continues to accelerate.86

Although official unemployment is currently low, over 40% of jobs offer less than $15 an hour, a rate too low to afford adequate housing in most cities, and workplace conditions in low-wage labor are often dangerous, abusive, and unstable, with work hours erratic at best.87 Indeed, low-wage workplaces are sometimes lawless in practice. For example, up

78 Id. at 47.
84 Id.
85 Id. at 2.
to two-thirds of workers see their wages stolen every week without repercussions in that their employers refuse to pay wages legally due and workers have no practical recourse when wages are "stolen" in this way.88 Also, millions of people who want to work are underemployed, incarcerated, or have dropped out of the labor force (and are thus not counted in statistics), and black unemployment is almost twice the rate of white unemployment.90

Furthermore, persistent discrimination in employment by race, combined with the millions of blacks and Latinos who have been unjustly and disproportionately incarcerated and face the barrier of criminal convictions while seeking a job, makes a federal jobs guarantee a tool that promotes racial equity as well. There is evidence that the perpetual proneness to poverty in many black and brown communities is a key driver of crime instability.90 Moreover, regardless of racial or gender demographic, for those without a college degree, the picture is bleak. For example, in 2016, one in six men in the prime work years (between 25 and 54) was unemployed.91

We also cannot ignore that chronic unemployment in our current system is structural. The Federal Reserve is bound by a Congressional mandate to manipulate monetary policy to create unemployment for the sake of containing inflation.92 Full employment is defined at being in practice at about 4.5%.93 The current low unemployment rate of 3.9%, ironically, presents a problem for the Federal Reserve: reaching the "sweet spot of full capacity" means accelerating wage inflation and denting profits for industry.94 In short, rather than a job guarantee, our policy framework guarantees a significant level of joblessness.

CHALLENGING THE BUSINESS OF FEAR


DAVID COOPER & TERESA KROEGER, ECONOMIC POLICY INSTITUTE, EMPLOYERS STEAL BILLIONS FROM WORKER’S PAYCHECKS EACH YEAR (2015), https://www.epi.org/publication/growing-movement-15/ (noting that "low wages in retail are compounded by less-than-fulltime hours and unpredictable schedules; retail workers report higher rates of involuntary part-time than many other industries").


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In addition to addressing deep and structural problems currently posed by our labor system, federal jobs potentially bring a range of other social benefits. As economists Robert Pollin, Garret Peeler, and Jeannette Wicks Lim noted in a study of a New York State proposal on government-created green jobs, for example:

"Direct effects—the jobs created, for example, by retrofitting buildings to make them more energy efficient or building wind turbines;

Indirect effects—the jobs associated with industries that supply intermediate goods for the building retrofits or wind turbines, such as lumber, steel, and transportation;

Induced effects—the expansion of employment that results when people who are paid in the construction or steel industries spend the money they have earned on other products in the economy."95

Estimates of the costs of a federal jobs guarantee vary, but even on the high end, the benefits justify the cost. Economists Mark Paul, William Darity, Jr., and Derrick Hamilton estimate that such a program would employ 13 million people at a cost of $543 billion a year.96 This amount is less than the country’s military budget (which is about 16% of the total federal budget), and the costs would be lower in the larger scheme, given that tax revenue would increase, and public spending on Medicaid, food assistance, and other needs-based social welfare programs would decrease.97 These economic benefits would be in addition to the lower financial and human costs driven by joblessness, such as crime and addiction.

A federal jobs guarantee comes close to ensuring the right to a basic income universally, and it is currently included as a proposal in the Green New Deal proposed by Representative Alexandria Ocasio-Cortez (NY). It is also an approach shaped by the human rights principle of equity as it directs resources to those in greater need and also increases racial equity in employment. While it would have to be paired with a strategy to meet the needs of those unable to work (to achieve full universality), it would immediately reach communities facing the worst conditions and provide a dignified life for all able to work. As a result, it would powerfully ensure the well-being, human rights, dignity and social inclusion of our most vulnerable communities.

IV. Conclusion


96 MARK PAUL, ET AL., supra note 84, at 12.

A commitment to the protection and preservation of human rights has long been one of the American Bar Association’s goals. 98 By recognizing the human right to a basic income, the ABA has the power to help American workers attain security and dignity in their work. Whether this goal is met by supporting increased minimum wage legislation, urging the development of a federal jobs guarantee, or other means, the ABA has a pivotal role to play to support and encourage implementing a basic income for all working Americans through law.

Respectfully submitted,

Wilson Adam Schooley
Chair, Section of Civil Rights & Social Justice
August 2019

98 See supra note 1.
GENERAL INFORMATION FORM

Submitting Entity: ABA Section on Civil Rights and Social Justice

Submitted By: Wilson Adam Schooley, Chair, Section on Civil Rights and Social Justice

1. Summary of Resolution(s). The Resolution urges state, local and federal governments to enact legislation recognizing and furthering the right of all individuals to a basic income.


The Commission on Domestic and Sexual Violence approved co-sponsorship of the Resolution on Thursday, April 11, 2019.

Commission on Homelessness and Poverty agreed to cosponsor on May 6, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously? Yes. We previously submitted this policy for the 2018 Annual Meeting but retracted it to address any outstanding issues prior to final submission for consideration. It was not resubmitted at that time.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution integrates with existing Association policies, such as the Association’s policies promoting the human rights to adequate food and nutrition and adequate housing. This Resolution also builds upon the Association’s 1992 resolution urging that “welfare programs be funded at a level required to meet the need for the basic essentials of life.”

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) Forty-five states, the District of Columbia, Guam, the Virgin Islands, and Puerto Rico have implemented their own minimum wages. In jurisdictions where there is a state and a federal minimum wage, the higher of the two applies. The District of Columbia currently has the highest minimum wage at $13.25 per hour. As of the time of this report’s submission, there were more than 700 bills pending in state legislatures to increase state minimum wages. The last federal minimum wage hike occurred in 2009 when Congress increased the minimum wage from $6.55 to $7.25. As of the submission date of this report, there were nine bills pending in Congress to increase the federal minimum wage including H.R.122, S.150, H.R.582. Also, some jurisdictions have passed legislation to study universal basic income, such as Hawaii, Stockton and California.

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6. Status of Legislation. (If applicable) Forty-five states, the District of Columbia, Guam, the Virgin Islands, and Puerto Rico have implemented their own minimum wages. In jurisdictions where there is a state and a federal minimum wage, the higher of the two applies. The District of Columbia currently has the highest minimum wage at $13.25 per hour. As of the time of this report’s submission, there were more than 700 bills pending in state legislatures to increase state minimum wages. The last federal minimum wage hike occurred in 2009 when Congress increased the minimum wage from $6.55 to $7.25. As of the submission date of this report, there were nine bills pending in Congress to increase the federal minimum wage including H.R.122, S.150, H.R.582. Also, some jurisdictions have passed legislation to study universal basic income, such as Hawaii, Stockton and California.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. We will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy in tribal, local, state and federal governments. Passing this resolution will allow the ABA to encourage jurisdictions to pass more comprehensive and substantial laws and policies that further the human right to a basic income.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) There are no known conflicts of interest.

10. Referrals. By copy of this form, the Resolution will be referred to the following ABA entities:
- Commission on Disability Rights
- Commission on Sexual Orientation and Gender Identity
- Commission on Hispanic Rights and Responsibilities
- Commission on Racial and Ethnic Diversity in the Profession
- Commission on Women in the Profession
- Center for Human Rights
- Solo, Small Firm and General Practice Division
- Tort Trial & Insurance Practice Section
- Section of Alternative Dispute Resolution
- Section of Litigation
- Section of Labor and Employment Law
- Section of Business Law
- Section of Taxation
- Senior Lawyers Division
- Young Lawyers Division
- Law Student Division
- Commission on Law and Aging
- Commission on Mental and Physical Disability Law
- Coalition on Racial and Ethnic Justice

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

Kaitlin D. Wolff | Uniform Law Commission
Legislative Counsel
111 N. Wabash Avenue, Suite 1010
Chicago, IL 60602
Tel.: (312) 450-6615
kwoff@uniformlaws.org
12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Estelle H. Rogers, CRSJ Section Delegate (main)
111 Marigold Ln
Forestville, CA 95436-9321
Tel.: (202) 337-3332 (Work)
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E-mail: schickman@freelandlaw.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

In reaffirmation of the ABA’s commitment to preserving and protecting human rights, this resolution urges the United States government, and governments around the world to promote the human right to a basic income by increasing the funding, development and implementation of basic income strategies to prevent infringement of this right.

The accompanying report summarizes several policies that would allow for citizens to obtain a basic income, defined as the income needed for a person to afford housing, food and other fundamental life necessities. The intent behind the report is to lay out options that may be acted upon to realize the human right of basic income for all. These options include federal, state, and local minimum wage laws, living wages as well as a “universal basic income” and federal job guarantee. The report does not favor one option over another and acknowledges that it will likely be a combination of two or more of these strategies that will achieve this goal.

2. Summary of the Issue that the Resolution Addresses

The United States has long struggled to establish a decent standard of living for all. In times of great economic dislocation and technological change, such as the Great Depression that came in the wake of the second industrial revolution, that national commitment becomes increasingly critical. Nearly 75 years later, not only have these rights yet to be realized at any point for all Americans, another wave of economic dislocation partially fueled by leaps in information and other technologies have impoverished almost half the nation and put the vast majority at economic risk.

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

Through encouraging governments to prioritize establishing policies consistent with the human right to income, the effects of the economic changes felt by too many Americans can be mitigated or reversed. By crafting legislation and creating programs to advance a basic income, individuals can afford necessities like food, clothing, and housing for themselves and their families. This combats domestic abuse, and homelessness and the myriad of other factors created by economic dislocation and disadvantages.

No minority views or opposition have been identified.

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RESOLVED, That the American Bar Association encourages all federal, state, tribal, territorial, and local court systems, in conjunction with state, territorial, tribal and local bar associations, to carefully review their cellphone policies, so as to balance the security risks posed by cellphone use with the needs of litigants to ensure meaningful access to our judicial system, especially to those who are self-represented;

FURTHER RESOLVED, That the American Bar Association opposes cellphone policies that impose undue burdens on litigants, particularly those who are self-represented, lower income, disabled, and/or seeking emergency access to the courts; and

FURTHER RESOLVED, That the American Bar Association opposes cellphone policies or procedures that force litigants to leave their cellphones in unsecure locations outside the courthouse or to pay a fee for storage at a location outside the courthouse.
I. Introduction

This resolution addresses cellphone use in courthouses. Specifically, it encourages chief judges and court administrators to carefully consider cellphone access in the courtroom and to adopt policies that balance access and legitimate security concerns.

Cellphones today are no longer just for making phone calls. Advanced cellphones, often referred to as “smartphones,” may include cameras, video cameras, and Internet access for research, email, and text communications. They also allow users to disseminate information instantaneously.¹

Cellphones are everywhere. According to one report, there were 435.31 million wireless-subscribers in the U.S. in the third quarter of 2018. Another study reports that in 2011, the number of cellphones in the U.S. exceeded the entire population of the United States, 327 million cellphones for 315 million people.²

As cellphone use has exploded, courts have grappled with their presence in the courtroom. Reasons cited in support of banning cellphones from courthouses and courtrooms include disruptiveness, security, and intimidation of witnesses and other trial participants. These are legitimate concerns for the orderly administration of justice. On the other hand, there is evidence that cellphone bans can impede access to the courts and limit some litigants’ ability to adequately present their cases.

Cellphone bans affect judges, court personnel, law enforcement and court security, lawyers, their clients, and the general public seeking access to the courts. Research shows that bans disproportionately disadvantage unrepresented and lower-income litigants.

II. Reasons in Support of Cellphone Bans

There are three principal arguments in support of cellphone bans: disruptiveness, security, and the protection of witnesses and other trial participants.

a. Disruptiveness

A common complaint among courts all over the country is that cellphones distract attention from judges and lawyers, and disrupt court proceedings. The Circuit Court in Lynchburg, Virginia, for example, does not allow cellphones in an effort to avoid distractions during hearings and interference with court proceedings that are recorded.

It has also been noted that cellphone interruptions can derail legal proceedings. In 2013, Cook County Chief Judge Tim Evans of Chicago, Illinois acknowledged that banning cellphones in the courthouse inconvenienced the public, but said sheriff's deputies had been unable to control the use of phones in court: "I wish it were possible to just say to the people coming to court, 'Please turn off your phones and devices.' The simple fact is we have tried that, and it does not work...People either ignore or refuse to comply with the judge's directions."

The disruption caused by vibrating and ringing cellphones, was cited as a reason for a blanket cellphone ban in 2016 in the Lancaster Pennsylvania Court of Common Pleas. The court also cited the possibility that witnesses could be photographed and intimidated.

b. Security

Purported security risks are another reason cited for cellphone bans. Safety and security concerns have focused on cellphones possibly being used to conceal firearms, bombs, or to study courthouse layouts.

In 2012, a cellphone ban was implemented in the criminal court courthouse and civil courthouse of Madison County, Missouri, because law-enforcement bulletins had warned of the possibility that some cellphones could contain firearms.

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Some also have said that cellphones could be used to trigger an explosive device. At least one court has cited concerns over terrorists using camera phones and technology to detonate bombs as the basis for banning cellphones from the courthouse.\(^9\)

The possibility that cellphones could be used to capture images to study courthouse security was cited as the basis for a total ban of all cellphones in Albuquerque, N.M. courts.\(^{10}\)

Despite these concerns, there are few actual examples of cellphones being detonated or used as weapons in courthouses. As one source observed, nationwide, there is no agreement in the federal system on whether telephones, pagers, laptop computers and other electronic devices pose a threat to court security or are just a ring-a-ning nuisance. The rule has been in effect for more than a decade, but why it exists eludes easy answer.\(^\text{11}\)

### c. Protection of witnesses and trial participants

Witness intimidation in the criminal courts appears to be the most significant and often cited reason for cellphone bans. Cellphone bans do not only protect witnesses and jurors from intimidation in high-profile criminal cases. Such bans also can protect the identity of minors and can prevent jurors, or potential jurors, from being exposed to biased opinions or messages concerning the case that may appear on the Internet.\(^\text{12}\) However, safety of witnesses and jurors in criminal cases remains a paramount consideration.

Because smartphones are equipped with cameras and video functionality, there is a real risk of individuals inappropriately capturing photographs or even testimony of victims, witnesses, jurors or court employees, which could easily be posted on the Internet.\(^\text{12}\) However, safety of witnesses and jurors in criminal cases remains a paramount consideration.

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\(^12\) Schober, supra note 5.
online and used to threaten or intimidate witnesses. People could also use smartphones to broadcast the court proceedings to outside parties. Numerous instances of witness intimidation during high-profile criminal cases have been documented in large cities and urban areas during the early 2000s, when many cellphone bans were being implemented. The danger of such a scenario is aptly illustrated by this description:

You’re sitting on the witness stand in a Philadelphia courtroom, about to provide incriminating eyewitness testimony in a Philadelphia homicide trial. You’ve overcome all the fear that comes along with living in a city that, according to the district attorney’s office, has a “near epidemic” level of witness intimidation. People in the gallery aren’t supposed to use their cellphones, but as you’re testifying somebody in the crowd takes one out and snaps a picture…Before you’re even off the stand, the photo has been uploaded to a social media website for all the world to see. In 2007, a Massachusetts judge explained that cellular phones equipped with cameras could be used to intimidate jurors or witnesses or to identify undercover police officers, and told of an incident when a witness’s grand jury testimony was printed out and posted throughout the neighborhood. Likewise, a Circuit Court judge explained the basis for a 2014 cellphone ban in Edgard, Louisiana that encompassed the entire building: “[T]he impetus for the complete ban was the result of someone secretly using a phone to record a court hearing then posting the recording to a social media site to intimidate witnesses.”

In the Cook County Criminal courthouse in Chicago, Illinois, a court official noted that gang members had taken pictures of judges and witnesses with their phones and texted testimony to their friends awaiting trial.

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In a television news interview in 2013, Cook County Circuit Court Chief Judge Timothy Evans said he believed the ability for courthouse visitors to photograph or film testimonies had absolutely led to the murder of witnesses. “Absolutely,” Evans said. “No question in my mind…”18

One of the most famous cases of cellphone use for possible witness intimidation was during the December 2018 trial of notorious drug kingpin Joaquin ‘El Chapo’ Guzman, who was accused of international drug trafficking and conspiracy to commit murder.19 Although electronics are strictly forbidden in the Brooklyn federal courthouse, El Chapo’s wife was caught bringing four cellphones into the courtroom, and was actively using them during trial proceedings. Mrs. Guzman told a security officer that “her attorney” gave her one of the cellphones. The presiding U.S. District Judge issued an order banning both attorneys from using cellphones inside the court for one year.

III. How Cellphone Bans Affect Access to Justice

a. Cellphone Bans Impinge on Presentation of Evidence, Communications, Language Access and Legal Research

Cellphones, and particularly smart phones, are a part of everyday life and dependence on cellphones cannot be overstated. A growing body of literature demonstrates that bans pose an inconvenience for all litigants, but particularly burden those without representation.

In a comprehensive report examining how bans affect access to justice, the Massachusetts Appleseed Center for Law and Justice categorized the problems into four distinct areas: evidence; communication and logistics; language access and accessibility; and information gathering and legal research.20

Evidence is often kept on cellphones. Examples in which self-represented litigants might need to use their cellphones to display evidence include proof of payment, proof of communication, proof of an agreement, and proof of property damage or injury. Litigants might use their cellphone to present this evidence in the form of


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texts, emails, pictures, or voicemails. For instance, they might show photographs of allegedly damaged property or text messages documenting custody disputes. Self-represented litigants are unable to access and present such evidence, if cellphones are banned from the courthouse.

The report also identified instances in which pro se litigants need to use their cellphones to communicate with individuals outside the courthouse, such as coordinating transportation, coordinating childcare, or communicating with employers. Producing a witness can be very difficult if the witness needs to be on-call at his or her job and the pro se litigant cannot use his or her cellphone to communicate with the witness.

The report also identified language access and accessibility issues for people who need to use their cellphones to communicate with individuals inside the courthouse. The hearing impaired need mobile devices to access translation services and hearing assistance applications to understand and communicate in the courtroom as their cases are being presented. Confidentiality may become an issue if a litigant who is hard of hearing has to communicate with his or her attorney at a shouting volume.

The necessity of using cellphones to connect the hearing-impaired with the world around them was demonstrated in 2016 when the highest court in the land set aside its policy against cellphones in the courtroom so that 12 members of the Deaf and Hard of Hearing Bar Association could be sworn into the United States Supreme Court Bar. The lawyers used their mobile devices to receive a real-time transcription of the swearing-in ceremony through a service called Communication Access Real-time Translation (CART). With the help of the transcription service on their mobile devices, the members were able to see and understand the proceedings as they were being sworn in.

Lastly, the report identified instances in which self-represented litigants need their cellphone for information gathering and legal research. For example, unrepresented individuals can use mobile devices to gather phone-based evidence, verify information before settling an agreement, obtain online legal aid materials, perform legal research, and fill out and store legal forms.

b. Cellphone Bans Create Storage Issues for Litigants

Still another significant obstacle for unrepresented litigants is the delay, angst and distress they experience when they arrive at a courthouse and realize they are not allowed to bring their phones inside. Many pro se litigants are unaware of the fact that cellphones are banned from the courthouse.

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Appleseed, supra, note 20.


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cellphone policy until they arrive. Caught off guard, they are suddenly faced with figuring out what to do with their cellphones so they do not miss their court dates. This is especially problematic for people who use public transportation. The difficulty of having to determine what to do with a cellphone at the last minute, can present quite a significant barrier for unrepresented litigants trying to get to a hearing on time.

On the first day a court ban on recording and photography devices took effect in Onslow County, North Carolina, half of the court’s 566 visitors brought cellphones and were turned away. People appearing for jury duty and custody hearings were among those who left rather than lose their cellphones. A sheriff’s deputy described the scene as “pandemonium, chaos.” One person had appeared for jury duty, but had nowhere to take her phone, which she needed to call for a ride. Others left the courthouse entry point to take cellphones back to their cars.25

When the Cook County criminal courthouse began implementing a 60-day trial cellphone ban in March 2017, officers had to turn visitors away, many of whom had nowhere to store their devices. One couple whose mother dropped the couple off, had nowhere to store their phones, so the girlfriend held their phones in her hands while waiting outside in the cold.26

A spokesperson for the court said “For venues where many are dependent on public transportation it is unrealistic that they would leave a phone at home.” The spokesperson said that people who did not drive to the courthouses were hiding their phones under trees, or asking their attorneys to get the devices into the building for them.

In 2016 at the Leighton criminal courthouse in Chicago, those arriving were told they could not bring their cellphones into the building, and there was no place to store them. One person said: “In 2016, everyone has a cell phone. Are people who arrive on public transportation supposed to throw their phones away?”27

Being turned around at the courthouse doors because you have cellphone can be particularly burdensome for people with children. This is illustrated by the experience of a grandmother who traveled to a Virginia courthouse to file paperwork. She was babysitting three of her grandchildren, ages 8, 5, and 2 and took them with her. When she approached security, she was told she could not


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bring her cellphone inside. After she figured out where she needed to go to store her cellphone, she rounded up the three children, crossed light rail tracks and headed to the general District Court building, where she paid for a locker to store her phone. She then made the return trip back to the Circuit Court, but it was not until she made it back to the Circuit Court that she realized the information she needed for paperwork was stored on her phone.28

For victims of domestic violence, having a cellphone can be a matter of life and death. Obtaining emergency relief could be impeded if a victim of domestic violence seeking an order of protection, or a tenant illegally locked out of an apartment arrives at the court and is denied entry into the courthouse with their cellphone.29 Recognizing this possible consequence of cellphone bans has led some court officials to consider alternate solutions.30

When a cellphone ban first went into effect at Cook County criminal court people due in court had to leave to find storage for their phones. The courthouse provided a limited amount of storage at a cost of $3. But several people who did not have enough money for the kiosks were asking others for cash to cover the fees. One person was heard asking a reporter outside the courthouse, "Could you hold my phone while I go to court? I don't have money for the machine."31

IV. Alternatives to Cellphone Bans

Courts have the difficult task of regulating cellphones in a world where nearly 450 million people own them. Regulating cellphones in courtrooms for different purposes in different contexts only adds to the difficulty. Creating cellphone policies that take into account numerous competing interests; that honor the rights of all; and make sure litigants, represented or not, are not unduly affected, is a delicate balancing act. Can courts protect the interests of orderly justice and the safety of witnesses and jurors, while at the same time ensuring that unrepresented litigants and other vulnerable populations, such as the elderly, disabled, and domestic violence victims, have access to justice? How have courts throughout the country managed this balancing act?

a. Regulatory Efforts

29 Appleseed, supra note 20-
31 Meyer, supra, note 6.
Most courts regulate cellphone usage in some form. The National Center for State Courts reports that 33 states (including Hawaii and Guam) have promulgated policies governing electronic device use. The policies are set by Courtroom Rules of Conduct, Administrative Orders, Chief Judge Orders, Orders of Administrative Office of Courts, Supreme Court Rules, Local Court Rules, Office of Court Management, Supreme Court Order, and Rules of Professional Conduct. Statutes and regulations also govern the ability to regulate possession and use of electronic devices in some states.

There is no uniform policy in courts regarding cellphones. What is appropriate in one jurisdiction may be unnecessary in another. Moreover, the same policy may not even apply equally to every courthouse within the same judicial district. For example, the presiding judge in Bedford Circuit Court in Virginia allows cellphones as long as they are not a disruption. Next door, in the Lynchburg Virginia General District Court, cellphones have been banned since November 2016. Some courts have come full circle - from completely banning cellphones to later loosening those restrictions.

Judicial bodies at the federal level have promulgated guidance for the development of personal electronic device policies. For instance, the United States Office of the Courts Committee on Court Administration and Case Management (CACM) has provided guidance for the development of Portable Communication Devices to all federal judicial systems. The guidance sets out a comprehensive list of factors to consider when formulating policy, such as security, who should develop the policy, to whom the policy applies, public notice of the policy, use of devices by the media, the impact of workload on security officers, and processes for taking custody of devices.

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33 For example, Virginia Code 19.2-266: [a] Judge may limit or ban the possession or use of any Portable Electronic Device if possession or use of the Portable Electronic Device may or does interfere with the administration of justice or cause any threat to safety or security, or for any other reason.

http://www.courts.state.va.us/courts/id/Culpeper/elecdevicepolicy.pdf

34 Mahoney, supra, note 1.

A model policy issued last year by the Virginia Supreme Court also is instructive. The policy states that visitors to Virginia’s circuit and district courts should be allowed to bring devices including cellphones inside, as long as they comply with restrictions set in each courthouse, such as placing the devices on silent mode and using them in public spaces, designated for such use. The model policy prohibits use of the device to take photographs or audio or video recordings. In explaining the model policy, the Supreme Court cited the growing role of cellphones in everyday life, access to data and representation as compelling reasons to allow them. Those needs must be tempered with the potentials for abuse and security threats, the policy states.

b. Different Types of Policies

A survey of cellphone policies throughout the country shows there are three general categories of policy.

- Some jurisdictions allow cellphones in the courthouse and courtrooms with no formal restrictions.
- Some jurisdictions allow cellphones in the courthouse and courtrooms, but place restrictions on their use in and around the courtroom. For example, they may have to be turned off or silenced.
- Some jurisdictions prohibit devices in the courthouse; but grant exemptions to certain users. Court personnel, law enforcement, building tenants, and attorneys are afforded the greatest levels of access. Jurors typically have more restricted access to devices.

i. Bans with Exemptions

Some courthouses bar all electronic devices unless approved by the court. The Leighton Criminal courthouse in Cook County was the first major metropolitan area to ban cellphones in courthouses in 2013. The ban exempted lawyers; judges; reporters; law enforcement officers; many government workers; jurors; building maintenance workers; domestic violence advocates and counselors; those seeking an order of protection or involved in the domestic violence assistance program; anyone required to wear an electronic monitoring device; and people with

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37 Mahoney, supra note 1.
disabilities who need electronic devices to communicate. In an order revising Cook County’s cellphone policy, Chief Judge Tim Evans expanded the list of those exempt from the ban to include domestic violence advocates and victims. Others listed as exempt included current or former judges, members of the media, and city, state and federal employees.

In 2016 in the Lancaster County, Pennsylvania Court of Common Pleas, employees, attorneys, emergency responders, jurors and law enforcement officials were exempted from a cellphone ban. Members of the press are required to apply in advance for an exception to the prohibition. An order in the Culpeper County, Virginia courthouse prohibits video and audio recording equipment, except for use at events such as investitures, ceremonies, and weddings. A 2018 administrative order banning cellphone use in the Pitt County, North Carolina criminal court is applicable to everyone, even lawyers. Only courtroom security personnel are allowed to have cellphones.

A District of Columbia court policy provides that electronic devices (e.g., cellphones, iPads, and computers) may not be used in any courtroom. Anyone who violates the provisions may be subject to arrest, expulsion, or may be banned from entering D.C. Court buildings.

ii. Phones Allowed with Restrictions

In some courthouses, cellphones are allowed but they must be turned off or kept silent, and may be seized if they ring during a court proceeding and violators may have to pay a fine for the phone’s return.

The Circuit Court for Anne Arundel County, Maryland, allows people to bring electronic devices into their facilities, subject to a list of enumerated restrictions.

40 Court Cell Phone Ban: Chicago Criminal Court Judge Thinks Ban Could Prevent Witness Murder
41 Meyer, supra, note 6
42 Lancaster Cellphone Policy, supra, note 7.
43 Order, In the Circuit Court for the County of Culpeper, VA, RE: Possession and Use of Portable Electronic Devices (March 18, 2019) http://www.courts.state.va.us/courts/gd/Culpeper/electdevicepolicy.pdf [hereinafter, Culpeper County Ct. Order]

In an order revising Cook County’s cellphone policy, Chief Judge Tim Evans expanded the list of those exempt from the ban to include domestic violence advocates and victims. Others listed as exempt included current or former judges, members of the media, and city, state and federal employees.

In 2016 in the Lancaster County, Pennsylvania Court of Common Pleas, employees, attorneys, emergency responders, jurors and law enforcement officials were exempted from a cellphone ban. Members of the press are required to apply in advance for an exception to the prohibition. An order in the Culpeper County, Virginia courthouse prohibits video and audio recording equipment, except for use at events such as investitures, ceremonies, and weddings. A 2018 administrative order banning cellphone use in the Pitt County, North Carolina criminal court is applicable to everyone, even lawyers. Only courtroom security personnel are allowed to have cellphones.

A District of Columbia court policy provides that electronic devices (e.g., cellphones, iPads, and computers) may not be used in any courtroom. Anyone who violates the provisions may be subject to arrest, expulsion, or may be banned from entering D.C. Court buildings.

ii. Phones Allowed with Restrictions

In some courthouses, cellphones are allowed but they must be turned off or kept silent, and may be seized if they ring during a court proceeding and violators may have to pay a fine for the phone’s return.

The Circuit Court for Anne Arundel County, Maryland, allows people to bring electronic devices into their facilities, subject to a list of enumerated restrictions.

40 Court Cell Phone Ban: Chicago Criminal Court Judge Thinks Ban Could Prevent Witness Murder
41 Meyer, supra, note 6.
42 Lancaster Cellphone Policy, supra, note 7.
43 Order, In the Circuit Court for the County of Culpeper, VA, RE: Possession and Use of Portable Electronic Devices (March 18, 2019) http://www.courts.state.va.us/courts/gd/Culpeper/electdevicepolicy.pdf [hereinafter, Culpeper County Ct. Order]
The restrictions prohibit photographs and video; interference with court proceedings or work; and devices in jury deliberation rooms. Further, cellphone possession or use may be restricted by court order when warranted by security or privacy issues in a particular case.47

The Virginia Model Policy states that visitors should be able to bring devices into the courthouse, but may use mobile devices in the courtroom only with authorization by a presiding judge. Judges have the discretion and authority to impose cellphone prohibitions in their courtrooms for particular cases, or place further reasonable restrictions. Judges and security officers may confiscate devices for violations of policy.48 Some courts have revised their cellphone policies to apply only to certain floors of the courthouse, as a convenience for those doing business on the main floors.

In January 2019, three Circuit Judges in Harrisonburg, Virginia signed an order revising the court’s previous order that had prohibited electronic devices from the entire courthouse. The new order lifted the ban on the floor where the clerk’s office is located so as to avoid inconvenience for those simply wanting to complete a clerk-related task, such as apply for a passport or concealed-carry permit.49

iii. Storage Locker Availability

To accommodate individuals who appear at the courthouse with cellphones, some courthouses are supplying storage lockers that are available for a small fee. This service is especially important for individuals who arrive by public transportation or park far away. Having a safe place to store their cellphones may prevent such individuals from being late for a court hearing.

In Culpepper County, Virginia, a recent court order mandates the provision of storage lockers for those who otherwise have no means of storage available to them.50 Courthouses in Norfolk and Virginia Beach, Virginia, have lockers for the storage of devices may be limited to persons who represent to security personnel at the courthouse for anyone who is not authorized to bring their devices into the courtroom.

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48 Mahoney, supra, note 1.
50 “If possession of portable electronic devices in the courtroom is prohibited or restricted, then storage for the devices shall be provided at the security entrance to the courthouse for anyone who is not authorized to bring their devices into the courtroom. Storage of devices may be limited to persons who represent to security personnel at they have no means of storage available to them, such as a vehicle parked on or near the courthouse premises.” Culpepper County Ct. Order, supra, note 51.
When the McLean County Law and Justice Center in Kentucky enacted a cellphone ban in 2017, visitors were allowed to secure their phones in storage lockers at the Sheriff’s Department’s Patrol Division. The U.S. Supreme Court building in Washington D.C. has coin-operated lockers where visitors may store their belongings, including cellphones.

An alternative storage device is the use of Yondr pouches, in which litigants keep their phone on their person, but it is sealed in such a way as to prevent its use. For some courthouses where cellphone storage is unavailable, nearby businesses provide cellphone storage lockers, for example, behind their sales counters. The fees provide the proprietor additional income, while offering a solution for those who need to temporarily store their cellphones. Some individuals have even sought court approval to install kiosks immediately outside the courthouse.

Advertisements for cellphone storage lockers, displaying different models with pricing, have popped up online.

### c. Penalties for Violations

Courts have imposed various penalties for violations of a court’s cellphone policies, including confiscating the user’s phone. Judges may issue penalties of increasing severity, including stiff fines and arrest for contempt of court. “If it rings, it is subject to confiscation,” said a Williamsburg County Virginia Clerk of Court. The owner of Common Pleas.

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**Footnotes:**

51 Wilson, supra, note 28.
53 Lancaster Cellphone Policy, supra, note 7.
54 “How it Works,” Tondr (February 2018), [https://www.overyondr.com/howitworks](https://www.overyondr.com/howitworks)
55 Cell Phone Storage Lockers Solves Courtroom Phone Ban Issue: Cellphones Banned From Court Creates New Market Opportunity For Cell Phone Storage Lockers, The Mailbox Works (February 23, 2015), [https://www.mailboxworks.com/blog/cellphone-storage-lockers-courtrooms](https://www.mailboxworks.com/blog/cellphone-storage-lockers-courtrooms) [hereinafter, New Market Opportunity]
56 See, “Cell Phone Storage Lockers Solves Courtroom Phone Ban Issue: Cellphones Banned From Court Creates New Market Opportunity For Cell Phone Storage Lockers, The Mailbox Works” (February 23, 2015), [https://www.mailboxworks.com/blog/cellphone-storage-lockers-courtrooms](https://www.mailboxworks.com/blog/cellphone-storage-lockers-courtrooms) [hereinafter, New Market Opportunity]
A defendant in an Orlando, Florida courtroom was sentenced to five days in jail for using a cellphone while sitting in the audience of the courtroom, as she continued to use her cellphone to check emails, despite being told to turn it off. A Cleveland Ohio judge overseeing a murder trial in 2009 had two trial attendees arrested for pointing cellphones towards a jury. The two men, one the defendant’s friend, and the other the defendant’s cousin, were seen pointing their devices at the jury during trial testimony from where they were seated in the back row of the courtroom. The judge ordered the two men arrested for contempt of court and also declared a mistrial.

The news contains many examples illustrating that other stakeholders, such as the media and even attorneys, also have received penalties for violating court cellphone policies.

In one courtroom with a well-publicized prohibition against cellphone use after the start of proceedings, a media blogger covering a trial was removed from the courtroom for sending a text during the proceedings. He was banned from the courtroom, but was permitted to watch the trial in an overflow room.

Courthouses give notice of cellphone bans in a variety of ways. They include signage throughout the courthouse; printed notices on subpoenas and summons; and notices on county webpages.

Whatever policy is adopted, ample notice should be provided. This is especially important for unrepresented litigants who do not have an attorney to guide them through the process. Signs should be posted conspicuously outside the courtroom.

### d. Other Stakeholders

The news contains many examples illustrating that other stakeholders, such as the media and even attorneys, also have received penalties for violating court cellphone policies.

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### e. Notice Requirements

Courthouses give notice of cellphone bans in a variety of ways. They include signage throughout the courthouse; printed notices on subpoenas and summons; and notices on county webpages.

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58 *Should people go to jail for using their cellphone in a courtroom?*, WESH2 (March 12, 2015) https://www.wesh.com/article/should-people-go-to-jail-for-using-their-cellphone-in-a-courtroom/4440735


60 Robinson, *supra*, note 59.
The above policies and consequences show that there are various solutions that would allow entry of phones while still minimizing disruption.

V. Conclusion

As demonstrated above, there are legitimate security risks presented by cellphone use in courthouses, including possible threats to the safety of witnesses, jurors, prosecutors, or other trial participants, as well as the need to ensure proper decorum and prevent disruptions in courtrooms.

On the other hand, being unable to bring one’s cellphone into the courthouse may result in being unable to present evidence; conduct legal research; or for those with disabilities, understand or communicate during the proceedings. As a result, the ability to use cellphones may make the difference between winning and losing a case, or presenting crucial evidence and receiving a just outcome.

The unrepresented and low-income populations are the most likely to be adversely impacted by inability to bring their cellphones into the courthouse. Such litigants may be unaware of cellphone restrictions and may expect to offer evidence on their cellphones that may be necessary to prevail in their cases; may expect online self-help resources, such as online forms or financial calculation tools; or may anticipate using their cellphones for language accessibility.

The American Bar Association should endorse policies that address court administration concerns, while promoting access to justice for all.

Respectfully submitted,

Palmer Gene Vance II
Chair, Litigation Section
August 2019

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1. Summary of Resolution(s). The Resolution urges courts, as well as their respective bar associations, to carefully review their policies on use and admittance of cellphones in courthouses, to ensure meaningful access to our judicial system, balancing the security risks posed by cellphone use with the needs of litigants, and in particular, those who are self-represented or of lower income.

2. Approval by Submitting Entity. This Resolution has been adopted by the Section of Litigation Council on May 6, 2019.

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.


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The ABA Section of Litigation will publish the Resolution on its website and distribute the Resolution to federal and state courts throughout the United States.

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

9. Disclosure of Interest. (If applicable) No interests of the Access to Justice Committee, or its members, are implicated by this Resolution.
10. Referrals.
   Criminal Justice Section
   Commission on Homelessness and Poverty
   Family Law Section
   Judicial Division
   Tort Trial and Insurance Practice Section

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

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   (415) 733-6068
   dwoo@goodwinlaw.com

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

   Eileen M. Letts
   Section Delegate to the House of Delegates
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   eletts@zuberlaw.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges courts, as well as their respective bar associations, to carefully review their policies on use and admittance of cellphones in courthouses, to ensure meaningful access to our judicial system, balancing the security risks posed by cellphone use with the needs of litigants, and in particular, those who are self-represented or of lower income.

2. Summary of the Issue that the Resolution Addresses

Courts’ policies on cellphone use and admittance to courthouses vary widely. Policies banning use and/or admittance of cellphones to courthouses is an access to justice issue because, on the one hand, there are legitimate security reasons to disallowing such use, while on the other, bans can harm the legitimate needs of litigants, disproportionately affecting those who are self-represented or of lower income.

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

The Resolution will urge courts, as well as their respective bar associations, to carefully review their policies on use and admittance of cellphones in courthouses, to ensure meaningful access to our judicial system, balancing the security risks posed by cellphone use with the needs of litigants, and in particular, those who are self-represented or of lower income.

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

None.

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None.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments and other public entities involved in the current opioid litigation to use proceeds from settlements of the litigation to address the harm resulting from the epidemic directly, by:

1. expanding treatment services for opioid use disorder,
2. creating additional transitional and extended housing programs to support those in treatment,
3. fostering community social service resources and harm-reduction/overdose prevention efforts,
4. furthering research on treatment and enhancing education and training of healthcare professionals,
5. educating patients and the public on the use and misuse of opioids,
6. reducing the stigma associated with having an opioid use disorder, and
7. improving healthcare infrastructure, especially at the community level, so as to increase the capacity of healthcare professionals to treat patients with opioid use disorder.
INTRODUCTION

The opioid epidemic is likely the greatest public health emergency to face this country in the past hundred years. While the number of deaths attributable to opioid overdoses is smaller than the figure for those lost to tobacco use, the annual number grows ever closer to one hundred thousand and now exceeds the number of Americans lost in the entire Vietnam War. Notwithstanding fatality rates alone, the impact of the epidemic on our nation is, in many respects, greater. This is largely the result of the disastrous effects of opioid addiction on human functioning and social cohesion as well as on health. The costs of the epidemic extend well beyond the expense of treating those enmeshed in the epidemic, to include the impact on the criminal justice and social support systems, not to mention the economic losses associated with millions of people with opioid use disorder, many of whom are not able to function as members of the workforce or as parents. Finally, the damage relating to the destruction of families, as well as individual lives, is incalculable.

It is widely understood that the tobacco litigation of the 1990s produced mixed results in terms of its direct impact on reducing the burden of tobacco-related disease on the public. In many states and other jurisdictions, little, if any, of the money resulting from the settlements, was used to pay the costs of tobacco-related disease or for tobacco-cessation programs. Instead, the money often went into the state’s general fund and was used for such purposes as tax or debt reduction or infrastructure projects. If the harm caused by the epidemic is to be addressed effectively, the proceeds of the opioid litigation must be directed to programs that address the harm created.

SUMMARY OF HARM

The nation’s opioid epidemic affects the public health, social well-being and the economic welfare of all Americans. Overdose and death related to prescription opioids, heroin and illicit fentanyl is having an historic negative impact on our life expectancy, as overdose deaths are now the leading cause of death among people under the age of 50 in the U.S. Overdoses cause more deaths annually than AIDS during the peak of that epidemic—and even more than the Vietnam, Iraq and Afghanistan wars combined. The rise in fatal drug overdoses is almost entirely responsible for the growth in mortality rates for white, non-Hispanic people between the ages of 22 and 56 in recent years. People of all ethnicities have shown an increase in opioid-related deaths. ¹

The federal government reports that on average, drug-related overdoses claim the lives of 130 Americans each day, although not all of those drugs were obtained by prescription. In 2017, there were 70,237 deaths, a dramatic and tragic six-fold increase over previous years. ²

² https://www.cdc.gov/mmwr/volumes/67/wr/mm6712a1.htm?s_cid=mm6712a1_w
from 16,849 deaths in 1999.3 Over the next 10 years, opioids could kill over a half million more, two-thirds from heroin and one-third from prescription pills.4

The human cost—the emotional toll on individuals suffering from opioid use disorder ("OUD"), and that on their families and communities, is substantial. The opioid epidemic has devastated community life, isolating families and residents who are struggling with its effects. Nationwide, at least two million people live with untreated OUD. Of those, about 17 percent, or 340,000, are uninsured.5 The misuse of prescription opioids and use of illicit opioids and other drugs may have serious, enduring, and costly consequences, including automobile crashes, sexual violence, child abuse and neglect, suicide attempts and fatalities, strokes, and overdose deaths. Other harms include the rising incidence of neonatal abstinence syndrome due to opioid use and misuse during pregnancy, and the spread of infectious diseases including HIV and hepatitis C.6

The costs of the opioid crisis are borne by individuals in the form of lost wages; by the private sector in lost productivity and healthcare costs; and by federal, state and local governments in lost tax revenue and additional spending on healthcare, social services, education and criminal justice. The opioid epidemic costs the U.S. hundreds of billions annually in healthcare, criminal justice and national productivity, with estimates ranging from $504 billion7 to $740 billion.8

Stigma and the frustration individuals with a substance use disorder experience when trying to obtain care cause additional harm. Stigma, which most typically manifests itself as equating opioid use disorder with a “moral failing” or similar pejorative, provides negative incentive for someone to seek or remain in treatment and is a significant barrier in state policy development. For example, while the medical community relies on medication-assisted treatment (“MAT”) to treat patients with opioid use disorder, MAT is criticized by some as “trading one addiction for another.” This is akin to considering diabetes patients “insulin addicts.”

There is also harm when a patient is ready to seek care and start treatment, but the patient’s health insurer or other payer does not have the resources available for the patient’s needs. If a patient receives an overdose and says he or she wants to see an addiction medicine or other specialist while in the Emergency Department, it’s very possible the patient’s health insurance network will not have one available. Even though the patient has paid value for an insurance product, the services the patient needs are not available. Also, the patient may lose hope and interest in receiving treatment and therapy.


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return to using opioids. This scenario would be extremely unlikely for a patient who suffers a heart attack, yet it is the reality all too frequently encountered by patients who experience opioid-related overdoses.

THE TOBACCO LITIGATION

In 1998 the landmark legal settlement between the states and the tobacco industry (the Master Settlement Agreement or MSA) required the tobacco companies to pay $246 billion over 25 years to the states as compensation for tobacco-related healthcare costs, mostly for states to recoup Medicaid losses.9

However, despite these significant successes, concern has been expressed that a far smaller percentage of the MSA payments were used for tobacco-related causes, or healthcare in general, than was anticipated.

While the Attorneys General involved in the MSA strongly suggested, and recitals under the MSA included, that MSA funds be used to address tobacco-related issues, including cessation programs and other health initiatives, the funds were ultimately paid into state treasuries and subject to state legislative appropriations. Funds subjected to legislative processes were designated for many purposes, including non-health related projects such as education, infrastructure and budget deficits.

In an attempt to compel funds to be directed at health-related issues, some state legislatures passed restrictions on “supplantation,” prohibiting MSA funds from replacing existing smoking and healthcare programs. Still other states attempted to use the ballot box by allowing voters to vote on referendums requiring the use of MSA funds for healthcare. Nonetheless, much of the MSA funds has been used for non-health related purposes, leading former Mississippi Attorney General Michael Moore to say that “The tragedy of the tobacco cases is that we had a chance to dramatically improve public health and save lives, but we let that opportunity slip by.”10 The lessons to be learned from the use, or misuse, of the MSA funds can and should be applied to the opioid cases currently being litigated.

OPIOID-RELATED LITIGATION

Our nation’s opioid epidemic has been under way since the early 1990s and has occurred in three waves.11 The first wave started in 1991 when opioid overdose deaths rose sharply due to increased prescribing of opioids for both acute and chronic pain.12

9 National Public Radio https://www.npr.org/2013/10/13/233449505/15-years-later-where-did-all-the-cigarette-money-go,
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By 1999, 86% of patients using opioids were using them for non-cancer pain. The second wave began around 2010 with a rapid increase in deaths from heroin abuse resulting from efforts to decrease opioid prescribing, making heroin a cheap, readily available alternative. The third wave manifested in 2013 with an increase in deaths resulting from the increasing use of illicit, synthetic opioids, such as fentanyl. The sharpest rise in drug-related deaths occurred in 2016 with over 20,000 deaths from fentanyl and related drugs.

In recent years there have been numerous local, state and federal governmental actions and measures taken to combat the opioid epidemic, including an ever increasing number of lawsuits to recover monetary damages from those entities deemed to be responsible for manufacturing, marketing, distributing and selling prescription opioids. An early example is the 2007 decision by the U.S. Department of Justice to bring criminal charges against Purdue Pharma for its allegedly misleading advertising of OxyContin, which resulted in the payment of $634.5 million in criminal and civil fines.

More recently, within months after President Trump declared the opioid epidemic a public health emergency in December 2017, the U.S. Judicial Panel on Multidistrict Litigation consolidated what now amounts to nearly 1,500 opioid-related cases into multidistrict litigation in the U.S. District Court for the Northern District of Ohio. The consolidated suits are against dozens of prescription drug manufacturers for misleading and aggressive marketing and advertising; against distributors for shipping large amounts of opioids to wholesalers and retailers when distribution patterns suggested significant overprescribing and diversion and then failing to report that pattern to the DEA; and against large retailers for “turning a blind eye” to overprescribing and the misuse of opioids by their customers. Representative plaintiffs include states, counties and local governments, Native American tribes, hospitals, third-party payers, and individuals throughout the country. The Justice Department has filed a statement of interest, emphasizing the government’s “substantial costs and significant interest in addressing the opioid epidemic.”

In late 2017, a coalition of 41 states’ attorneys general served major opioid manufacturers, including Endo, Janssen, Teva, Cephalon, Allergan and Purdue Pharma, with investigative subpoenas seeking information about opioid marketing and sales techniques. The coalition is also demanding documents and information from major distributors, including AmerisourceBergen, Cardinal Health and McKesson, tied to

societies claiming that the risk of addiction to prescription opioids was very low.

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distribution practices. In many cases, the attorneys general have filed lawsuits against these defendants.

In a recent development in March 2019, Purdue Pharma settled with the state of Oklahoma for $270 million in the state’s suit against it for misleading and aggressive marketing of OxyContin that allegedly fueled that state’s opioid epidemic. In the same month, more than 600 cities, counties and Native American tribes from 28 states filed a federal lawsuit in New York against members of the Sackler family, the owners of Purdue Pharma, alleging that the Sacklers created the opioid addiction crisis through their company’s misrepresentations and misleading marketing of OxyContin.

While a budget bill signed by President Trump in early 2018 authorizes $6 billion for two years of opioid prevention programs and law enforcement, experts opine that it would cost between $45 billion to $60 billion over 10 years to remedy the harm resulting from the opioid crisis. A White House report issued in November 2017 said that the overall cost of the U.S. economy more than $500 billion in 2015. The President’s Commission on Combating Drug Addiction and the Opioid Crisis issued its final report in the same month, recommending, among other things, the establishment of nationwide drug courts that would place opioid addicts in treatment facilities rather than in prison.

Where will the money come from to help those harmed? How will funding become available for prevention, treatment interventions, transitional housing, education, research and infrastructure? In large part, governments should earmark the revenue derived from opioid-related litigation for these purposes. This Resolution directly addresses that need.


23 https://thehill.com/policy/healthcare/372759-budget-deal-includes-6-billion-to-fight-opioid-abuse


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117A

RECOMMENDATIONS ON HOW THE PROCEEDS FROM THE OPIOID SETTLEMENT SHOULD BE USED

To avoid the misdirection of funds that occurred following the tobacco litigation, where the settlement proceeds frequently went to the states’ general coffers as opposed to being earmarked for smoking prevention, cessation, and harm-reduction efforts, the policy of the ABA should be to encourage federal, state, and local governments and tribal entities to use proceeds obtained from the current and pending opioid lawsuits to address the harm resulting from the opioid epidemic by: (1) expanding treatment services for OUD, (2) creating additional transitional and extended housing programs to support those in treatment and early recovery, (3) fostering community social service resources and harm-reduction/overdose prevention efforts, (4) furthering research on treatment and enhancing education and training of healthcare professionals, (5) educating patients and the public on the use and misuse of opioids, (6) reducing the stigma associated with having OUD, and (7) improving healthcare infrastructure, especially at the community level, so as to increase the capacity of healthcare professionals to treat patients with OUD. Each of these proposals for best utilizing the proceeds obtained through the opioid lawsuits is addressed in more detail below.

A. Expanding Treatment for Opioid Use Disorder

The current system of addiction treatment in the United States pre-dates the major scientific advances that have shown addiction to be a preventable and treatable chronic medical disease. Although there are many good individual treatment providers, they are operating within a fundamentally broken and under resourced system. OUD is a chronic and disabling health condition that requires serious effort and significant funding to address effectively and sufficiently the holistic treatment, prevention and educational efforts required to battle this epidemic, which has destroyed individuals, families and communities.

Addiction is best treated like other chronic illnesses with an emphasis on outpatient care that is tailored to the specific needs of the patient, is proactive in nature, and includes regular clinical monitoring to predict and avert potential relapses. Such an approach requires well-trained professionals who have the skills and ability to provide the evidence-based medications, therapies and social supports necessary to attack this epidemic.

While research has proven MAT to be an effective treatment for opioid use disorders, access to such care is limited due to regulatory restraints. MAT can utilize buprenorphine and buprenorphine/naloxone combinations as primary pharmacotherapies combined with non-pharmacologic therapies, and can be provided conveniently in outpatient office-based practices.28 Unfortunately, the use of buprenorphine is currently restricted under federal regulations to physicians who must attain national waiver status and pass required training to become eligible prescribers. The national program itself limits the number of active patients that any single physician can treat, thereby further


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limiting the number of potentially eligible individuals who can receive this medication. These restrictions create an access gap between this effective treatment and the much larger number of patients who could benefit from this therapy. Improving the availability of MAT for patients will require not only changes in the law, but also large expenditures to fund the required training in its use.

Community health clinics ("CHCs") and community mental health centers ("CMHCs"), are front-line treatment centers for many underinsured and uninsured patients with OUD. These centers are typically funded through combinations of county, state, and some federal sources—funding that can be increased by using funds derived through the opioid litigation. As many of these centers are situated directly in the communities where individuals affected with OUD live, they are ideally suited to provide immediate, direct care to individuals.

Governments must channel funding from the opioid settlements to these critically situated centers that deal with affected persons on a direct, face-to-face and day-to-day level. While some academic centers have established research departments and publication track records in substance use disorders, they are not always located in areas where those with OUD live and work. Monies from the settlement must be earmarked specifically to reach the communities that work directly with affected peoples.

B. Creating Additional Transitional and Extended Housing Programs to Support Those in Treatment and Early Recovery

In addition to treatment focused on the addiction itself, those suffering from an OUD will frequently require interventions, including peer and other recovery support services, that address other areas of their lives including:

- housing
- transportation
- mental health treatment
- education, including GED programs
- parenting and family counseling
- job training and employment counseling
- access to affordable medical care
- case-management and relapse-prevention support services

Settlement proceeds should be used to address the items listed above, as they are vital to individuals getting their lives back on track and sustaining success.

C. Fostering Community Social Service Resources and Harm Reduction/Overdose Prevention Efforts

Settlement proceeds can be used to invest in data-driven prevention interventions and strategies. Such monies can be used to identify the most pressing issues and the most "at risk" populations to develop targeted prevention and treatment strategies on group and individual levels. Community social service organizations are notoriously limited in their capacity to fund the required training in its use.

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underfunded and will require significant financial support if they are to respond effectively to the epidemic. Similarly, additional funding to address adolescents with OUDs is needed to prevent the progression of early opiate experimentation into full OUD.

Settlement proceeds can also be used to establish and fund a State Prevention office.29 Such an office should commission a statewide review of school-based prevention to ensure that schools are properly trained, organized and equipped to deliver evidence-based prevention interventions. Prevention should be a significant part of the school curriculum every year of middle and high school and be addressed in multiple courses. Students, even if not personally using opioids, can be educated to identify OUD problems in their homes and schools, and facilitate referral of affected family members to proper treatment.30

D. Furthering Research on Treatment and Enhancing Education and Training of Healthcare Professionals

Settlement dollars can be directed to CHCs and CMHCS that are implementing conventional pharmacologic therapies in combination with newer psychosocial modalities such as Assertive Community Treatment outreach teams, telemedicine, in-home monitoring, and clinical visits at community-based locations such as adult day-care centers. Abstinence and reduced opiate-use outcomes can be measured when these modalities are combined with established pharmacologic protocols to determine if abstinence rates are further increased in comparison to current treatments alone.

The CHCs and CMHCs provide research settings that are “real-world” in that they treat individuals in the home community context. Environmental and cultural triggers that can precipitate relapses in patients can be better identified and addressed by these centers since they are situated in the patient’s community.31 CHCs and CMHCs have a head start in exploring environmental-trigger research, especially if they already have established case-management services that provide enhanced monitoring of the patients’ behaviors and lifestyles in their own communities.

Research opportunities at the CHCs and CMHCs can also explore other non-opiate pharmacologic treatment protocols. For patients with minimal or no current opiate withdrawal symptoms, naltrexone can be an effective agent when coupled with counseling, cognitive behavioral therapy, and other supportive measures. Studies have shown superiority of the long-acting-injectable (“LAI”) form of naltrexone over daily oral tablets for some substance use disorders including OUDs.32 Moreover, in a community-based research protocol, naltrexone LAI can be further studied in the CMHC setting when administered via home healthcare visits or telemedicine services in the patient’s home or office.29 Such an office should commission a statewide review of school-based prevention to ensure that schools are properly trained, organized and equipped to deliver evidence-based prevention interventions. Prevention should be a significant part of the school curriculum every year of middle and high school and be addressed in multiple courses. Students, even if not personally using opioids, can be educated to identify OUD problems in their homes and schools, and facilitate referral of affected family members to proper treatment.30

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at the CMHC itself, to determine whether greater abstinence periods can be achieved than with conventional clinic-only visits.

In addition, a state can use opioid settlement proceeds to establish a State Screening and Brief Intervention program to educate, train and incentivize healthcare professionals to understand and use proven methods for identifying risk factors and promoting positive behavioral change, particularly in pediatric and school healthcare settings.

E. Educating Patients and the Public on the Use and Misuse of Opioids

Attempting to get help or accurate information for OUD can be a confusing and overwhelming task for many individuals and families. Accordingly, state and local governments should promote public and professional educational efforts, and opioid settlement funds should be used to create and improve policies and programs that show measurable evidence of greater public awareness and involvement in drug-related issues.

As an example, the Addictions Solutions Campaign has recommended that city and state investments in general public education should focus on:

- Implementing public awareness campaigns focused on parents that highlight proven and effective strategies to help protect their children: An emphasis in these public awareness campaigns should address differences among substance use, misuse and addiction — and how to reduce risk factors and promote protective factors.
- Investing in data-driven policies: States and cities differ dramatically in the nature and amount of drug use and drug risks. Cities should, therefore, partner with colleges and universities to analyze available data to identify the most pressing issues and the most "at risk" populations in order to develop local prevention and treatment strategies.
- Implement evidence-based prevention and early intervention strategies to reduce substance misuse and related harmful behaviors: Addiction is a developmental disorder that frequently begins in adolescence. Research shows that the at-risk years for substance misuse are 12-25 and that over 80% of all addictions begin during this period.


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F. Reducing the Stigma Associated with Having an OUD

Stigma and the resulting misperceptions serve to perpetuate bad policies and ineffective solutions. Addiction historically has been conceptualized as a sign of weak character, a personality disorder, or the consequence of a habitual series of bad personal choices. As a result, stigma and lack of education are often the largest barriers to treatment.

G. Improving Healthcare Infrastructure to Increase the Capacity of Healthcare Professionals to Treat Patients with an OUD

Settlement proceeds can be used to increase the availability of MAT, which combines psychological/behavioral therapy and FDA-approved medications, including methadone, buprenorphine, naltrexone, is the most effective means of treating OUDs and preventing opioid overdose. Despite its proven effectiveness, fewer than ten percent of patients with opioid addiction receive MAT. Settlement proceeds can be used for the following purposes:

- Increasing treatment capacity by addressing the shortage of physicians trained to treat addiction and those specializing in addiction medicine and to provide funding to support internships and fellowships in addiction medicine;
- Training physicians, nurse practitioners and other prescribers in the safe prescribing of opioids (e.g., using the lowest effective dosage for the shortest duration for the treatment of acute pain); and
- Providing education and training for clinicians in the usage of non-pharmacologic pain-reducing strategies (such as physical therapy, yoga or meditation) to minimize, or as an alternative to, prescription opioid use in the treatment of both acute and chronic pain.

Opioid settlement funds could be used to promote and incentivize expansion of evidence-based primary care and specialty treatment and clinically functional organizational linkages between healthcare systems and better addiction treatment programs.

RELATED ABA POLICY

The ABA has a long history of policies that address the needs of persons seeking to recover from mental health and/or substance abuse disorders:

At the 1972 Midyear Meeting, the House of Delegates approved the Uniform Alcoholism and Intoxication Treatment Act, a model law drafted by the National Conference of Commissioners on Uniform State Laws, which provides for treatment of
alcoholics and intoxicated persons instead of subjecting such persons to criminal penalties; establishes facilities and machinery for treatment of such persons; and, provides for voluntary commitment to a treatment facility or involuntary commitment by court order. 72M90

At the 1975 Midyear Meeting, the ABA reaffirmed its support for the Uniform Alcoholism and Intoxication Treatment Act, and urged states that had not already done so to utilize the newly available federal funding (P. L. No. 93-282) to implement its provisions. The ABA also generally reaffirmed its support for the principle of decriminalization of alcoholism. 75M116

At the 1994 Midyear Meeting, the House of Delegates approved a policy supporting development of a comprehensive, systemic approach to addressing the needs of criminal defendants with drug and alcohol problems through multidisciplinary strategies that include coordination among the criminal justice, health, social service and education systems and the community and urged the courts to adopt certain treatment-oriented, diversionary drug court programs as one component of a comprehensive approach. The policy urges bar associations to facilitate the development of such programs that result in dismissal of drug-related charges upon the completion of drug rehabilitation. 94M100

At the 1995 Annual Meeting, the House of Delegates endorsed the U. S. Sentencing Commission’s proposal to amend federal sentencing guidelines to eliminate differences in sentences based on drug quantity for offenses involving crack versus powder cocaine, and assign greater weight in drug offense sentencing to other factors that may be involved in the offense, such as weapons used, violence, or injury to another person. 95A129

At the 1995 Annual Meeting, the House of Delegates also approved a policy urging bar associations to join the ABA in developing and encouraging initiatives aimed at preventing inhalant abuse. 95A106

At the 1997 Annual Meeting, the House of Delegates approved a policy supporting the removal of legal barriers to the establishment and operation of approved needle-exchange programs that include drug counseling and drug treatment referrals, in order to further scientifically-based public health objectives to reduce HIV infection and other blood-borne diseases, and in support of the ABA’s long-standing commitment to promoting effective substance abuse prevention and treatment. 97A106B

At the 2004 Annual Meeting, the House of Delegates approved a policy urging federal, state, territorial and local governments to eliminate policies that sanction discrimination against people seeking treatment or recovery from alcohol or other disease, including specific recommendations in the area of public benefits. 04A112

At the 2005 Annual Meeting, the House of Delegates approved a policy urging all state, territorial and local legislative bodies and governmental officials to repeal laws and discontinue practices that permit insurers to deny coverage for alcohol or drug related injuries or losses that otherwise would be covered by accident and sickness insurance.

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policies covering hospital, medical and surgical expenses. The policy also supports the 2001 Amendment by the National Association of Insurance Commissioners to its model law, the Uniform Accident and Sickness Policy Provision law, permitting coverage for injuries or illness involving alcohol or drugs. 05A105

At the 2006 Annual Meeting, the House of Delegates approved a policy urging all federal, state, territorial and local legislative bodies and governmental agencies to adopt laws and policies that require health and disability insurers who provide coverage for the treatment of both abuse of and dependence on drugs and alcohol to do so in a manner based on the most current scientific protocols and standards of care, so as significantly to enhance the likelihood of successful recovery for each patient. 06A109

At the 2007 Annual Meeting, the House of Delegates affirmed the principle that dependence on alcohol or other drugs is a disease, supported the principle that insurance coverage for the treatment of alcohol disorders should be at parity with that for other diseases, and urged that: (1) all federal, state, territorial, tribal and local legislative bodies and governmental agencies repeal laws and discontinue policies and practices that allow health and disability insurers to provide coverage for the treatment of such disorders that do not at parity with coverage for other diseases; (2) states with mandated benefit laws that do require coverage for treatment of such disorders that is at parity with coverage for other diseases should establish policies and practices that ensure such laws are enforced; and (3) the federal government should require ERISA-regulated health and disability insurers to provide coverage for treatment of such disorders in a manner that is at parity with coverage for other diseases and consistent with state laws, without limiting the scope of their coverage. 07A106A

At the 2009 Annual Meeting, the House of Delegates approved a policy supporting federal legislation that would ensure every American access to quality healthcare regardless of the person’s income, and without regard to the payor system, eliminating the specific payor system characteristics embodied in the recommendations adopted by the House of Delegates in 1990 and 1994. 09A10A

At the 2010 Midyear Meeting, the House of Delegates approved a policy that supports the development of comprehensive, systemic approaches to address the special needs of veterans within civil and criminal court contexts, including but not limited to proceedings involving veterans’ service-related injuries, disorders, mental health and substance abuse needs, through programs that connect veterans to appropriate housing, treatment and services through partnerships with the local Veterans Affairs Medical Centers, community-based services and housing providers. The policy urges state, local, and territorial courts to facilitate the development of Veterans Treatment Courts, including but not limited to, specialized court calendars or the expansion of available resources within existing civil and criminal court models focused on treatment-oriented proceedings. 10M105A
At the 2011 Annual Meeting, the House of Delegates approved a resolution that the American Bar Association urges Congress to amend the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA” or “the Act”), 38 U.S.C. §§ 4301–4335, by adding provisions to require employers to provide certain reasonable accommodations for returning veterans with combat injuries that may not manifest themselves until after a return to work. The policy urges Congress to: (1) amend the USERRA to provide authority for the award of comprehensive attorneys’ fees, costs, and damages to redress violations of the Act; (2) amend the USERRA to make unenforceable any clause of any agreement between an employer and an employee that requires arbitration of a dispute under the Act; and (3) authorize the U.S. Department of Labor to initiate investigation and prosecution of appropriate claims to address patterns and practices of USERRA violations that rise to the level of a nationally compelling interest.

11A120

At the 2013 Annual Meeting, the House of Delegates approved a resolution supporting the rights of all Americans, particularly our nation’s veterans, to access adequate mental health and substance use disorder treatment services and coverage, and urges States, in implementing the essential health benefits provisions of the Patient Protection and Affordable Care Act, to provide fully and adequately for mental health and substance use disorder coverage. The resolution also provided that the ABA urge Congress, the federal Departments of Labor, Health and Human Services and the Treasury, and state and territorial legislative, regulatory and administrative bodies, to ensure that, in the implementation of the health insurance parity requirements of the Mental Health Parity and Addiction Equity Act of 2008 and in the essential health benefits provisions of the Patient Protection and Affordable Care Act, a uniform, plain-language disclosure of the terms of coverage and criteria used in making coverage decisions is required across all insurance plans and public benefit plans, to ensure that all individuals are able to make informed, appropriate choices in accessing coverage of mental health and substance use disorder treatment services at parity with other health benefits coverage.

13A101

At the 2019 Midyear Meeting, the House of Delegates approved a resolution that the American Bar Association urges federal, state, local, territorial, and tribal courts, governmental entities, bar associations, public health agencies, lawyer assistance programs, lawyer regulatory entities, institutions of legal education, and law firms to implement the recommendations and action points in the report, Experienced Lawyers, American Families, and the Opioid Crisis—Report of the Opioid Summit May 2018.

19M108

CONCLUSION

For these reasons, the American Bar Association urge states, counties, tribes and local governments to enact legislation to ensure that any proceeds that they receive from the current opioid litigation be used for remedying the harm resulting from the opioid epidemic.

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Respectfully submitted,
Alexandria Hien McCombs
Chair, Health Law Section
August 2019
1. **Summary of Recommendation.**

The Resolution urges states, counties, tribes and local governments to enact legislation to ensure that any proceeds that they receive from the current opioid litigation be used for remedying the harm resulting from the opioid epidemic.

2. **Approval by Submitting Entities**

The Council of the Health Law Section approved the filing of this Resolution and Report on May 4, 2019.

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

There has not been a similar resolution filed.

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

There are no known Association policies directly relevant to this Resolution. The Resolution would encourage governmental entities to commit to using the proceeds of the litigation for the purpose of remedying the harm caused by the epidemic through (1) expanding treatment services for opioid use disorder, (2) creating additional transitional and extended housing programs to support those in treatment, (3) fostering community social service resources and harm-reduction/overdose prevention efforts, (4) furthering research on treatment and enhancing education and training of healthcare professionals, (5) educating patients and the public on the use and misuse of opioids, (6) reducing the stigma associated with having an opioid use disorder, and (7) improving healthcare infrastructure, especially at the community level, so as to increase the capacity of healthcare professionals to treat patients with opioid use disorder.

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 sponsoring entities will work with the ABA Governmental Affairs Office to actively engage in federal and state legislative activities related to this issue.

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.

By copy of this form, the Resolution will be referred to the following entities:

Section of Administrative Law and Regulatory Practice
Business Law Section
Section of Civil Rights and Social Justice
Section of State and Local Government Law
Section of Science and Technology Law
Section of Litigation
Law Practice Division
Law Student Division
Senior Lawyers Division
Solo, Small Firm and General Practice Division
Young Lawyers Division
Commission on Law and Aging
Commission on Lawyer Assistance Programs
Commission on Disability Rights
Commission on Women in the Profession
Standing Committee on Ethics and Professional Responsibility
Standing Committee on Lawyers’ Professional Liability
Standing Committee on Legal Aid and Indigent Defendants
National Association of Bar Executives
National Bar Association Inc.
National Conference of Bar Presidents

11. Contact Name and Address Information.

Alexandria McCombs, Chair
ABA Health Law Section
Signify Health
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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robyn.shapiro@healthscienceslawgroup.com
EXECUTIVE SUMMARY

1. Summary of the Resolution.
The Resolution urges states, counties, tribes and local governments to enact legislation to ensure that any proceeds that they receive from the current opioid litigation be used for remedying the harm resulting from the opioid epidemic.

2. Summary of the Issue that the Resolution Addresses.
The United States faces an opioid crisis of epidemic proportions that will require many tens of millions of dollars to remedy the harm to the public resulting from the epidemic. Over one thousand lawsuits primarily brought by states, counties, tribes and local governments have been filed. Past experience with the tobacco litigation suggests that in the absence of governmental commitment to spending the proceeds on remedying the resulting harm, much of the money will be spent for purposes unrelated to the epidemic, which will inevitably lead to insufficient resources to provide the care required by the millions of people affected by the epidemic.

3. Please Explain How the Proposed Policy Position will Address the Issue?
The Resolution would encourage governmental entities to commit to using the proceeds of the litigation for the purpose of remedying the harm caused by the epidemic through (1) expanding treatment services for opioid use disorder, (2) creating additional transitional and extended housing programs to support those in treatment, (3) fostering community social service resources and harm-reduction/overdose prevention efforts, (4) furthering research on treatment and enhancing education and training of healthcare professionals, (5) educating patients and the public on the use and misuse of opioids, (6) reducing the stigma associated with having an opioid use disorder, and (7) improving healthcare infrastructure, especially at the community level, so as to increase the capacity of healthcare professionals to treat patients with opioid use disorder.

No minority views or opposition have been identified.

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No minority views or opposition have been identified.
RESOLVED, That the American Bar Association urges Congress to amend the Ethics in Patients Referrals Act of 1989, Section 1877 of the Social Security Act, 42 U.S.C. § 1395nn (commonly known as the “Stark Law”), to make changes to (a) clarify the application of the Stark Law and (b) address concerns of physicians and other healthcare providers that new alternative payment and delivery models promoted by the Centers for Medicare & Medicaid Services and other payers may result in violations of the Stark Law;

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the Stark Law to remove the statutory prohibition against payment for services furnished pursuant to a compensation arrangement that failed to meet an exception to the Stark Law solely due to non-compliance with technical requirements of the statute;

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the Stark Law to clarify the requirement that compensation must be consistent with fair market value, and to provide that a valuation from a nationally recognized healthcare appraiser or valuation consultant shall create a rebuttable presumption of fair market value for purposes of the Stark Law;

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the Stark Law to provide greater clarity and consistency in the application of the prohibition on compensation arrangements that vary with or take into account the volume or value of physician referrals; and

FURTHER RESOLVED, That the American Bar Association urges Congress to adopt a statutory exception under the Stark Law for compensation paid under an alternative payment arrangement meeting specified requirements in order to encourage the adoption of collaborative healthcare delivery models without concerns of violating the Stark Law.
Introduction

The purpose of this Resolution is to urge Congress to amend the Ethics in Patient Referrals Act, Section 1877 of the Social Security Act, 42 U.S.C. §1395nn (commonly known as the “Stark Law”), to provide clarification of critical requirements of the Stark Law to address concerns of physicians and other healthcare providers who potentially face significant penalties under the Stark Law as a result of entering into collaborative healthcare delivery approaches and value-based incentive payment arrangements.

The Stark Law prohibits a physician from referring patients for “designated health services” ("DHS") payable by Medicare to an entity with which the physician or an immediate family member has a financial relationship, and prohibits the entity from submitting a claim for such DHS to Medicare, to the patient or to any other payer, unless an exception applies.1 A financial relationship may be a direct or indirect ownership or investment interest, or a direct or indirect compensation arrangement. As more fully discussed below, the Stark Law is a strict liability law; if a financial relationship between a referring physician and an entity providing DHS is covered by the statute, it must fit precisely within an exception to the statute or else the referral is prohibited and payment for the DHS is prohibited, without regard to the intent of the parties or the medical necessity of the DHS being provided.

Congress initially enacted the Stark Law in 1989 to prohibit physician referrals for clinical laboratory services covered by Medicare, unless an exception applied, to address concerns that physicians’ financial relationships with clinical laboratories would unduly influence their clinical decision-making. In 1993, Congress expanded the definition of “designated health services” to include ten additional categories of DHS.

The categories of DHS subject to the Stark Law are: (1) clinical laboratory services; (2) physical therapy services; (3) occupational therapy services; (4) outpatient speech-language pathology services; (5) radiology and certain other imaging services; (6) radiation therapy services and supplies; (7) durable medical equipment and supplies; (8) parenteral and enteral nutrients, equipment and supplies; (9) prosthetics, orthotics, and prosthetic devices and supplies; (10) home health services; (11) outpatient prescription drugs; and (12) inpatient and outpatient hospital services.

There are over 30 exceptions to the Stark Law that are either included in the statutory language or that have been adopted by the Centers for Medicare & Medicaid Services (“CMS”) in the Stark Law regulations. The Stark Law exceptions are divided into three categories: (1) general exceptions applying to both ownership and compensation arrangements; (2) exceptions applying only to ownership/investment interests; and (3) exceptions applying only to compensation arrangements. The exceptions to the Stark Law were intended to permit the existence of legitimate business 1

1 Section 1903 of the Social Security Act, 42 U.S.C. §1396b, prohibits payment of the federal share of Medicaid to states for services paid under Medicaid that would have a constituted a prohibited referral under Medicare.
There have been few amendments to the Stark Law statute itself; however, CMS has done extensive rulemaking since 1989 to implement the statute as well as to create additional exceptions. The extensive regulatory changes by CMS have added to the complexity of the Stark Law and sometimes have been impediments to the development of value-based payment models that reward providers for delivering higher-quality and more cost-effective healthcare services. Notwithstanding this complexity, the Department of Justice and whistleblowers have brought False Claims Act cases on the theory that because (in their view) the statute is clear, the alleged Stark violations at issue must have been knowing violations.

Current State of the Law and Proposals for Change

There have been few amendments to the Stark Law statute itself; however, CMS has done extensive rulemaking since 1989 to implement the statute as well as to create additional exceptions. The extensive regulatory changes by CMS have added to the complexity of the Stark Law and sometimes have been impediments to the development of value-based payment models that reward providers for delivering higher-quality and more cost-effective healthcare services. Notwithstanding this complexity, the Department of Justice and whistleblowers have brought False Claims Act cases on the theory that because (in their view) the statute is clear, the alleged Stark violations at issue must have been knowing violations.
The following sections identify some major areas where clarification of existing provisions of the Stark Law or amendments to those provisions would reduce the sometimes draconian impediments or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the sometimes draconian effects of the law and redress or eliminate the

"Technical” violations not causing program integrity concerns

Many of the regulations promulgated under the Stark Law involve formal, technical requirements, the failure to comply with which does not in and of itself pose any material risk of abuse to the Medicare program or its beneficiaries (e.g., payment of Medicare funds for services that were inappropriate or medically unnecessary). For example, the Stark Law exception for personal service arrangements between a referring physician and a DHS entity requires that the arrangement be reflected in a written agreement signed by the parties that is in place before any services are rendered or any compensation paid. If, through clerical error or unavoidable errors (e.g., a required signature is on vacation or sick leave), a contract signature is delayed beyond the time permitted or omitted, any claims for services rendered before that deficiency is cured are prohibited, even if the claims were for appropriate, medically necessary items or services and even if Medicare would have paid the claims without question if the parties did not have a Stark-covered financial relationship. Similarly, if a written agreement for such an arrangement expires without being formally renewed but the parties nonetheless continue to perform in accordance with the contract, services rendered after the expiration date will give rise to a Stark Law violation, even if they would have been permissible if the parties had entered into a written extension.

Practitioners commonly refer to these types of violations as “technical” violations, because they do not result in claims to Medicare for items or services that are suspect from a program integrity standpoint (as distinguished from violations of the fair market value, commercial reasonableness and volume-or-value prohibition, which may indicate an arrangement that results in overutilization of services). However, CMS has consistently taken the position that there is no such thing as a technical Stark violation; any failure to meet the formal requirements of a Stark Law exception precisely is a violation subject to the same penalties as a failure to meet the substantive terms of an exception. Thus, the penalty for a late or missing signature on a contract is the same as the penalty that would apply if the contract provided for compensation that varied directly with the volume or value of referrals — any claim submitted to Medicare is prohibited by statute from being billed or paid, and the parties are subject both to repayment obligations and to penalties. In this context, the strict-liability nature of the Stark Law punishes both innocent errors and intentional misconduct with a sledgehammer approach.

Although CMS has offered some limited relief for temporary non-compliance with these sorts of formal requirements, that relief is quite narrow in scope. Given the ever-increasing complexities of the healthcare delivery system, the opportunity for non-substantive (technical) errors will likewise continue to increase. It is appropriate for the Stark Law to be amended to provide that the per se prohibition on payment for DHS

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referred under a financial relationship that does not meet all of the requirements of an exception does not apply to technical non-compliance with an exception. Such amendment would remove the threat of False Claims Act liability premised on the allegation by (chiefly) a relator or the Government that the technical non-compliance was a knowing violation, and would also obviate the legal obligation for a DHS entity that discovers the technical non-compliance to refund the payment for the DHS involved or, alternatively, to make a self-disclosure to CMS. Instead, such technical non-compliance would allow (but not require) CMS, upon audit, to deny payment retrospectively for such DHS if the DHS entity cannot establish that it met all technical requirements of an applicable exception.

**Fair market value**

A critical requirement of several exceptions to the Stark Law is that any compensation between a referring physician and a DHS entity must be “consistent with” fair market value; i.e., the Stark Law does not differentiate between arrangements in which the referring physician pays less than fair market value and those in which the referring physician receives less than fair market value. In contrast, for purposes of the Anti-Kickback Statute (“AKS”), 42 U.S.C. §1320a-7(b), the Government is rightly not concerned if the physician or other referral source is paid compensation that is less than fair market value, or conversely, pays the referral target in excess of fair market value. Accordingly, the ABA recommends that “consistent with fair market value” be clarified to mean that the referring physician pays at least fair market value for items and services furnished by a DHS entity and receives no more than fair market value for items and services provided to a DHS entity. (Thus, for example, a physician who rents office space from a DHS entity could not pay less than fair market value rent, and a hospital who contracts with a physician to provide medical direction services could not pay more than fair market value compensation for such services.)

The ABA also recommends that, in order to provide some assurance that the compensation paid or received will not be attacked by the Government or a relator as being more than or less than fair market value, where the parties to an arrangement secure a fair market valuation from an independent and competent valuator, that valuation should be presumed to be correct. This is especially important in the context of alternative payment arrangements in which the parties are attempting to arrive at the fair market value of a physician’s success in lowering costs and increasing quality and patient satisfaction.

**Volume or value of referrals**

Generally, the Stark Law prohibits any payment that varies with or otherwise takes into account the volume or value of referrals from the recipient of the payment to the payer. The test for whether compensation impermissibly takes into account the volume

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2 The AKS makes it a felony to offer, pay, solicit or receive any remuneration, in cash or in kind, for referring a person for items or services which may be paid for by any federal healthcare reimbursement program, such as Medicare, Medicaid and Tricare.

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or value of referrals has proven to be particularly vexing. For example, a hospital’s payments to a physician for the bona fide performance of services may be considered by the Government or a relator to reflect the volume or value of referrals if the performing physician must admit a patient to a hospital in order to perform those services. The ABA recommends that Congress amend the Stark Law to clarify the interpretation and application of the “volume or value of referrals” prohibition in situations where there is ambiguity or inconsistency in the text of the statute or in the interpretations of the statute applied by CMS. The following paragraphs provide specific examples as to which the ABA believes amendments to the statute would provide greater clarity and consistency without undermining the policy goals of the Stark Law. Adoption of this Resolution will allow the ABA to address these and similar issues through appropriate outreach to Congress. First, the ABA recommends that Congress adopt the existing “safe harbor” in CMS’s regulations for unit-based (“per click” or “per procedure”) compensation and make it applicable through a statutory safe harbor to any type of compensation that is set in advance, including percentage compensation arrangements (e.g., compensation based on a percentage of revenue or percentage of collections). Such an amendment to the Stark Law would provide greater clarity to healthcare providers and would reduce the exposure of such providers to enforcement actions based on inconsistent interpretations of the Stark Law. For example, the ABA is aware of one case in which a health system was leveraged into a $25 million settlement because its percentage compensation arrangement was disallowed as taking into account the volume or value of referrals. Although CMS agrees that percentage compensation arrangements can meet its definition of “set in advance,” and although the preamble language to CMS’s regulations concerning the volume or value prohibition supported the health system’s position, the safe harbor in the regulations does not include percentage compensation arrangements.

Next, the ABA believes it is especially important that the “volume or value” standard be clarified in the context of alternative payment arrangements in which physicians share a share of per-case cost savings, as more referrals/more procedures by the physicians may result in more savings (but may also result in lower savings). These types of payment arrangements are critical to the sorts of value-based payment approaches that CMS is actively advocating, but their legal status under the Stark Law is very unclear.

Further, some of the Stark Law exceptions prohibit the taking into account the volume or value of referrals only for Medicare DHS, whereas others extend the prohibition to also include “other business generated between the parties” (which is everything else – Medicaid, commercial pay, Medicare and Medicaid managed care, etc.). Again, this creates inconsistent guidance for providers and the risk of inconsistent enforcement actions for alleged violations. Accordingly, the ABA recommends making the prohibition on the volume or value of referrals relate only to Medicare DHS, which would better reflect the initial legislative intent behind the Stark Law (i.e., protection of the Medicare Trust). Having a single, albeit more liberal, standard provides some flexibility and reduces the possibility that arrangements unwittingly violate the Stark Law because the parties are unaware that the “other business generated” standard applies. Also, to the extent that “the other business generated” standard is intended to prevent “swapping or value of referrals has proven to be particularly vexing. For example, a hospital’s payments to a physician for the bona fide performance of services may be considered by the Government or a relator to reflect the volume or value of referrals if the performing physician must admit a patient to a hospital in order to perform those services. The ABA recommends that Congress amend the Stark Law to clarify the interpretation and application of the “volume or value of referrals” prohibition in situations where there is ambiguity or inconsistency in the text of the statute or in the interpretations of the statute applied by CMS. The following paragraphs provide specific examples as to which the ABA believes amendments to the statute would provide greater clarity and consistency without undermining the policy goals of the Stark Law. Adoption of this Resolution will allow the ABA to address these and similar issues through appropriate outreach to Congress. First, the ABA recommends that Congress adopt the existing “safe harbor” in CMS’s regulations for unit-based (“per click” or “per procedure”) compensation and make it applicable through a statutory safe harbor to any type of compensation that is set in advance, including percentage compensation arrangements (e.g., compensation based on a percentage of revenue or percentage of collections). Such an amendment to the Stark Law would provide greater clarity to healthcare providers and would reduce the exposure of such providers to enforcement actions based on inconsistent interpretations of the Stark Law. For example, the ABA is aware of one case in which a health system was leveraged into a $25 million settlement because its percentage compensation arrangement was disallowed as taking into account the volume or value of referrals. Although CMS agrees that percentage compensation arrangements can meet its definition of “set in advance,” and although the preamble language to CMS’s regulations concerning the volume or value prohibition supported the health system’s position, the safe harbor in the regulations does not include percentage compensation arrangements.

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arrangements," in which favorable compensation terms may be offered on non-Medicare DHS business to induce the referrals of Medicare DHS, the AKS is available to address that, and is a more appropriate vehicle for that analysis because of the intent-based nature of AKS liability.

Finally, the ABA recommends that the statute be amended to clarify that the "volume or value" standard does not apply to personally performed services of the referring physician, even if those personally performed services are surgical procedures for which a hospital bills a facility fee. The ABA believes this recommendation is consistent with CMS’s policy, but dicta from the Fourth Circuit in the *Tuomey* case has caused some anxiety among hospitals and academic medical centers as to how they may properly compensate their physicians for services when those services, by their nature, result in additional revenues for the hospitals.

**Conclusion**

The Resolution herein requests that the American Bar Association urge Congress amend the Stark Law to address concerns described in this Report and provide greater clarity, consistency and fairness in the interpretation and enforcement of the statute.

The Health Law Section requests that the American Bar Association House of Delegates adopt this Resolution.

Respectfully submitted

Alexandria Hien McCombs  
Chair, Health Law Section  
August 2019

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

The Resolution urges Congress to enact legislation to amend the Ethics in Patients Referrals Act of 1989, 42 U.S.C. § 1395nn (commonly known as the Stark Law), to modernize the law and encourage the adoption of value-based payment arrangements and other coordinated care arrangements that will lower costs to the Medicare program and improve the quality of services to its beneficiaries.

2. **Approval by Submitting Entity.**

The Council of the Health Law Section approved the filing of this Resolution and Report on May 5, 2019.

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

There has not been a similar resolution filed.

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

There are no known Association policies directly relevant to this Resolution.

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

There is no current legislation pending proposing relevant changes to the Stark Law. However, there may be legislative activity soon, as we have been informed that the Senate Finance Committee is exploring statutory changes to Stark, and both HHS’s Centers for Medicare & Medicaid Services (CMS) and Office of Inspector General have recently issued Requests for Information concerning potential changes in the regulatory exceptions to the Stark Law and the Anti-Kickback Statute. Earlier this year, Congress made minor changes to the Stark Law, which it characterized as for the purpose of modernizing the law.

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

There is no current legislation pending proposing relevant changes to the Stark Law. However, there may be legislative activity soon, as we have been informed that the Senate Finance Committee is exploring statutory changes to Stark, and both HHS’s Centers for Medicare & Medicaid Services (CMS) and Office of Inspector General have recently issued Requests for Information concerning potential changes in the regulatory exceptions to the Stark Law and the Anti-Kickback Statute. Earlier this year, Congress made minor changes to the Stark Law, which it characterized as for the purpose of modernizing the law.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**
The sponsoring entities will work with the ABA Governmental Affairs Office to actively engage in federal and state legislative activities related to this issue.

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.**
By copy of this form, the Resolution will be referred to the following entities:

   Section of Administrative Law and Regulatory Practice
   Section of State and Local Government Law
   Section of Science and Technology Law
   Law Practice Division
   Law Student Division
   Young Lawyers Division
   Commission on Law and Aging
   Commission on Disability Rights
   Commission on Women in the Profession
   Standing Committee on Ethics and Professional Responsibility
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   National Association of Bar Executives
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11. **Contact Name and Address Information.**
Alexandria McCombs, Chair
ABA Health Law Section

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

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Ph: 414-206-2101  
Fax: 414-206-2109  
robyn.shapiro@healthscienceslawgroup.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution.**

The Resolution urges Congress to enact legislation to amend the Ethics in Patients Referrals Act of 1989 (commonly known as the Stark Law) to modernize the law and encourage the adoption of value-based payment arrangements and other coordinated care arrangements that will lower costs to the Medicare program and improve the quality of services to its beneficiaries.

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

The Resolution would eliminate or reduce the penalties for certain technical violations of the Stark Law that do not reasonably present a risk of fraud and abuse in the modern physician payment context, especially given the proliferation of alternative and value-based payment arrangements. The proposed legislative amendments would further simplify compliance with the Stark Law, keeping in step with other recent regulatory changes and Centers for Medicare and Medicaid Services policy initiatives towards reduction of unnecessary regulatory burdens.

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

The Resolution would propose amendments to the existing Stark Law legislation including those that would (i) alleviate regulatory burdens associated with self-disclosure of certain Stark Law technical violations, (ii) simplify determinations of fair market value in transactions subject to the Stark Law, and (iii) eliminate certain technical issues associated with compensation “determined in a manner that takes into account the volume or value of referrals.”

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.
RESOLUTION

RESOLVED, That the American Bar Association recognizes children and parents have legal rights to family integrity and family unity;

FURTHER RESOLVED, That the American Bar Association urges legal professionals, courts, and relevant state agencies to mitigate the trauma and long-term harm that can result from separation from parents and other primary caregivers;

FURTHER RESOLVED, That the American Bar Association supports the use of prevention services, including legal services, to ensure children’s safety without the need for removal from a parent or caregiver;

FURTHER RESOLVED, That the American Bar Association recognizes government action may intentionally interfere with rights to family integrity when necessary for the child’s health, safety, and well-being, provided that procedural protections are applied, including access to high quality legal representation for children and parents;

FURTHER RESOLVED, That the American Bar Association urges federal authorities seeking to separate a child from a parent to protect the child’s health, safety, or well-being to engage state or tribal child protection authorities, which have exclusive jurisdiction to take such action under state and federal statutory law; and

FURTHER RESOLVED, the American Bar Association urges, state, local, territorial, and tribal authorities to ensure family connectedness is safely maintained and supported with parents and kin during the pendency of the child welfare case if children cannot safely remain with their parents or other primary caregivers and must enter the custody of a state or tribe. The definition of kin in such circumstances should include relatives and unrelated persons with significant relationships to the child or family the children or youth identify as individuals with whom they want to remain connected. Additionally, child welfare agency staff, attorneys, and judges should:
a) Identify kin and ensure they are notified and engaged within 30 days of removal and throughout the life of the case. Family search and engagement efforts should seek not only kin resources as placement options, but as other types of long-term connections;

b) Prioritize placement with kin, including relatives, former caregivers, or close family friends;

c) Help children maintain important family connections and support, through regular family time and a presumption of unsupervised visitation unless the court finds that unsupervised visitation is not in the child’s best interests;

d) Tailor services and assistance to address the unique needs of kinship foster families, while still working toward the goal of safe reunification with parents where that is the case goal;

e) Seek to facilitate placing siblings together in the same foster home, absent a court finding of a safety or well-being concern, and allow regular and meaningful visitation between siblings when that is not possible. The definition of “sibling” should include those connected through one or more common parents and those connected through shared living arrangements, including those formed through foster home placements;

f) Support youth who may age out of the foster care system rather than achieve permanency by developing a network of positive adult connections (including their parents, if the youth wish) that serve as a support network while the youth are part of the child welfare system that can be maintained after the youth leave the system; and

g) Include family members, including parents and caregivers, in development of the service plan and critical treatments for youth in foster care.
Introduction

This policy derives from three recent developments in the child welfare field.

First, federal litigation challenging family separation at the U.S. Border has brought with it an increased focus on applying child welfare laws and principles in federal litigation across the country. Those cases emphasize that both children and parents have substantive and procedural rights to family integrity and government action can intentionally interfere with such rights only when it has a compelling reason to do so and follows required processes.

Second, Congress enacted new child welfare legislation in 2018, titled the Family First Prevention Services Act1 ("Family First Act" or "Family First"), which changes child welfare funding structures and emphasizes the overall importance of children’s connections to family, including birth parents, kin, siblings, and foster families.

Third, the federal government recently updated the Child Welfare Policy Manual of the U.S. Department of Health and Human Services to allow states to use federal funding to pay part of the cost of providing children and parents with legal counsel in child welfare/dependency cases. This change recognizes high quality child and parent legal representation protects children and parents’ substantive and procedural due process rights and produces better long-term outcomes for families, including shorter time to permanency (e.g., reunification, guardianship, or adoption).

All three developments – federal family separation litigation, the Family First Act, and new federal funding to support child and parent counsel – are unified around a theme of promoting family integrity and family connection for children and youth. Although the ABA has existing policy supporting children’s rights in a variety of contexts, it lacks policy addressing children and youth’s interests in family integrity and family connection. This resolution addresses that gap by recognizing:

- Children and parents have rights to family integrity and family unity;
- Children’s separation from parents and primary caregivers can produce trauma;
- Prevention services, including legal services, can ensure children’s safety without removing them from their families;
- Government may interfere with children and parents’ rights to family integrity when necessary for the child’s health, safety, and well-being;
- Decisions to separate a child from a parent to protect health, safety and well-being are subject to state and tribal authorities; and

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1 Family First Prevention Services Act, P.L. 115-123 (enacted as part of the Bipartisan Budget Act of 2018 on Feb. 9, 2018) ("Family First Act").
When children are in foster care, family connections should be safely maintained and supported with parents, kin, and siblings during the pendency of the case.

The following report structure corresponds with the five sections in the Resolution: (1) Legal Principles Defining Family Integrity; (2) Trauma of Removal; (3) Promoting Child Safety through Prevention Services; (4) Government Intervention and Foster Care Placement; (5) Jurisdictional Authority; and (6) Family Connections while in Foster Care.

I. Legal Principles Defining Family Integrity

The Supreme Court has repeatedly held parents have a constitutional liberty interest "in the care, custody, and control of their children." In *Troxel v. Granville*, the Court went so far as to describe this parental interest as "perhaps the oldest of the fundamental liberty interests recognized."2

Over the last year and a half, federal courts around the country have interpreted and applied that holding in litigation challenging instances of family separation at the U.S.-Mexico Border.4 As part of the government’s "Zero Tolerance Policy for Criminal Illegal Entry" in 2018, the Department of Homeland Security separated thousands of children from their parents.5 The leading case involves a certified class of parents who were separated from their children pursuant to this policy.6 In a powerful rebuke of the government’s policy, the Southern District of California concluded the class of parents suffered "agonizing" harm from the separations in violation of their substantive and procedural due process rights to family integrity.7

Although parental assertions of rights to family integrity under *Troxel* and related cases are not new, a more novel thread of family integrity assertions has also emerged in the border cases. In this group, the plaintiffs are children who have asserted the government

2 *Troxel v. Granville*, 530 U.S. 57, 65 (2000); see *Parham v. J. R.*, 442 U.S. 584, 602 (explaining "our constitutional system long ago rejected any notion that a child is the mere creature of the State"); *Quilquin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is clear that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements"); see also *Bohn v. City of Dakota*, 772 F.2d 1433, 1435 (8th Cir. 1985) ("We can conceive of no more important relationship, no more basic bond in American society, than the tie between parent and child").


5 *See Ms. L., 310 F.Supp.3d 1133.

6 *Ms. L., 310 F.Supp.3d at 1146.*
violated their own rights to family integrity. Each federal court to address these assertions has agreed that children have their own rights to family integrity protected by the Fifth Amendment (and by extension the Fourteenth Amendment in states). For example, in *J.S.R. v. Sessions*, the District of Connecticut recognized that by “forcibly removing them from their parents without due process of law” the government “deprived the children of their family integrity – depriving them of their primary and only consistent source of support.” Similarly, in *W.S.R. v. Sessions*, another case involving child plaintiffs, the Northern District of Illinois recognized “the liberty interest at stake is a child’s right to remain in the custody of his parent . . . [as] a fundamental right.” Finally, in *Jacinto-Castanon de Nolasco v. ICE*, the D.C. District Court reviewed claims from a mother and son and concluded all three plaintiffs were likely to “succeed on their substantive due process claim premised on their constitutional right to family integrity.”

In addition to these cases involving child plaintiffs, seventeen states and the District of Columbia challenged the federal government’s zero tolerance policy, arguing inter alia that both children and parents’ rights to family integrity had been violated. Specifically, the states asserted in Counts One and Two that “parents have a fundamental liberty interest in the care, custody, and control of their children...” and “minors have a reciprocal liberty interest in their parents’ care.” To support the children’s rights assertion, the plaintiffs cited numerous state statutes and case law affirming the importance of children’s rights to family. A few key examples are included below:

- *Massachusetts* cited a state supreme court case finding “the interest of the child is best served by a stable, continuous environment with his or her own family.”
- *Iowa* explained children and parents can be separated only in “the most exceptional circumstances” because remaining in parental custody is presumed to be in a child’s best interest and separation “inflict[s] a unique deprivation of a constitutionally protected liberty interest.”

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1 *J.S.R. 330 F.Supp.3d at 742*
2 *W.S.R. 318 F.Supp.3d at 1124*
3 *Jacinto-Castanon de Nolasco, 319 F.Supp.3d at 502.*
4 *See State of Washington, 2018 WL 3139446 (W.D. Wash.).*
5 *Id.*
6 *Id.*
7 Adoption of Frederick, 405 Mass. 1, 4 (1989); see also *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 348 (1997) (preserving and fostering the parent-child relationship are “extremely important interests that rise to the level of ‘compelling interests’ for purposes of constitutional analysis.”)
8 *In re M.S., 889 N.W.2d 675, 677-78 (Iowa Ct. App. 2016); see also Or. Rev. Stat. § 419B.090(3) (explaining that Oregon law requires the government to “safeguard and promote each child’s relationships with parents, siblings, grandparents, other relatives and adults with whom a child develops healthy emotional attachments.”) 62 Pa. Stat. Ann. § 217(2)(a)(1) (requiring Pennsylvania officials to recognize “[t]he family is the basic institution in society in which our children’s sense of self-esteem and positive self-image are developed and nurtured” and “[t]hese feelings and values are essential to a healthy, productive and independent life during adulthood”).*
9 *Id.*
10 *Id.*
11 *Id.*
12 Adoption of Frederick, 405 Mass. 1, 4 (1989); see also *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 348 (1997) (preserving and fostering the parent-child relationship are “extremely important interests that rise to the level of ‘compelling interests’ for purposes of constitutional analysis.”)
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II. Trauma of Removal

Recent federal litigation challenging family separation at the border has repeatedly emphasized the “irreparable harm” that can ensue from separating a child and parent. For example, Jack Shonkoff, Director of Harvard University’s Center on the Developing Child, explained when testifying before the House of Representatives that “[s]udden, unexpected separation, even for a short period of time, can disrupt the quality of parent-child relationships, preclude Ms. Jacinto-Castanon’s involvement in any aspect of her sons’ care, custody, and control, from their mental health;);

Jacinto-Castanon de Nolasco, 319 F.Supp.3d at 501 (finding separation “absolutely precludes Ms. Jacinto-Castanon’s involvement in any aspect of her sons' care, custody, and control, from their mental health” and “prevents her from expressing love for, and comfort to, her sons – comfort that they surely need as they endure the bewildering experience of detention”).

118 • New Mexico state law provides to “the maximum extent possible, children in New Mexico shall be reared as members of a family unit” and process is due when a proceeding affects or interferes with the parent-child relationship.15

This ABA Policy Resolution builds on the recognition of children’s rights to family integrity in both federal and state sources of law. We encourage attorneys for children in dependency proceedings to use these and other sources of authority on children’s rights to family when consistent with client interests.16 Advocacy based on children’s rights to family integrity may be especially compelling in instances involving access to services or supports that can promote child safety without effectuating a removal, as provided for through the Family First Prevention Services Act and potential pre-petition representation.17 Relatedly, arguments about children’s fundamental rights to family integrity may be effective as attorneys advocate for child welfare agencies to provide reasonable efforts to prevent removals and facilitate reunification as required by federal and state law.18

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forcible separation of children from their parents is deeply traumatic for both.\textsuperscript{20} This realization of the trauma of separating children from their families helps to shift in the child welfare context that while foster care can be a critical response to certain family circumstances, it is not without consequences. As the American Academy of Pediatrics has stated “[r]emoval is emotionally traumatizing for almost all children, although for some, it is the first time they may feel safe.”\textsuperscript{21}

In federal FY 2017, 269,690 children entered foster care across the United States, to become part of the almost 443,000 youth in care that year.\textsuperscript{22} Research shows that removal from parents and transition into foster care is stressful and distressing to children,\textsuperscript{23} as children removed from their parents' care often also lose connections to their homes, siblings, friends, other family members (if kinship care is not considered), pets, familiar environments, and sometimes school settings. A study completed by a professor at MIT in 2007 demonstrated that children “on the margin” (i.e., who could have avoided foster care placement) had better life outcomes when they were raised by their families of origin than those raised in the foster care system.\textsuperscript{24}

The research on trauma does not suggest children should be left in harm’s way when circumstances require government intervention. Indeed, Dr. Shonkoff’s Congressional testimony provides a clear caution against such inaction by explaining “inadequate caregiving and limited nurturance very early in life can have long-term (and sometimes permanent) effects on immune and inflammatory responses.”\textsuperscript{25} In this respect, medical research on the trauma of separation does not justify a government’s failure to act to support children. Rather, it underscores the importance of investing in supports that address child health and safety within the family and ensuring due process when a child needs to be physically removed for safety reasons. This approach is consistent with state laws and policies that simultaneously affirm the importance of family integrity and identify government responsibilities to prevent the unnecessary removal of children from their homes. For example, Minnesota law provides “all children are entitled to live in families familiar environments, with pets, familiar environments, and sometimes school settings.”\textsuperscript{26}

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\textsuperscript{21} Am. Acad. of Pediatrics, Policy Statement on Health Care Issues for Children and Adolescents in Foster Care and Kinship Care (2015), available at https://pediatrics.aappublications.org/content/136/4/e1131.


\textsuperscript{23} See Monique Mitchell & Leon Kuczynski, Does Anyone Know What is Going On? Examining Children’s Lives Trapped by the Care Transition into Foster Care, 32 Child and Youth Services Review 437-443 (2010).


\textsuperscript{25} Shonkoff, supra note 21, at 7.
that offer safe, nurturing, permanent relationships, and that public services be directed toward preventing the unnecessary separation of children from their families.24

ABA policy recognizing the trauma of child and parent separation can help inform attorney advocacy and judicial decision-making in the child welfare field where questions about keeping a child safe require considerations beyond simply whether to remove a child from the home. Instead, with an understanding of the trauma that such a removal may cause for the child as well as the family and community, legal professionals have a responsibility to examine alternative options when a child can be cared for safely without needing to effectuate a removal if that is in the child’s interests. In many instances, those options may include the provision of government assistance and support services to help stabilize a family and address specific safety concerns. We also encourage states to consider adopting language like Alaska’s statute, which requires courts reviewing removal petitions to consider potential harm to the child caused by removal from the home and family when making determinations about health, safety, and best interests.27

Importantly, when removal from parents or other primary caregivers is needed to ensure a child’s health or safety, legal professionals can also join the agency to develop policies that minimize the trauma of that transition for children.28

III. Promoting Child Safety through Prevention Services

Historically, federal child welfare funding has been limited to supporting children after they entered foster care.23 The corresponding lack of federal funding for prevention services to help keep a child in foster care has long frustrated attempts at broad system improvement. A 2010 ABA resolution urged child welfare financing reform that would allow states to use federal funds available through Title IV-E to examine alternative options when a child can be cared for safely without needing to effectuate a removal if that is in the child’s interests. In many instances, those options may include the provision of government assistance and support services to help stabilize a family and address specific safety concerns. We also encourage states to consider adopting language like Alaska’s statute, which requires courts reviewing removal petitions to consider potential harm to the child caused by removal from the home and family when making determinations about health, safety, and best interests.27

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23 Minn. Stat. § 252.32, subd. 1; see also 10 Del. C. § 902(a) (declaring preservation of the family as a unit to be “fundamental to the maintenance of a stable, democratic society.”); 705 Ill. Comp. Stat. 405/1-2 (requiring Illinois to “secure for each minor … such care and guidance, preferably in his or her own home, as will secure the safety and moral, emotional, mental, physical welfare of the minor and the best interests of the community; [and] preserve and strengthen the minor’s family ties whenever possible.”); Md. Code Ann., Fam. Law § 4-401(1) (recognizing the government’s responsibility to “promote family stability, [and] to preserve family unity”); N.J. Stat. Ann. § 30:4C-1(a) (New Jersey provides “the preservation and strengthening of family life is a matter of public concern as being in the interest of the general welfare.”); 26 Minn. Stat. § 3102(a) (in Pennsylvania “[t]he family is the basic unit in society and the protection and preservation of the family is of paramount public concern”); Adams v. Tessner, 354 N.C. 57, 60 (N.C. 2001) (explaining that the family unit is guaranteed not only by the U.S. Constitution but also by North Carolina law).24 Alaska Stat. Ann. § 47.10.082 (requiring courts to consider children’s best interests and the “potential harm to the child caused by removal of the child from the home and family environment”).25 See, e.g., ACS-NYU Children’s Trauma Institute, Easing Foster Care Placement: A Practice Brief, (2012) https://www.nctsn.org/sites/default/files/resources/fact-sheet/easing_foster_care_placement_a_practice_brief.pdf.26 42 U.S.C. § 672(a)(2)(A)(ii) (providing for federal funding after a child has been placed in foster care).
of the Social Security Act on child abuse and neglect prevention, among other efforts to strengthen and stabilize families.30

The Family First Act, which was signed into law in 2018, addresses several of these proposals by bringing a range of improvements to the child welfare system. For example, states can now access federal Title IV-E funding to provide services and programs to children, parents, and kinship caregivers with the goal of preventing children from entering foster care. Eligible families in which a child is a “candidate for foster care” can access preventive mental health, substance abuse, and parenting skills services for up to 12 months. The new federal law complements existing state responsibilities to support families and prevent child-parent separation when possible.31

Within the context of this new legislation, legal professionals have several key roles including a responsibility to protect children’s and parents’ rights to family integrity.32 Similarly, counsel for child welfare agencies have an opportunity to work closely with their clients to ensure “reasonable efforts” are provided in a deliberate way to help families in need of services and prevent a child from entering foster care when services can help stabilize the family.33 To protect legal rights while prevention services are being provided, jurisdictions should consider appointing counsel for children, parents, and agencies once a child has been deemed a “candidate for foster care” and prevention services are offered.34 New federal funding for children’s counsel and parents’ counsel appears to permit federal reimbursement (at a 50% match rate) in such instances, creating new opportunities for pre-petition legal services.

As significant as the funding shifts are likely to be from Family First, it is far from a comprehensive approach to prevention and family support. Consequently, in addition to services to help families when children are at imminent risk of entering foster care, it is critical for states and communities to develop and offer programs and services that provide more robust primary prevention and family support. As noted by the Children’s Bureau of the U.S. Department of Health and Human Services, “coordinated and robust

30 See ABA House of Delegates Resolution 110 (adopted February 2010), available at
https://www.americanbar.org/groups/child_law/resources/attorneys/child_welfare_financingreform/

31 See, e.g., 29 Del. C. § 9001 (Delaware “has a basic obligation to promote family stability and preserve the family as a unit….”), supra note 27.

32 For additional details on the role of the legal community in implementing Family First, see ABA Center on Children in the Law, Legal Professional Roles: Implementing the Family First Prevention Services Act, https://www.americanbar.org/content/dam/aba/administrative/child_lawfssp-tenat-roles.pdf.

33 For an overview of federal and state requirements that agencies make reasonable efforts both to prevent the removal of a child from the home and to achieve reunification with the family, see, e.g., U.S. Dep’t of Health and Human Servs., Admin. for Children and Families, Admin. on Children, Youth and Families, Children’s Bureau, Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children (2016), available at https://www.childwelfare.gov/pubs/POF/reunify.pdf.

34 A See ABA House of Delegates Resolution 112A (adopted August 2009) (urging federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction).
primary prevention efforts are critically important to strengthen families, prevent the initial occurrence of and ongoing maltreatment, prevent unnecessary disruption of families, reduce family and child trauma, interrupt intergenerational cycles of maltreatment, and build a well-functioning child welfare system.36

Legal services provide a core component of these more comprehensive prevention efforts. For example, medical-legal partnerships identify and address simultaneous legal and medical pressures that can exacerbate child health risks, such as when children’s medical, mental health, or special needs create challenges in the care they can receive at home.36 The medical-legal partnership between Arkansas’s Children’s Hospital and Arkansas Legal Aid provides a useful example of a practice that assists children and families’ legal and medical needs concurrently.37 Children’s Law Center in Washington, DC has a similar program in place with Children’s National Medical Center and several other health clinics; the medical-legal partnership between Mt Sinai-St. Luke’s Child and Family Institute and the Legal Aid Society in New York City provides education advocacy to students with significant emotional disabilities.

Multidisciplinary legal teams in child welfare representation can also strengthen families by incorporating an attorney, a social worker, and a peer advocate as part of a triad of service delivery.38 As a prevention model, the Detroit Center for Family Advocacy (CFA) provides an excellent example of how multidisciplinary representation can help eliminate the need for foster care placement.39 In CFA’s prevention services program, families with a substantiated allegation of child abuse or neglect but no filed petition or court proceeding were provided with a multidisciplinary legal team including a lawyer, a social worker, and a parent advocate who had been involved in the child welfare system to address the legal issues that put them at risk of a dependency petition. During a three-year evaluation, CFA’s multidisciplinary teams prevented the need for dependency petitions in nearly 93% of all cases handled.


38 For more information about the Arkansas medical-legal partnership, see http://arklegalaid.org/what-we-do/medical-legal-partnerships-in-arkansas.

39 Children’s Bureau No. ACYF-CSA-IM-17-02, supra note 17 (noting several models of multidisciplinary representation in child welfare).


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39 Children’s Bureau No. ACYF-CSA-IM-17-02, supra note 17 (noting several models of multidisciplinary representation in child welfare).

Finally, policymakers should explore efforts to expand access to civil legal aid to help families maintain stable housing, protect against domestic violence, and access benefits for which they are eligible. Each of these legal issues can affect child safety. Legal clinics and services co-located at Family Resource Centers throughout the country provide examples for how to expand primary prevention legal supports for families.

IV. Government Intervention and Foster Care Placement

There are circumstances when it is necessary for a child to separate from a parent or caregiver and enter foster care to ensure the safety of the child. All states recognize this legal reality. State laws vary, however, in the statutory language they use to support parent-child separation. Some require a showing that the child’s health or safety are at risk.43 Other states use broader language.44

Because children and parents’ rights to family integrity are fundamental interests, the government may not intentionally intrude on rights to family integrity without a particularized court finding of unfitness on the part of each parent.42

Not every child found to be neglected or dependent must be removed from parental custody.43 Generally, a court determination of the necessity of removal should include assessment of the nature of the threat(s) of danger, the child’s vulnerability, and the

42 See Alaska Stat. § 47.10.082 (Alaska law requires courts to “keep the health and safety of the child as a court’s paramount concern”). Kan. Stat. Ann. § 24-2705 (requiring the first finding to include an analysis of “whether the removal and the reasons for the removal of the juvenile is necessary to protect the health and safety of the juvenile”); Id. Code Ann. § 16-1601 (“At all times, the health and safety of the child shall be the primary concern.”); N.Y. Fam. Ct. Act § 1027 (providing for a child’s removal from the parent when necessary to avoid imminent risk to the child’s life or health); Wash. Rev. Code § 26.44.010 (the state is justified to intervene in a parent-child relationship only if certain threats to the child’s safety occur); in re Duža, 143 N.C. App. 16, 17 (N.C. Ct. App. 2001) (allowing a child to be removed from the home only when “necessary to protect the safety and health of the child”);

43 See, e.g., Cal. Welf. & Inst. Code § 222(a), 16000(a) (providing for removal of a child from the custody of a parent “only when necessary for his or her welfare or for the safety and protection of the public”); Kan. Stat. Ann. 38-2243 (courts may order removal when the “health or welfare of the child may be endangered without further care”);

44 See Quilloin, 434 U.S. at 658; Stanley, 405 U.S. at 658; see also In re Sanders, 852 N.W.2d 524, 533, 539 (Mich. 2014).

There are circumstances when it is necessary for a child to separate from a parent or caregiver and enter foster care to ensure the safety of the child. All states recognize this legal reality. State laws vary, however, in the statutory language they use to support parent-child separation. Some require a showing that the child’s health or safety are at risk.43 Other states use broader language.44

Because children and parents’ rights to family integrity are fundamental interests, the government may not intentionally intrude on rights to family integrity without a particularized court finding of unfitness on the part of each parent.42

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44 See Quilloin, 434 U.S. at 658; Stanley, 405 U.S. at 658; see also In re Sanders, 852 N.W.2d 524, 533, 539 (Mich. 2014).

Finally, policymakers should explore efforts to expand access to civil legal aid to help families maintain stable housing, protect against domestic violence, and access benefits for which they are eligible. Each of these legal issues can affect child safety. Legal clinics and services co-located at Family Resource Centers throughout the country provide examples for how to expand primary prevention legal supports for families.

IV. Government Intervention and Foster Care Placement

There are circumstances when it is necessary for a child to separate from a parent or caregiver and enter foster care to ensure the safety of the child. All states recognize this legal reality. State laws vary, however, in the statutory language they use to support parent-child separation. Some require a showing that the child’s health or safety are at risk.43 Other states use broader language.44

Because children and parents’ rights to family integrity are fundamental interests, the government may not intentionally intrude on rights to family integrity without a particularized court finding of unfitness on the part of each parent.42

Not every child found to be neglected or dependent must be removed from parental custody.43 Generally, a court determination of the necessity of removal should include assessment of the nature of the threat(s) of danger, the child’s vulnerability, and the
family’s protective capacities to manage the threat.44 Judges and attorneys should understand these factors and develop a framework for child safety decision-making that facilitates consistency and clarity in the field. Assessing safety is relevant not only at the point of initial removal, but also when developing and approving an effective case plan and when determining whether a child can be reunified with parents or should achieve a different form of permanency (e.g. adoption or guardianship).

When a state or tribe seeks to prove a parent unfit and seeks removal of a child, procedural due process protections apply.45 For example, the parent must be given notice and an opportunity to contest the basis for that fitness determination.44 As a general rule, this court hearing should occur before the parent ‘may be deprived of the care, custody, or management of the children without their consent.’46 Only in emergency situations, where the government has evidence that harm to the child is imminent, should the state assume custody of the child without court authorization or parental consent.47 Emergency removals should not be permitted when the agency has “reasonable time consistent with the safety of the child to obtain a judicial order.”48 To exercise these procedural safeguards, children and parents should have access to quality legal representation at every stage of the case.


46 See Quilloin, 434 U.S. at 255 (“We have little doubt that the Due Process Clause would be offended [if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest]”). Stanley, 405 U.S. at 658 (“The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment”). In re Montgomery, 311 N.C. 101, 106 (N.C. 1984) (A parent’s “right to retain custody of their child and to determine the care and supervision suitable for their child is a fundamental liberty interest which warrants due process protection.”).

47 See Stanley, 405 U.S. at 658.

48 Southerland v. City of New York, 680 F.3d 127, 142 (2d Cir. 2012) (“The Fourteenth Amendment imposes a requirement that except in emergency circumstances, judicial process must be accorded both parent and child before removal of the child form his or her parent’s custody may be effected.”); Ram v. Rubin, 118 F.3d 1306, 1311 (9th Cir. 1997), cert. denied, 522 U.S. 1045 (1998) (holding “notice and a hearing are required before a child can be removed, even temporarily, from the care of the natural parents” and explaining emergency circumstances exist only when a state official has a reasonable belief the children are in imminent danger).

49 N.Y. Fam. Ct. Act § 1024(a) (defining emergencies as “circumstances[s]” wherein a child’s remaining in the parent’s care and custody ‘presents an imminent danger to the child’s life or health’).


Attorneys and judges can use this emphasis on procedural protections to ensure children and parents’ rights to family integrity are protected while also keeping children safe.

Careful consideration of due process protections is also important when implementing the Family First Prevention Services Act because state and local child welfare agencies will be working with unrepresented parents and children in the context of providing prevention services and developing case plans without judicial review or legal representation.

V. Jurisdictional Authority

Determinations of parental fitness and the necessity of removal fall exclusively to state and tribal jurisdiction. In instances where federal authorities have custodial authority over a child and parent, decisions to separate the child from a parent to protect the child’s safety, health, or well-being require coordination with state or tribal authorities that have exclusive statutory authority to effectuate such separations as part of the jurisdiction’s child welfare legal process.

VI. Family Connections while in Foster Care

Once children enter state or tribal custody, their ties to family (whether parents, siblings, relatives, or unrelated persons with a significant relationship to the child or family) should be maintained. Attorneys and courts can develop, strengthen, and support a host of promising practices which have been recognized at the state and federal levels to maintain family connections for youth of all ages.

i. Kin and Relative Engagement

Decades of research confirms that children who cannot remain with their parents thrive when raised by relatives and close family friends, known as kinship care. Children in foster care with relatives have more stable and safe childhoods than children in foster care with non-relatives, with greater likelihood of a having a permanent home. They experience fewer school changes, have better behavioral and mental health outcomes, and report that they “always felt loved.” They keep their connections to brothers and sisters, family and community, and their cultural identity. Youth in kinship care homes themselves generally express more positive feelings about their placements and are less likely to experience depression and other mental health issues.

52 See 8 U.S.C. § 1101(a)(27)(J) (noting that the adjudication of dependency law matters is conducted by state courts under state law); see also U.S. Immigration and Customs Enforcement, Policy No. 11064.2, Detention and Removal of Alien Parents or Legal Guardians (Aug. 29, 2017) (providing if there is an indication that the minor child(ren) has been subject to abuse or neglect by a parent or other adult who may be asked to take custody of the minor child(ren), ICE personnel should contact the local child welfare authority or law enforcement agency to take custody of the minor child(ren), available at https://www.ice.gov/doclib/detention-reform/pdf/directiveData/Parents.pdf.

53 See, e.g., supra note 41.

likely to run away. Moreover, children in foster care with relatives are less likely to re-enter the foster care system after returning to birth parents. If returning to parents is not possible, relatives are often willing to adopt or become permanent guardians. In fact, in Fiscal Year 2017, 34% of all children adopted from foster care were adopted by relatives and 10% of children exited foster care into kinship guardianships.

Federal and state child welfare law and policy prioritize placing children in kinship care arrangements when children enter foster care. For example, federal law requires state child welfare agencies to notify all adult relatives when a child is removed from care of the parent within 30 days of the removal, and to exercise due diligence to identify and locate all adult relatives of the child. An exception is articulated for cases involving family or domestic violence. Most state laws and policies also support a priority for placement with a relative.

More recently, Family First includes increased support of kinship families. The Act seeks to improve licensing standards for relative foster family homes, by requiring states to identify at least one foster family that meet the new federal foster family home licensing standards and to identify what non-safety licensing standards can be waived for relative caregivers. Family First also provides federal reimbursement for state expenditures on kinship navigator programs, which provide information, referral, and follow-up services to grandparents and other relatives raising children.

Building on the additional support for kin provided for through Family First, this ABA Resolution serves as an additional opportunity to urge judges and attorneys to ask about agency efforts to place a child with a kin caregiver. Judges and attorneys should also inquire about how family connections are being maintained throughout a case.

ii. Unsupervised Visitation

Goals of family visitation after a child enters foster care include maintaining the parent-child relationship, reducing the trauma of separation, and promoting reunification. Frequent and meaningful family time can improve the child-parent relationship and promote permanency by engaging parents; a parent can be significantly motivated through meaningful and regular contact with a child. However, in unfamiliar settings supervised by unfamiliar people, a family may find it challenging to interact naturally.

56 See supra, note 57.
57 See supra, note 57.
58 See 2017 AFCARS Report, supra note 23.
59 42 U.S.C. § 671(a)(19) (Title IV-E of the Social Security Act requires states receiving federal financial support to "consider giving preference to an adult relative over a nonrelated caregiver when determining placement for a child, provided that the relative caregiver meets all relevant state child protection standards.") Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351 ("Fostering Connections Act") (recognizing the important role relatives play in the life of a child and explicitly encouraged states to connect foster children with their relatives).

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To promote meaningful visitation, family visits should be conducted in the least-restrictive environment available that supports the child’s safety, and the level of supervision a family requires should be determined on a case-by-case basis. In its recommendations for improving court practice, the National Council for Juvenile and Family Court Judges (NCJFCJ) has noted, “[c]onsistent with child safety, relationships between and among children, parents, and siblings are vital to child well-being. Judges must ensure that quality family time is an integral part of every case plan. Family time should be liberal and presumed unsupervised unless there is a demonstrated safety risk to the child.”62 Some states have recognized the value of safe, unsupervised visitation and include the presumption in their statutes.63

State legislatures should examine this model as recommended by NCJFCJ and should consider adopting similar policies of allowing a presumption of unsupervised visits between children and parents. Attorneys and judges can also support a presumption for unsupervised visits, including the safety considerations that must be considered, and question what barriers exist to safe, unsupervised visitation in individual cases.

iii. Sibling Connections

Federal and state child welfare law and policy recognize the importance of sibling bonds for children and youth in foster care, and have explored many strategies and approaches to maintaining those connections.64 Absent a risk to child safety, courts should consider and attorneys advocate for regular, frequent contact between and among siblings.

Effective implementation of Family First will include careful consideration of the sibling-related provisions. For example, an exception to the limit on the number of children who can reside in a “foster family home” at the same time is available to place sibling groups together.65 Additionally, if a child is placed in a Qualified Residential Treatment Program, the program must provide outreach to relatives, including siblings, and document how the child’s sibling connections are being maintained.66 The state’s case plan must include

62 Nat’l Council of Juvenile and Family Court Judges, supra note 45.
63 See, e.g., Ga. Code Ann. 15-11-112(b) (establishing a presumption that visitation shall be unsupervised unless the court finds that unsupervised visitation is not in a child’s best interests).
64 See, e.g., U.S. Department of Health and Human Services, Children’s Bureau, Sibling Issues in Foster Care and Adoption (January 2013), https://www.childwelfare.gov/pubs/facts/brochures/siblingissues.pdf; See Fostering Connections Act, Sec. 206 (requiring child welfare agencies to make reasonable efforts to place siblings together, whether in foster care, kinship guardianship, or adoptive placements).
65 Preventing Sex Trafficking and Strengthening Families Act of 2014, P.L. 113-183, Sec. 206(a)(2) (requiring child welfare agencies to notify parents of a child’s siblings when the child is removed from a parent’s care, to include individuals who would have been considered siblings if not for the termination or other disruption of parental rights).
placement preferences reflecting that children should be placed with their siblings absent a court order to the contrary.57

When sibling connections are considered, courts, attorneys, and agencies should not overlook the bonds developed between unrelated children and youth in a foster care setting. Children or youth who leave a foster care setting may want to maintain a relationship and connection with other young people they lived with in that setting, and those ongoing relationships should be supported. Judges and attorneys should question how sibling bonds are being maintained during individual child welfare cases, whether the child’s siblings are also child welfare-involved or not. They should also seek the input of a child or youth in care as to who the youth wants to remain connected to in addition to biological relatives.

iv. Other Positive Adult Connections

As a great deal of research has shown, youth who age out of foster care face many challenges at higher rates than youth who were never in foster care or who exited foster care to reunify with parents or achieve another form of permanency.60 Often, the connection to family or another supportive adult is critical for older youth, and is key for youth to have permanent, emotionally sustaining, and committed relationships to reach self-sufficiency and to reduce the risk of negative outcomes such as homelessness and criminal involvement.

For example, a key recommendation from the Evan B. Donaldson Adoption Institute report, “Never Too Old: Achieving Permanency and Sustaining Connections for Older Youth in Foster Care”69 was to increase efforts to recruit, support, and use relatives by promoting kinship adoption and subsidized guardianship, and explore subsidized guardianship and adoption. One study showed the value of mentoring relationships, a role often fulfilled by a close relative which contributed to: socio-emotional development, problem-solving, and identity development. This was especially valuable to youth during vulnerable periods like transitions into and out of foster care.70 One strategy for facilitating engagement by caring adults is permanency planning that reflects efforts at relational permanency, demonstrated by building and maintaining connections with family and other supportive adults.71

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60 Kym R. Ahrens, et al., Qualitative Exploration of Relationships with Important Nonparental Adults in the Lives of Youth in Foster Care, 33 Children and Youth Services Review, 1012–1023 (2011).
61 See, e.g., ABA Center on Children and the Law and Juvenile Law Center, Issue Brief. The Role of the Court in Implementing the Older Youth Provisions of the Strengthening Families Act (February 2016).
66 See, e.g., ABA Center on Children and the Law and Juvenile Law Center, Issue Brief. The Role of the Court in Implementing the Older Youth Provisions of the Strengthening Families Act (February 2016).
Judges and attorneys in dependency cases should ensure older youth in care maintain family connections and establish positive relationships with adults. Judges should ask related questions during court proceedings. Attorneys representing youth in care should ask clients who they talk to regularly, who they seek advice from or go to for help, and who they would like to remain connected to after leaving state child welfare custody.

v. Service Plan and Treatment Plan

In recent years, child welfare professionals and legislators have focused on the importance and value of directly engaging youth in foster care in the creation of their service plans and any needed treatment plans, and also closely involving their families. For example, the Family First Act articulates how family members and others should be included in treatment for a youth placed in a Qualified Residential Treatment Program (QRTP). For a state to access federal funding for a child’s placement in a QRTP, the placement must be recommended by an impartial assessor and approved by the court.72 Part of the assessment involves consultation with a family and permanency team, which must consist of appropriate biological family members, relatives, fictive kin and “professionals who are a resource to the family...such as teachers, medical or mental health providers who have treated the child, or clergy.”73 And if the child placed in the QRTP is over 14, the team must also include members selected by the child. The QRTP must involve family members when it would be in the child’s best interest, describe how to integrate them in a post-discharge plan, and provide post-discharge and family-based support for six months.74

Building on these laws, judges should ensure the relevant federal and state rules are applied, and attorneys should advocate for youth’s active involvement in their own case planning, the involvement of family members and other adults important to the youth. Similarly, judges and attorneys should regularly pursue questions in court about the appropriateness of a child or youth’s specific placement in foster care. Once a state is using QRTPs as placements, more specific inquiries should be established.

Conclusion

Major events, legal actions, and child welfare legislative and policy changes have produced renewed attention on children and youth rights to family integrity and family connection. The legal community should serve as a leader advocating for and upholding these rights in legal representation, judicial decision-making, and legislative action.

Respectfully submitted,

Hon. Marguerite Downing
Chair, Commission on Youth at Risk
August 2019

73 See 42 U.S.C. § 675a(c)(1)(B).
74 See 42 U.S.C. § 675a(c).
1. Summary of Resolution(s). This Resolution recognizes the children and parents' legal right to family integrity and family unity. Relatedly, the Resolution urges the legal community to work to mitigate the trauma to children and families that separation causes and supports the use of prevention services to ensure children’s safety without the need for removal. The Resolution confirms that state actors may interfere with family integrity when necessary for a child’s health and safety, and outlines important procedural protections for children and parents when removal is necessary.

The Resolution further urges maintenance of family connectedness if a child does need to enter foster care. Specifically, the Resolution calls for prompt identification, notification, and engagement of the kin of a child in foster care; prioritization of placement of the child with kin; unsupervised visitation between parents and children in foster care, unless a court finds that unsupervised visitation is not in the child’s best interest; support for kinship foster families; maintained of sibling connections; positive adult connections for youth who may age out of foster care; and family involvement in the service plan and treatment of youth in foster care.

2. Approval by Submitting Entity.
   Final approval by the Commission on Youth at Risk on May 7, 2019
   Approved by the Section of Litigation on May 6, 2019
   Approved by the Commission on Homelessness and Poverty on May 7, 2019

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

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution would build upon past ABA policies that have touched on related points:
   - ABA House of Delegates Resolution 10M110 urged federal child welfare financing reform that would allow states to access federal funding for prevention services for families in need of support. That change was part of the Family First Prevention Services Act of 2018, and the new funding opportunity is highlighted in a section of this proposed Resolution's accompanying Report.
This Resolution’s inclusion of quality legal representation as part of the legal protections available when a child is removed from the home builds on the ABA House of Delegates Resolution 96M112A (adopting ABA Standards for Lawyers who Represent Children in Abuse and Neglect Cases), ABA House of Delegates Resolution 06A112A (adopting Standards of Practice for Lawyers who Represent Parents in Abuse and Neglect Cases), and ABA House of Delegates Resolution 11A101A (adopting ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings).

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

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

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. If adopted, this ABA Resolution with Report will be shared among networks of attorneys and judges involved in child welfare and immigration cases. We will encourage attorneys for children and parents in child welfare proceedings to use these and other sources of authority on the right to family integrity and connectedness when consistent with client interests.

8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with Commission staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. Disclosure of Interest. (If applicable) None

10. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:
- Center for Human Rights
- Civil Rights and Social Justice Section
- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Homelessness and Poverty
- Commission on Immigration
- Criminal Justice Section
- Family Law Section
- Health Law Section
- Judicial Division
- Litigation Section, Committee on Children’s Rights
- Section of Science and Technology
- Solo, Small Firm and General Practice Division
- Young Lawyers Division

This Resolution’s inclusion of quality legal representation as part of the legal protections available when a child is removed from the home builds on the ABA House of Delegates Resolution 96M112A (adopting ABA Standards for Lawyers who Represent Children in Abuse and Neglect Cases), ABA House of Delegates Resolution 06A112A (adopting Standards of Practice for Lawyers who Represent Parents in Abuse and Neglect Cases), and ABA House of Delegates Resolution 11A101A (adopting ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings).
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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rfhunter@hotmail.com

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution recognizes children and parents have legal rights to family integrity and family unity. Relatedly, the Resolution urges the legal community to work to mitigate the trauma to children and families that separation causes and supports the use of prevention services to ensure children’s safety without the need for removal. The Resolution confirms that state actors may interfere with family integrity when necessary for a child’s health and safety, and outlines important procedural protections for children and parents and jurisdictional requirements when removal is necessary.

The Resolution further urges maintenance of family connectedness if a child does need to enter foster care. Specifically, the Resolution calls for prompt identification, notification, and engagement of the kin of a child in foster care; prioritization of placement of the child with kin; unsupervised visitation between parents and children in foster care, unless a court finds that unsupervised visitation is not in the child’s best interest; support for kinship foster families; maintained of sibling connections; positive adult connections for youth who may age out of foster care; and family involvement in the service plan and treatment of youth in foster care.

2. Summary of the Issue that the Resolution Addresses

Promising practices and recent developments in the child welfare field call for development of this Resolution, which centers on family integrity and family connection. First, federal litigation challenging family separation at the U.S. Border has brought with it an increased focus on applying child welfare laws and principles in federal litigation across the country, including the substantive and procedural rights of children and parents to family integrity. Second, 2018 child welfare legislation titled the Family First Prevention Services Act (P.L. 115-123) changed child welfare funding structures and emphasized the overall importance of children’s connections to family, including birth parents, kin, siblings, and foster families. Third, the federal government recently updated the Child Welfare Policy Manual of the U.S. Department of Health and Human Services to allow states to use federal funding to pay part of the cost of providing children and parents with legal counsel in child welfare/dependency cases. This change recognizes high quality child and parent legal representation protects children and parents’ substantive and procedural due process rights and produces better long-term outcomes for families, including shorter time to permanency (e.g., reunification, guardianship or adoption).
All three developments are unified around a theme of promoting family integrity and family connection for children and youth. Although the ABA has existing policy supporting children’s rights in a variety of contexts, it lacks policy addressing children and youth’s interests in family integrity and family connection.

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

This resolution addresses the gap identified by urging that:

- Children and parents have legal rights to family integrity and family unity;
- The legal community and state agencies should work to mitigate the trauma resulting from children’s separation from parents;
- Prevention services, including quality legal representation services, can ensure children’s safety without removing them from their families;
- Government may interfere with children and parents’ rights to family integrity when necessary for the child’s health or safety; and
- When children are in foster care, family connections should be safely maintained and supported with parents, kin, and siblings during the pendency of the case.

This Resolution seeks to inform attorneys and judges in the child welfare and other legal fields of these important developments related to family integrity and family connectedness and provide guidance on effective implementation of the several intertwined practices and concepts.

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

None have been identified
RESOLVED, That the American Bar Association supports reasonable and necessary legislation and related regulations to detect and combat money laundering and terrorist financing that would:

(a) require every domestic business entity to designate either (i) a responsible individual who significantly participates in the control or management of the entity, or (ii) a records contact individual with responsibility for obtaining, maintaining, and taking reasonable measures to verify applicable beneficial or record ownership information for the entity, or both, and

(b) provide law enforcement agencies with timely access to adequate, accurate, and timely information regarding the entity’s responsible individual, or the entity’s applicable beneficial or record ownership, or both, in response to a valid subpoena, summons, or warrant; and

FURTHER RESOLVED, That the American Bar Association urges that any legislation and related regulations to detect and combat money laundering and terrorist financing be consistent with the following fundamental principles:

(1) constitutional rights and legitimate confidentiality interests must be protected;

(2) appropriate due process must be provided;

(3) the collection, maintenance, and verification of applicable responsible individual, beneficial ownership, or record ownership information must be an obligation of the entity;

(4) any definition of and reporting threshold for beneficial ownership must be clear, reasonable, and not unduly burdensome;
information concerning an entity's responsible individual, beneficial ownership, or record ownership, as applicable, should only be available to:

(i) law enforcement agencies promptly, but only in response to a valid subpoena, summons, or warrant; and

(ii) financial institutions, but only with the consent of the entity and subject to confidentiality protections when appropriate;

all types of business entity structures, including corporations and limited liability companies, should generally be subject to the same requirements, with appropriate exemptions or variations to recognize differences in entity forms, risk levels, existing regulatory obligations, or other factors;

any penalties for noncompliance must be calibrated to reflect the nature and degree of the noncompliance; and

any new requirements must not undermine the attorney-client privilege, the confidentiality of lawyer-client communications, or the confidential lawyer-client relationship.
REPORT1

Background

At its Midyear Meeting in 2003, the American Bar Association (the “ABA”) adopted Resolution 03M104 in response to efforts by the inter-governmental body known as the Financial Action Task Force (“FATF”)2 to develop and promote anti-money laundering (“AML”) policies at the national and international levels. Five years later, at its Annual Meeting in 2008, the ABA adopted Resolution 08A300 in response to legislation that had been introduced in the United States Congress that would require those who form business entities to document, verify, and make available to law enforcement authorities the record and beneficial ownership of those business entities.3 Resolution 08A300 urged that the regulation of those involved in the formation of business entities should remain a matter of state and territorial law, and urged Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities and to defer to the states.

That proposed 2008 legislation was not enacted, but since 2008 there have been a variety of proposals requiring the disclosure of certain identifying information for certain owners of U.S. business entities. The most recent subsequent proposals that have been made in the U.S. or adopted in other countries are described in Appendix II to this Report. As a result of Resolutions 03M104 and 08A300, the ABA has opposed all Federal legislation requiring the disclosure of beneficial ownership information for U.S. business entities.

Proposed Resolution

The proposed Resolution (this “Resolution”) is to update and supplement Resolutions 03M104 and 08A300 and other existing ABA policies. It is expected that there will continue to be significant debate among many constituencies regarding proposals requiring the disclosure of ownership information for certain owners of U.S. business entities (which ownership information is hereinafter referred to as “beneficial ownership information” and which owners are hereinafter referred to as “applicable beneficial owners”), and the nature of any provisions ultimately considered cannot be accurately predicted at this time. Rather than attempting to address the provisions of particular proposals as they are introduced, this Resolution takes the approach of adopting a series

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1 This Report was prepared by the Committee on Corporate Laws and the Committee on LLCs, Partnerships and Unincorporated Entities, each of the Business Law Section, with input from the Task Force on Gatekeeper Regulation and the Profession.

2 The Financial Action Task Force is an inter-governmental body established in 1989 with the objective of setting standards and promoting effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

3 Resolutions 03M104 and 08A300, known informally as Resolutions 104 and 300, respectively, are available on the ABA Gatekeeper Task Force’s website at: https://www.americanbar.org/groups/criminal_justice/gatekeeper/.
of fundamental principles that any legislation or regulation must satisfy while preserving a degree of flexibility in the application of those principles to particular proposals. Those fundamental principles are described in this Report. This Resolution allows the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialog around those proposals.

This Resolution does not advocate the adoption of a particular legislative or regulatory approach, nor does it seek to interfere with traditional state and territorial law governing the formation of business entities. Instead, it supports reasonable Federal laws, state uniform laws, or other measures that would require every domestic business entity to designate a responsible individual who helps control or manage the entity, or a records contact individual responsible for obtaining and verifying beneficial or record ownership, or both, and that would allow law enforcement agencies timely access to such information upon satisfaction of appropriate protections. This Resolution also states that any such legislation and related regulations must be consistent with certain stated principles and thus meet certain minimum and uniform requirements. However, if Federal legislation or regulations are adopted consistent with this Resolution, states and territories could supplement those requirements if desired for the reasons described in this Report. Federal legislation or regulation has the advantage of uniformity, but if such measures are adopted, they should be designed as to not unduly burden the states and territories, which may lack the financial and personnel resources to establish or enforce any such reporting system.

Without advocating for the adoption of a particular legislative or regulatory approach, Appendix I to this Report sets forth a series of core considerations that should inform the development of legislation or regulations. Those include, among others, a framework that could provide that:

- Each entity must provide to a designated governmental authority or office (such as the secretary of state or similar governmental authority that regulates entity formation) the name and address of a records contact in the United States, who should be designated as such at the time of entity formation and who must be an individual U.S. citizen who has agreed to provide beneficial ownership information in response to an appropriate request from an authorized recipient.
- The records contact would maintain the following information (which is referred to herein as “beneficial ownership information”):
  - The name and address of each “applicable beneficial owner” (as defined in accordance with the fundamental principles discussed below).
  - For each applicable beneficial owner that is not a natural person, (i) the jurisdiction under which each such beneficial owner was formed, and (ii) the name and address of a natural person who has access to such beneficial owner’s records.
  - For each applicable beneficial owner that is not resident in the United States, the name and address of a natural person resident in the United States who has access to such beneficial owner’s records (including for each applicable non-U.S. beneficial owner that is not a natural person,

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  - For each applicable beneficial owner that is not resident in the United States, the name and address of a natural person resident in the United States who has access to such beneficial owner’s records (including for each applicable non-U.S. beneficial owner that is not a natural person,
the name of each record owner of such beneficial owner). The definition of applicable beneficial owner must be clear across all business forms so that entities can determine what information to collect and maintain. The information maintained by the records contact should be updated promptly (at least annually).

The beneficial ownership information would be made available by the records contact only to specified recipients upon a proper showing. Federal civil penalties would be applicable to any entity that, after appropriate due process, fails either to maintain a records contact or to produce the information that the records contact is required to maintain.

Federal criminal and/or civil penalties could be imposed for willful violations. Public entities and their controlled affiliates should be exempt from beneficial ownership disclosure requirements. In addition, private business entities engaging in active businesses at a physical location within the United States should be exempt from beneficial ownership disclosure requirements.

Public disclosure could create public safety issues for elected officials, judges, public figures and vulnerable individuals such as seniors and minors.

The goal of the framework described in this Report is “smart” enforcement, where the compelling interests of law enforcement in having prompt access to a natural person who controls an entity are balanced against valid confidentiality interests and the burdens of compliance with reporting requirements, especially if the requirements are unreasonable or are not clear. As a matter of enforcement, expanding the focus and increasing the amount of information actually benefits those who commit the illegal acts by diverting enforcement resources to the pursuit of record-keeping violations and validation of voluminous amounts of reported information. In addition, broader measures impose costs on capital formation, including by creating significant compliance costs, and reduce the wealth-creation potential of legitimate entities.

Each of the fundamental principles that will guide and shape the ABA’s response to legislative and regulatory proposals mandating some form of disclosure of beneficial ownership information is discussed below.

Principle 1: Constitutional Rights and Legitimate Confidentiality Interests Must Be Protected

Legislation contemplating a central database containing personal information, accessible without a warrant, would run the risk of violating Constitutional protections and thus should be opposed. By collecting and maintaining beneficial ownership information at the entity level and not in a central database, numerous valid interests in maintaining confidentiality are protected, including:

- Personal and data privacy represents a valid interest entitled to recognition and protection.
- Public disclosure could create public safety issues for elected officials, judges, public figures and vulnerable individuals such as seniors and minors.

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- Personal and data privacy represents a valid interest entitled to recognition and protection.
- Public disclosure could create public safety issues for elected officials, judges, public figures and vulnerable individuals such as seniors and minors.
Public disclosure creates an increased risk of identity theft or fraud. Philanthropic donors and donees have a legitimate interest in confidentiality. Legitimate commercial business interests, such as property acquisition, are also valid interests to protect with confidentiality. Ease of engaging in business transactions for planning, lending, investment, and joint venture relationships.

Although the creation of new central databases should be opposed, the information required to be included in existing databases or in new databases created in the United States or abroad notwithstanding this Resolution (e.g., a passport, driver’s license or government issued photo identification document for each individual resident outside the United States) should be limited only to information directly related to the specific objective for collecting the information. Collection and production of personal data should be limited to reduce the potential harm resulting from identity theft or fraud in the event of a data breach.

While law enforcement needs may be compelling and financial institutions’ compliance obligations are critical in supporting law enforcement, the public does not need and should not have access to the beneficial ownership information. Most states and territories currently require annual reporting of certain governing persons (which may include natural persons), including board members of a corporation and the managers, members or partners who constitute the equivalent in other forms of entities. The reporting of governing persons (especially if those governing persons are natural persons) has multiple benefits, including:

- it achieves many of the objectives for reporting by entities in a cost-effective way, without the burdens of broad beneficial ownership reporting; and
- it is a valuable tool for law enforcement to (i) discourage formation of entities that desire to avoid reporting by governing persons and (ii) to obtain readily available information.

Beneficial ownership reporting should include or supplement, and not displace, governing persons reporting.

Under the EU’s Fifth Anti-Money Laundering Directive, EU Member States may, in exceptional cases, deny access to the central register where such access would expose beneficial owners to disproportionate risks, to risks regarding fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or if the beneficial owner is a minor or otherwise legally incapable.

In jurisdictions with public ownership registers (such as the United Kingdom), beneficial owners are provided advance notice of the public disclosure of their personal information. That advance notice should not be necessary if information is held confidentially and produced only in limited circumstances.

At the Federal level, since 2010 the Internal Revenue Service (“IRS”) has required every business that obtains an Employer Identification Number to submit IRS Form SS-4, which includes the name of a “responsible party” within the business—i.e., an individual who is able to “control, manage, or direct the entity and the disposition of its funds and assets.”

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In addition to the general privacy concerns regarding public databases outlined above, public access to beneficial ownership information could have a negative impact on legitimate commercial business interests, including:

- Competitors, investors, suppliers or consumers may decide not to do business with a particular company because of its beneficial owners or because the access to the information may disproportionately influence prices and other business terms.
- Public access to beneficial ownership information may compromise employee confidentiality in situations where equity interests are given as compensation.
- Proceedings parties may use this information to allege that others have or do not have an ownership interest in an entity, and this may conflict with or be confused with stock ledgers and other official records of company ownership.
- Compliance may be difficult where ownership can be created and transferred quickly and frequently.
- If the information is not confidential or is sought for other purposes, entities may be encouraged to run the risk of penalties for non-compliance. If information is collected and maintained confidentially and tailored for use with appropriate law enforcement purposes (e.g., pursuing money laundering, tax evasion and terrorist financing upon a proper showing), better compliance should be achieved.

Consistent with limiting access to beneficial ownership information to that necessary to achieve specific law enforcement and financial institution compliance objectives, beneficial ownership information should be excluded from state or territory law record inspection rights and statutory provisions providing for interrogatories by a secretary of state.

If, despite the principles adopted in this Resolution and the points set forth above, persons other than law enforcement and financial institutions are granted access to beneficial ownership information, that access should be subject to judicial oversight. In many states and territories, state and territorial law have a framework with procedural safeguards for granting inspection rights of information on ownership held by the business entity. If persons or entities other than law enforcement and financial institutions are granted access to applicable or appropriate beneficial ownership information, a similar framework should be adopted to ensure that a compelling need for the information is demonstrated before disclosure occurs. For example, the process should ensure that the beneficial ownership information is not being used for political lobbying or private litigation purposes. In addition, where there is a serious risk that production of beneficial ownership information could be used for intimidation or violence, a process for suppressing applicable or appropriate beneficial ownership information should be available.

**Principle 2: Appropriate Due Process Must be Provided**

Given the valid interests in maintaining the confidentiality of beneficial ownership

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**Principle 2: Appropriate Due Process Must be Provided**

Given the valid interests in maintaining the confidentiality of beneficial ownership
information, appropriate due process must be provided before any persons can gain access to beneficial ownership information.

Rather than maintaining beneficial ownership information in a centralized database at either the Federal or the state level, with attendant risks of unintended disclosure, the requirement should be a framework in which the information is collected and maintained at the entity level with obligations that it be produced promptly to law enforcement, but only in response to a valid subpoena, summons or warrant. Maintaining records of beneficial ownership information on a Federal or state level exposes that information to possible confidentiality breaches.

- Confidentiality may be compromised if beneficial ownership information is shared among government entities or used by financial institutions for unrelated purposes and may be further compromised if information is shared with foreign authorities in the context of international investigations.
- Confidentiality and data breaches are inevitable and expose beneficial owners to the risk of identity theft or fraud.7
- Freedom of Information Act ("FOIA") type access is particularly problematic at the state and territorial level where application and process are inconsistent.

Some argue that maintaining records of beneficial ownership information on a Federal or state level minimizes the risk that beneficial owners will be “tipped” when their information is produced by the responsible individual or records contact to law enforcement in response to a valid subpoena, summons or warrant. However, legislation or regulation could address that concern, including by providing civil or criminal penalties for such tipping.

**Principle 3: The Collection, Maintenance, and Verification of Applicable Responsible Individual, Beneficial Ownership, or Record Ownership Information Must Be an Obligation of the Entity**

The collection, maintenance and verification of information about responsible individuals and about beneficial or record ownership must be an entity obligation. Because the individuals who file formation documents to form entities often do not have ongoing access to information, they should not be relied upon or obligated to report beneficial ownership information.

Instead, the preferable approach is to require that each entity provide to a designated governmental authority or office (such as the secretary of state or similar governmental authorities in the context of international investigations. Confidentiality and data breaches are inevitable and expose beneficial owners to the risk of identity theft or fraud.7
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6 A report by the Treasury Inspector General for Tax Administration found that half of the IRS employees in a sample e-mailed personally identifiable information from tax returns in violation of IRS policy, including to external non-IRS e-mail accounts. In 2015, the IRS was reportedly subject to a cyber-attack in which hackers gained access to personal data from more than 700,000 taxpayer accounts. See also Massive IRS data breach much bigger than first thought, CBS, available at [https://www.cbsnews.com/news/irs-identity-theft-online-hackers-social-security-number-get-transcript/](https://www.cbsnews.com/news/irs-identity-theft-online-hackers-social-security-number-get-transcript/).
authority that regulates entity formation) the name and address of a responsible individual or records contact in the United States, who should be designated as such at the time of entity formation. This record contact must be an individual U.S. citizen who has agreed to provide beneficial ownership information in response to an appropriate request from an authorized recipient.

The entity should have access to all information required to be obtained by the responsible individual or records contact. So long as “beneficial owner” is defined in a clear and reasonable manner, the entity should be able to identify its beneficial owners. If a beneficial ownership definition is overly expansive (such as including vague language about persons who have “a substantial interest in” or receive “substantial economic benefits from” the assets of the entity), it would include persons whose information would not necessarily be known or within the control of the entity, thereby making it impossible for the entity to comply with the disclosure requirements. Therefore, any such overly broad definition would work at counter purpose to Principle 4 below and should be opposed.

As described below under Principle 7, any penalties should be reasonable and commensurate with the nature of the offense to create a rational incentive for compliance. Penalties on beneficial owners, including, for example, equity owner disenfranchisement and/or restrictions on the exercise of rights, are unnecessary if the entity has access to all information it is required to maintain.

Principle 4: Any Definition of and Reporting Threshold for Beneficial Ownership Must Be Clear, Reasonable, and Not Unduly Burdensome

The definition of beneficial ownership used in reporting beneficial ownership information must be clear enough so that entities can determine what information to collect and maintain. Previous U.S. proposals have included a vague and broad definition of beneficial ownership (for example, the "TITLE Act" (S. 1454), the "Corporate Transparency Act" (S. 1717 and H.R. 3089), and the original draft version of the "Counter Terrorism and Illicit Finance Act" (H.R. 6068), all introduced in the 115th Congress) or deferred to U.S. Treasury rulemaking to define beneficial ownership. A vague or ambiguous definition will subject entities to undue delay and expense in determining how to comply properly with requirements that are difficult to interpret. Alternatively, entities, especially small businesses or unsophisticated entities, may be confused by unclear requirements and may not be able to comply. While large entities may have the ability to bear the costs of compliance, most U.S. entities are small businesses or single purpose entities where the costs of gathering and maintaining information would be burdensome.

The objective of beneficial ownership reporting should be to identify at least one natural

8 Although Section 9 of the original draft version of the Counter Terrorism and Illicit Finance Act would have established beneficial ownership reporting requirements on certain businesses, that controversial section of the bill dealing with beneficial ownership was removed shortly before the legislation was formally introduced in the House on June 12, 2018 as H.R. 6068.

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person that law enforcement can contact and communicate with during an investigation. The initial point of inquiry should be a direct equity ownership inquiry to the entity’s records contact. If the initial point of inquiry does not yield the identity of a natural person, a second point of inquiry could look to control and identify a natural person who exercises ultimate effective control over the entity, which could include a governing person of the entity. For example, it would meet the spirit of this Principle to define an “applicable beneficial owner” as (i) each person with ownership or voting power of 25% or more of the entity, and (ii) if no person has ownership or voting power of 25% or more of the entity, a natural person who exercises effective control over the entity, which would include any natural person who governs the entity.

Recent Federal regulations have sought to achieve this objective of identifying at least one natural person. The Geographic Targeting Order issued by the Financial Crimes Enforcement Network (“FinCEN”)9 has a specific definition of beneficial ownership (“each individual who, directly or indirectly, owns 25% or more of the equity interests of the Purchaser”) that is tied to equity ownership. That method is consistent with the definition of beneficial ownership used in the FinCEN Customer Due Diligence Requirements for Financial Institutions final rule (the “FinCEN CDD Rule”),10 which applies a two-prong test. The first prong, known as the “ownership prong,” includes each individual who directly or indirectly owns 25% or more of the equity interests of an entity. The second prong, referred to as the “control prong,” includes a single individual with significant responsibility to control, manage, or direct an entity. The definition of beneficial ownership in a reporting regime should be no more burdensome than existing law under these Federal regulations.

The beneficial ownership reporting regime should strike the appropriate balance between the benefits of law enforcement having ready access to beneficial ownership information and the burdens on governments in collecting that information and on business entities in complying with the reporting regime.

Fraud and corruption targeted by disclosure of beneficial ownership information is concentrated in closely-held entities, not entities that are owned by numerous stock or interest-holders. Individuals who have assets to shelter, income to hide from tax authorities or other improper motives do not band together to form broadly-held entities in which others invest. Rather, individuals and organizations engaged in fraud, corruption or illicit activity financing tend to form entities that they control through other entities or front-people they control. For that reason, the focus of any disclosure regime should be on the information of each applicable beneficial owner. Spending resources to collect information that has no rational connection to the source of the fraud, tax evasion, and other illegal conduct that is a legitimate concern of law enforcement risks wasting resources and detracting from economic growth, and engenders skepticism about whether government is regulating wisely in the public interest. If a strong disclosure regime is put in place that focuses on the closely-held entities that are the vehicles

8 FinCEN is a bureau of the United States Department of the Treasury (the “U.S. Treasury”).


through which illegal conduct is conducted, law enforcement should benefit because regulators charged with overseeing and enforcing that regime will be better positioned to do it well.

In considering any beneficial ownership test, whether under the ownership or control prong, an aggregation concept should be considered in appropriate circumstances, such as where a person’s ownership has been allocated into portions that individually fall below the threshold.

**Principle 5: Information Concerning an Entity’s Responsible Individual, Beneficial Ownership, or Record Ownership, As Applicable, Should Only Be Available to: (i) Law Enforcement Agencies Promptly, But Only in Response to a Valid Subpoena, Summons, or Warrant; and (ii) Financial Institutions, But Only with the Consent of the Entity and Subject to Confidentiality Protections When Appropriate**

Law enforcement has a bona fide interest in being able to obtain beneficial ownership information promptly. Access to beneficial ownership information is a valuable component in pursuing persons engaged in money laundering, tax evasion, and terrorist financing. A proper showing (i.e., a subpoena, summons or warrant issued in accordance with the Fourth Amendment) validates the propriety of the law enforcement request for production of beneficial ownership information.

Although the goal of beneficial ownership reporting legislation or regulation should be to permit law enforcement to pursue those engaged in money laundering, tax evasion, and terrorist financing, financial institutions are subject to due diligence requirements under Federal, state, and territorial law that require them to collect the same (and in many cases more) information. Federal legislation or regulation could permit the beneficial ownership information to be made available to a financial institution upon a request made by a financial institution, with customer consent, as part of the institution’s compliance with applicable Federal, state, or territorial law. However, the information should only be shared with the financial institution if after obtaining customer consent, (i) the financial institution agrees to prevent the public disclosure of such beneficial ownership information and that it will not use such beneficial ownership information for any other purpose and (ii) such information is only made available to law enforcement upon the same proper showing that would be required for law enforcement to obtain that information from the records contact.

In assessing the costs and benefits of a regulatory system that balances legitimate privacy concerns and bona fide law enforcement needs, it should be presumed that those engaged in money laundering, tax evasion, and terrorist financing are unlikely to observe, much less comply with, the regulatory system.

While law enforcement needs are compelling and financial institutions’ compliance obligations are critical in supporting law enforcement, the public does not need to have the same access to the same beneficial ownership information; many states and through which illegal conduct is conducted, law enforcement should benefit because regulators charged with overseeing and enforcing that regime will be better positioned to do it well.

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While law enforcement needs are compelling and financial institutions’ compliance obligations are critical in supporting law enforcement, the public does not need to have the same access to the same beneficial ownership information; many states and
territories already provide for some level of specified information to be reported to state secretaries of state for certain entities (i.e., names and business addresses of directors and principal officers of corporations, managers of LLCs, and general partners of limited partnerships).

Reporting on governing persons should focus on identifying natural persons who have governing positions in an entity (including as controlling equity holders), giving law enforcement a human point of contact.

If, despite the points set forth above, persons other than law enforcement and financial institutions are able to obtain information on beneficial ownership, that ability should be subject to judicial oversight.

**Principle 6: All Types of Business Entity Structures, Including Corporations and Limited Liability Companies, Should Generally be Subject to the Same Requirements, With Appropriate Exemptions or Variations to Recognize Differences in Entity Forms, Risk Levels, Existing Regulatory Obligations, or Other Factors**

It is critical that the same general reporting standards be applicable to all types of business entity structures. In the United States, state and territorial law has traditionally governed entity formation and the internal affairs of legal entities. That should continue.

The basic elements of any new system of reporting beneficial ownership information will only be effective if those elements cover all forms of entities. Current reporting requirements and certain proposed new requirements, however, do not apply evenly to limited liability companies, limited partnerships, general partnerships, business trusts and other noncorporate alternative entities. As a result, for instance, reports by these entities to a secretary of state or other regulatory authorities do not necessarily identify a natural person having control. Limited liability companies may have no natural persons as members or managers, and only a minority of the states and territories require reporting of the members or managers. Limited partnerships may have no natural person general partners. General partnerships are not required to make any filings unless they elect to be limited liability partnerships or seek to file an assumed name.

The formation of alternative entities outpaces the formation of corporations by at least three to one. In Delaware, of 199,000 new business entities formed in 2017, 144,000 (72%) were LLCs, 42,000 (21%) were corporations, 12,000 (6%) were LPs/LLPs and 1,400 (less than 1%) were statutory trusts. In Pennsylvania and Maryland, the 2017 figures are even more skewed towards LLCs with 57,000 (Pennsylvania) and 46,000 (Maryland) LLCs formed and 7,000 (Pennsylvania) and 8,000 (Maryland) corporate charters filed. Kentucky and Nevada are similar with 24,000 (Kentucky) and 20,000 (Nevada) LLC formations in 2017 compared to 2,100 (Kentucky) and 4,400 (Nevada) corporate formations.

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business entities. Legislation or regulation should not undermine or overburden legitimate businesses with aggregate costs that far outweigh the benefits of the legislative intent. Based on these realities, any new reporting regime should be applied to all types of business entity structures.\(^1\) Partnerships and business trusts (whether statutory or common law), which, as a practical matter, are alternative forms of business entities, should be treated similarly to all other business entities.\(^2\) However, consistent with the ‘risk-based approach,’ legislation or regulations should provide appropriate exemptions or variations to recognize differences in entity forms, risk levels, existing regulatory obligations, or other relevant factors.

**Principle 7: Any Penalties for Noncompliance Must Be Calibrated to Reflect the Nature and Degree of the Noncompliance**

It is expected that legislation will include penalties for failure to comply with beneficial ownership information disclosure. Recent proposed Federal beneficial ownership disclosure legislation has included both civil and criminal penalties.

For example, the original version of the Counter Terrorism and Illicit Finance Act (H.R. 6068; 115\(^{\text{th}}\) Congress) would have imposed criminal penalties for both “knowing” and “willful” violations of its requirements:\(^3\)

- Knowledge generally relates to knowing the relevant facts, even if the actor was not aware that the action was illegal.
- Willful generally relates to the intent to do something that is illegal.

The Closing Loopholes Against Money-Laundering Practices (“CLAMP”) Act (S. 3268; 114\(^{\text{th}}\) Congress) would have imposed criminal penalties on anyone who “willfully” or “intentionally” attempts to evade its requirements:

\(^3\) Donative trusts, which are traditional estate planning and property-owning vehicles, but are not generally regarded as business entities or required to register with any state or territory, also should be separately considered.

\(^2\) The scope of entities covered under beneficial ownership reporting legislation could be similar to the scope of entities that are “registered organizations” under the Uniform Commercial Code, where a registered organization means “an organization organized solely under the law of a single State or the United States by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the State or the United States.” Regardless of the scope of entities covered, the coverage of general partnerships may be problematic due to the informal nature of their formation.

\(^1\) Under the original version of the draft Counter Terrorism and Illicit Finance Act, Section 9 of the bill provided that it is unlawful for a person (including an applicant to form a corporation or limited liability company) to knowingly provide or attempt to provide false or fraudulent beneficial ownership information, or willfully fail to provide complete or updated beneficial ownership information to FinCEN. However, Section 9 of the draft bill was removed shortly before the legislation was formally introduced in the House on June 12, 2018 as H.R. 6068.

(Note continued on following page.)
• “Intentional” conduct results in greater penalties; treats a pattern of failing to provide or update information as an intentional failure.

Criminal penalties include imprisonment for not more than three years.

The 2016 U.S. Treasury proposal discussed in Appendix II provided for civil penalties and no criminal penalties.

The FinCEN CDD Rule imposes criminal and civil penalties:

• Civil penalties are imposed for “willful” violations and may be imposed for “negligent” violations of its requirements.14

• Criminal penalties are imposed for both “knowing” and “willful” violations of its requirements.15

• Criminal penalties include imprisonment for not more than ten years.

Criminal penalties for “knowing” violations without knowledge that the action is illegal or that the information is false essentially criminalize failures of recordkeeping, particularly activities of closely-held entities conducting legitimate small business activities. Preventing this is a matter of economic justice and regulatory fairness. Failure to comply should only be a crime if there is “mens rea” – i.e., a willful attempt to evade the requirements or knowing provision of false information. Principles of due process may be violated if criminal penalties are imposed on the large numbers of unsophisticated small businesses that currently have difficulty understanding even basic record-keeping requirements, such as failing to file state annual reports. It is inappropriate to impose criminal liability for “knowing” violations where the rules are objectively vague or unclear.

Possible penalties for failure to collect, maintain and verify the information should be reasonable and commensurate with the nature of the offense, in order to create a rational incentive for compliance. Federal civil penalties would be applicable to any entity that, after appropriate due process, either fails to maintain records contact information or fails to provide the information that is required to be maintained. Administrative dissolution could also be imposed as a penalty. Federal criminal and/or civil penalties could be imposed for willful violations.

Penalties on beneficial owners, including, for example, equity owner disenfranchisement and/or restrictions on the exercise of rights, are not necessary if the entity has access to all information required to be maintained by the records contact. Placing obligations (and imposing the attendant penalties) on beneficial or record owners imposes costs on capital

14 Under the FinCEN CDD Rule, it is unlawful for a person to willfully violate any reporting requirements. For any failure to file a report required under § 1010.340 or for filing such with any material omission or misstatement, the Treasury Secretary may assess a civil penalty. For negligent violation of any requirement, the Treasury Secretary may assess a civil penalty.

15 The FinCEN CDD Rule also makes it unlawful for a person to knowingly make a false, fictitious or fraudulent statement or representation, or willfully violate any requirement under the rule.

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formation undertaken for legitimate purposes, including by creating significant compliance costs, and reduces the wealth creating potential of entities. Beneficial owners should only be subject to civil or criminal penalties for willful violations. Under the FinCEN CDD Rule, it is unlawful for a person to knowingly make false, fictitious or fraudulent statement or representation, or willfully violate any requirement under the rule.

Principle 8: Any New Requirements Must Not Undermine the Attorney-Client Privilege, the Confidentiality of Lawyer-Client Communications, or the Confidential Lawyer-Client Relationship

The fiduciary and confidential relationship between lawyers and their clients has long been appropriately subject to the regulatory authority of the states’ highest courts of appellate jurisdiction.

Subjecting lawyers to Federal AML and suspicious activity reporting (“SAR”) requirements in connection with entity formation undermines the attorney-client privilege, the confidential client-lawyer relationship, and traditional state court regulation of lawyers. Certain proposed Federal legislation would subject many lawyers and law firms to the AML and SAR requirements of the Bank Secrecy Act. If lawyers and law firms that assist clients in forming business entities would be considered “formation agents” (and hence a new category of “financial institution” under the Bank Secrecy Act), the proposed Federal legislation would make them subject to the strict AML and SAR requirements under the Bank Secrecy Act. This would undermine the attorney-client privilege, the confidential lawyer-client relationship, and traditional state court regulation of the legal profession. These SAR requirements would compel lawyers to report privileged or confidential client information to government authorities.

Requiring lawyers to report confidential client information to the government—under penalty of civil and criminal sanctions—is inconsistent with their ethical duties and obligations established by the highest courts of states and territories that license, regulate, and discipline lawyers. Imposing SAR requirements on lawyers directly undermines ABA Model Rule of Professional Conduct 1.6 dealing with “Confidentiality of Information” and with the many binding state and territory rules of professional conduct that closely track the ABA Model Rule.16 One of the narrow exceptions is the “crime-fraud exception”, which permits the disclosure of criminal activity if the client was in the process of committing or intended to commit a crime and the client communicated with the lawyer with intent to further the crime or fraud, or to cover it up.17

16 The ABA Model Rule states that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…” or unless one or more of the narrow exceptions listed in the Rule is present.

17 ABA Model Rule of Professional Conduct 1.6 provides that “a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary. . . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”

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As described above, it is expected that there will continue to be significant debate among many constituencies regarding proposals requiring the disclosure of beneficial ownership information for U.S. business entities, and the nature of any provisions ultimately considered cannot be accurately predicted at this time. Rather than attempting to address the provisions of particular proposals as they are introduced, this Resolution takes the approach of adopting a series of fundamental principles that any legislation or regulation must satisfy. This Resolution allows the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialog around those proposals.

Respectfully submitted,

William H. Clark, Jr.
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August 2019
CORE CONSIDERATIONS IN DEVELOPING LEGISLATION

The existing reporting framework in the United States supports the adoption of a Federal approach to disclosure of beneficial ownership information by all U.S. entities as the preferred approach to beneficial ownership reporting. This is the conclusion that the Financial Action Task Force ("FATF") reached in its December 2016 Fourth Mutual Evaluation Report (the "FATF Report") on anti-money laundering and counter-terrorist financing measures in the United States.

The FATF Report reviewed the framework for the formation of U.S. legal entities and the reporting of information by U.S. legal entities, noting that no adequate mechanisms are in place to ensure that identifying information of each "applicable beneficial owner" (as defined in accordance with the fundamental principles discussed in this Report) of each U.S. business entity (which we refer to herein as "beneficial ownership information") is obtained and available at a specified location in the U.S. or otherwise be determined in a timely manner by a competent authority. The FATF Report also reviewed the information collected by the IRS, including "responsible party" information, concluding that the definition of a responsible party is not consistent with the FATF definition of beneficial owner and that not all legal entities are required to obtain employer identification numbers ("EINs").

In concluding that the United States was non-compliant in its transparency as to the beneficial ownership of legal persons, the FATF Report said that the major gap is "the generally unsatisfactory measures for ensuring that there is adequate, accurate and updated information on beneficial ownership information that can be obtained or accessed by competent authorities in a timely manner." After analyzing the Federal and state reporting framework in the United States, the FATF Report concluded that steps should be taken to "ensure that adequate, accurate and current beneficial ownership information of U.S. legal persons is available to competent authorities in a timely manner, by requiring that such information is obtained at the Federal level."

Federal legislation could be adopted to require that "adequate, accurate and current beneficial ownership information of U.S. legal persons is available to competent authorities in a timely manner" by mandating either a Federal system or a uniform state collection system (that could be appropriately augmented). Federal legislation has the advantage of establishing uniform requirements (similar to IRS reporting) and efficiency of enforcement by law enforcement authorities, but the availability of information may lag entity formation and access may be subject to political pressures. Although state level identification could impose reporting at the time of entity formation, many states lack the financial and personnel resources to enforce any reporting system. The use of state systems may also introduce incongruent variations in the

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information reported and maintained. A Federal regime eliminates the potential hurdle and delay of conducting inquiries on a state-by-state basis.

Without advocating for the adoption of a particular legislative or regulatory approach, either a Federal system or a state system adopted under uniform Federal legislation could provide that:

- Each entity must provide to a designated governmental authority or office (such as the secretary of state or similar governmental authority that regulates entity formation) the name and address of a records contact\(^\text{18}\) in the United States, who should be designated as such at the time of entity formation and who must be an individual U.S. citizen who has agreed to provide beneficial ownership information in response to an appropriate request from an authorized recipient. Only the name and address of the records contact would be reported to the authorized recipient; no other personal identification would be required.
- The records contact would maintain the following information (which is referred to herein as "beneficial ownership information"):\(^\text{19}\)
  - The name and address of each "applicable beneficial owner" (as defined in accordance with the fundamental principles discussed in this Report).
  - For each applicable beneficial owner that is not a natural person, (i) the jurisdiction under which each such beneficial owner was formed, and (ii) the name and address of a natural person who has access to such beneficial owner's records.
  - For each applicable beneficial owner that is not resident in the United States, the name and address of a natural person resident in the United States who has access to such beneficial owner's records (including for each applicable non-U.S. beneficial owner that is not a natural person, the name of each record owner of such beneficial owner).
- The definition of applicable beneficial owner must be clear across all business forms so that entities can determine what information to collect and maintain.
- The information maintained by the records contact should be updated promptly (at least annually).
- The beneficial ownership information would be made available by the records contact only to specified recipients upon a proper showing.
- Federal civil penalties would be applicable to any entity that, after appropriate due process, fails either to maintain a records contact or to produce the information that the records contact is required to maintain.

\(^{16}\) Although the FATF Report concluded that the definition of "responsible party" in the IRS rules is not consistent with the FATF definition of "beneficial owner" and that not all legal entities are required to obtain an EIN, Federal legislation could amend the relevant IRS rules to implement the "records contact" framework and, as proposed in the CLAMP Act, require that every United States entity obtain and have an EIN.

\(^{17}\) The information maintained by the records contact would supplement any fiduciary information otherwise provided on an annual or other periodic basis to the appropriate state official.

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\(^{19}\) The information maintained by the records contact would supplement any fiduciary information otherwise provided on an annual or other periodic basis to the appropriate state official.
Federal criminal and/or civil penalties could be imposed for willful violations.

Given the regulatory regime and transparency rules to which they are already subject, and for the reasons explained above, public entities (i.e., entities with common equity securities registered under the Securities Exchange Act of 1934 (the “Exchange Act”)) and their controlled affiliates should be exempt from beneficial ownership disclosure requirements.

Certain business entities engaging in active businesses at a physical location also should be exempt from beneficial ownership disclosure requirements. For example, proposed Federal legislation has included an exemption for any entity with 20 or more full-time employees, over $5 million in “gross receipts” or sales, and an operating presence at a physical office within the United States. Consideration should be given to expanding the exemption to entities that have business operations at a physical office in the United States without regard to a minimum revenue or number of employees component.

The goal of the framework described above is “smart” enforcement where the compelling interests of law enforcement in having prompt access to a natural person who controls an entity are balanced against valid confidentiality interests and the burdens of compliance with reporting requirements, especially if the requirements are unreasonable or are not clear. The identification of a records contact (who is resident in the United States with access to the required beneficial ownership information) by all entities strikes this balance.

Broader measures, such as public registries, could infringe on valid confidentiality interests and may subject entities and individuals to penalties for not taking actions that would not be relevant to law enforcement. As a matter of enforcement, expanding the focus and increasing the amount of information actually benefits those who commit the illegal acts by diverting enforcement resources to the pursuit of record-keeping violations and validation of voluminous amounts of reported information. In addition, broader measures impose costs on capital formation, including by creating significant compliance costs, and reduce the wealth-creation potential of legitimate entities.
SUMMARY OF PREVIOUS U.S. PROPOSALS AND EXISTING INTERNATIONAL REQUIREMENTS

As a preliminary matter, previous legislative proposals considered in the United States and existing international requirements for reporting beneficial ownership information provide important context to the fundamental principles highlighted above and discussed below. Many of those legislative proposals and existing international requirements are summarized here.

**Uniform Law Enforcement Access to Entity Information Act (2009)**

- The Uniform Law Enforcement Access to Entity Information Act (the “ULEAEIA”) was drafted in 2009 by the Uniform Law Commission at the request of the National Association of Secretaries of State.
- The ULEAEIA provides a single statute that can be enacted by states to address the issues regarding availability of beneficial ownership information raised by the FATF in its recommendations, which include a recommendation that countries “ensure that there is adequate, accurate and timely information on beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities.”
- The Committees were represented on the drafting committee of the ULEAEIA and reviewed the ULEAEIA, and under the Uniform Laws Commission process, the views of the American Bar Association were formally solicited, and the House of Delegates of the American Bar Association approved a resolution supporting the ULEAEIA.
- The ULEAEIA has not been adopted by any state.
- The ULEAEIA requires each entity organized under the laws of a state to provide an entity information statement to the secretary of state of that state.
  - o Entities subject to the ULEAEIA would include corporations, limited liability companies, limited partnerships, cooperative associations, statutory trusts and any other entities authorized by the laws of the state.
  - o The entity information statement would include the name and address of a records contact of the entity.
- The duties of the records contact would include requesting from the entity its “beneficial ownership and control information” for each interest holder upon an appropriate request from a competent authority.
  - o “Beneficial ownership” information would have included holders of record and not the beneficial owners of the holders of record of the entity.
  - o An entity does not have a duty under the ULEAEIA to inquire as to who are the beneficial owners of the interests in the entity held by its interest holders of record.
- If an entity failed to materially comply with the ULEAEIA, the attorney general of the state could commence a proceeding to dissolve the entity.

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  - o An entity does not have a duty under the ULEAEIA to inquire as to who are the beneficial owners of the interests in the entity held by its interest holders of record.
- If an entity failed to materially comply with the ULEAEIA, the attorney general of the state could commence a proceeding to dissolve the entity.
The ULEAEIA stated that the records contact would not be liable for providing information or for an inaccuracy in or omission from the information provided, except for liability for recklessness, intentional misconduct or criminal conduct.

United Kingdom’s PSC Regulations Adopted in Response to the European Union’s (“EU’s”) Anti-Money Laundering Directive (2016)

In response to the EU’s Anti-Money Laundering Directive, the United Kingdom has adopted a national legislative framework for reporting beneficial ownership of companies and similar entities.

- All companies and similar entities, other than publicly traded entities, are required to maintain a registry of persons identified as controlling persons and provide the information on the registry to Companies House.
- Anyone may have access to the full registry, or obtain a copy of it upon payment of a nominal fee, by making written request stating their name, address and purpose for seeking the information.
- Under the UK regime, special rules apply to the disclosure and publication of residential addresses and dates of birth, and the public information that is extracted from the registry and disclosed on the Companies House website is a subset of the information maintained on the company’s registry.
- Failure to comply with the requirements of the UK PSC regime is a criminal offense and the entity and its directors may face fines, imprisonment or both.
  - Recognizing that entities may not always have the information required to comply with the PSC regime, the UK regulations require that notice be provided on anyone believed to have information that will help identify the PSCs.
  - Failure to respond to this notice is also a criminal offense.
  - Moreover, an individual or legal entity’s failure to respond to a company’s enquiries about registering gives the company the ability (without a court order) to impose restrictions on any shares held by them.


- Amends the Bank Secrecy Act to provide that the “Secretary may require any United States entity to maintain records and file reports on the beneficial owners of such entity.”
- A “United States entity” includes any entity that uses “any facility in interstate or foreign commerce . . . in its business activity.”
- Beneficial ownership is to be defined by the U.S. Treasury.

Under the UK PSC regime, a company may note on its PSC registry that a restriction has been issued on the shares. While that restriction is in place, neither the shares nor any interest in the shares can be transferred or sold and no payments can be received in respect of the shares. A company may also apply to a court to sell or transfer the restricted shares.

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A “United States entity” includes any entity that uses “any facility in interstate or foreign commerce . . . in its business activity.”

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Does not include provisions relating to the confidentiality of information that is reported.
Contemplates civil penalties only (no criminal penalties).

Closing Loopholes Against Money-Laundering Practices (“CLAMP”) Act (114th Congress; 2016)
- Introduced in the U.S. Senate in July 2016 as S. 3268 by Sen. Thomas Carper (D-DE) and referred to the Senate Finance Committee. Comparable legislation was not re-introduced in the 115th Congress.
- Amends the Internal Revenue Code to require that every “United States entity” obtain and have an employer identification number, or EIN, and to submit IRS Form SS-4, which includes the name of a “responsible party” within the business, i.e., and individual who is able to “control, manage, or direct the entity and the disposition of its funds and assets.”.
- A United States entity is “any business entity created or organized in the United States or under the law of the United States or a State, possession, or territory of the United States” other than exempt organizations under Section 501(a) of the Internal Revenue Code.
- Provides that certain taxpayer identification information including the name of the entity’s responsible party may be disclosed to Federal law enforcement agencies for use in anti-money laundering and counterterrorism prosecutions and investigations.
- In addition to civil penalties, includes criminal penalties for “willful” violations.

FinCEN Customer Due Diligence Requirements for Financial Institutions (the “FinCEN CDD Rule”) (2016)
- Issued in May 2016 with compliance required by May 2018.
- Intended to clarify and strengthen customer due diligence requirements under the Bank Secrecy Act.
- Covered financial institutions are banks, brokers or dealers in securities, mutual funds, and futures commission merchants and introducing brokers in commodities.
- Requires identification and verification of the identity of beneficial owners of legal entity customers when a new account is opened.
- In addition, requires maintenance of records of the beneficial ownership information obtained.
- Amends the Anti-Money-Laundering Program to “explicitly include risk-based procedures for conducting ongoing customer due diligence, to include understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile.”
  - Requires risk-based maintenance and update of customer information that is event-driven from normal monitoring procedures (change in beneficial ownership information requires updating).
- “Beneficial owner” is broadly defined by two prongs:
Each individual, if any, who directly or indirectly owns 25 percent of the equity interests of a legal entity customer ("ownership prong"); and
- a single individual with significant responsibility to control, manage, or direct a legal entity customer, including an executive officer or senior manager or any other individual who regularly performs similar functions. ("control prong").
- Under the rule, at least one individual must be identified under the control prong while zero to four individuals can be identified under the ownership prong.
- Covered financial institutions may be liable for civil or criminal penalties for violating the rule.

**FinCEN Geographic Targeting Order (2016)**
- Issued in July 2016 and extended numerous times, most recently in November 2018 through May 2019.
- Intended to carry out the purposes of the Bank Secrecy Act.
- Requires title insurance companies to collect and report beneficial ownership information of entities purchasing residential real property in identified markets (i.e., New York City, Southern Florida, California, Honolulu, Las Vegas, Seattle, Boston, Chicago, Dallas and San Antonio) if the purchase is made without a bank loan or other similar form of external financing.
- The entity must report information about the identity of each beneficial owner of the entity and must collect information (driver’s license, passport or similar identifying information) about the individual “primarily responsible for representing” the purchaser.
- "Beneficial owner" is narrowly defined to mean “each individual who, directly or indirectly, owns 25% or more of the equity interests” of the Purchaser.
- The title insurance company may be liable for civil or criminal penalties for violating the order.

**Counter Terrorism and Illicit Finance Act (115th Congress; 2017)**
- Section 9 of the original unnumbered draft bill would require small corporations and limited liability companies (LLCs) and many of their lawyers to submit extensive information about the companies’ beneficial owners to the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) and would require FinCEN to disclose the information to many other federal and foreign governmental agencies and financial institutions upon request.
- The definition of beneficial ownership in Section 9 of the draft bill is broad and vague:
  - As defined, beneficial owner includes any natural person who directly or indirectly (a) "exercises substantial control over", (b) owns 25% or more of the equity interests of or (c) "receives substantial economic benefits

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- The definition of beneficial ownership in Section 9 of the draft bill is broad and vague:
  - As defined, beneficial owner includes any natural person who directly or indirectly (a) "exercises substantial control over", (b) owns 25% or more of the equity interests of or (c) "receives substantial economic benefits
from the assets of a corporation or limited liability company.

- Minor children, creditors, and persons acting solely as employees are excluded from the definition of beneficial owner.
- Section 9 of the draft bill would impose the initial obligation to provide beneficial ownership information on "each applicant to form a corporation or limited liability company" and penalizes applicants for "knowingly" providing false or fraudulent beneficial ownership information or "willingly" failing to provide complete beneficial ownership information.
- Also requires that the corporation or limited liability company update the beneficial ownership information within 60 days after any change in the information provided and otherwise annually.
- Various corporations and limited liability companies are excluded from the reporting requirements, including most significantly:
  - An issuer of a class of securities registered under the Exchange Act or an entity that is required to file reports under the Exchange Act;
  - Regulated entities, including banks, bank holding companies, broker-dealers, insurance companies and public utilities;
  - An entity with (i) 20 or more full-time employees, (ii) over $5 million in "gross receipts" or sales and (iii) "an operating presence at a physical office within the United States"; and
  - A corporation or limited liability company that is "formed and owned by an entity" that is not required to be subject to the reporting requirements.
- Section 9 of the draft bill would require beneficial ownership information is to be provided in response to:
  - a criminal subpoena from a Federal agency;
  - a request made by a Federal agency on behalf of a law enforcement agency of another country (provided that such other country agrees to prevent the public disclosure of such beneficial ownership information or use it for another purpose); or
  - a request made by a financial institution, with customer consent, as part of the institution’s compliance with due diligence requirements under the Bank Secrecy Act, the PATRIOT Act or other applicable Federal or state law.
- Penalties under Section 9 include civil fines and criminal fines and imprisonment for not more than three years.
- On November 29, 2017, a joint hearing to discuss the draft bill was held by the House Financial Services Subcommittees on Financial Institutions & Consumer Credit and Terrorism & Illicit Finance.
- On June 12, 2018, Reps. Steve Pearce (R-NM) and Blaine Luetkemeyer (R-MO) introduced a revised version of the bill as H.R. 6068 that did not include Section 9 of the original draft bill dealing with beneficial ownership reporting. H.R. 6068 was referred to the House Financial Services Committee, but there was no further action on the bill during the 115th Congress.

TITLE Act (115th Congress; 2017)
Introduced in the Senate by Sen. Sheldon Whitehouse (D-RI) as S. 1454.
Would require states, small businesses, and those businesses’ lawyers to gather and maintain extensive beneficial ownership information on the new corporations and limited liability companies they help create and make the information available to Federal law enforcement authorities.
Also contains provisions that would regulate many lawyers and law firms as “formation agents” (and hence “financial institutions”) under the Bank Secrecy Act and subject them to the Act’s AML and SAR requirements when they help clients establish new companies.
The definition of “beneficial owner” is vague, overly broad, and unworkable. It includes every natural person who directly or indirectly exercises “substantial control” over the company or who has a “substantial interest” in or receives “substantial economic benefits” from the assets of the company, subject to several exceptions.
Because the beneficial ownership definition is so expansive and unclear and would cover many individuals whose personal information is not even within the knowledge or control of the businesses or their lawyers, it would be almost impossible for many of them to comply with the bill’s disclosure requirements.
The bill would impose a civil penalty and authorized criminal penalties—including fines, prison terms up to three years, or both—for providing false or fraudulent beneficial ownership information or for willfully failing to provide complete or updated beneficial ownership information.
S. 1454 was referred to the Senate Judiciary Committee, but there was no further action on the bill during the 115th Congress.

Corporate Transparency Act (115th Congress; 2017)

Would require small businesses and those businesses’ lawyers to gather and maintain extensive beneficial ownership information on the new corporations and limited liability companies they help create and make the information available to Federal law enforcement authorities.
Also contains provisions that would regulate many lawyers and law firms as “formation agents” (and hence “financial institutions”) under the Bank Secrecy Act and subject them to the Act’s AML and SAR requirements when they help clients establish new companies.
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The bill would impose a civil penalty and authorized criminal penalties—including fines, prison terms up to three years, or both—for providing false or fraudulent beneficial ownership information or for willfully failing to provide complete or updated beneficial ownership information.
S. 1454 was referred to the Senate Judiciary Committee, but there was no further action on the bill during the 115th Congress.
The bill would impose a civil penalty and authorized criminal penalties—including fines, prison terms up to three years, or both—for providing false or fraudulent beneficial ownership information or for willfully failing to provide complete or updated beneficial ownership information.

S. 1717 was referred to the Senate Banking, Housing, and Urban Affairs Committee and H.R. 3089 was referred to the House Financial Services Committee, but there was no further action on either bill during the 115th Congress.


- EU Member States are required to maintain a central register of beneficial ownership information for corporate and other legal entities.
- EU Member States should ensure that registers of ultimate beneficial owners of companies and other legal entities become accessible to the general public (but not the register of ultimate beneficial owners of trusts, which will still require demonstration of a legitimate interest).
- Under the EU’s Fifth Anti-Money Laundering Directive, EU Member States may, in exceptional cases, deny access to the central register where such access would expose beneficial owners to disproportionate risks, to risks regarding fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or if the beneficial owner is a minor or otherwise legally incapable.
1. Summary of Resolution.

This Resolution provides that the American Bar Association supports reasonable and necessary measures to detect and combat money laundering and terrorist financing. This Resolution also supports legislation and related regulations that would require every domestic business entity to designate either (i) a responsible individual who significantly participates in the control or management of the entity or (ii) a records contact individual with responsibility for obtaining, maintaining, and taking reasonable measures to verify applicable beneficial or record ownership information for the entity, or both, and then provide law enforcement agencies with timely access to information regarding the entity’s responsible individual, beneficial ownership, and/or record ownership in response to a valid subpoena, summons, or warrant. Further, this Resolution provides that any legislation and related regulations to detect and combat money laundering and terrorist financing must be consistent with the eight fundamental principles outlined in this Resolution.

2. Approval by Submitting Entity.

This Resolution was approved by (i) the Task Force on Gatekeeper Regulation and the Profession on April 10, 2019, (ii) the Business Law Section on March 30, 2019, and (iii) the Section of Real Property, Trust & Estate Law on April 10, 2019.

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

This Resolution is to update and supplement Resolutions 03M104 and 08A300. Resolution 03M104 was adopted by the ABA House of Delegates at its Midyear Meeting in 2003, and Resolution 08A300 was adopted by the ABA at its Annual Meeting in 2008. Neither this Resolution nor a similar resolution has been submitted previously to the House of Delegates or the Board of Governors since the adoption of Resolution 08A300.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
At its Midyear Meeting in 2003, the ABA adopted Resolution 03M104 in response to efforts by the FATF to develop and promote anti-money laundering policies at the national and international levels, including potential new lawyer obligations that could undermine the confidential lawyer-client relationship. Subsequently, at its Annual Meeting in 2008, the ABA adopted Resolution 08A300. Resolution 08A300 was adopted in response to legislation that had been introduced in Congress that would have required those who form business entities to document, verify, and make available to law enforcement authorities the record and beneficial ownership of those business entities. Resolution 08A300 also urged that the regulation of those involved in the formation of business entities should remain a matter of state and territorial law and urged Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities and to defer to the states and territories.

That proposed 2008 legislation was not enacted, but since 2008 there have been a variety of proposals requiring the disclosure of certain identifying information for certain owners of U.S. business entities. As a result of Resolutions 03M104 and 08A300, the ABA has opposed all Federal legislation requiring the disclosure of beneficial ownership information for U.S. business entities.

This Resolution is to update and supplement Resolutions 03M104 and 08A300, and other existing ABA policies. It is expected that there will continue to be significant debate among many constituencies regarding proposals requiring the disclosure of ownership information for certain owners of U.S. business entities (which ownership information is hereinafter referred to as "beneficial ownership information") and which owners are hereinafter referred to as "applicable beneficial owners"), and the nature of any provisions ultimately considered cannot be accurately predicted at this time. Rather than attempting to address the provisions of particular proposals as they are introduced, this Resolution takes the approach of adopting a series of fundamental principles that any legislation or regulation must satisfy while preserving a degree of flexibility in the application of those principles to particular proposals. Those fundamental principles are described in this Report. This Resolution allows the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialog around those proposals.

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

N/A


The 115th Congress considered but declined to enact several AML bills, including the "TITLE Act" (S. 1454, sponsored by Sen. Sheldon Whitehouse, (D-RI)); the "Corporate Transparency Act" (S. 1717, sponsored by Sen. Ron Wyden, (D-OR), and H.R. 3089, sponsored by Rep. Carolyn Maloney, (D-NY)); and the original version of the "Counter Terrorism and Illicit Finance Act" (H.R. 6068, sponsored by Reps. Steve Pearce (R-NM))

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and Blaine Luetkemeyer (R-MO)). Each of these measures would have required small businesses, those businesses’ lawyers, and states (TITLE Act only) to gather and maintain extensive beneficial ownership information on the new corporations and limited liability companies they help create and make the information available to various types of government agencies and to financial institutions. The TITLE Act and the Corporate Transparency Act also contained provisions that would have regulated many lawyers and law firms as “formation agents” (and hence, “financial institutions”) under the Bank Secrecy Act and subjected them to the Act’s AML and SAR requirements when they help clients establish new companies.

S. 1454 was referred to the Senate Judiciary Committee. S. 1717 was referred to the Senate Banking, Housing, and Urban Affairs Committee, and H.R. 3089 and H.R. 6068 were referred to the House Financial Services Committee. Although the House Financial Services Committee held a hearing on the Counter Terrorism and Illicit Finance Act in November 2017 and the Senate Judiciary Committee held a similar hearing on beneficial ownership legislation in general, there was no further action on any of these four bills during the 115th Congress.

On March 13, 2019, the House Financial Services Subcommittee on National Security, International Development and Monetary Policy held a hearing titled “Promoting Corporate Transparency: Examining Legislative Proposals to Detect and Deter Financial Crime.” At that hearing, Rep. Carolyn Maloney (D-NY) discussed the latest draft of the “Corporate Transparency Act,” which she said she planned to introduce during the 116th Congress. On May 3, 2019, Rep. Maloney formally introduced the Corporate Transparency Act as H.R. 2513. The House Financial Services Committee began to mark up a substitute version of the bill on May 8, 2019 but the markup was postponed until the Committee’s next scheduled markup in June 2019. Prior to the May 8 markup, the ABA sent a new letter21 to the Committee expressing concerns over the legislation and urging all Members of the Committee to oppose it. It is also expected that legislation similar to the other bills described above will be re-introduced in the 116th Congress.

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

If the proposed Resolution is adopted by the House of Delegates, the ABA will engage in constructive dialogue with the sponsors of the leading beneficial ownership reporting bills and will likely submit new letters or testimony to Congress in an effort to implement the principles outlined in the Resolution.

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

If the proposed Resolution is adopted by the House of Delegates, the ABA will engage in constructive dialogue with the sponsors of the leading beneficial ownership reporting bills and will likely submit new letters or testimony to Congress in an effort to implement the principles outlined in the Resolution.

21 The ABA’s letter to the House Financial Services Committee expressing concerns over H.R. 2513 is available at https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2019may6-letteronfscopposinghr2513substitutebill.pdf.
This Resolution does not commit the ABA to incur any direct or indirect costs. The proposed implementation will allow the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialog around those proposals. The direct or indirect costs of being involved in that dialogue are in the discretion of the ABA and are not currently estimable.


None.

10. Referrals.

In addition to the ABA entities referenced in item 2, the Resolution has been referred to the Criminal Justice Section (which subsequently agreed to become a co-sponsor) and the Standing Committee on Ethics and Professional Responsibility.

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

William H. Clark, Jr.
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One Logan Square, Ste. 2000
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T: 215.988.2804
E: William.Clark@dbr.com

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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T: 410.244.7772
M: 443.889.7712
E: KLShepherd@Venable.com
1. Summary of Resolution.

This Resolution provides that the American Bar Association supports reasonable and necessary measures to detect and combat money laundering and terrorist financing. This Resolution also supports legislation and related regulations that would require every domestic business entity to designate either (i) a responsible individual who significantly participates in the control or management of the entity or (ii) a records contact individual with responsibility for obtaining, maintaining, and taking reasonable measures to verify applicable beneficial or record ownership information for the entity, or both, and then provide law enforcement agencies with timely access to information regarding the entity’s responsible individual, beneficial ownership, and/or record ownership in response to a valid subpoena, summons, or warrant. Further, this Resolution provides that any legislation and related regulations to detect and combat money laundering and terrorist financing must be consistent with the eight fundamental principles outlined in this Resolution.

2. Summary of the issue which the Resolution addresses.

At its 2003 Midyear Meeting and 2008 Annual Meeting, the ABA adopted Resolutions 03M104 and 08A300, respectively. Resolution 03M104 was adopted in response to efforts by the FATF to develop and promote AML policies at the national and international levels, including potential new lawyer obligations that could undermine the confidential lawyer-client relationship. Resolution 08A300 was adopted in response to legislation that had been introduced in the United States Congress that would have required those who form business entities to document, verify, and make available to law enforcement authorities the record and beneficial ownership of those business entities. Resolution 08A300 also urged that the regulation of those involved in the formation of business entities should remain a matter of state and territorial law and urged Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities and to defer to the states and territories.

That proposed 2008 legislation was not enacted, but since 2008 there have been a variety of proposals requiring the disclosure of certain identifying information for certain owners of U.S. business entities. As a result of Resolutions 03M104 and 08A300, the ABA has opposed all Federal legislation requiring the disclosure of beneficial ownership information for U.S. business entities.

3. An explanation of how the proposed policy position will address the issue.

This Resolution is to update and supplement Resolutions 03M104 and 08A300, and other existing ABA policies. It is expected that there will continue to be significant debate among many constituencies regarding proposals requiring the disclosure of information concerning the beneficial owners of U.S. business entities, and the nature of the provisions ultimately adopted (if any) cannot be accurately predicted at this time. Rather
than attempting to address the provisions of particular proposals as they are introduced, this Resolution takes the approach of adopting a series of fundamental principles that any legislation or regulation must satisfy while preserving a degree of flexibility in the application of those principles to particular proposals. Those fundamental principles are described in this Report. This Resolution allows the ABA to respond as appropriate to future legislative and regulatory proposals and will enable the ABA to engage in constructive dialog around those proposals.

4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.

Although the proponents of this Resolution are not aware of formal opposition to the Resolution, the National District Attorneys Association has expressed concerns regarding the subpoena, summons, or warrant requirements contained in the Resolution.
RESOLVED, That the American Bar Association urges the United States and other countries to take measures in response to any crimes committed against the Rohingya by the Burmese military. Specifically:

1) The U.S. Secretary of State should make a public determination on crimes committed against the Rohingya;

2) The United States should impose targeted sanctions against Burmese military (known as Tatmadaw) officials under the Global Magnitsky Human Rights Accountability Act ("Global Magnitsky Act") and the Tom Lantos Block Burmese JADE (Junta’s Anti-Democratic Efforts) Act ("JADE Act"), and the U.S. Secretary of State should designate Tatmadaw officials under the Department of State, Foreign Operations, and Related Programs Appropriations Act of 2019 ("Appropriations Act");

3) The United States should invoke tools of economic pressure to demand access for humanitarian aid in the Rakhine State and an end to serious human rights against the Rohingya and other minority groups;

4) The United Nations Security Council should refer the crimes committed by Burma – including suspected genocide, crimes against humanity, and war crimes – to the International Criminal Court and the United States should signal its support for such a referral;

5) The United States should continue to provide humanitarian aid to support needs on the ground in Bangladesh as well as particular challenges of children and women and girls, and encourage other countries to do the same;

6) The United States and other countries should engage with the Government of Bangladesh to remove barriers and inefficiencies in relation to providing humanitarian assistance; and

7) The United States and other countries should help ensure that repatriation of the Rohingya is safe, voluntary, and dignified; and that repatriation agreements consider views of the Rohingya and human rights protections, including the recommendations of the Rakhine Advisory Commission prior to repatriation.
I. The Atrocities Against the Rohingya Merit a Response on Moral as Well as National and Regional Security Grounds

Over a million Rohingya Muslims live, or until recently did live, in Burma. They have constituted a minority of the Burmese population for centuries, with a long history of being persecuted by Burma’s Buddhist majority.

In late 2016, in response to attacks by a group of Rohingya militants on three police outposts that killed nine police officers, according to a Southeast Asia-based human rights organization, Fortify Rights, the Tatmadaw attacked “Rohingya civilians in approximately 40 villages in Maungdaw Township, displacing more than 94,000 civilians” and destroying over 1,200 homes in Rohingya villages. In 2017, the persecution of the Rohingya accelerated. The Tatmadaw and local Buddhist extremists looted and burned Rohingya villages, engaged in mass killings of civilians, gang-raped Rohingya women and girls, and forced the wide-spread displacement of Rohingyas. As a result, over 700,000 Rohingyas have fled or been driven out of Rakhine State and have taken shelter in neighboring Bangladesh as refugees. At least 9,400 Rohingyas have died, and 6,700 deaths were caused by violence.

The September 2018 survey report by the U.S. State Department ("State Department Report"), which was based on ‘firsthand experiences of 1,024 Rohingya refugees’ found that the violence in Rakhine State was “extreme, large-scale, widespread, and seemingly geared toward both terrorizing the population and driving out the Rohingya residents.” It also found that the violence was largely perpetrated by Burmese security officials. In

9 Id. at 2, 5.
addition, the August 2018 UN Report of the Independent International Fact-Finding Mission on Myanmar ("UN Report" or "UN Fact Finding Mission"), which was based on 875 in-depth interviews, concluded that there are "reasonable grounds" to investigate and prosecute "senior officials in the Tatmadaw chain of command" for genocide, and that the Tatmadaw has committed crimes against humanity and war crimes. An investigative report by Fortify Rights reached the same conclusion. In the fall of 2017, then-Secretary of State Rex Tillerson referred to the atrocities as "ethnic cleansing".

In January 2019, Senator Merkley (D-OR) introduced a resolution expressing the sense of the Senate that the Governments of Burma and Bangladesh ensure the safe, dignified, voluntary, and sustainable return of Rohingyas who have been displaced by the campaign of ethnic cleansing conducted by the Burmese military. In November 2018, Senators Cardin (D-MD) and Young (R-IN) introduced the Burma Human Rights and Freedom Act of 2018, which would, inter alia, prohibit certain military cooperation with the Burmese military until the U.S. Government can certify that the "Burmese military has demonstrated significant progress in abiding by international human rights standards and is undertaking meaningful and significant security sector reform", authorize humanitarian assistance and support for voluntary resettlement or repatriation efforts, and require the President to determine whether to sanction individuals determined to have "knowingly played a direct and significant role in the commission of human rights violations in Burma".

In 1948, following the Holocaust, the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention" or "Convention"), making genocide a crime under international law. The United States ratified the Convention in November 1988. In spite of the Genocide Convention and the associated spirit of "never again", "genocide and mass atrocities have been perpetrated again and again, often with impunity." Following the tragedies in Rwanda and the Balkans, in 2005, UN Member States endorsed the principle of "responsibility to...
R2P provides that if a State is unwilling or unable to protect its people from genocide, war crimes, ethnic cleansing and crimes against humanity, the international community should step in to do so.19

In this case, the Burmese Government has failed to meet its “responsibility to protect” obligations. According to the UN Report, the State Counselor, Daw Aung San Suu Kyi, “has not used her de facto position as Head of Government, nor her moral authority, to stem or prevent the unfolding events, or seek alternative avenues to meet Burma’s responsibility to protect its civilian population.”20 To the contrary, “the civilian authorities have spread false narratives; denied the Tatmadaw’s wrongdoing; blocked independent investigations, including of the UN Fact-Finding Mission; and overseen destruction of evidence.”21 In addition, despite appeals from UN bodies, the Government of Burma failed to provide official responses to the UN’s requests for information22 and denied the allegations in the UN Report.23 Notably, while the Government had the opportunity to comment on the UN Report prior to its release, it failed to do so, reasonably implying that it is unable to refute its findings or is apathetic towards the process or the findings.

Given the Burmese Government’s failure to protect the Rohingya, the international community, including the United States, is called upon to act under the R2P principle. While the moral reasons for stopping genocide or ethnic cleansing are obvious and sufficiently compelling, we also have geopolitical, foreign policy-based reasons at stake.

Promoting democracy and human rights throughout the world are fundamental objectives of U.S. foreign policy. Burma is no exception. Indeed, the U.S. previously imposed sanctions on Burma because of concerns regarding democracy and human rights.24 From 1997 to 2016, the U.S. imposed broad economic sanctions on Burma, including a general prohibition on new investment by U.S. persons, a general prohibition on new investment in Burma and determining that “the Government of Burma has committed large-scale repression of the democratic opposition in Burma after Sept [30, 1990, and... the actions and policies of the Government... constitute an unusual and extraordinary threat to the national security and foreign policy of the United States... Based on the continuation of the same circumstances, President Bush continued and extended sanctions, including blocking property subject to U.S. control of certain Burmese government officials. E.O. No. 13310, 68 F.R. 44853 (July 28, 2003). President Obama initially continued sanctions again, citing to the repression of democracy, as well Burma’s “military trade with North Korea” and “human rights abuses... particularly in ethnic areas.” Executive Order No. 13619, 77 F.R. 42423 (July 11, 2012).
on exports of Burmese origin, and targeted sanctions on junta cronies and other actors in Burma. The Obama Administration maintained reporting requirements for new imports of jade and rubies even once it began easing sanctions in 2013. In 2016, the Obama Administration ended these sanctions, citing “Burma’s substantial advances to promote democracy, including historic elections in November 2015…and greater enjoyment of human rights and fundamental freedoms, including freedom of expression and freedom of association and peaceful assembly.”

Since then, however, “disturbing trends have emerged” in relation to the issues of “democratic space and the enjoyment of rights and freedom of expression, association and peaceful assembly.” Specifically, the UN Report noted that the Burmese authorities “use various laws to arrest, detain or harass civil society actors, journalists, lawyers and human rights defenders who express critical views.”

As the executive orders on sanctions make clear, assaults on democracy and human rights in Burma are a “threat to the national security and foreign policy of the United States.” This Administration has also identified the right to religious freedom as a “top priority” of the United States. At the first annual July 2018 Ministerial to Advance Religious Freedom at the State Department, the U.S., along with other countries, expressed “deep concern[s]” regarding the “shocking and brutal violence” against the Rohingya by Burmese security forces. These foreign policy goals – promoting democracy, regional and national security, human rights, and religious freedom – are undermined by our silence or failure to take strong action in the face of the grave abuses suffered by the Rohingya.

These policies are rooted in part in U.S. national security considerations. States or actors that commit atrocities with impunity against one group tend to target other groups. In the case of Burma – a country with a number of ethnic minorities – these issues are particularly acute. Indeed, the Burmese military enjoys a long history of impunity. Fighting between the military and ethnic armed groups, marked by attacks on civilians, has left some 100,000 people displaced in northern Burma since 2011. In May 2018, following the Tatmadaw-driven Rohingya exodus, the Tatmadaw launched an offensive against the Rohingya by Burmese security forces. These foreign policy goals – promoting democracy, regional and national security, human rights, and religious freedom – are undermined by our silence or failure to take strong action in the face of the grave abuses suffered by the Rohingya.

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targeting the Kachin, a Christian minority in the country.33 A researcher for Human Rights Watch noted that the “international community’s failure to punish the military for reported abuses against the Rohingya…has encouraged the military to step up action against other groups.”34 Approximately 7,500 Kachin residents have been displaced as a result.36 Both the U.S. and China have called for an end to the violence.36

In addition, refugees and those who are victimized by genocide or abandoned are particularly prone to human trafficking and at risk of being radicalized.37 According to the UN Migration Agency, thousands of Rohingya are at-risk of human trafficking,38 leading to an increase in slave labor in the region, and in turn, a further breakdown of the rule of law and instability. Indeed, following the UN Report, the Foreign Minister of Malaysia issued a strong statement, stating that “the widespread movement of the Rohingyas creates instability in the region, and could easily become a rallying-call for violent extremism in the region.”39 In light of the “deep implications” for “Malaysia and the region”, he stated that “Malaysia cannot be silent, or ignore the Rohingya crisis.”40 Indeed, according to experts, the “repression and marginalization” of the Rohingya by a “powerful government largely consisting of leaders from another religion present a potential, transnational flashpoint for Jihadi-Salafi organizations.”41 Additionally, roughly half of Rohingya refugees are children and youth who are stateless and have no access to formal education or jobs,42 making them targets for radicalization.

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governance, anti-trafficking, and nuclear non-proliferation.44 As such, the U.S. is the “predominant security ally of most nations” in ASEAN.43 From an economic standpoint, U.S. direct investment in ASEAN totaled $274 billion, more than its investment in China, India, Japan, and South Korea combined.45 Instability in the region would impede investor protections, as well as the advancement of our strategic interests with ASEAN.

Finally, from a long-term perspective, applying a carrot and stick approach, with the carrot being linked to progress on human rights issues, can help the U.S. and our allies counter China’s growing influence in the region. China is a leading investor in Burma. For example, in November 2018, China and Burma agreed to develop a multi-billion dollar deep sea port in Kyaukpyu on the coast of the Bay of Bengal, the third port in the region with the other two in Pakistan and Sri Lanka,44 which the Sri Lankan government handed over to China along with 15,000 acres of surrounding land because the former was unable to pay debts owed to China.45 In this case, there is a real concern that China could gain a “dangerous level of economic leverage” over Burma due to the accumulation of a significant amount of Chinese debt.46 These very concerns led Burma to scale back the size of the project.47 In fact, Burma has long had concerns about China’s economic leverage over the country.51 Based on our experience and according to experts, “[o]ne of the driving factors behind Myanmar’s decision to move toward civilian government in 2010-2011 was worry about overreliance on China amid Japanese and Western sanctions.”52 This demonstrates that Western sanctions have provided a powerful tool to incentivize changes in behavior in Burma.

Today, while the previously imposed sanctions have been lifted, Burma’s attempts to reduce reliance on China are becoming difficult in the face of declines in investment by the U.S. and Western governments due to the Burmese military’s treatment of

47 For example, in 2011, Myanmar suspended work on the Myitsone dam, a $3.6 billion Chinese-financed project that was to send 90% of its electricity back to China, after strong local opposition to plans to displace villagers. See id.
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Rohingyas.55 Imposition of targeted sanctions and threats of re-imposition of broad sanctions would solidify the issue of overreliance on China for the Burmese government. This would incentivize the Burmese Government and military officials to take tangible measures to change behavior in order to ease the sanctions and advance its interests in attracting diverse sources of foreign investment. In turn, these measures would advance our interests in countering China’s growing influence in the region.

For all these reasons, we urge the United States to take the steps detailed below in response to the Rohingya refugee crisis.

II. The U.S. Secretary of State Should Make a Public Determination on Crimes Committed Against the Rohingyas

On the basis of extensive investigative reporting already conducted by the United States (and corroborated by the UN and non-governmental organizations (“NGOs”), the Secretary of State should issue a public determination regarding crimes committed against Rohingyas.54 Doing so would help affirm our longstanding commitment to human rights, raise the profile of the issue, and help lead to a coordinated global resolution.

As noted above, in the fall of 2017, then-Secretary Tillerson characterized the crimes against the Rohingyas as “ethnic cleansing.” In September 2018, the State Department released a report, which found that, between August and September 2017, there were systematic and large-scale attacks that “explicitly targeted the Rohingya and left neighboring non-Rohingya sites (e.g., Buddhist stupas) and critical infrastructure...wreaked during the assalt[,]” and that “Burmese security forces, and the army in particular, [were] primarily...responsible for the violence.”56 Notably, the report described the violence against the Rohingyas as “extreme, large-scale, widespread, and seemingly geared toward both terrorizing the population and driving out the Rohingyas[,] and that the “scope and scale of the military’s operations indicate that they were well-planned and coordinated.”57 The House of Representatives,58 Holocaust


56 In a March 2019 hearing before the House Foreign Affairs Committee, in response to a question by Representative Chabot regarding whether the State Department is ready to conclude “whether the crimes committed against the Rohingya by the Burmese military did constitute at least crimes against humanity” Secretary Pompeo indicated that he was in the process of assessing that issue. See House Foreign Affairs Committee, State Department Fiscal Year 2020 Budget Request, March 29, 2019, https://www.c-span.org/video/?c4789135/pompeo-making-determination-crimes-committed-rohingya. Since the end of the Cold War, the State Department has made statements that genocide has occurred in five instances: Bosnia (1993), Rwanda (1994), Iraq (1995), Darfur (2004), and areas under the control of Islamic State of Iraq and Syria (ISIS) (2016 and 2017). Todd F. Buchwald & Adam Keith, By Any Other Name – How, When, and Why the U.S. Government Has Made Genocide Determinations, March 2019, at 3.

57 Id. at 7.

58 Id. at 1-2.


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Magnitsky Act,62 the Administration has imposed sanctions on two Burmese military units and five military commanders for their role in the abuses. The Global Magnitsky Act authorizes the president to impose sanctions on any person the president determines is responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed in any foreign country against individuals seeking to obtain, exercise, or promote human rights and freedoms.63 In December 2017, President Trump signed Executive Order (“E.O.”) 13,818, authorizing the Treasury Secretary to impose sanctions on any foreign person determined to be responsible or complicit in, or to have directly or indirectly engaged in, serious human rights abuse.64

In addition to his obligations under the Global Magnitsky Act, the president has broad authority to impose sanctions under the JADE Act,65 which requires the president to impose sanctions on former or present leaders of the Burmese military, any official of the Burmese military involved in the commission of human rights abuses or any individual or entity providing substantial economic support for the Burmese military.66 President Obama waived the obligation to impose such sanctions in 2016.67 However, President Trump maintains full discretion to impose sanctions on Burma military commanders involved in the commission of human rights abuses or other officials of the military by issuing a new executive order to revoke the waiver as appropriate and delegate the authority to impose, among other things, U.S. visa restrictions, financial sanctions, and import bans on Burmese jadeite and rubies pursuant to the JADE Act.

Finally, the Secretary of State should designate Tatmadaw officials for restrictions for entry into the United States under the Appropriations Act. Section 7031(c) of the Appropriations Act provides that in cases where the Secretary of State has credible information that officials of foreign governments have been involved in significant corruption or gross violations of human rights, those individuals and their immediate family members are ineligible for entry into the United States.68

While the United States has taken some measures to impose sanctions against Tatmadaw officials, it should contribute sufficient resources and political commitment to imposing sanctions on a continuous basis and a broader scale. This would accomplish several goals in pursuit of a diplomatic solution to the crisis. The Tatmadaw has significant commercial interests that could be negatively impacted by the sanctions. U.S. sanctions on Burma limited the military’s efforts to do business outside of the country, and the Tatmadaw remains heavily reliant on profits from its commercial arm sales, the

63 Id. § 1263.
64 E.O. No. 13818 § 10(i)(vi) (Dec. 20, 2017).
65 110 P.L. 286 (July 29, 2008).
66 Id. § 5.
68 Public Law No: 116-6.
Myanmar Economic Corporation and Myanmar Economic Holdings Limited. Sanctions on the Tatmadaw would limit the military’s access to U.S. dollar transactions and deter companies worldwide from engaging with its commercial arms. In addition, new sanctions would act as a strong deterrent by sending the message that others could face the same costs for involvement in such nefarious activities.

IV. The United States Should Invoke Tools of Economic Pressure to Demand Access for Humanitarian Aid and an End to Human Rights Abuses

The United States should use its tools of economic leverage over Burma to demand access for humanitarian assistance to Rakhine State and an end to the atrocities against the Rohingya. As discussed above, the United States should impose sanctions on the Burmese military and its officials for their involvement in human rights abuses. The United States should also put economic pressure on Burma as a whole to compel its government to authorize humanitarian access and take action to end the atrocities.

President Trump should exercise his broad authority to threaten and, if necessary, impose calibrated sanctions on Burma unless it agrees to admit humanitarian workers to Rakhine State and take steps to end abuses against the Rohingya. The president has the authority pursuant to the International Emergency Economic Powers Act (“IEEPA”) to impose sanctions by issuing an executive order and triggering his authority to impose sanctions by declaring the ethnic cleansing in Burma to be an unusual and extraordinary threat to U.S. national security, foreign policy, or economy. President Trump and his predecessors have set the precedent by declaring such a national emergency pursuant to IEEPA based on threats to human rights overseas, including for efforts in Burma to “obstruct the peace process with ethnic minorities...and human rights abuses in Burma particularly in ethnic areas.” The United States should follow the same established standard and invoke its authorities to threaten and impose broader economic costs to Burma if it does not attempt to meet basic international standards for the protection of human rights.

V. The United Nations Security Council Should Refer the Crimes Committed by Burma to the International Criminal Court

The United Nations Security Council (“UNSC”) should refer the atrocity crimes committed by the Burmese military to the International Criminal Court (“ICC”). At minimum, the United States should not stand in the way of such a referral. After an extensive investigation, the UN Fact Finding Mission concluded that the scale of the atrocities committed by the Burmese military against the Rohingya necessitated “the investigation and prosecution of Burma’s Commander-in-Chief, Senior General Min Aung Hlaing, and his top military leaders for genocide, crimes against humanity and war crimes.”

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Unfortunately, the Burmese Government has demonstrated that there is no hope for credible domestic investigations or prosecutions of Burma’s senior military leadership, and the Burmese military is, for all intents and purposes, constitutionally above the law. 74

With a credible domestic investigation impossible, the ICC presents the most immediate option for holding the Tatmadaw leadership accountable for its crimes. Unfortunately, the ICC cannot unilaterally open an inquiry to investigate fully the allegations of genocide, crimes against humanity, and war crimes committed within Burma since the state is not a signatory to the Rome Statute. 75 The only path to ICC referral of these crimes is through the UNSC referring the matter to the ICC by resolution.

While the U.S. itself has not ratified the Rome Statute, we stress that this has not prevented prior Administrations from taking important stances on ICC referrals. The George W. Bush Administration condemned the genocidal attacks in Darfur, Sudan, and then signaled its tacit support of the referral of the crimes committed in Darfur to the ICC by abstaining from voting and allowing the UNSCR on Darfur to pass.

We urge the Trump Administration to go beyond the example of the Bush Administration, and actively support a resolution referring the alleged crimes committed by Burma’s security forces to the ICC. At a bare minimum, the United States should not stand in the way.
way of a referral, but rather signal to its fellow Security Council Members that it supports a referral and will abstain from voting on such a resolution.

VI. The United States Should Continue to Provide Humanitarian Aid to Support Needs on the Ground in Bangladesh and Encourage Other Countries to Do the Same

We are proud that the United States remains the top donor of humanitarian assistance to the Rohingya. Since August 2017, we have donated approximately $389 million in humanitarian aid. The United States should continue to provide humanitarian aid to Rohingya refugees and encourage other countries to provide aid, consistent with the Administration’s goal of burden-sharing. The Rohingya continue to be exposed to significant dangers and risks in the densely populated refugee camps.

Gender-based violence is widespread in the camps in Bangladesh with hundreds of incidents reported weekly. Many of the Rohingya women and girls were already subjected to sexual abuse by the Burmese security forces before fleeing. Now, issues such as intimate partner violence, sexual exploitation and abuse, child marriage and trafficking in the camps also require urgent programmatic interventions.

There is a need for a mass deployment of quality gender-based violence and sexual and reproductive health capacity and services in the camps. The humanitarian community in Bangladesh is not prepared to prioritize and provide such services on a large scale. We understand from volunteers on the ground that the required services are often provided by unqualified practitioners who do not follow basic gender-based violence programming principles and offer limited options for different courses of care and treatment.

In addition, during the monsoon season, which occurs in June through October, the camps are extremely vulnerable to impacts of monsoonal rains and cyclone-strength winds as shelters are made up of bamboo and plastic and many are placed on the sides of dirt hills shorn of vegetation and prone to landslides or in low-lying areas prone to flooding. Last year, the UN High Commissioner for Refugees identified 150,000 Rohingya as particularly vulnerable to high winds, flooding and landslides and pressed for their urgent relocation. Relocation efforts by the Bangladesh government are on-going: as of May 2018, only about 16,000 refugees had been relocated to safer areas.

80 Id.
81 State Department Report at 12.
84 Id.
The United States should continue to provide humanitarian aid to the Rohingya refugees that targets issues such as those described above to minimize the risks of dangers in the camps. Bangladesh needs help to maintain the relative safety of the refugee camps and provide for the most basic needs of the refugees subsisting there. Without help from the international community, Bangladesh could find itself unable to cope with the needs of Rohingya, leading to closure of the camps or a decline in the conditions of the camps to the point that the Rohingya are compelled to risk returning to Burma without safety.

VII. The United States and Other Countries Should Engage with the Government of Bangladesh to Remove Barriers and Inefficiencies in Relation to Providing Humanitarian Assistance

The United States and other countries should engage with the Government of Bangladesh to remove bureaucratic barriers and restrictions that hinder international efforts to provide humanitarian assistance to the Rohingya in Bangladesh. Although the Bangladeshi Government has been welcoming to Rohingya refugees, there are several bureaucratic practices that cause concern for humanitarian aid. For example, it is difficult for NGO workers to get authorization to operate in Bangladesh due to a lengthy visa process. As a result, many NGO workers have to use tourist, business or on-arrival visas which impede the workers’ ability to assist in humanitarian efforts.85

The process to register NGOs and obtain clearance to implement foreign-funded response activities is lengthy and cumbersome. It can take several months and the approvals to use foreign funding can take several weeks. Adding to these challenges are requirements to open domestic bank accounts, regularly submit budget reports to government entities and obtain certificates of approval. These often delay projects until the proposed implementation period has already passed.86 In addition, stringent restrictions imposed by the Bangladeshi Government on humanitarian actors and refugees severely undercut efforts to meet the needs of Rohingya women and girls. For example, the Government only permits “lifesaving” interventions and does not consider gender-based violence and other types of protection programming to be “lifesaving”.87

The Government of Bangladesh continues to refuse to recognize Rohingyas as refugees, which limits their access to the rights and protections that accompany the status.88 This is a result of the Government’s refusal to allow planning and projects that are deemed “long-term” as the Government believes that allowing long-term planning would provide Rohingyas incentive to stay in Bangladesh and let Burma off the hook. As such, projects that involve long term planning such as education or livelihood projects are discouraged and restricted. Stronger building materials, such as bricks or concrete, for shelters and community learning centers and mosques are not permitted or restricted.

85 Id. at 8.
86 Id.
87 Id. at 16.

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85 Id. at 8.
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87 Id. at 16.
The United States and other countries should urge the Government of Bangladesh to remove these and other bureaucratic barriers that impede the humanitarian response activities of international NGOs.

VIII. The United States and Other Countries Should Help Ensure that Repatriation of the Rohingya is Safe, Voluntary, and Dignified

The United States and other countries should use economic leverage with Burma to advocate for safe, dignified, and voluntary repatriation for Rohingyas, which is the ideal long-term solution. Fleeing extreme violence and death in Burma, Rohingyas have subsisted in overcrowded and under-resourced refugee camps, primarily in Bangladesh (an impoverished nation). These camps were meant to be a temporary safe haven, not a permanent solution. It is generally recognized that voluntary repatriation is typically the "most appropriate solution" for refugees, and, returning to their homeland, under specific and necessary conditions, is what most Rohingya want.

For repatriation to be a durable solution for Rohingyas, it must be safe, dignified, and voluntary. Knut Ostby, the UN Resident and Humanitarian Coordinator in Burma, has recognized that a key element in the "safe and voluntary return" of Rohingyas depends upon "an end to violence" in their home state. Article 33 of the of the UN Convention Relating to the Status of Refugees ("Article 33"), which the United States is bound to comply with by virtue of subsequent Protocol, provides the principle of "non-refoulement" (prohibition of expulsion or return), stating "No Contracting State shall expel or return ("refoule") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." While the U.S. Supreme


91 UN High Commissioner for Refugees, Conclusion on the International Protection of Refugees, No. 18 (XXXI) (a), Executive Committee – 31st Session (1980).


93 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223. The United States adheres to Articles 2 through 34 of the UN Convention Relating to the Status of Refugees by virtue of subsequent protocol. While Bangladesh is not a party to the UN Convention Relating to the Status of Refugees, it is a party to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), which provides that a Party is prohibited from expelling or returning a person to another State where "there are substantial grounds for believing that the person is in danger of being subjected to torture." (See Article 3 of UN CAT). In addition, even where countries are not obligated to comply with the non-refoulement principle, the United States has pressed such countries to respect the principle. The United States should do the same here. UN Treaty Collection, CAT, Dec. 10, 1984 (showing that Bangladesh became a party in 1984), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en.

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96 UN High Commissioner for Refugees, Conclusion on the International Protection of Refugees, No. 18 (XXXI) (a), Executive Committee – 31st Session (1980).

97 Myanmar and U.N. Agree to Aim for Repatriation of Rohingyas (citing May 23, 2018 survey by the Xchange Foundation finding that "among more than 1,700 Rohingya interviewed in camps in Bangladesh, 97.5 percent wished to eventually go home to Myanmar," but only under certain conditions).


100 Convention and Protocol Relating to the Status of Refugees, Geneva, 28 July 1951, UN Treaty Series, vol. 189, p. 137, at Article 33. We note that the non-refoulment provision has two exceptions. Namely, the
Court has found that Article 33 does not apply outside of the U.S. territory, the United States has, as a policy matter, applied the non-refoulement principle overseas and should continue to do so in this case. Here, a “safe” return for the Rohingya goes beyond mere cessation of violence by the government itself; it must include a broader concept of physical security as well as legal safety and material security.

In addition to safety and freedom from state-sanctioned violence, any plan to repatriate must include dignity for their return, meaning refugees returning to Burma must be able to return at their own pace and be treated with respect by national authorities. Further, every effort must be made to keep returning families together and be mindful of school and occupational timing. Unsurprisingly, Rohingya themselves feel that safety and dignity are necessary conditions for them to voluntarily return to Burma.

There are several measures the United States should support in order to create the conditions necessary for repatriation to be a viable option. First, it should work with the international community to ensure that Burma addresses the root causes of the Rohingya refugee crisis. The State Department report referenced above explicitly recognizes that the “roots of anti-Rohingya sentiments and discrimination lie in a longstanding belief in Burma that Rohingya are ‘not native’ to Burma” and are a type of illegal immigrant. Burma does not recognize Rohingyas as an indigenous ethnic group, but considers them to be migrant foreigners and denies them citizenship rights accordingly. As the Rakhine Advisory Commission concluded, the lack of any level of citizenship or citizenship rights is a significant (if not the primary) cause of suffering and insecurity for Rohingyas in Burma. Safe and dignified repatriation can only happen if and when benefit of the provision may not be “claimed by a refugee whom there are reasonable grounds for regarding as a danger to the community of that country.”

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Burma restores basic citizenship rights to Rohingyas and provides them with protection under the rule of law.

Second, the United States and other countries should promote and support a participatory approach to repatriation. It should work with the international community to encourage the use of a Quadiartite Commission, in which representatives from the Rohingya community would have a place alongside UNCHR, Burma, and Bangladesh in negotiating the terms and conditions of repatriation. As part of the process leading up to repatriation, Rohingyas must be able to gather information and provide first-hand accounts of the situation to fellow refugees. This must also be an integral part of repatriation itself (also referred to as “go and see” visits and “come and tell” visits). In addition, Rohingya representatives must be fully integrated into post-repatriation monitoring operations.

Third, the United States and other countries must make sure UNHCR and other humanitarian agencies have both the political support they need to have long-term access to repatriated Rohingyas and the financial means to engage in reintegration and monitoring operations critical to ensuring repatriation is safe, dignified, and voluntary. UN involvement should include: (1) providing assistance to returning Rohingyas to ensure their security and self-sufficiency, and (2) ongoing monitoring to ensure all parties respect and maintain the negotiated terms and conditions of repatriation.

The August 2018 UN Report concluded that under “current circumstances,” the safe, dignified, and voluntary repatriation of the Rohingya is “not possible.” In November 2018, the UN High Commissioner for Refugees echoed these findings. Unfortunately, existing agreements meant to achieve conditions appropriate for repatriation are inadequate to accomplish their stated goals. The United States should engage with Burma to influence the country’s approach to repatriation and help ensure repatriation of the Rohingya is safe, dignified, and voluntary.

102 Jeff Crisp & Katy Long, Safe and Voluntary Refugee Repatriation: From Principle to Practice, Journal on Migration and Human Security, Vol. 4, No. 3 (2016), p. 147 (defining “go and see” visits as “enabling refugees to spend some time in their homeland before making a final decision to return,” and “come and tell” visits as when “refugees who have already repatriated are able to relate their experiences to those who remain in countries of asylum.”)
103 UN Fact-Finding Report at 20.
106 Neither the bilateral agreement between Bangladesh and Burma, nor the memorandum of understanding between Burma, UNDP, and UNHCR provide for Rohingya participation in determining the terms and conditions of repatriation or address Rohingya concerns regarding ongoing violence and persecution by Myanmar security forces, lack of citizenship rights, and restrictions on freedom of movement. As a result, the Rohingya have largely rejected these agreements as insufficient to enable them to safely return to Burma. Shaikh Aazaur Rahman, Rohingya refugees reject UN-Myanmar repatriation agreement, July 5, 2018, https://www.theguardian.com/world/2018/jul/06/rohingya-refugees-reject-un- myanmar-repatriation-agreement; Poppy McPherson & Zeba Siddiqui, Secret U.N.-Myanmar deal on Rohingya offers no guarantees on citizenship, June 29, 2018, https://www.washingtonpost.com/world/asia_pacific/rohingya-secret-un-myanmar-deal-on-rohingya-offers-no-guarantees-on-citizenship-b653781111f0/.
Respectfully submitted,

Robert Brown
Chair, Section of International Law
August 2019

Respectfully submitted,

Robert Brown
Chair, Section of International Law
August 2019
1. Summary of Resolution(s).

The resolution recommends a number of measures for action by the United States and other countries to address the Rohingya refugee crisis including: issuing a public determination on crimes committed against the Rohingya; imposing targeted sanctions against Burmese military officials; utilizing tools of economic pressure to ensure access for humanitarian aid and an end to serious human rights abuses against the Rohingya and other minority groups; referring the crimes committed by the Rohingya to the International Criminal Court; continuing to provide humanitarian aid; engaging with the Burmese government to remove barriers to humanitarian assistance; and ensuring safe and voluntary repatriation of the Rohingya.

2. Approval by Submitting Entity.

Approved by the Section of International Law on April 9, 2019.

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

No. The resolution was previously in the form of ABA Section of International Law comments to the Secretaries of State and Treasury. These were approved by the Section pursuant to a Blanket Authority Request.

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

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). This resolution calls upon the United States and other countries to advance the policies endorsed in the aforementioned resolution.

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

N/A

6. Status of Legislation. (If applicable)

N/A. This resolution is not a legislative resolve. However, legislation pertaining to this issue – named the Burma Human Rights and Freedom Act of 2018 – is currently pending in Congress. As of November 2018, the bill has been read twice and referred to the Committee on Foreign Relations. This bill would, inter alia, prohibit certain military cooperation with the Burmese military until the U.S. Government can certify that the “Burmese military has demonstrated significant progress in abiding by international human rights standards and is undertaking meaningful and significant security sector reform”, authorize humanitarian assistance and support for voluntary resettlement or repatriation efforts, and require the President to determine whether to sanction individuals determined to have “knowingly played a direct and significant role in the commission of human rights violations in Burma”.107

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

The Section will work with the Governmental Affairs Office to communicate the recommendations and urge their implementation with relevant legislative and executive branch officials.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

ABA Representatives and Observers to the United Nations
Center for Human Rights
Commission on Domestic and Sexual Violence
Commission on Immigration Law
Commission on Women
Rule of Law Initiative
Section of Administrative Law
Section of Business Law
Section of Civil Rights and Social Justice
Section of Criminal Justice
Section of Litigation
Young Lawyers Division

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11. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Sahar Hafeez
202-663-8051; 415-717-1574
Sahar.hafeez@pillsburylaw.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution recommends a number of measures for action by the United States and other countries to address the Rohingya refugee crisis including: issuing a public determination on crimes committed against the Rohingya; imposing targeted sanctions against Burmese military officials; utilizing tools of economic pressure to ensure access for humanitarian aid and an end to serious human rights abuses against the Rohingya and other minority groups; referring the crimes committed by the Rohingya to the International Criminal Court; continuing to provide humanitarian aid; engaging with the Burmese government to remove barriers to humanitarian assistance; and ensuring safe and voluntary repatriation of the Rohingya.

2. Summary of the Issue that the Resolution Addresses

Over a million Rohingya Muslims live, or until recently did live, in Burma. They have constituted a minority of the Burmese population for centuries, with a long history of being persecuted by Burma’s Buddhist majority. Through decades of military rule, and especially during the last three years, that persecution has become systematic and widespread. In 2016-2017, the persecution of the Rohingya accelerated. The Tatmadaw and local Buddhist extremists looted and burned down Rohingya villages, engaged in mass killings of civilians, raped Rohingya women and girls, and forced the wide-spread displacement of the Rohingya population. As a result, over 700,000 Rohingya people have fled or been driven out of Rakhine State and have taken shelter in neighboring Bangladesh as refugees.

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

The resolution recommends actions be taken by the U.S. government that would advance four objectives: (1) accountability for the perpetrators of the atrocities committed against the Rohingya; (2) pressure the Burmese Government to take action to end the serious human rights abuses committed against the Rohingya; (3) provide needed assistance to the Rohingya refugees; and (4) ensure a sustainable, long-term solution to the crisis. Toward these ends, we have seven specific recommendations identified above in the “Summary of the Resolution.”

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

We are aware of no opposition to the resolution.

Summary of the Resolution

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

We are aware of no opposition to the resolution.
RESOLVED, That the American Bar Association urges the Department of Justice to amend 8 C.F.R. §1003.1(h) to include, following formal rulemaking, standards and procedures governing the process by which the Attorney General may certify cases to himself or herself.

FURTHER RESOLVED, That the applicable standards should include procedures for (a) notice to the public of the Attorney General’s intent to certify a case to himself or herself; (b) identification of the specific legal questions the Attorney General intends to review; (c) an opportunity for public comment and briefing prior to issuance of any final decision, and (d) release of underlying decision(s) in the case; and

FURTHER RESOLVED, That the American Bar Association urges the Attorney General to exercise such certification authority sparingly, and only to review decisions issued by the Board of Immigration Appeals in the ordinary administrative appeal process rather than as a mechanism to pre-empt full administrative agency review or to address questions not at issue in the case prior to certification.
The American Bar Association’s Commission on Immigration expressed renewed concern over the lack of independence in the nation’s immigration court system in its recent Reforming the Immigration System Update Report.1 Other major stakeholders including the National Association of Immigration Judges and the Federal Bar Association have also raised serious concerns over the lack of immigration court independence.2 The immigration court system is part of the Executive Office for Immigration Review, an administrative agency within the Department of Justice. The U.S. Attorney General is responsible for overseeing the immigration court system including the 63 immigration courts and two adjudication centers as well as the Board of Immigration Appeals (“BIA” or “Board”). Due to the Attorney General’s broad duties within the Department of Justice, he or she serves as both immigration adjudicator and immigration prosecutor at the federal level. This dual function has been cited as a major conflict of interest and a primary reason why the immigration court system should be removed from the Department of Justice and placed in an independent, Article I court.3

The BIA is the highest administrative body to interpret and apply the immigration laws throughout the nation.4 The BIA has appellate jurisdiction and reviews cases on appeal from the immigration courts. BIA review is generally completed on the written record although oral argument may be permitted. BIA precedential decisions are binding on the immigration courts and provide guidance on the proper interpretation of the Immigration and Nationality Act and its implementing regulations.5 Where jurisdiction exists, BIA decisions may be appealed to the U.S. Circuit Courts of Appeals.

Pursuant to existing federal regulations, the Attorney General is authorized to refer BIA decisions to himself or herself for adjudication.6 The regulations governing certification for review by the Attorney General currently permit referral where: (1) the Chairman of the BIA, a majority of the BIA, the Secretary of Homeland Security, or specifically designated Department of Homeland Security (“DHS”) officials refer a matter;

3 AMERICAN IMMIGRATION LAWYERS ASSOCIATION, Policy Brief, Restoring Integrity and Independence to America’s Immigration Courts, September 28, 2018.
5 8 C.F.R. § 1003.1(d)(1).
6 8 C.F.R. § 1003.1(h)(1)(i), “[t]he Attorney General directs the Board to refer to him.” (direct quote)
or (2) “[the Attorney General directs the Board to refer the matter to him.” The procedures governing self-referral require only that the Attorney General’s decision be in writing and transmitted to the BIA or DHS for service upon the party affected. The regulations do not establish criteria or specify categories of cases appropriate for the exercise of the certification authority, which would permit more predictability for stakeholders and increase the integrity of and public confidence in the process.

From January 1, 2018 through October 18, 2018 — less than three weeks before he left office — former Attorney General Jeff Sessions certified seven and made final decisions in five BIA cases, a rate significantly higher than his predecessor Attorneys General. Recently the certification process has been used, as opposed to rulemaking or legislative recommendations, to establish not only procedural and docket management policies, but also substantive questions of law governing immigration proceedings that have resulted in reversing longstanding precedential decisions and limiting relief available under the asylum laws. In keeping with this practice, in December 2018, then Acting Attorney General Matthew Whitaker referred two additional cases to

1 7 Id. 11§ 1003.1(h)(2).
3 10 Attorneys General in the Obama administration used the certification authority more sparingly, approve approximately once every two years. See Matter of Chavarria-Castrejon, 26 I&N Dec. 576 (A.G. 2018); Matter of Silva-Trevino, 26 I&N Dec. 550 (A.G. 2015); Matter of Dornman, 25 I&N Dec. 485 (A.G. 2011); Matter of Compean, 25 I&N Dec. 1 (A.G. 2009). Bush administration Attorneys General issued 16 decisions, an average of two per year, more frequently than the Obama administration but far less frequently than the Trump administration to date. See Alberto R. Gonzales & Patrick Glen, Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority, 101 IOWA L. REV. 841, 857-58 (2006); https://law.uow.edu.au/assets/Uploads/LLR-101-3-Gonzales.pdf (hereinafter “Advancing Executive Branch Immigration Policy”) (chronicling the use of the certification authority and noting that “from a peak of 37 cases a year through 1952, the authority was exercised on average, only twice per year during the Bush administration and only 6 times during the 8 years of the Obama administration”).
himself for review, both of which raise substantive immigration law questions. Finally, in April 2019, Attorney General Barr decided a case that overturned long-standing BIA precedent making asylum-seekers who pass a credible fear interview ineligible for a custody redetermination hearing before an Immigration Judge.

The Department of Justice further indicated in Spring 2018 that it is considering a rule broadly expanding the circumstances under which the Attorney General may refer cases to himself or herself. The proposed new scope of referral would include matters the Board has not yet decided, and even matters decided by immigration judges “regardless of whether those decisions have been appealed to the BIA.” Under such a rule, the scope of the Attorney General’s referral authority would go beyond establishing law governing BIA adjudications, and could extend into who is perceived as eligible for protection by Customs and Border Patrol and who receives and passes an initial screening interview for protection from persecution or torture. These developments have highlighted the need for standards and procedures to govern the certification process and allow for adequate notice and input from the parties and the public.

The use of the Attorney General’s certification authority has been the subject of considerable debate for years. Former Attorney General Alberto Gonzales and DOJ Senior Litigation Counsel Patrick Glen have argued that the mechanism is preferable to an administration using executive orders and memoranda to advance immigration policy. Others have raised concerns that the exercise of the authority has disrupted the development of immigration law and policy and altered longstanding practices for partisan purposes; that the Attorney General is removed from the agency’s expertise in immigration, and that the Attorney General’s role as the nation’s chief law enforcement

13 See Matter of L-E-A-, 27 I&N Dec. 494 (A.G. 2018) (relating to whether, and under what circumstances, an alien may establish persecution on account of membership in a “particular social group” based on the alien’s membership in a family unit); Matter of Castillo-Perez, 27 I&N Dec. 495 (A.G. 2018) (relating to the appropriate legal standard for determining when an individual lacks “good moral character” under 8 U.S.C. § 1182(a)(4)(B) and the impact of multiple convictions in determining whether to grant discretionary relief in the form of cancellation of removal under 8 U.S.C. § 1229b(b)).

14 See Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019) (holding that individuals transferred from expedited removal proceedings to full removal proceedings after passing a credible fear interview are ineligible for release on bond). Pursuant to the decision, implementation of this case has been delayed until July 15, 2019. This case overturned long-standing precedent in Matter of X-K-23 I&N Dec. 731 (BIA 2005).


16 Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority, supra note 10.


18 See, e.g., Bijal Shah, The Attorney General’s Disruptive Immigration Power, 102 IOWA L. REV. 129, 141 (2017) (noting that “because the Attorney General is removed from the agency’s expertise in immigration, scholars might also debate the proper level of judicial deference to administrative decision-making in...etermination hearing before an Immigration Judge.”

The use of the Attorney General’s certification authority has been the subject of considerable debate for years. Former Attorney General Alberto Gonzales and DOJ Senior Litigation Counsel Patrick Glen have argued that the mechanism is preferable to an administration using executive orders and memoranda to advance immigration policy. Others have raised concerns that the exercise of the authority has disrupted the development of immigration law and policy and altered longstanding practices for partisan purposes; that the Attorney General is removed from the agency’s expertise in immigration, and that the Attorney General’s role as the nation’s chief law enforcement
officer prevents him or her from bringing the necessary balance and objectivity to immigration “lawmaking” through the adjudication process. 19 Immigration advocates have also argued that there are significant procedural shortcomings in the Attorney General’s certification process, such as short briefing timelines, lack of alignment between the factual and legal issues presented in the underlying decisions and the question addressed by the Attorney General on certification, certification of issues not on appeal to the BIA, and certification of cases where the respondent is not represented by counsel.20

While the BIA’s authority to adjudicate removals is delegated from the Attorney General and subject to Attorney General review under the current framework, and agency head review of administrative proceedings is not unusual, as the chief law enforcement officer of the United States, the Attorney General serves as both the prosecutor and the adjudicator in referred cases. As such, the Attorney General has an inherent conflict between his or her enforcement and adjudicator roles.

The Attorney General’s exercise of the certification authority without more transparency and due process safeguards can undermine the legitimacy and acceptability of the immigration adjudication process. For these reasons, the Department of Justice should use the rulemaking process to establish standards and procedures for Attorney General certification, including procedures providing notice and an opportunity for the parties and the public to brief the specific legal questions the Attorney General intends to consider, and for amici to weigh in21 before a decision is rendered. EOIR also should provide access to the underlying decisions in redacted form if necessary, in cases immigration or perhaps any area of law in which a political official exercises discretion beyond her core competencies”).

19 See, e.g., Stephen H. Legomsky, Restructuring Immigration Adjudication, 59 DUKE L.J. 1635, 1672 (2008) (https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1468&context=dlj) (“... empowering Attorneys General to review and reverse BIA decisions makes them more politically accountable for the BIA’s shortcomings. In practice, that benefit is of small consolation. As the nation’s chief law enforcement officer, the Attorney General has an inherent incentive to care more about some shortcomings than others. The legitimate interests in enhancing the speed of the decision making, and thus the productivity, of the adjudicators and staff can conflict with other legitimate interests like the accuracy of outcomes and the fairness of procedures.”).


21 See Laura S. Trice, Note, Adjudication by fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions, 85 N.Y.U. L. REV. 1766, 1876 (2010) (commenting that the Attorney General promulgate regulations that require meaningful, adversarial participation by the parties and provide a transparent means of soliciting input from interested amici on issues of broad significance, arguing that “to ask the Attorney General to provide basic procedural protections upon review is to ask no more than many agencies provide as standard practice under the Administrative Procedure Act (5 U.S.C. § 557(c)), which entitles parties to present arguments when the agency reviews a decision of its subordinates.”). In his 2018 decisions, former Attorney General Sessions invited amicus briefing in some cases, but not in others. For example, the former Attorney General certified Matter of E-F-H-J-L., 27 I. & N. Dec. 226 (A.G. 2018), to himself and decided the case on March 5, 2018, without providing the parties or amici the opportunity to brief any of the issues involved.
referred to the Attorney General, to provide adequate context and specification regarding the issues presented and more meaningful participation by amici.

Finally, the American Bar Association has long worked toward ensuring fairness and due process rights for immigrants and asylum-seekers in the United States. Irrespective of specific policies implemented by the current administration, the precedential implications of using the Attorney General’s referral power to overturn long-standing precedent, diminish substantive relief, and eliminate traditional docket management tools is troubling from a due process and systemic standpoint. The Attorney General’s referral authority should return to being used sparingly, and only to clarify immigration law after a full administrative review process at the Board of Immigration Appeals. Such review should be narrowly tailored to address the issues on appeal. It should not be used to rewrite immigration law or promote broad-based policy objectives.

Respectfully submitted,

Wendy S. Wayne
Chair, Commission on Immigration
August 2019
1. **Summary of Resolution(s).** Amend 8 C.F.R. §1003.1(h) and establish, through rulemaking, standards and procedures for the Attorney General certification process. Include procedures for a) notice and intent of the Attorney General to certify a case, b) opportunity for public comment and briefing prior to issuance of the final decision, c) identification of the specific legal questions the Attorney General intends to review, and d) release of underlying decisions at issue. The Attorney General should exercise certification authority sparingly, and only to review decisions issued by the Board of Immigration Appeals in the ordinary administrative appeal process.

2. **Approval by Submitting Entity.** The resolution content was discussed and approved by Commission Members between April 22nd and April 26th. Previously, Members were also active in preparing a Report from which the recommendations for the resolution originate, 2019 Update: Reforming the Immigration System. The Update Report was released in March 2019 after 3 years of research and development.

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

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

   - **06M107C** – policy recommending due process, independence, and neutrality in the adjudication of immigration cases, as well as full, fair and meaningful review in the federal courts. Proceedings should comply with procedures afforded in Administrative Procedure Act.

   - **06M107D** – policy encouraging an immigration system that is transparent, user-friendly, accessible, and fair, with adequate resources to carry out its functions; development of efficient interagency procedures; enforcement against unauthorized practice of law and ineffective assistance of counsel; free availability of legal resources for participants in immigration matters; reasonable discovery procedures; efficient process for timely handling of FOIA requests.

   - **10M114D** – policy urging restoration of federal judicial review of immigration decisions to U.S. Courts of Appeals.

5. If this is a late report, what urgency exists which requires action at this meeting of the
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 Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudication system.

8. Cost to the Association. (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.


10. Referrals.

   - Center on Children and the Law
   - Commission on Hispanic Rights and Responsibilities
   - Section of Civil Rights and Social Justice
   - Section of Criminal Law
   - Section of International Law
   - Standing Committee on Pro Bono and Public Service
   - Standing Committee on Unaccompanied Minor Immigrants

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

   Meredith A. Linsky  
   Director, Commission on Immigration  
   1050 Connecticut Ave NW, Suite 400  
   Washington, DC 20036  
   Tel: 202-662-1006  
   E-mail: meredith.linsky@americanbar.org

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Meredith A. Linsky  
Director, Commission on Immigration  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

Amend 8 C.F.R. §1003.1(h) and establish, through rulemaking, standards and procedures for the Attorney General certification process. Include procedures for a) notice and intent of the Attorney General to certify a case, b) opportunity for public comment and briefing prior to issuance of the final decision, c) identification of the specific legal questions the Attorney General intends to review, and d) release of underlying decisions at issue. The Attorney General should exercise certification authority sparingly, and only to review decisions issued by the Board of Immigration Appeals in the ordinary administrative appeal process.

2. Summary of the Issue that the Resolution Addresses

The Attorney General is empowered to *sua sponte* refer Board of Immigration Appeals ("BIA") decisions to himself and independently re-adjudicate them. For the last half of a century Attorney Generals have traditionally used the referral power sparingly. However, Attorneys General in the current administration have referred several BIA decision for review, substantially rewriting immigration law in the process. These developments have highlighted the need for regulations delineating the standards and procedures for such referrals. Moreover, the referral power should be used sparingly, and only to review decisions issued by the Board of Immigration Appeals in the ordinary administrative appeal process.

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

Developing established standards and procedures for the Attorney General certification process will ensure predictability, allow for adequate input from the affected parties and the public, and enhance fairness and due process.

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

There are no minority views of which we are aware.
RESOLVED, That the American Bar Association urges the Department of Justice to amend 8 C.F.R. §§ 1003.1(d)(2)(i)(G) and 1003.38(b) to expressly provide a good cause exception to the strict thirty day deadline for filing an appeal to the Board of Immigration Appeals for pro se appellants; and

FURTHER RESOLVED, That even absent such amendment, in cases where a detained or pro se respondent orally reserves appeal on the record in Immigration Court, the Board should establish a presumption that a subsequent Notice of Appeal be deemed timely filed so long as it is received at the Board within a reasonable time, notwithstanding the expiration of the thirty day filing deadline.
The United States immigration court system consists of two components: the immigration courts and the Board of Immigration Appeals. Both are units of the Justice Department’s Executive Office for Immigration Review (“EOIR”).

While there are approximately sixty immigration courts nationwide, there is only a single Board of Immigration Appeals (“BIA” or “Board”). Based in Falls Church, Virginia, the Board adjudicates appeals of decisions by immigration judges. It handles appeals of immigration judge decisions regarding removal, bond, and asylum, among others. In this capacity, it is the final administrative appeal route available for most immigration-law matters.

The process for submitting an immigration appeal to the Board is complicated, and even more so for pro se individuals. Lack of adequate representation diminishes the prospects of fair adjudication for a noncitizen. An initial notice of the intent to file a BIA appeal is due within 30 days of the immigration’s judge’s decision. Once received and processed by the Board, the individual will have 21 days to submit an appeal brief but may request an extension of this deadline. The time period in these provisions has been viewed as unduly short compared to other appellate time periods. Filing a timely notice of appeal and managing the requirements of the BIA appeals process is often challenging for the unrepresented. This is particularly true in the case of detained individuals who can be transferred without notice, and who can be subject to varying rules and requirements concerning the receipt and sending of mail while in custody, causing significant delays in receiving official correspondence.

The difference between filing an appeal notice and filing a brief in support of the appeal may be confusing for petitioners without representation. This is of particular relevance because, in recent years, twenty to twenty-five percent of all cases completed by the Board have involved pro se petitioners. According to EOIR’s most recently published data of Board decisions, from fiscal year 2009 to 2017 at a minimum twenty percent of Board decisions involve unrepresented petitioners.

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1 8 CODE OF FEDERAL REGULATIONS § 1003.1(a) [hereinafter C.F.R.].
2 8 C.F.R. § 1003.38(b).
3 8 C.F.R. § 1003.38(b).
4 In comparison, Federal Rules of Appellate Procedure Rule 31 allows an appellant 40 days to file its principal brief after the record is filed; and an amicus has 30 days to respond. FED. R. APP. P. 31.
Similarly, a substantial percentage of cases completed by the Board involve detained petitioners. In fiscal year 2017, for example, twenty-seven percent of Board opinions, numbering 4,243 cases, from appeals of immigration judge decisions involved detained petitioners. That year illustrates well the Board’s caseload in recent years.6

By regulation, the EOIR is required to create the Board.7 Its members are appointed by the Attorney General “to act as the Attorney General’s delegates.”8 The Board is empowered to issue precedential decisions that bind itself and immigration judges. It includes twenty-one members, including a chairman appointed by the director of the EOIR, and additional temporary board members.9

Partly to fulfill the Board’s regulatory obligations under 8 C.F.R. § 1003, the Board publishes a guidance document detailing practice protocols before it.13 Across more than 200 pages that are periodically updated, the Board instructs parties before it on expected procedures and obligatory policies, including the means of appealing from immigration judge decisions. The BIA Practice Manual provides that: “For appeals and motions that must be filed with the Board, the appeal or motion is not deemed ‘filed’ until it is received at the Board.”14

The BIA does not observe the “mailbox rule,”15 and therefore, the timelines for filing appeals can be confusing and unduly burdensome for petitioners in detention or without representation. The regulations, 8 C.F.R. §§ 1003.1(d)(2)(i)(G) and 1003.38(b), and the BIA Practice Manual, section 3.1(a)(i),

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6 U.S. Dep’t of Justice, Executive Office for Immigration Review, Statistics Yearbook Fiscal Year 2017, at 40 fig.31; U.S. Dep’t of Justice, Executive Office for Immigration Review, Statistics Yearbook Fiscal Year 2013, at U1 fig.32 (2014).

8 8 C.F.R. § 1003.1(a)(1).

10 8 C.F.R. § 1003.1(a)(2)(i).


14 BIA Practice Manual at 31, section 3.1(a)(i); 8 C.F.R. § 1003.38(c).

15 Id.
should give Board Members broad authority to relax the Board’s rule for receipt of appeals and motions for petitioners without representation or in detention, in the interest of fairness, and accept filings within a reasonable time outside of the 30-day submission period. The Board should also have the discretion to excuse the lack of a timely brief for pro se litigants where possible.

Respectfully submitted,

Wendy S. Wayne
Chair, Commission on Immigration
August 2019
1. **Summary of Resolution(s).** The Department of Justice, through the Executive Office of Immigration Review, should create a presumption to extend the filing of an appeal to the Board of Immigration Appeals for pro se applicants and allow a good cause exception to the strict thirty day deadline.

2. **Approval by Submitting Entity.** The resolution content was discussed and approved by Commission Members between April 22nd and April 26th. Previously, Members were also active in preparing a Report from which the recommendations for the resolution originate, *2019 Update: Reforming the Immigration System*. The Update Report was released in March 2019 after 3 years of research and development.

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?**

   *06M107C:* urges an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include proceedings like those governed by the Administrative Procedure Act, in person and on the record, with notice and opportunity to be heard, and a decision that includes findings of facts and conclusions of law; availability of full, fair, and meaningful review in the federal courts where deportation or removal from the United States is at stake; and the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal.

   The proposed policy would complement and support existing policy.

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

6. **Status of Legislation.** (If applicable) n/a

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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 Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudication system.

8. Cost to the Association. (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.


11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
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Washington, DC 20036
Tel: 202-662-1006
E-mail: meredith.linsky@americanbar.org

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)
Mary Ryan
Unaccompanied Minor Immigrant Working Group Liaison
Commission on Immigration
155 Seaport Blvd.
Boston, MA 02210
Tel: 619-439-2212
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1. Summary of the Resolution

The Department of Justice, through the Executive Office of Immigration Review, should create a presumption to extend the filing of an appeal to the Board of Immigration Appeals for pro se applicants and allow a good cause exception to the strict thirty day deadline.

2. Summary of the Issue that the Resolution Addresses

The timelines for filing appeals with the BIA can be restrictive for petitioners in detention or without representation, particularly given that the BIA deems a motion as filed only once it is received by the Board, rather than observing the "mailbox rule." This rule can be confusing and unduly burdensome for detained or unrepresented applicants.

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

Allowing discretion to relax the deadline for submission of an appeal will aid unrepresented and detained petitioners in exercising their right of appeal in a meaningful way.

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

There are no minority views of which we are aware.
RESOLVED, That the American Bar Association urges the Executive Office for Immigration Review (EOIR) to expedite complete implementation of an integrated, system-wide electronic filing and case management system nationwide, with adequate funding from Congress;

FURTHER RESOLVED, That the Association urges Congress and the Department of Justice to create or restore docket management tools – including administrative closure, termination of proceedings, and reasonable continuances – that enable immigration judges to balance the need for prompt adjudications with the rights of respondents to achieve just outcomes. Such tools should be utilized particularly in cases involving vulnerable populations, including unaccompanied children and individuals experiencing mental illness, and otherwise as justice requires;

FURTHER RESOLVED, That the American Bar Association urges EOIR to increase its efforts to hire immigration judges and Board of Immigration Appeals members from diverse professional backgrounds, including practitioners with experience representing non-citizens and individuals reflecting a broad mix of racial, ethnic, gender and gender identity, sexual orientation, disability, religious and geographically diverse backgrounds;

FURTHER RESOLVED, That the American Bar Association urges the Department of Homeland Security to restore the use of prosecutorial discretion by both officers and attorneys to reduce the number of Notices to Appear served on and enforced against noncitizens who should not be priorities for removal, including those who: 1) are prima facie eligible for relief from removal; 2) veterans and members of the U.S. armed forces; 3) long-time lawful permanent residents; 4) minors and elderly individuals; 5) individuals present in the U.S. since childhood; 6) pregnant or nursing women; 7) victims of domestic violence, trafficking, or other serious crimes; 8) individuals who suffer from a serious mental or physical disability; and 9) individuals with serious health conditions; and
FURTHER RESOLVED, That the American Bar Association urges EOIR to amend 8 C.F.R. §1003 subpart G, the Professional Conduct Practitioners—Rules and Procedures, to authorize civil monetary contempt penalties to be imposed by immigration judges against both removal defense and government trial attorneys and establish criteria for when such penalties can be applied.
Since 1983, the immigration courts have been part of the Executive Office for Immigration Review (EOIR), which is housed within the U.S. Department of Justice (DOJ) and answers directly to the Attorney General. The Attorney General appoints a director, who supervises the two offices within EOIR—the Board of Immigration Appeals (BIA or Board) and the Office of the Chief Immigration Judge (OCIJ). The OCIJ supervises the immigration courts and the immigration judges. Approximately 400 immigration judges, sitting in courts in 63 locations around the country, hear several hundred thousand matters each year. The matters include, among others, removal proceedings, bond redeterminations for some immigrants and asylum-seekers held in detention, and reviews of credible and reasonable fear determinations.

Immigration judges issue life-altering decisions each day that may deprive individuals of their freedom; separate families, including from U.S. citizen family members; and, in the case of those seeking asylum, may be a matter of life and death. Yet, these agency courts lack many of the basic structural and procedural safeguards that we take for granted in other areas of our justice system. To address these systemic issues, the ABA has adopted a policy that supports restructuring the system to create an independent body for adjudicating immigration cases, such as an Article I court. Recognizing that system restructuring is likely to take a number of years, incremental reforms outlined in this resolution could be made within the current structure—either through policy revision, regulation or legislation—which would make significant improvements in the operation of the immigration courts.

**Administrative Management Measures**

Currently, there is no electronic filing system available in the vast majority of immigration courts. Attorneys and pro se respondents instead must mail or deliver in-person hard copies of documents related to their cases. This creates inefficiencies in the system and barriers for many respondents, particularly those in detention.

Practitioners, immigration judges, and government officials all agree that electronic case management and filing are key to a more efficient and reliable system. An independent 2017 EOIR-funded audit of the immigration courts recommended moving to an electronic filing system as expeditiously as possible to improve the overall functioning of the immigration courts. 

EOIR initiated an effort to establish the EOIR Courts and Appeals System (ECAS), an e-filing and document storage program in 2016, but acknowledged that, as of 2018, it was not operational across all immigration courts. A detailed report of this effort is available online. See, e.g., American Immigration Council, *Immigration Courts Are Rolling out an Electronic Filing Pilot Program in July, IMMIGRATION IMPACT* (July 6, 2018), http://immigrationimpact.com/2018/07/06/immigration-courts-electronic-filing-pilot-program (characterizing the roll out of electronic filing pilot as an “important advancement for these courts that still heavily rely on paper documentation”).

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December 2017, it had made “little appreciable progress” towards establishing an electronic filing system. In July 2018, EOIR launched a pilot e-filing and document storage program in the San Diego Immigration Court, and it has since been rolled out in four other courts. EOIR’s goal is to extend ECAS to all immigration courts in 2019.

While this is a positive step, the full implementation of this system is long overdue, given the importance of electronic filing for a functioning and efficient court system. EOIR should be encouraged to expedite the nationwide implementation of ECAS, or a similar integrated, system-wide electronic filing and case management system, and Congress should provide the necessary funding to enable them to do so as soon as possible.

Limitation of Docket Management Measures

In the last decade, immigration courts have been used as an extension of immigration enforcement mechanisms. Executive actions and policies that reshuffle the immigration court’s docket and remove necessary management tools from immigration judges are disruptive and counterproductive to the independence of the judges and the administration of justice. This approach undermines judges’ ability to independently manage their courtrooms and to administer their dockets in a fair and efficient manner. Further, because the immigration courts are situated within EOIR, within the Executive branch, immigration judges are required to comply with such Executive directives regardless of the impact on their dockets. Ultimately, these actions reinforce the confusion between the enforcement of immigration laws and the adjudication of relief applications, creating the perception that immigration judges are simply part of the government’s prosecution efforts.

In 2017 and 2018, DOJ and EOIR severely limited or eliminated several tools that immigration judges routinely used to manage their caseloads and clear cases from their dockets. Specifically, DOJ sharply curtailed the use of continuances in immigration proceedings and virtually eliminated the use of administrative closure and termination so as to render them nearly extinct as avenues to resolve cases.

In Matter of Castro-Tum, then-Attorney General Sessions rewrote decades of immigration law and practice by finding that neither immigration judges nor the Board of Immigration Appeals had the authority, express or implied, to suspend cases using the

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6 Notably, in redefining the legal landscape for each of these issues DOJ acted through or on the Attorney General’s referral power pursuant to 8 C.F.R. § 1003.1(h)(1). The potential negative impact such politicized use of this power can have on the immigration court system, and importantly, due process is addressed in a separate resolution submitted concurrently herewith.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
procedure known as administrative closure. Instead, the former Attorney General found that administrative closure is authorized only in a very limited subset of cases in which a previous regulation or judicially approved settlement expressly authorized such action.

In Matter of S-O-G- & F-D-B-, then-Attorney General Sessions similarly restricted the use of termination as a tool to remove cases from the immigration courts’ dockets. There he limited the use of termination of proceedings to those specific instances in which it is authorized by regulation or where DHS has failed to sustain the charges of removability. To support this conclusion, the former Attorney General again ruled that immigration judges “have no inherent authority to terminate or dismiss removal proceedings” for reasons other than those identified in statute or regulation.

In each decision implementing these changes, the Attorney General reasserted his authority, power, and influence over immigration judges, stating repeatedly that immigration judges may “exercise only the authority provided by statute or delegated by the Attorney General” (emphasis added) and that they have no “inherent authority” to use docket management tools unspecified by regulation. As a result of these decisions, immigration judges are now severely restricted from using two tools traditionally available to them to manage their dockets and prioritize adjudication of cases.

On August 16, 2018, in another case intruding into the independence and discretion of immigration judges, then-Attorney General Sessions decided Matter of L-A-B-R-, a case regarding continuance practices in immigration courts. The decision expressed deep skepticism about the use of continuances in immigration proceedings and redefined how the standard for granting continuances would be applied to removal cases in which a respondent was seeking relief in collateral proceedings before U.S. Citizenship and Immigration Services or in state or federal courts. The decision states that to succeed on such a request, the noncitizen will usually need to present full evidentiary submissions and requires immigration judges to articulate the specific basis for granting a continuance on the record to aid in the review of such decisions. The ruling in Matter of L-A-B-R- makes it more difficult and burdensome to obtain a continuance in immigration proceedings in which the respondent is or plans to seek collateral relief, wastes valuable court time, and reduces its utility as a tool to manage the immigration court’s docket.

2 Id.
4 Id.
5 Id.
7 Matter of Matter of S-O-G- & F-D-B-, 27 I&N Dec. 245 (A.G. 2018) (citing for review issues relating to “when there is ‘good cause’ to grant a continuance for a collateral matter to be adjudicated, [and] ordering cases stayed pending review”).
8 Matter of L-A-B-R, 27 I&N Dec. at 411 (stating that “[t]he overuse of continuances in immigration courts is a significant and recurring problem.”).
These decisions have eroded or threaten to erode the fundamental fairness and impede the efficiency of immigration proceedings. Efforts that undermine the immigration courts' ability to independently administer justice free of political interference and fear of retribution raise the question whether respondents are able to receive a fair hearing.\footnote{10} If judges don’t have the necessary tools to ensure the appropriate time, attention, or detailed consideration to the matters before them, both the system and those individuals subject to it suffer.

Therefore, Congress and the Department of Justice should create or restore docket management tools – including administrative closure, termination of proceedings, and reasonable continuances – that enable immigration judges to balance the need for expeditious resolution with the rights of respondents to achieve just outcomes. Such tools should be utilized particularly in cases involving vulnerable populations, including unaccompanied children and individuals experiencing mental illness, or as justice requires.

Hiring of Immigration Judges and Board of Immigration Appeals Members

Historically, many immigration judges have been recruited and hired from the ranks of government attorneys with experience working for either ICE (or its predecessor, INS) or DOJ. Some commentators have noted that when a majority of immigration judges possess similar background and experience, the result may be a body of decision makers with similar perspectives and a lack of system-wide neutrality.\footnote{11} For this reason, it is important that members of the immigration judiciary reflect a broad range of diversity.

In the wake of allegations of politicized hiring and firing of immigration judges and BIA members between 2004 and 2007, EOIR adopted reforms purportedly to guard against such actions in the future.\footnote{12} While the measures adopted from 2007 to 2016 appeared to have stemmed politicized hiring in that period, they had the unintended consequences of slowing hiring to a glacial pace. These measures also did little to address concerns regarding the lack of diversity of immigration judges, as a very high percentage of new immigration judges continued to be former government attorneys.\footnote{13}


As noted earlier, the lack of diversity on the bench is troubling, as the implications for such hiring bias is far reaching. It impacts both practice before the courts and perceptions of fairness in the public. An audit of the immigration courts conducted by GAO found that “having a body of [immigration judges] largely composed of lawyers who previously worked for DHS, ICE or DOJ branches limits the diversity of perspectives on the bench.” The audit recommended that EOIR “broaden hiring pools and outreach programs to increase diversity of experience of [immigration judges].” Policies and hiring practices adopted and implemented in 2017 and 2018, however, appear poised to frustrate these recommendations.

In April 2017, DOJ announced its plan to “streamline its hiring of [immigration] judges, reflecting the dire need to reduce the backlogs in our immigration courts.” At a high level, EOIR announced that the new hiring process “requires thorough vetting, as before, but also aims to reduce the hiring timeline . . . by [by] setting clear deadlines for . . . moving applicants to the next stage . . . [by] eliminating steps that did not aid the selection process in order to decrease processing times . . . [and] allowing for temporary appointments pending the completion of full background investigations for both federal and non-federal employees.” EOIR estimated that these changes would result in a hiring timeline of less than six months. That timeline stands in sharp contrast to the time it took applicants to navigate the multi-layered, multi-agency approach that was put in place after 2007. DOJ began implementing this new approach as of February 2018.

While many stakeholders agree that improved, faster hiring practices are necessary, there is some concern that DOJ’s current approach may elevate speed over substance and exacerbate the lack of diversity on the bench. As one report notes:

Review of this background information does raise concerns that DOJ is hiring immigration judges who were predominantly Department of Homeland Security (DHS) attorneys who prosecuted cases in immigration courts and on appeal. In fact, more than half of the judges selected in 2018—40 out of 78—are former DHS attorneys who previously worked for DHS and nearly 20% of immigration judges previously worked at another DOJ branch. While many stakeholders agree that improved, faster hiring practices are necessary, there is some concern that DOJ’s current approach may elevate speed over substance and exacerbate the lack of diversity on the bench. As one report notes:

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employees. An additional 37 percent were previously in other federal or state government positions. All in all, about 88 percent are former DHS or other government attorneys. Very few have backgrounds in public interest or private immigration law. More than one third of the recent hires do not list any prior immigration law experience in their published biographies.25 This lack of diversity can undermine the public’s confidence in fair and impartial decision making in the immigration courts. Therefore, EOIR should increase its efforts to hire immigration judges and Board of Immigration Appeals members from diverse professional backgrounds, including practitioners with experience representing non-citizens and individuals reflecting a broad mix of racial, ethnic, gender and gender identity, sexual orientation, disability, religious and geographically diverse backgrounds.

Another troubling aspect of the current hiring regime is the lack of transparency. Despite requests, DOJ and EOIR have declined to share the new hiring criteria with stakeholders, instead relying on high-level descriptions and generalities. To the extent the new hiring process in fact trades the “qualification requirements of judges” for speed, due process concerns are likely implicated; such an approach arguably removes safeguards designed to protect against politicized hiring and favors certain categories of candidates, which also likely undermines the diversity of immigration judges on the bench.

Prosecutorial Discretion

The decision to serve a Notice to Appear on a noncitizen is an exercise of prosecutorial discretion. DHS officers in ICE, CBP, and USCIS have considerable discretion with respect to removal proceedings against noncitizens in a variety of circumstances. In particular, they have discretion not to initiate proceedings at all; to concede eligibility for relief from removal after receipt of an application; to stop litigating a case after key factual developments; to develop to make removal unlikely or demonstrate compelling humanitarian factors (such as the serious illness of the respondent or a family member); to offer deferred action, administrative closure, or termination of proceedings early in the process; and not to file an appeal in certain types of cases.

In June 2010, then-Director of ICE John Morton issued the first of three memoranda describing ICE’s removal priorities and standards for the exercise of prosecutorial discretion.26 The first memorandum focused on delineating enforcement priorities based on the severity of the offense and utilization of scarce resources. Priority 1 included national security and criminal categories, “with a particular emphasis on violent criminals, felons, and repeat offenders,” as well as “aliens subject to outstanding criminal warrants,” and “aliens who otherwise pose a serious risk to public safety.”27 This latter

27 Id. at 1-2. ICE further subdivided Priority 1 into Levels 1, 2, and 3 according to type of offense.

employees. An additional 37 percent were previously in other federal or state government positions. All in all, about 88 percent are former DHS or other government attorneys. Very few have backgrounds in public interest or private immigration law. More than one third of the recent hires do not list any prior immigration law experience in their published biographies.25 This lack of diversity can undermine the public’s confidence in fair and impartial decision making in the immigration courts. Therefore, EOIR should increase its efforts to hire immigration judges and Board of Immigration Appeals members from diverse professional backgrounds, including practitioners with experience representing non-citizens and individuals reflecting a broad mix of racial, ethnic, gender and gender identity, sexual orientation, disability, religious and geographically diverse backgrounds.

Another troubling aspect of the current hiring regime is the lack of transparency. Despite requests, DOJ and EOIR have declined to share the new hiring criteria with stakeholders, instead relying on high-level descriptions and generalities. To the extent the new hiring process in fact trades the “qualification requirements of judges” for speed, due process concerns are likely implicated; such an approach arguably removes safeguards designed to protect against politicized hiring and favors certain categories of candidates, which also likely undermines the diversity of immigration judges on the bench.

Prosecutorial Discretion

The decision to serve a Notice to Appear on a noncitizen is an exercise of prosecutorial discretion. DHS officers in ICE, CBP, and USCIS have considerable discretion with respect to removal proceedings against noncitizens in a variety of circumstances. In particular, they have discretion not to initiate proceedings at all; to concede eligibility for relief from removal after receipt of an application; to stop litigating a case after key factual developments; to develop to make removal unlikely or demonstrate compelling humanitarian factors (such as the serious illness of the respondent or a family member); to offer deferred action, administrative closure, or termination of proceedings early in the process; and not to file an appeal in certain types of cases.

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category was “not intended to be read broadly,” but rather to be employed only when “serious and articulable public safety issues exist.”28 Priority 2 included “recent illegal entrants,” though no entry date was specified; and Priority 3 included “aliens who are fugitives,” which included those subject to a final order of removal who failed to depart for various reasons as well as aliens who reentered unlawfully after being deported with enumerated subcategories.29

In 2011, Morton issued another guidance memo that emphasized the necessity of affirmatively exercising prosecutorial discretion, citing such positive factors such as length of residence, arrival in the United States as a young child, and lack of criminal history.30 The memorandum also stressed weighing potential prosecution against available relief, particularly if the individual was likely to qualify for a benefit based on family relationships or asylum or other humanitarian relief.31 An additional memorandum re-emphasized the necessity of exercising discretion in cases where the individual had been the victim of a crime, was a witness in a criminal or other judicial matter, or was attempting to vindicate a right in court.32

However, in contrast to prior enforcement and discretion parameters, ranking enforcement priorities in order of importance, Executive Order 13768 issued by the current administration and DHS implementation memoranda prioritize virtually all undocumented or unlawful immigrants for removal.33 Under § 5(c) of the Executive Order, many undocumented immigrants with no criminal convictions (who entered the country without authorization) are designated as priorities for removal, because entering the United States without inspection is a “chargeable criminal offense.”34

28 Id. at 2 n.1.
29 Id. at 2-3.
31 Other factors outlined in the 2011 Morton Memorandum included: the person’s pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degree; whether the person, or the person’s immediate relative, has served in the U.S. military, reserves, or national guard; the person’s ties and contributions to the community, including family relationships; the person’s ties to the home country and conditions in the country; and whether the person is currently cooperating or has cooperated with federal, state, or local law enforcement authorities, such as ICE, the Department of Justice, the Department of Labor, or the National Labor Relations Board. Id. at 4-5.
32 Memorandum from John Morton, Director, ICE, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs” (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf. The 2011 Morton Victims Memorandum built on prior agency guidance and provided for prosecutorial discretion to “minimize any effect that immigration enforcement may have on the willingness of victims, witnesses, and plaintiffs to call police and pursue justice.” Id. at 1.
33 Memorandum from John Morton, Director, ICE, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs” (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf. The 2011 Morton Victims Memorandum built on prior agency guidance and provided for prosecutorial discretion to “minimize any effect that immigration enforcement may have on the willingness of victims, witnesses, and plaintiffs to call police and pursue justice.” Id. at 1.
34 Am. Immigration Council, Fact Sheet: Summary of Executive Order “Enhancing Public Safety in the Interior of the United States” (May 19, 2017),
Not surprisingly, as a result of these policy changes, ICE interior arrests escalated in 2017. According to an analysis prepared by ICE, 143,470 individuals were arrested in FY 2017, 110,568 of whom were arrested after January 20, 2017. During this same eight-month time period in 2016, ICE arrested 77,806 individuals. The analysis notes that ICE arrested more individuals during the first eight to nine months of 2017 than during the entirety of FY 2016.

Given limited enforcement and judicial resources at all levels, unnecessary removal proceedings or unnecessary litigation of legal and factual issues is particularly costly to the system. DHS should restore the use of prosecutorial discretion by both officers and attorneys to reduce the number of Notices to Appear served on or enforced against noncitizens who should not be priorities for removal, including persons who: 1) are prima facie eligible for relief from removal; 2) veterans and members of the U.S. armed forces; 3) long-time lawful permanent residents; 4) minors and elderly individuals; 5) individuals present in the U.S. since childhood; 6) pregnant or nursing women; 7) victims of domestic violence, trafficking, or other serious crimes; 8) individuals who suffer from a serious mental or physical disability; and 9) individuals with serious health conditions.

Immigration Judge Contempt Authority

The Department of Justice has recognized the need for immigration judges to be able to "control their courtrooms and protect the adjudicatory system from fraud and abuse." To further this goal, EOIR should amend 8 C.F.R. §1003 subpart G, the Professional Conduct Practitioners—Rules and Procedures, to allow for civil monetary contempt authority to be imposed by immigration judges against both removal defense and government trial attorneys and establish criteria for when such penalties can be applied.


36 Id.

37 Id.


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This authority is currently enabled by legislation albeit not yet implemented by regulation. Contempt authority was specifically listed in the Attorney General’s 2006 Directives, but was not implemented in the amended rules. Although the contempt authority has existed since 1996, the Attorney General has not implemented it because DHS (and previously INS) has continually “objected to having its attorneys subjected to contempt provisions by other attorneys within the Department, even if they do serve as judges.” Contempt authority could provide immigration judges “with an important tool to enforce [DHS] compliance with its orders” and empower judges to “meaningfully sanction attorneys for contemptuous behavior, such as late filings or ignoring judicial orders, that slows down the court and makes just adjudications more difficult.”

Conclusion

The immigration courts are suffering under a massive backlog of cases and several recent policies put into place have raised concerns about due process and fairness in the system. While ultimately, as the ABA has recommended previously, the system should be restructured into an independent court, implementing the recommendations in this resolution will assist in alleviating some of the concerns in the current system.

Respectfully submitted,

Wendy S. Wayne
Chair, Commission on Immigration
August 2019

40 See 8 U.S.C. § 1229a(b)(1) (“The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter.”).
41 See OFFICE OF THE ATTORNEY GENERAL, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS 5 (Aug. 9, 2006), available at http://www.usdoj.gov/ag/readingroom/ag-080906.pdf (“The Director of EOIR . . . will draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge’s proper exercise of authority.”).
1. **Summary of Resolution(s).** This resolution urges the Executive Office for Immigration Review (EOIR) to fully implement an electronic filing system for the immigration courts and urges Congress and the Department of Justice to restore docket management measures in order to achieve improved efficiency and fairness in the adjudication of immigration cases. EOIR should also increase its efforts to hire immigration judges and Board Members from diverse backgrounds. DHS should restore the use of prosecutorial discretion and not pursue removal against individuals who merit special care and consideration. EOIR should amend 8 C.F.R. §1003 subpart G, the Professional Conduct Practitioners--Rules and Procedures, to allow for civil monetary contempt authority to be imposed by immigration judges against both removal defense attorneys and government trial attorneys and establish criteria for when such penalties can be applied.

2. **Approval by Submitting Entity.** The resolution content was discussed and approved by the Commission on Immigration between April 22 and 26, 2019. Previously, Members were also active in preparing a Report from which the recommendations for the resolution originate, 2019 Update: Reforming the Immigration System. The Update Report was released in March 2019 after 3 years of research and development.

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?**

   **06M107D:** Supports (a) a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient, and that has sufficient resources to carry out its functions in a timely manner; (b) the development of efficient interagency procedures to ensure that those involved in immigration matters have a clearly identified means for addressing and resolving issues that require action by more than one of the federal agencies that have jurisdiction.

   **10M114A:** (a) Increase use of prosecutorial discretion by both DHS officers and attorneys to reduce the number of Notices to Appear (“NTA”) served on noncitizens who are prima facie eligible for relief from removal, and to reduce the number of issues litigated; (b) Give DHS attorneys greater control over the initiation of removal proceedings, and in DHS local offices with sufficient attorney resources, establish a pilot program requiring approval of a DHS lawyer prior to issuance of all discretionary Notices to Appear by DHS officers; (c) To the extent possible, assign one DHS trial attorney to each removal proceeding; (d) Cease issuing Notices to Appear to more than one of the federal agencies that have jurisdiction.
noncitizens who are prima facie eligible to adjust to lawful permanent resident status; 
(e) Upgrade DHS’s data systems to permit better tracking of detainees within the 
detention system, and improve protocols for transfers of detainees between detention 
facilities to ensure notification of family members and counsel; and (f) Create a 
position within DHS to oversee and coordinate all aspects of DHS immigration policies 
and procedures, including asylum matters.

The policy proposal would complement and support existing policy.

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

6. Status of Legislation. (If applicable) n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted by the 
House of Delegates. The Commission plans to coordinate with the ABA 
Governmental Affairs Office to advocate with relevant contacts within Congress, the 
Department of Homeland Security, the Department of Justice, and other stakeholders 

8. Cost to the Association. (Both direct and indirect costs) 
Adoption of the resolution will not result in expenditures for the ABA.

9. Disclosure of Interest. (If applicable) 
No known conflict of interest exists.

10. Referrals.

Center on Children and the Law 
Commission on Hispanic Rights and Responsibilities 
Section of Civil Rights and Social Justice 
Section of Criminal Law 
Section of International Law 
Standing Committee on Pro Bono and Public Service 
Working Group on Unaccompanied Minor Immigrants, 

11. Contact Name and Address Information. (Prior to the meeting. Please include name, 
address, telephone number and e-mail address) 
Meredith A. Linsky 
Director, Commission on Immigration 
1050 Connecticut Ave NW, Suite 400
12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Mary Ryan
Liaison to the Commission on Immigration from the Working Group on Unaccompanied Minor Immigrants
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155 Seaport Blvd.
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E-mail: mryan@nutter.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

EOIR should implement an electronic filing system for the immigration courts nationwide. Congress and DOJ should create or restore specified docket management measures in order to achieve improved efficiency and fairness in the adjudication of immigration cases. EOIR should also increase its efforts to hire immigration judges and Board Members from diverse backgrounds. DHS should restore the use of prosecutorial discretion and not pursue removal against individuals who merit special care and consideration. EOIR should amend 8 C.F.R. §1003 subpart G, the Professional Conduct Practitioners—Rules and Procedures, to allow for civil monetary contempt authority to be imposed by immigration judges against both removal defense and government trial attorneys and establish criteria for when such penalties can be applied.

2. Summary of the Issue that the Resolution Addresses

EOIR should establish an electronic filing system as expeditiously as possible to improve the overall functioning of the immigration courts. Executive orders and policies that reshuffle immigration judges’ dockets without input or reference to the status of any other pending matters are disruptive and counterproductive to the independence of the courts and the administration of justice. Non-diversified hiring threatens fairness and due process in immigration courts.

In contrast to prior enforcement and discretion parameters, ranking enforcement priorities in order of importance, recent administration and DHS policies prioritize virtually all undocumented or unlawful immigrants for removal, which increases the overall case backlog and undermines fairness and efficiency in the adjudication system. The Department of Justice has recognized the need for Immigration Judges to be able to “control their courtrooms and protect the adjudicatory system from fraud and abuse.”

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

The proposal supports the more ideal operation of the immigration adjudication system by enabling tools that will result in efficiency, professionalism, and fairness.

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

There are no minority views of which we are aware.
RESOLVED, That the American Bar Association supports a range of mechanisms through which an individual who is not subject to mandatory detention under the Immigration and Nationality Act may obtain release from immigration detention including bond, parole, and release on recognizance or under an order of supervision;

FURTHER RESOLVED, That in light of the Attorney General’s recent decision in Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019), which reversed longstanding precedent by eliminating the authority of Immigration Judges (effective July 15, 2019) to grant bond to certain asylum-seekers even after they have established a credible fear of persecution or torture, the American Bar Association urges Immigration and Customs Enforcement ("ICE") to utilize the critically important alternative of humanitarian parole as a basis for release from custody; and

FURTHER RESOLVED, That the Association urges the Department of Homeland Security to:

(a) codify the core requirements of ICE’s 2009 Parole Directive into regulation;

(b) ensure that the 2009 Parole Directive remain in full force and effect prior to or in the absence of such codification;

(c) conduct regular training programs for new and experienced ICE officers to reinforce their familiarity with and understanding of the factors set forth in the Parole Directive that support release from custody; and

(d) conduct prompt parole determinations for all asylum-seekers who have passed a Credible Fear interview and grant parole to those who have established their identities, who pose no threat to national security or public safety and who do not present a significant flight risk.
One of the greatest obstacles to achieving a fair day in court for individuals in immigration proceedings is detention. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress imposed categories of mandatory detention for some noncitizens, expanded detention and release criteria for others, and created a broad preliminary detention requirement for asylum-seekers who attempt to seek protection at ports of entry or are otherwise placed in an accelerated removal process known as expedited removal. While the ABA has consistently opposed mandatory detention of immigrants, particularly asylum-seekers and families traveling together, the ABA’s 2019 Reforming the Immigration System Update Report has specifically identified the problems asylum-seekers face when they are subject to detention.\\(^1\\)

Immigration and Customs Enforcement (“ICE”), part of the Department of Homeland Security (“DHS”), currently holds over 50,000 noncitizens each night in detention facilities across the United States, one of the highest numbers on record and more than the number currently authorized by Congress.\\(^2\\) Immigration detention results in a severe deprivation of liberty and immigration detainees are afforded far fewer procedural protections than criminal detainees.\\(^3\\) The ABA has long opposed the use of civil immigration detention for noncitizens in removal proceedings except in exceptional circumstances.\\(^4\\) The exceptions include when the individual presents a danger to the public or a national security threat, or when the individual poses a substantial flight risk;\\(^5\\) ABA policy contemplates procedural protections in determining detention status and requires that a decision to detain a non-citizen should be made in a hearing subject to judicial review.\\(^6\\)

For asylum-seekers, the consequences of detention can be particularly severe. Many asylum-seekers have experienced persecution, torture, and other trauma and have been detained in their country of persecution; under those circumstances, detention can exacerbate physical, emotional and mental suffering. Individual asylum claims often require that a decision to detain a non-citizen should be made in a hearing subject to judicial review.\\(^7\\)

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2 Caitlin Dickerson, ICE Faces Migrant Detention Crunch as Border Chaos Spills into Interior of the Country, N.Y. TIMES, April 22, 2009.
5 Id.
6 Id.
require painstaking research and analysis, which can be difficult to conduct when an asylum-seeker is cut off from counsel and family. And given the current backlog\(^2\) of over 800,000 cases in immigration court, asylum-seekers are often discouraged from pursuing their claims, deterred by the prospect of months or even years in custody.\(^6\) Furthermore, a recent study reviewing six years of data from the immigration courts demonstrated that immigrants in detention were the least likely to obtain representation, with only 14\% of detained immigrants securing legal counsel, compared with two-thirds of non-detained immigrants.\(^9\)

These concerns make recent changes to detention authority with respect to asylum-seekers of critical importance. In a recent decision, Attorney General William Barr severely restricted the ability of asylum-seekers to seek release from detention, eliminating the authority of immigration judges to conduct bond redeterminations.\(^10\) The only avenue remaining for asylum-seekers is through DHS parole authority, a discretionary determination that has been inconsistently and arbitrarily applied over the years.\(^11\)

### Asylum-Seekers and Expedited Removal

The Immigration and Nationality Act ("INA") provides for mandatory detention of certain categories of persons, including those convicted of enumerated crimes and those who have engaged in terrorist activities.\(^12\) However, the INA authorizes a variety of procedural mechanisms to release noncitizens from immigration detention including release on bond, parole, or under an order of supervision.\(^13\) These procedures differ depending on the manner in which the individual entered the United States and whether removal proceedings are pending or have concluded.

Noncitizens who present themselves at a U.S. port of entry, such as an airport or an international bridge, and who are found to be inadmissible are generally placed in expedited removal proceedings.\(^14\) The INA also authorizes the use of expedited removal against individuals who enter the United States without inspection and cannot affirmatively show that they have been present in the United States continuously for the

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\(^2\) While detained cases are prioritized in the immigration court system, a single detained asylum case can take months or even years when there is a pending appeal.


\(^6\) 8 U.S.C. § 1226(c).

\(^7\) Id. § 1226(a) (bond); id. § 1182(d)(5)(A) (parole); id. § 1231(a)(3) (order of supervision).

\(^8\) Id. § 1225(b).
2-year period immediately prior to their arrest. Currently, this provision of the INA is only enforced against individuals who are apprehended within 100 miles of the border and within 14 days of entry.

Under the statutory and regulatory provisions of expedited removal, an individual who expresses a fear of return to her country or place of last residence is examined to determine whether she can establish a “credible fear” of persecution or torture. If the individual can establish a significant possibility of meeting the eligibility requirements for protection, the expedited removal process is voided and the individual has the opportunity to raise her or her claim before an immigration judge. Once credible fear has been established, the non-citizen may be paroled into the country, on a case-by-case basis, for “urgent humanitarian reasons” or “significant public benefit,” provided the noncitizen presents neither a security risk nor a risk of absconding. In the first instance, the Department of Homeland Security makes this discretionary determination, and throughout the history of expedited removal, both DHS and legacy INS officials have been criticized for inconsistent determinations.

According to the federal regulations, there are five categories of noncitizens who may meet the parole standards: (1) those with serious medical conditions, making detention inappropriate; (2) pregnant women; (3) juveniles; (4) witnesses in judicial, legislative, or administrative proceedings in the United States; and (5) noncitizens for whom continued detention is not in the public interest. A grant of parole may be made by a wide range of ICE officials at various levels of the immigration system. A grant of parole is an exercise of discretion by the Secretary of DHS, and a denial is not reviewable by the courts (including an immigration judge).

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15 Id. § 1225(b)(1)(A)(ii)(II).
18 B.C.F.R § 235.6(e)(1).
19 Id. § 212.5(b).
21 Id. § 212.5(b).
22 The authority to grant parole may be exercised by “the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing.” Id. § 212.5(a).
23 8 U.S.C. § 1226(e). Pursuant to the Homeland Security Act §§ 102(a), 441, 1512(d), and 1517; 116 Stat. at 2142-43, 2192, 2310, and 2311; 6 U.S.C. §§ 112, 251, 552(d), and 557; and 8 C.F.R. § 2.1, the Attorney General’s authority under INA § 236(e), 8 U.S.C. § 1226(e), was transferred to the DHS Secretary, and references to the Attorney General in the statute are deemed to refer to the DHS Secretary.
In 2005, the Board of Immigration Appeals ("BIA") issued a precedential decision holding that those who are placed in expedited removal proceedings after having entered the United States without inspection, but who pass a credible fear interview and are placed into removal proceedings before an Immigration Judge, are eligible for a custody redetermination hearing before the Immigration Judge. Over the past 14 years, this decision has empowered immigration judges to evaluate thousands of custody determinations each year for noncitizens seeking protection under our asylum laws. Recently, in Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019), Attorney General Barr reversed this longstanding decision and eliminated the authority of Immigration Judges to grant bond to those created in Matter of X-K-, effective July 15, 2019. Once this holding is implemented, all asylum-seekers who are placed in expedited removal proceedings and demonstrate a credible fear of persecution or torture will remain detained pending their removal proceedings, unless DHS decides to grant parole.

Parole authority has been applied inconsistently and arbitrarily for decades. To address this problem and reiterate the availability of parole, John Morton, then Assistant Secretary of ICE, issued a December 8, 2009 parole memo titled, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture" ("2009 Parole Directive"). This memo set out more precise standards and procedures for the evaluation of parole for inadmissible noncitizens who had passed a credible fear interview. The 2009 Parole Directive referenced the five parole categories enumerated in the federal regulations and listed above, but attempted to provide additional guidance on what constituted release in the “public interest.” The 2009 Parole Directive instructed that each detainee’s eligibility for parole should be considered on its own merits, but that generally if an individual passes a credible fear interview, establishes his or her identity, and is neither a flight risk or a danger to the community, absent additional factors, parole would generally be in the public interest. The 2009 Parole Directive also set forth several procedural requirements on the adjudication of parole, including:

- As soon as practicable following a credible fear determination, providing arriving noncitizens with notice of their parole process including the date of the interview and the deadline for submitting documentation in a language they understand;
- Providing an automatic parole review no later than seven days following a credible fear finding, and if parole is denied, providing notification and the

29 Id. ¶ 6.2.
30 Id. ¶ 6.1.
rationale for the denial and inform the individual of her right to request a subsequent parole determination.\textsuperscript{29}

In recent years, practitioners who have worked in the field for more than ten years confirmed that ICE has been denying more parole applications, even for asylum-seekers who meet the criteria in the Parole Directive and would have been paroled in prior years.\textsuperscript{30} Practitioners also indicate that ICE relies on onerous conditions of release including unreasonably high bond amounts in conjunction with parole grants.\textsuperscript{31}

Once Matter of M-S- takes effect, asylum-seekers will be left at the mercy of discretionary parole determinations made by individual DHS officers at the local level. Consequently, ensuring that there is a rigorous, fair, and transparent system for granting parole applications is critical to ensuring that applicants for asylum have a full opportunity to make their case before an immigration judge. For this reason, all ICE offices should be directed to use their discretion consistent with the 2009 Parole Directive. ICE should provide regular training to officers who make parole determinations and keep records of the numbers of parole grants and denials, to ensure accountability and transparency. Finally, DHS should implement a policy favoring parole without payment of bond, given the limited resources of most asylum-seekers, particularly those intercepted at the Southwest border, and instruct ICE officers that they must consider ability to pay in cases where bond is required for release.

Respectfully submitted,

Wendy S. Wayne
Chair, ABA Commission on Immigration
August 2019

\textsuperscript{29} Id. ¶ 8.2
\textsuperscript{30} 2019 Update Report at UD 1-24; Human Rights First, \textit{Fact Sheet: Taking the Fight for Asylum-seekers to Court} (March 2018).
\textsuperscript{31} 2019 Update Report at UD 1-24.
1. **Summary of Resolution(s).** The resolution recommends codification of the core requirements of the 2009 Parole Directive into regulation. However, at a minimum, DHS should ensure that the 2009 Parole Directive remains in full force and is followed. Immigration and Customs Enforcement (ICE) should a) conduct parole determinations as a matter of course for asylum-seekers who have passed a credible fear screening and b) grant parole where asylum-seekers have established their identities, community ties, lack of flight risk and the absence of any threat to national security, public safety, or persons. DHS should also provide training programs for ICE officers regarding the relevant factors for consideration when making parole decisions. Finally, DHS should implement a policy to allow the discretion to grant parole without payment of a bond and provide guidance to ICE officers to consider ability to pay when a parole bond is required for release.

2. **Approval by Submitting Entity.** The resolution content was discussed and approved by Commission Members between April 22 and April 26, 2019. Previously, Members were also active in preparing a Report from which the recommendations for the resolution originate, **2019 Update: Reforming the Immigration System.** The Update Report was released in March 2019 after 3 years of research and development.

3. **Has this or a similar resolution been submitted to the House or Board previously?** Yes.
   - **12A102 – Adoption of the ABA Civil Immigration Detention Standards** which include a recommendation that a noncitizen should only be detained based upon an objective determination that he or she presents a threat to national security or public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision.
   - **06M107E – opposes detention of non-citizens in removal proceedings except in extraordinary circumstances which include where the person presents (1) a threat to national security, (2) a threat to public safety, (3) a threat to another person or persons, or (4) a substantial flight risk. Also discusses procedural mechanisms to ensure due process.**
   - **90M131 – Policy to improve the asylum process including facilitating procedures.**
access to counsel, interpretation, and only detaining asylum-seekers in extraordinary circumstances and in the least restrictive environment necessary to ensure appearance in immigration court.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? 12A102, 06M107E, 90M131 (above). The adoption of the proposed policy would support and complement existing policy by providing additional guidance pursuant to which asylum-seekers can be released from detention on parole and result in a more consistent application throughout the country.

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 Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudication system.

8. Cost to the Association. (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.


10. Referrals.
    Center on Children and the Law
    Commission on Hispanic Rights and Responsibilities
    Section of Civil Rights and Social Justice
    Section of Criminal Law
    Section of International Law
    Standing Committee on Pro Bono and Public Service
    Working Group on Unaccompanied Minor Immigrants

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    Section of International Law
    Standing Committee on Pro Bono and Public Service
    Working Group on Unaccompanied Minor Immigrants
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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Liaison to the Commission on Immigration from the Working Group on Unaccompanied Minor Immigrants  
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1. Summary of the Resolution

The resolution recommends that the Department of Homeland Security ("DHS") seek codification of the core requirements of the 2009 Parole Directive into regulation. However, at a minimum, DHS should ensure that the 2009 Parole Directive remains in full force and is followed. ICE should a) conduct parole determinations as a matter of course for asylum-seekers who have passed a credible fear screening and b) grant parole where asylum-seekers have established their identities, community ties, lack of flight risk and the absence of any threat to national security, public safety, or persons. DHS also should provide training programs for ICE officers regarding the relevant factors for consideration when making parole decisions. Finally, DHS should implement a policy to allow the discretion to grant parole without payment of a bond and provide guidance to ICE officers to consider ability to pay when a bond is required for release.

2. Summary of the Issue that the Resolution Addresses

DHS can enhance due process through appropriate parole and bond policies that offer noncitizens individualized assessments of flight risk and danger to the community. However, in recent years, practitioners who have worked in the field for more than ten years confirmed that ICE has been denying more parole applications, even for asylum-seekers who meet the criteria in the 2009 parole directive and would have been paroled in prior years. Practitioners have also observed that ICE increasingly relies on onerous or intrusive conditions of release, including unreasonably high bond amounts. Given the Attorney General’s recent decision in Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019), as of July 15, 2019, parole will be the only way for asylum-seekers to be released from detention after passing a credible fear interview but before the completion of their removal proceedings. It is therefore crucial that ICE follows consistent and transparent standards when considering parole applications.

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

The proposal would reestablish the criteria for granting parole and provide guidance to make parole more widely available for urgent humanitarian reasons, significant public benefit, and when no security or flight risk is present.

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

There are no minority views.
RESOLVED, That the American Bar Association urges the U.S. Circuit Courts of Appeals to establish or expand pro bono programs to provide *pro bono* representation to *pro se* appellants in immigration cases.
The Board of Immigration Appeals ("BIA" or "Board") reviews decisions made by immigration judges (and, in some cases, by the Department of Homeland Security). The Board is part of the Executive Office for Immigration Review ("EOIR"), which is a part of the Department of Justice ("DOJ"). The Attorney General appoints Members of the Board. Where judicial review of final decisions is available, it must be sought in the United States Court of Appeals for the judicial circuit in which the immigration judge completed the proceedings.4

Several of the Circuit Courts of Appeals—most notably the Ninth and Second Circuits—have developed formal programs to provide pro bono counsel to pro se parties with meritorious or complex appeals, including immigration appeals.5 These programs have proven extremely popular and successful, with many more volunteer attorneys than cases each year. The Ninth Circuit also provides additional resources, including an immigration law outline developed by the Immigration Legal Resource Center.6 Such programs serve to increase pro bono representation and allow the Circuit Court to make more effective, well-reasoned, and fair decisions. Such efforts are laudable, and other Circuit Courts should be encouraged to examine and adopt similar programs to increase representation for pro se litigants in immigration-related appeals.

Because removal proceedings are civil, not criminal, in nature, noncitizens are not entitled to representation at government expense in immigration proceedings. By statute, noncitizens are entitled to representation in immigration proceedings, but at no charge.7

I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); Romero v. U.S.I.N.S., 399 F.3d 109, 112 (2d Cir. 2005) ("As deportation proceedings are civil in nature, aliens in such proceedings are not protected by the Sixth Amendment right to counsel.").


5 See, e.g., I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); Romero v. U.S.I.N.S., 399 F.3d 109, 112 (2d Cir. 2005) ("As deportation proceedings are civil in nature, aliens in such proceedings are not protected by the Sixth Amendment right to counsel.").
cost to the Government. As a result, a substantial number of noncitizens do not secure representation for their immigration proceedings. This number is particularly high for certain groups of noncitizens, including detained immigrants and family units.

At the same time, studies show that representation plays a critical role in ensuring due process, fairness, and efficiency in immigration proceedings. Providing pro bono counsel to pro se noncitizens in the Circuit Courts helps to achieve these goals by assisting noncitizens to identify legal errors and/or ineffective assistance of counsel below, developing potentially meritorious legal arguments, and achieving successful outcomes that can benefit other noncitizens. Pro bono programs also assist the courts by identifying bona fide legal issues, and avoiding frivolous arguments.

Providing greater access to pro bono representation in appeals before the Circuit Courts is especially important because it is the only level of the immigration adjudication system that is independent of the Department of Justice. Because immigration judges and BIA members are employees of DOJ, widespread concerns have persisted regarding

8 U.S.C. § 1229a(b)(4)(A) (‘The alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.’).  

10 Eagly & Shafer, supra note 8, at 1 (noting that representation rates for noncitizens in detention have been around 30 percent in recent years, and that in 2016, 70 percent of family units were unrepresented when their cases closed); Eagly & Shafer, supra note 8, at 32 (during the period studied, only 14% of detained noncitizens were represented, whereas 68% of non-detained noncitizens were represented).

11 Eagly & Siulc, supra note 8, at 1-2 (noting that represented noncitizens are much more likely to succeed in their cases, obtain release from detention, and show up for their hearings); Vera Institute of Justice, Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity 5-6, 27-29, 34-35 (Nov. 2017), www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation (studying program providing a free attorney to nearly all detained financially eligible noncitizens in New York City and finding that led to more successful case outcomes, helped immigration proceedings run more smoothly, and helped to ensure due process by evaluating and pursuing all potentially meritorious forms of relief); Eagly & Shafer, supra note 8, at 2 (finding that immigrants with attorneys were more likely to seek and obtain relief from removal, and that the involvement of counsel was associated with gains in efficiency because represented noncitizens brought fewer non-meritorious claims, were more likely to be released from custody, and were more likely to appear at future hearings).

12 Vera Institute of Justice Evaluation, supra note 10, at 36-37, 40 (clients of program providing a free attorney to eligible noncitizens experienced a higher rate of appeals, and won appeal outcomes that were more favorable; counsel identified, litigated, and established precedential decisions in important areas of law).
the independence of the immigration judiciary and its fairness toward noncitizens. Therefore, encouraging the adoption of pro bono programs by the Circuit Courts will also have the beneficial effect of bestowing more legitimacy to the immigration system as a whole.

The ABA has long supported the appointment of counsel at federal government expense to represent all indigent persons in removal proceedings before EOIR, including in immigration court and before the BIA, and, if necessary, to advise such individuals of their rights to appeal to the federal Circuit Courts of Appeals. However, until the goal of government-funded representation is accomplished, we support increasing pro bono efforts to provide legal counsel in removal proceedings, including appeals of those proceedings, to indigent persons who lack counsel or the financial means to hire private counsel.

Respectfully submitted,

Wendy S. Wayne
Chair, Commission on Immigration
August 2019

13 See ABA Commission on Immigration, 2019 Update Report, Reforming the Immigration System, Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, UD 6-4, 6-6-6-12 (March 2019) ("2019 Update Report"). For this reason, and others, the ABA has recommended the creation of an independent, Article I court to adjudicate immigration cases. See ABA House of Delegates Resolution 10M114F (adopted February 8-9, 2010), available at https://www.americanbar.org/content/dam/aba/directories/policy/2010_my_114f.authcheckdam.pdf; 2019 Update Report at UD 6-11-6-16.

1. **Summary of Resolution(s).** This Resolution encourages Circuit Courts of Appeals to examine and adopt programs to increase pro bono representation for pro se litigants in immigration-related appeals.

2. **Approval by Submitting Entity.** The resolution content was discussed and approved by Commission Members between April 22\textsuperscript{nd} and April 26\textsuperscript{th}. Previously, Members were also active in preparing a Report from which the recommendations for the resolution originate, *2019 Update: Reforming the Immigration System*. The Update Report was released in March 2019 after 3 years of research and development.

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?**

   Policy Resolution 06M107A supports the due process right to counsel for all persons in removal proceedings, and the availability of legal representation to all noncitizens in immigration-related matters. It also supports establishing a system to screen and refer indigent persons with potential relief to pro bono attorneys. The proposed policy would expand access to pro bono legal representation until the goal of Policy Resolution 06M107A could be accomplished.

   Policy Resolution 11A118 supports measures to improve access to counsel in removal proceedings and to encourage participation in pro bono services by qualified agencies and individuals. The proposed policy would complement and support Policy Resolution 11A118.

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 Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice,
and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudication system.

8. **Cost to the Association.** (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.

9. **Disclosure of Interest.** (If applicable) No known conflict of interest exists.

10. **Referrals.**

    Center on Children and the Law  
    Commission on Hispanic Rights and Responsibilities  
    Section of Civil Rights and Social Justice  
    Section of Criminal Law  
    Section of International Law  
    Standing Committee on Pro Bono and Public Service  
    Working Group on Unaccompanied Minor Immigrants

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

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    Director, Commission on Immigration  
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    E-mail: meredith.linsky@americanbar.org

12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

    Mary Ryan  
    Liaison to the Commission on Immigration  
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EXECUTIVE SUMMARY

1. Summary of the Resolution

Several of the United States Circuit Courts of Appeals—most notably the Ninth and Second Circuits—have developed formal programs to provide pro bono counsel to pro se parties with meritorious or complex appeals, including immigration appeals. These programs serve to increase pro bono representation and allow the Circuit Courts to make more effective, well-reasoned, and fair decisions. This Resolution encourages other Circuit Courts to examine and adopt similar programs to increase representation for pro se litigants in immigration-related appeals.

2. Summary of the Issue that the Resolution Addresses

Representation plays a critical role in ensuring due process, fairness, and efficiency in immigration proceedings; however, there is no right to counsel at government expense in immigration proceedings, and most non-citizens are unable to secure representation. This resolution encourages other Circuit Courts to examine and adopt pro bono programs to increase representation for pro se litigants in immigration-related appeals.

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

The ABA supports the appointment of counsel at federal-government expense to represent all indigent persons in removal proceedings, and, if necessary, to advise such individuals of their right to appeal to the federal Circuit Courts of Appeals. Until this goal is achieved, the proposal would help to increase representation for pro se litigants in immigration appeals.

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

There are no minority views of which we are aware.

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RESOLVED, That the American Bar Association encourages Congress and the Department of Justice to amend laws and regulations to ensure that noncitizens who have the statutory right to seek judicial review of orders of removal in the circuit courts of appeal are able to exercise that right without relinquishing the benefits or protections granted during their administrative immigration proceedings. Specifically, the Association urges:

1. (1) that Congress amend 8 U.S.C. §1252(b)(3)(B) and applicable regulations to establish an automatic stay of removal of a final administrative decision of the Board of Immigration Appeals until either (a) the expiration of the thirty-day period for filing a Petition for Review in the Court of Appeals having jurisdiction; or (b) a ruling by the Circuit Court on a motion for a stay of removal pending disposition of the appeal, whichever is earlier; and

2. (2) that the Department of Justice amend 8 C.F.R. §1240.26(i), which provides for automatic termination of a grant of voluntary departure upon the filing of a petition for review in the Court of Appeals, and to allow that the period of voluntary departure granted by the Board of Immigration Appeals, if any, should be stayed during any period of judicial review and reinstated following the decision of the Circuit Court.

RESOLVED, That the American Bar Association encourages Congress and the Department of Justice to amend laws and regulations to ensure that noncitizens who have the statutory right to seek judicial review of orders of removal in the circuit courts of appeal are able to exercise that right without relinquishing the benefits or protections granted during their administrative immigration proceedings. Specifically, the Association urges:

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2. (2) that the Department of Justice amend 8 C.F.R. §1240.26(i), which provides for automatic termination of a grant of voluntary departure upon the filing of a petition for review in the Court of Appeals, and to allow that the period of voluntary departure granted by the Board of Immigration Appeals, if any, should be stayed during any period of judicial review and reinstated following the decision of the Circuit Court.
Persons who seek to immigrate to the United States face substantial obstacles and high stakes. Noncitizens typically are not fluent in English, are ethnic or racial minorities in the United States, and lack adequate financial resources. The American system of immigration adjudication is complex and difficult to navigate. The stakes for many noncitizens are high: they face loss of livelihood, permanent separation from U.S. family members, or even persecution or death if deported to their native countries.

The disparity in outcomes of immigration proceedings, depending on whether noncitizens are unrepresented or represented, is striking. In particular, lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation.

Under the umbrella of the Department of Justice, the Board of Immigration Appeals ("BIA" or "Board") is the administrative body that reviews decisions of immigration judges in removal and deportation cases. Decisions by the Board can be appealed through the federal courts by filing a petition for review with the relevant district court. Access to review of immigration cases by the federal judiciary is essential to ensure consistency, fairness, and due process in the administration of our nation's immigration system. However, many barriers to obtaining judicial review of immigration decisions remain.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") together have deprived the federal courts of jurisdiction to review removal orders for noncitizens convicted of certain crimes, barred challenges to certain discretionary acts of the Attorney General, restricted all judicial review — to the extent still permitted — to the courts of appeals, and imposed a 30-day deadline for a petitioner to appeal a final removal order to the court of appeals. Filing a petition for review in the court of appeals does not stay a removal order. The petitioner must file — and the court of appeals must grant — a separate motion for stay of removal. Additionally in 2005, Congress enacted the REAL ID Act.

1 See 8 CODE OF FEDERAL REGULATIONS § 1003.1 [hereinafter C.F.R.].
2 See 8 UNITED STATES CODE § 1252 [hereinafter U.S.C.]

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that decisively eliminated habeas jurisdiction over removal orders (other than expedited removal orders), but permitted review by the courts of appeals of constitutional claims and questions of law that were previously subject to habeas review.

In the 2010 Reforming the Immigration System report, the Commission on Immigration noted that the 30-day deadline for filing a petition for review of a final removal order with the court of appeals was unduly short, particularly for petitioners in detention without representation. The 2010 Report recommended that Congress amend the Immigration and Nationality Act to provide for a 60-day period in which to appeal, as is the case for non-immigration appeals against the government. The 2010 Report further suggested that the BIA amend its regulations to provide that each final removal order in which the government prevails must clearly state the right to appeal, the applicable circuit court, and the deadline for filing the federal appeal. Since the 2010 report, the landscape for judicial review of removal orders has remained mostly unchanged. Congress has passed no legislation altering the scope of judicial review or restoring the possibility of courts of appeals remanding to the agency for further fact-finding in appropriate circumstances.

Seeking review of a removal decision has significant implications on a grant of voluntary departure, a form of immigration relief in which a petitioner agrees to leave the U.S. of his own accord, and the enforceability of an alternative removal order. Voluntary departure is automatically terminated if a motion to reopen or motion to reconsider is filed with the Board. Voluntary departure also automatically terminates upon the filing of a petition for review before the circuit court of appeals.

General eligibility requirements for Voluntary Departure. Voluntary departure can be granted at any point during immigration removal proceedings, from the preliminary hearing stage until the conclusion of proceedings. The immigration judge has more discretion to grant voluntary departure during the preliminary stages of proceedings. During that period, the immigration judge can allow up to 120 days for an individual in proceedings to depart the country if he makes the request at a preliminary hearing, is not requesting other forms of relief, concedes removability, waives appeal, and has not been convicted of an aggravated felony or engaged in terrorist activity. Voluntary departure can also be granted at the end of proceedings, but more restrictions apply in that case.

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The immigration judge can allow up to 60 days for an individual in proceedings to depart. However, the individual in proceedings also must be in the U.S. for a year or more prior to the start of proceedings, must be able to show good moral character for a minimum of 5 years prior to the request, cannot be convicted of an aggravated felony or engaged in terrorist activity, provide proof of financial ability and intent to leave the country, and post a voluntary departure bond within 5 days of the voluntary departure grant. Failure to leave the country after a grant of voluntary departure has severe penalties, such as ineligibility for many forms of relief for a period of 10 years and civil fines ranging from $1,000 to $5,000.

In practical terms, in order to exercise the right to appeal before the circuit court, the petitioner must file (and be granted) a stay of removal; otherwise, a removal order would take effect during the pendency of his appeal and he could be deported from the U.S. The criteria for the grant of a stay of removal request is for the petitioner to show that there is a likelihood of success on the merits of the appeal, he will suffer irreparable harm if the stay is not approved, harm to the petitioner is greater than harm to the other party if the stay is not granted, and approval of the stay would serve the public interest. As noted above, any grant of voluntary departure is terminated once federal review is requested, but a stay of voluntary departure would aid petitioners in the review process.

In the Ninth and Second Circuits there is an exception to the general circuit court practice regarding stay of removal motions. In these circuits, the filing of a stay motion temporarily stays removal until the motion is adjudicated. The Ninth Circuit has held that the filing of a stay motion automatically confers a temporary stay of removal: Deloven v. INS, 115 F.3d 643 (9th Cir. 1997), see also 89th Cir. General Order 6.4(c)(1). In the Second Circuit, the court entered into an informal “forbearance” agreement with the Department of Homeland Security. The Department has agreed to delay effectuating the removal of an alien while his or her petition for review is pending with the court, if the petition is accompanied by a motion for a stay of removal: See Persaud v. Holder, No. 10-6506, 2011 WL 5326485, at *1 (W.D.N.Y. Nov. 3, 2011). In other circuits, however, Immigration and Customs Enforcement (“ICE”) may remove the petitioner immediately. For individuals who are detained, particularly noncitizens from Mexico and Central America, removal can occur within days or even hours of the issuance of a removal order. See T. REALMUTO, J. CHICCO, N. MORAVNETZ & B. WERLIN, SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS: STANDARD, IMPLICATIONS OF ICE’S RETURN POLICY AND THE OSG’S MISREPRESENTATION TO THE SUPREME COURT, AND SAMPLE STAY MOTION (May 25, 2012). In the Ninth and Second Circuits there is an exception to the general circuit court practice regarding stay of removal motions. In these circuits, the filing of a stay motion temporarily stays removal until the motion is adjudicated. The Ninth Circuit has held that the filing of a stay motion automatically confers a temporary stay of removal: Deloven v. INS, 115 F.3d 643 (9th Cir. 1997), see also 89th Cir. General Order 6.4(c)(1). In the Second Circuit, the court entered into an informal “forbearance” agreement with the Department of Homeland Security. The Department has agreed to delay effectuating the removal of an alien while his or her petition for review is pending with the court, if the petition is accompanied by a motion for a stay of removal: See Persaud v. Holder, No. 10-6506, 2011 WL 5326485, at *1 (W.D.N.Y. Nov. 3, 2011). In other circuits, however, Immigration and Customs Enforcement (“ICE”) may remove the petitioner immediately. For individuals who are detained, particularly noncitizens from Mexico and Central America, removal can occur within days or even hours of the issuance of a removal order. See T. REALMUTO, J. CHICCO, N. MORAVNETZ & B. WERLIN, SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS: STANDARD, IMPLICATIONS OF ICE’S RETURN POLICY AND THE OSG’S MISREPRESENTATION TO THE SUPREME COURT, AND SAMPLE STAY MOTION (May 25, 2012).

Once an order of deportation or removal from the Board of Immigration Appeals (BIA) becomes administratively final, it is immediately enforceable, absent a stay from the court of appeals. An order of removal becomes final: (1) upon the BIA’s dismissal of the noncitizen’s appeal; (2) if the case is certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal; or (3) upon entry of a stay by operation of law. As noted above, any grant of voluntary departure is terminated once federal review is requested, but a stay of voluntary departure would aid petitioners in the review process.

16 B.C.R. § 1240.26(c).
17 8 C.F.R. § 1240.26(c)(1).
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to know that they still have the option to leave the U.S. on their own if ultimately unsuccessful on appeal without the cloud of a removal order. The current regulation discourages individuals from exercising their due process rights; instead, if a non-citizen decides to exercise the right to judicial review, he must face the consequences of a removal order.

Immigration cases continue to make up a significant proportion of the federal courts of appeals' civil docket nationwide (10% in 2017). Nonetheless, the percentage of BIA decisions appealed has seen a steady decline from 28.7% of all BIA cases completed at its apex in 2006 to 16% in 2016. Efforts to expand access to counsel have also increased, but there is still no systemic, guaranteed right to access to counsel in immigration proceedings, nor is there the necessary framework for ensuring that existing programs are administered consistently and fairly across all parts of the country. As enforcement actions increase, this vital component of ensuring due process in immigration matters is ever more crucial.

While a noncitizen is legally entitled to pursue a petition for review of the BIA’s decision from abroad, once a noncitizen has been involuntarily removed to his or her home country, the right to pursue an appeal is often moot for all practical purposes. This is because it will be virtually impossible for the petitioner to obtain counsel or file the petition for review pro se from abroad. Moreover, for those whose case involves a threat of persecution or torture, there is no adequate remedy if they have been deported, tortured or killed by the time the circuit court issues a ruling. These concerns highlight the need for a process that balances the right of a noncitizen to appeal in a way that is meaningful against the government’s legitimate interest in finality of litigation and why access to a stay of removal and stay of voluntary departure after filing a federal appeal are critical for due process in immigration cases.

Respectfully submitted,
Wendy S. Wayne
Chair, Commission on Immigration
August 2019

23 See 2019 Report at UD 4-9, Table 4-1.
24 Compare 2010 Report at 4-24, Table 4-1 with 2019 Report at UD 4-9, Table 4-1.
1. **Summary of Resolution(s).** The Resolution encourages Congress to amend 8 U.S.C. §1252(b)(3)(B) to allow for automatic stay of the execution of a removal order when a petition for review is filed with the Circuit Courts of Appeals. Additionally, the Department of Justice is encouraged to amend 8 C.F.R. §1240.26(i) to allow for the granted period of voluntary departure to be stayed during the review period by the federal court.

2. **Approval by Submitting Entity.** The resolution content was discussed and approved by Commission Members between April 22 and April 26. Previously, Members were also active in preparing a Report from which the recommendations for the resolution originate. 2019 Update: Reforming the Immigration System. The Update Report was released in March 2019 after 3 years of research and development.

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?**

   06M107C: urges an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include proceedings like those governed by the Administrative Procedure Act, in person and on the record, with notice and opportunity to be heard, and a decision that includes findings of facts and conclusions of law; availability of full, fair, and meaningful review in the federal courts where deportation or removal from the United States is at stake; and the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal.

   83M119: Oppose legislation to limit availability and scope of judicial review of administrative decisions regarding reopening and reconsideration of exclusion or deportation proceedings or asylum determinations on constitutional and statutory writs of habeas corpus. Oppose legislation to limit to less than 60 days the time within which petitions for review must be filed.

   10M114D: To restore the U.S. Court of Appeals’ authority to review discretionary decisions of the Attorney General under the abuse of discretion standard in effect prior to review discretionary decisions of the Attorney General under the abuse of discretion standard in effect prior to review discretionary decisions of the Attorney General under the abuse of discretion standard in effect prior to review discretionary decisions of the Attorney General under the abuse of discretion standard in effect prior.
to 1996 legislation. Such legislation should provide that courts apply a presumption in favor of judicial review and specifically reject attempts by the Attorney General to label additional actions as discretionary and insulate them from review.

The proposed policy would compliment and support existing policy.

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

6. Status of Legislation. (If applicable) n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudication system.

8. Cost to the Association. (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.


10. Referrals.
Center on Children and the Law
Commission on Hispanic Rights and Responsibilities
Section of Civil Rights and Social Justice
Section of Criminal Law
Section of International Law
Standing Committee on Pro Bono and Public Service
Working Group on Unaccompanied Minor Immigrants

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)
Meredith A. Linsky
Director, Commission on Immigration
1050 Connecticut Ave NW, Suite 400
Washington, DC 20036
Tel: 202-662-1006
12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Mary Ryan  
Unaccompanied Minor Immigrant Working Group Liaison  
Commission on Immigration  
155 Seaport Blvd.  
Boston, MA 02210  
Tel: 619-439-2212  
E-mail: mryan@nutter.com

E-mail: meredith.linsky@americanbar.org
EXECUTIVE SUMMARY

1. Summary of the Resolution

Access to review of immigration cases by the federal judiciary is essential to ensure consistency, fairness, and due process in the administration of our nation’s immigration system. However, barriers to obtaining judicial review remain. A petition seeking review must be filed—and the circuit court must grant—a separate motion for stay of removal. Without such motion and approval, the removal order will become final and the petitioner could be removed from the U.S. during the pendency of the appeal. Additionally, voluntary departure is terminated upon filing a petition for review, which may deter individuals from exercising their right to seek judicial review.

2. Summary of the Issue that the Resolution Addresses

Once an order of deportation or removal from the Board of Immigration Appeals becomes administratively final, it is immediately enforceable, absent a stay from the court of appeals; there is no automatic stay of removal during the pendency of the appeal and ICE may remove the petitioner immediately. While a noncitizen is legally entitled to pursue a petition for review from abroad, once a noncitizen has been involuntarily removed to his or her home country, the right to pursue an appeal is often moot for practical purposes. The automatic termination of voluntary departure and the absence of an automatic stay of removal or deportation upon the filing of a petition for review with the circuit court are part of the statutory barriers that prevent meaningful judicial review of immigration decisions. This is critical for those whose case involves a threat of persecution or torture; there is no adequate remedy if they have been deported, tortured, or killed by the time the circuit court issues a ruling.

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

The recommendations would provide balance for the right of a noncitizen to appeal in a way that is meaningful against the government’s legitimate interest in the finality of litigation.

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

There are no minority views of which we are aware.
RESOLVED, That the American Bar Association approves the following paralegal education programs: Brichtwood College, Paralegal Studies Program, Nashville, TN; Ferris State, Legal Studies Program, Big Rapids, MI; National American University, Paralegal Studies Program, Minneapolis, MN; South University, Paralegal Studies/Legal Studies Program, Cleveland, OH; Pennslyvania College of Technology, Legal Assistant/Paralegal Program, Williamsport, PA; National American University, Paralegal Studies Program, Sioux Falls, SD; University of Tennessee Chattanooga, Legal Assistant Studies Program, Chattanooga, TN; and Utah Valley University, Paralegal Studies Program, Orem, UT at the request of the institutions; and

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal education programs: Faulkner University, Legal Studies Program, Montgomery, AL; South University, Montgomery, Legal and Paralegal Studies Program, Montgomery, AL; California State University, Paralegal Studies Program, Los Angeles, CA; University of San Diego, Paralegal Program, San Diego, CA; Kapi'olani Community College, Paralegal Program, Honolulu, HI; Kankakee Community College, Paralegal/Legal Assistant Studies Program, Kankakee, IL; Midstate College, Paralegal Studies Program, Peoria, IL; Anne Arundel Community College, Paralegal Program, Arnold, MD; Macomb Community College, Legal Assistant Program, Warren, MI; Inver Hills Community College, Paralegal Program, Inver Grove Heights, MN; Bergen Community College, Paralegal & Legal Nurse Consultant Programs, Paramus, NJ; Hofstra University, Paralegal Studies Program, Hempstead, NY; Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC; Methodist University, Legal Studies Program, Fayetteville, NC; South College, Legal Studies/Paralegal Studies Program, Asheville, NC; Chattanooga State Community College, Paralegal Studies Program, Chattanooga, TN; and Southwest Tennessee Community College, Paralegal Studies Program, Memphis, TN;

FURTHER RESOLVED, That the American Bar Association withdraws the approval of the following paralegal education programs: Brightwood College, Paralegal Studies Program, Nashville, TN; Ferris State, Legal Studies Program, Big Rapids, MI; National American University, Paralegal Studies Program, Minneapolis, MN; South University, Paralegal Studies/Legal Studies Program, Cleveland, OH; Pennsylvania College of Technology, Legal Assistant/Paralegal Program, Williamsport, PA; National American University, Paralegal Studies Program, Sioux Falls, SD; University of Tennessee Chattanooga, Legal Assistant Studies Program, Chattanooga, TN; and Utah Valley University, Paralegal Studies Program, Orem, UT at the request of the institutions; and
FURTHER RESOLVED, That the American Bar Association extends the terms of approval until February 2020 Mid-Year Meeting of the House of Delegates for the following paralegal education programs: American River College, Legal Assistant Program, Sacramento, CA; De Anza College, Paralegal Studies Program, Cupertino, CA; University of California, Riverside, Paralegal Studies Program; Riverside, CA; West Los Angeles College, Paralegal Studies Program, Culver City, CA; Community College of Aurora, Paralegal Program, Denver, CO; University of Hartford, Paralegal Studies Program, West Hartford, CT; Wesley College, Legal Studies Program, Dover, DE; Miami Dade College, Paralegal Studies Program, Miami, FL; Illinois Central College, Paralegal Program, Peoria, IL; South Suburban College, Paralegal/Legal Assistant Program, South Holland, IL; Ball State University, Legal Studies Program, Muncie, IN; Louisiana State University, Paralegal Studies Program, Baton Rouge, LA; Bay Path University, Legal Studies Program, Longmeadow, MA; Lansing Community College, Paralegal Program, Lansing, MI; Hamline University, Paralegal Program, St. Paul, MN; Winona State University, Paralegal Program, Winona, MN; New Hampshire Technical Institute, Paralegal Studies Program, Concord, NH; Atlantic Cape Community College, Paralegal Studies Program, Mays Landing, NJ; Rowan College at Burlington County, Paralegal Program, Pemberton, NJ; Rowan College at Gloucester County, Paralegal Program, Sewell, NJ; Union County College, Paralegal Studies Program, Cranford, NJ; Truckee Meadows Community College, Paralegal/Law Program, Reno, NV; Hilbert College, Legal Studies/Paralegal Program, Hamburg, NY; LaGuardia Community College, Paralegal Studies Program, Long Island, NY; Schenectady County Community College, Paralegal Studies Program, Schenectady, NY; Westchester Community College (SUNY), Paralegal Studies Program, Valhalla, NY; Meredith College, Paralegal Program, Raleigh, NC; Lakeland Community College, Paralegal Studies Program, Kirtland, OH; Peirce College, Paralegal Studies Program, Philadelphia, PA; Roger Williams University, Paralegal Studies Program, Providence, RI; Trident Technical College, Paralegal Program, Charleston, SC; Florence-Darlington Technical College, Paralegal Program, Florence, SC; Roane State, Paralegal Studies Program, Harriman, TN; El Centro College, Paralegal Studies Program, Dallas, TX; Lone Star College, Paralegal Studies Program, Houston, TX; San Jacinto College, Paralegal Program, Houston, TX; Texas A&M University Commerce, Paralegal Studies Program, Commerce, TX; American National University, Paralegal Program, Salem, VA; Northern Virginia Community College, Paralegal Studies Program, Alexandria, VA; Highline College; Legal Studies Program, Des Moines, WA; Lakeshore Technical College, Paralegal Program, Cleveland, WI; and Milwaukee Area Technical College, Paralegal Program, Milwaukee, WI.
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 (https://www.americanbar.org/content/dam/aba/administrative/paralegals/fs_prlegs_2019_paralegal_guidelines.pdf). 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 approval be granted.

Southwestern Community College, Paralegal Studies Program, Chula Vista, CA
Southwestern Community College is a community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Science Degree in Paralegals Studies, an Associate of Science Degree in Paralegal Studies – Bilingual, a Certificate in Paralegal Studies and a Certificate in Paralegal Studies – Bilingual.

Del Mar College, Paralegal Studies Program, Corpus Christi, TX
Del Mar College is a community college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies and an Advanced Technical Certificate in Paralegal Studies.

South University, Richmond, Legal Studies Program, Richmond, VA
South University, Richmond is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers an Associate of Science Degree in Paralegal Studies and a Bachelor of Science Degree in Legal 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 paralegal education programs:

Faulkner University, Legal Studies Program, Montgomery, AL
Faulkner University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers an Associate of Science Degree in Legal Studies and a Bachelor of Science Degree in Legal Studies.

South University, Montgomery, Legal and Paralegal Studies Program, Montgomery, AL
South University, Montgomery is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers an Associate of Science Degree in Paralegal Studies and a Bachelor of Science Degree in Legal Studies.

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

University of San Diego, Paralegal Program, San Diego, CA
University of San Diego is a four-year university accredited by the Western Association of Schools and Colleges. The University offers a Day Paralegal Certificate and an Evening Paralegal Certificate.

Kapiʻolani Community College, Paralegal Program, Honolulu, HI
Kapiʻolani Community College is a community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Science Degree in Paralegals Studies, an Associate of Science Degree in Paralegal Studies – Bilingual, a Certificate in Paralegal Studies and a Certificate in Paralegal Studies – Bilingual.

Del Mar College, Paralegal Studies Program, Corpus Christi, TX
Del Mar College is a community college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies and an Advanced Technical Certificate in Paralegal Studies.

South University, Richmond, Legal Studies Program, Richmond, VA
South University, Richmond is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers an Associate of Science Degree in Paralegal Studies and a Bachelor of Science Degree in Legal 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 paralegal education programs:

Faulkner University, Legal Studies Program, Montgomery, AL
Faulkner University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers an Associate of Science Degree in Legal Studies and a Bachelor of Science Degree in Legal Studies.

South University, Montgomery, Legal and Paralegal Studies Program, Montgomery, AL
South University, Montgomery is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers an Associate of Science Degree in Paralegal Studies and a Bachelor of Science Degree in Legal Studies.

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

University of San Diego, Paralegal Program, San Diego, CA
University of San Diego is a four-year university accredited by the Western Association of Schools and Colleges. The University offers a Day Paralegal Certificate and an Evening Paralegal Certificate.

Kapiʻolani Community College, Paralegal Program, Honolulu, HI
Kapiʻolani Community College is a community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Science Degree in Paralegals Studies, an Associate of Science Degree in Paralegal Studies – Bilingual, a Certificate in Paralegal Studies and a Certificate in Paralegal Studies – Bilingual.
Degree in Paralegal Studies and a Certificate of Achievement in Paralegal Studies.

Kankakee Community College, Paralegal/Legal Assistant Studies Program, Kankakee, IL
Kankakee Community College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal/Legal Assistant Studies and a Certificate in Paralegal/Legal Assistant Studies.

Midstate College, Paralegal Studies Program, Peoria, IL
Midstate College is a four-year college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies.

Fayetteville Technical Community College is a community college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Science Degree in Paralegal/Legal Assistant Studies.

Anne Arundel Community College, Paralegal Program, Arnold, MD
Anne Arundel Community College is a community college accredited by Middle States Association of Colleges and Schools. The College offers Associate of Applied Science Degrees in Business/Paralegal Studies, Litigation/Paralegal Studies, and General Practice/Paralegal Studies, and Certificates in Business/Paralegal Studies, Litigation/Paralegal Studies, General Practice/Paralegal Studies and a Nurse Paralegal Certificate.

Macomb Community College, Legal Assistant Program, Warren, MI
Macomb Community College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Science Degree in Paralegal Studies.

Inver Hills Community College, Paralegal Program, Inver Grove Heights, MN
Inver Hills Community College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Science Degree in Paralegal Studies and a Certificate in Paralegal Studies.

Bergen Community College, Paralegal & Legal Nurse Consultant Programs, Paramus, NJ
Bergen Community College is a community college accredited by Middle States Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Legal Nurse Consultant Certificate.

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

Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC
Fayetteville Technical Community College is a community college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Science Degrees in Business/Paralegal Studies, Litigation/Paralegal Studies, and Certificates in Business/Paralegal Studies, Litigation/Paralegal Studies, General Practice/Paralegal Studies and a Nurse Paralegal Certificate.

Kankakee Community College, Paralegal/Legal Assistant Studies Program, Kankakee, IL
Kankakee Community College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal/Legal Assistant Studies and a Certificate in Paralegal/Legal Assistant Studies.

Midstate College, Paralegal Studies Program, Peoria, IL
Midstate College is a four-year college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies.

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

Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC
Fayetteville Technical Community College is a community college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Science Degrees in Business/Paralegal Studies, Litigation/Paralegal Studies, and Certificates in Business/Paralegal Studies, Litigation/Paralegal Studies, General Practice/Paralegal Studies and a Nurse Paralegal Certificate.
Applied Science Degree in Paralegal Technology Studies and a Certificate in Paralegal Technology Studies.

Methodist University, Legal Studies Program, Fayetteville, NC
Methodist University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Minor in Paralegal Studies.

South College, Legal Studies/Paralegal Studies Program, Asheville, NC
South College is a four-year college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies, a Bachelor of Science Degree in Legal Studies and a Paralegal Certificate.

Chattanooga State Community College, Paralegal Studies Program, Chattanooga, TN
Chattanooga State Community College is a community college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Certificate in Paralegal Studies.

Southwest Tennessee Community College, Paralegal Studies Program, Memphis, TN
Southwest Tennessee Community College is a community college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies.

The following paralegal education programs are recommended for withdrawal of ABA approval, at the request of the institutions:

National American University, Paralegal Studies Program, Sioux Falls, SD
National American University is a four-year university accredited by the Higher Learning Commission. The University offers an Associate of Applied Science Degree in Paralegal Studies and a Bachelor of Science Degree in Paralegal Studies.

National American University, Paralegal Studies Program, Minneapolis, MN
National American University is a four-year university accredited by the Higher Learning Commission. The University offers an Associate of Applied Science Degree in Paralegal Studies and a Bachelor of Science Degree in Paralegal Studies.

Brightwood College, Paralegal Studies Program, Nashville, TN
Brightwood College is a four-year college accredited by the Accrediting Council for Independent Colleges and Schools. The College offers an Associate of Applied Science Degree in Paralegal Studies and a General Practice Paralegal Certificate.

Ferris State University, Legal Studies Program, Big Rapids, MI
Ferris State University is a four-year university accredited by the Higher Learning Commission. The University offers an Associate of Applied Science Degree in Paralegal Studies and a General Practice Paralegal Certificate.
Ferris State University is a four-year university accredited by the Higher Learning Commission. The University offers an Associate of Applied Science Degree in Legal Studies.

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

South University, Paralegal Studies/Legal Studies Program, Cleveland, OH
South University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers an Associate of Science Degree in Paralegal Studies and a Bachelor of Science Degree in Legal Studies.

University of Tennessee, Chattanooga, Legal Assistant Studies Program, Chattanooga, TN
University of Tennessee, Chattanooga is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science Degree in Paralegal Studies, a Bachelor of Science Degree in Paralegal Studies with a Social Science Concentration and a Minor in Paralegal Studies.

Utah Valley University, Paralegal Studies Program, Orem, UT
Utah Valley University is a four-year university accredited by the Northwest Association of Schools and Colleges. The University offers an Associate of Applied Science Degree in Paralegal Studies, an Associate of Science Degree in Paralegal Studies, a Bachelor of Science Degree in Paralegal Studies and a Certificate in Paralegal Studies.

Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2020 Mid-Year Meeting of the American Bar Association House of Delegates.

American River College, Legal Assisting Program, Sacramento, CA;
De Anza College, Paralegal Studies Program, Cupertino, CA;
University of California, Riverside, Paralegal Studies Program; Riverside, CA;
West Los Angeles College, Paralegal Studies Program, Culver City, CA;
Community College of Aurora, Paralegal Program, Denver, CO;
University of Hartford, Paralegal Studies Program, West Hartford, CT;
Wesley College, Legal Studies Program, Dover, DE;
Miami Dade College, Paralegal Studies Program, Miami, FL;
Illinois Central College, Paralegal Program, Peoria, IL;
South Suburban College, Paralegal/Legal Assistant Program, South Holland, IL;
Pennsylvania College of Technology is a four-year college accredited by Middle States Association of Colleges and Schools. The College offers an Associate of Applied Science Degree in Legal Assistant/Paralegal Studies, a Bachelor of Science in Legal Assistant/Paralegal Studies and a Nurse/Health Care Certificate in Paralegal Studies.

South University, Paralegal Studies/Legal Studies Program, Cleveland, OH
South University is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers an Associate of Science Degree in Paralegal Studies and a Bachelor of Science Degree in Legal Studies.

University of Tennessee, Chattanooga, Legal Assistant Studies Program, Chattanooga, TN
University of Tennessee, Chattanooga is a four-year university accredited by the Southern Association of Colleges and Schools. The University offers a Bachelor of Science Degree in Paralegal Studies, a Bachelor of Science Degree in Paralegal Studies with a Social Science Concentration and a Minor in Paralegal Studies.

Utah Valley University, Paralegal Studies Program, Orem, UT
Utah Valley University is a four-year university accredited by the Northwest Association of Schools and Colleges. The University offers an Associate of Applied Science Degree in Paralegal Studies, an Associate of Science Degree in Paralegal Studies, a Bachelor of Science Degree in Paralegal Studies and a Certificate in Paralegal Studies.

Applications for reapproval have been filed by the following schools and are currently being evaluated. Until the evaluation process has been completed, the Committee recommends that the term of approval for each program be extended until the 2020 Mid-Year Meeting of the American Bar Association House of Delegates.

American River College, Legal Assisting Program, Sacramento, CA;
De Anza College, Paralegal Studies Program, Cupertino, CA;
University of California, Riverside, Paralegal Studies Program; Riverside, CA;
West Los Angeles College, Paralegal Studies Program, Culver City, CA;
Community College of Aurora, Paralegal Program, Denver, CO;
University of Hartford, Paralegal Studies Program, West Hartford, CT;
Wesley College, Legal Studies Program, Dover, DE;
Miami Dade College, Paralegal Studies Program, Miami, FL;
Illinois Central College, Paralegal Program, Peoria, IL;
South Suburban College, Paralegal/Legal Assistant Program, South Holland, IL;
Ball State University, Legal Studies Program, Muncie, IN;
Louisiana State University, Paralegal Studies Program, Baton Rouge, LA;
Bay Path University, Legal Studies Program, Longmeadow, MA;
Lansing Community College, Paralegal Program, Lansing, MI;
Hamline University, Paralegal Program, St. Paul, MN;
Winona State University, Paralegal Program, Winona, MN;
New Hampshire Technical Institute, Paralegal Studies Program, Concord, NH;
Atlantic Cape Community College, Paralegal Studies Program, Mays Landing, NJ;
Rowan College at Burlington County, Paralegal Program, Pemberton, NJ;
Rowan College at Gloucester County, Paralegal Program, Sewell, NJ;
Union County College, Paralegal Studies Program, Cranford, NJ;
Truckee Meadows Community College, Paralegal/Law Program, Reno, NV;
Hilbert College, Legal Studies/Paralegal Program, Hamburg, NY;
LaGuardia Community College, Paralegal Studies Program, Long Island, NY;
Schenectady County Community College, Paralegal Studies Program, Schenectady, NY;
Westchester Community College (SUNY), Paralegal Studies Program, Valhalla, NY;
Meredith College, Paralegal Program, Raleigh, NC;
Lakeland Community College, Paralegal Studies Program, Kirtland, OH;
Peirce College, Paralegal Studies Program, Philadelphia, PA;
Roger Williams University, Paralegal Studies Program, Providence, RI;
Trident Technical College, Paralegal Program, Charleston, SC;
Florence-Darlington Technical College, Paralegal Program, Florence, SC;
Roane State, Paralegal Studies Program, Harriman, TN;
El Centro College, Paralegal Studies Program, Dallas, TX;
Lone Star College, Paralegal Studies Program, Houston, TX;
Texas A&M University Commerce, Paralegal Studies Program, Commerce, TX;
American National University, Paralegal Program, Salem, VA;
Northern Virginia Community College, Paralegal Studies Program, Alexandria, VA;
Highline College; Legal Studies Program, Des Moines, WA;
Lakeshore Technical College, Paralegal Program, Cleveland, WI; and
Milwaukee Area Technical College, Paralegal Program, Milwaukee, WI.

Respectfully submitted,
Chris S. Jennison
Chair, Standing Committee on Paralegals
August 2019
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Paralegals

Submitted By: Chris S. Jennison, Chair

1. **Summary of Resolution(s).**
   This Resolution recommends that the House of Delegates grants approval to 3 programs, grants reapproval to 17 paralegal education programs, withdraws the approval of 8 programs at the requests of the institutions, and extends the term of approval to 42 paralegal education programs.

2. **Approval by Submitting Entity.**
   This resolution was approved by the Standing Committee on Paralegals in April 2019.

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

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

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

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

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

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

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

10. **Referrals.**
    None

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

    Jessica Watson
    Manager, Paralegal Programs
    Standing Committee on Paralegals
    American Bar Association
    321 North Clark Street
    Chicago, IL 60654
    (312) 988-5757
    E-Mail: Jessica.Watson@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.)

    Chris S. Jennison
    2808 Village Lane
    Silver Spring, MD 20906
    (301) 538-5705
    E-Mail: chris.s.jennison@gmail.com

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

    Chris S. Jennison
    2808 Village Lane
    Silver Spring, MD 20906
    (301) 538-5705
    E-Mail: chris.s.jennison@gmail.com
EXECUTIVE SUMMARY

Submitting Entity: Standing Committee on Paralegals

Submitted By: Chris S. Jennison, Chair

1. Summary of the Resolution

   This Resolution recommends that the House of Delegates grants approval to 3 programs, grants reapproval to 17 paralegal education programs, withdraws the approval of 8 programs at the requests of the institutions, and extends the term of approval to 42 paralegal education 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.
RESOLVED, That the American Bar Association approves the Principles and Guidelines on the Election Process for Officers of the Association as amended August 2019.
With the recognition that seeking office in the Association is a political process, it is the intent of these Rules to minimize the expenditures of a campaign required for office and to ensure that all members of the Association have fair access to the political process without unnecessary financial burdens or sacrifice.

1. A person seeking to serve as President-Elect, Chair of the House of Delegates, Secretary or Treasurer of the Association shall commence the campaign for office by filing a signed letter of intent setting forth the office and the term with the Policy and Planning Division at the American Bar Center. A candidate’s letter of intent shall be filed no earlier than the last January 1 occurring more than 12 months prior to the Midyear Meeting at which the nomination will be made. The letter of intent shall be in the form attached to these Rules and may be accompanied by a resume. The letter shall state that the candidate has read these Rules and commits to abide by them.

2. After determining that the letter of intent meets the requirements of these Rules, the Policy and Planning Division shall forward a copy of the letter to all members of the House of Delegates. All questions of interpretation with respect to these Rules shall be directed to the Policy and Planning Division, which shall respond promptly to such questions.

3. No candidate or prospective candidate (references in this paragraph and in paragraph 6 to “candidate” shall include “prospective candidate”), and no person acting on his or her behalf, shall solicit a public or private commitment from any member of the Nominating Committee, other than from his or her State Delegate, prior to the candidate’s filing the letter of intent as required by Rule #1. Nominating Committee members (with the single exception noted above) shall not give any such commitments. Meetings by or on behalf of any member exploring or considering a candidacy for any office may be held no earlier than one year before the date that such member would be eligible to declare his or her candidacy under these guidelines. Except for the State Delegate from the prospective candidate’s state, members of the Nominating Committee or their designees may not attend the meetings referenced in the preceding sentence.

4. Each member of the Nominating Committee is personally responsible for providing each candidate who desires to meet with the member an opportunity to meet at the Section Officers Conference or the Nominating Committee Orientation meeting, and travel and a per diem will be paid to the candidate for such meeting (other than for a

PRINCIPLES AND GUIDELINES ON THE ELECTION PROCESS FOR OFFICERS OF THE ASSOCIATION
(Adopted – August 2019)
meeting held in conjunction with the Annual Meeting or Midyear Meeting). Candidates and prospective candidates are discouraged from arranging visits to Nominating Committee members in their home cities and Nominating Committee members are discouraged from accepting such visits.

5. Each member of the Nominating Committee is encouraged to afford the candidate an opportunity to meet with other members of his or her delegation or constituency. Each State Delegate member is encouraged to consult with all members of his or her delegation before making a commitment. Although a candidate may ask a member of the Nominating Committee to nominate the candidate, no other commit shall be requested or made before the Midyear Meeting of the year the candidate announces his/her candidacy.

6. A candidate shall not sponsor, or permit others to sponsor on the candidate’s behalf, any reception, or organized social function, in support of his or her candidacy. This provision is not intended to interfere with business meetings or functions not sponsored by a candidate or on a candidate’s behalf attended by a candidate and member(s) of the Nominating Committee. Staff may secure a conference room for use by a candidate for a non-social function during the Midyear and Annual Meetings. Nothing in these guidelines shall prohibit a candidate from serving non-alcoholic beverages and snacks at a meeting permitted by these guidelines.

7. After a candidate has filed his or her letter of intent, the candidate may speak at the Forums sponsored by the Nominating Committee at the immediately following Midyear and Annual Meetings. The Forums will be open to any member of the Association who wishes to attend and suitable notice will be given of the time and place of the Forums. At each Midyear and Annual Meeting, the Nominating Committee will conduct a session to discuss/consider the announced candidates.

8. A candidate who decides to terminate his or her campaign for office promptly shall supply a signed letter to that effect to the Policy and Planning Division, which promptly will forward such letter to all members of the House of Delegates.
Introduction

During its meeting in August 2018 the Nominating Committee approved in concept two modifications to the Principles and Guidelines on the Election Process for Officers of the Association (the “Principles”). The first proposal would prohibit public commitments by any Nominating Committee member other than the candidate’s State Delegate before the Midyear Meeting in the year before the election. The second would require a regularly scheduled executive session for the Nominating Committee to discuss the candidates. The Steering Committee of the Nominating Committee has drafted revisions to Paragraphs five and seven of the Principles to reflect these recommendations.

The Proposed Amendments

The Steering Committee recommends the following amendments to the current Principles. Deletions are struck through and additions are underlined:

PRINCIPLES AND GUIDELINES ON THE ELECTION PROCESS FOR OFFICERS OF THE ASSOCIATION
(Adopted - August 2008-2019)

With the recognition that seeking office in the Association is a political process, it is the intent of these Rules to minimize the expenditures of a campaign required for office and to ensure that all members of the Association have fair access to the political process without unnecessary financial burdens or sacrifice.

1. A person seeking to serve as President-Elect, Chair of the House of Delegates, Secretary or Treasurer of the Association shall commence the campaign for office by filing a signed letter of intent setting forth the office and the term with the Policy and Planning Division at the American Bar Center. A candidate’s letter of intent shall be filed no earlier than the last January 1 occurring more than 12 months prior to the Midyear Meeting at which the nomination will be made. The letter of intent shall be in the form attached to these Rules and may be accompanied by a resume. The letter shall state that the candidate has read these Rules and commits to abide by them.

2. After determining that the letter of intent meets the requirements of these Rules, the Policy and Planning Division shall forward a copy of the letter to all members of the House of Delegates. All questions of interpretation with respect to these Rules shall be directed to the Policy and Planning Division, which shall respond promptly to such questions.

3. No candidate or prospective candidate (references in this paragraph and in paragraph 6 to “candidate” shall include “prospective candidate”), and no person acting on his or her behalf, shall solicit a public or private commitment from any member of the Association

4. No candidate or prospective candidate (references in this paragraph and in paragraph 6 to “candidate” shall include “prospective candidate”), and no person acting on his or her behalf, shall solicit a public or private commitment from any member of the Association

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1. A person seeking to serve as President-Elect, Chair of the House of Delegates, Secretary or Treasurer of the Association shall commence the campaign for office by filing a signed letter of intent setting forth the office and the term with the Policy and Planning Division at the American Bar Center. A candidate’s letter of intent shall be filed no earlier than the last January 1 occurring more than 12 months prior to the Midyear Meeting at which the nomination will be made. The letter of intent shall be in the form attached to these Rules and may be accompanied by a resume. The letter shall state that the candidate has read these Rules and commits to abide by them.

2. After determining that the letter of intent meets the requirements of these Rules, the Policy and Planning Division shall forward a copy of the letter to all members of the House of Delegates. All questions of interpretation with respect to these Rules shall be directed to the Policy and Planning Division, which shall respond promptly to such questions.

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Nominating Committee, other than from his or her State Delegate, prior to the candidate’s filing the letter of intent as required by Rule #1. Nominating Committee members (with the single exception noted above) shall not give any such commitments. Meetings by or on behalf of any member exploring or considering a candidacy for any office may be held no earlier than one year before the date that such member would be eligible to declare his or her candidacy under these guidelines. Except for the State Delegate from the prospective candidate’s state, members of the Nominating Committee or their designees may not attend the meetings referenced in the preceding sentence.

4. Each member of the Nominating Committee is personally responsible for providing each candidate who desires to meet with the member an opportunity for a meeting. Nominating Committee members are encouraged to hold such meetings during a Midyear or Annual Meeting and the member may choose to include at the meeting others whose views such member may wish to hear. If this does not prove feasible, the member should provide the candidate an opportunity to meet at the Section Officers Conference or the Nominating Committee Orientation meeting, and travel and a per diem will be paid to the candidate for such meeting (other than for a meeting held in conjunction with the Annual Meeting or Midyear Meeting). Candidates and prospective candidates are discouraged from arranging visits to Nominating Committee members in their home cities and Nominating Committee members are discouraged from accepting such visits.

5. Each member of the Nominating Committee is encouraged to afford the candidate an opportunity to meet with other members of his or her delegation or constituency. Each State Delegate member is encouraged to consult with all members of his or her delegation before making a commitment: although a candidate may ask a member of the Nominating Committee to nominate the candidate, no other commitment shall be requested or made before the Midyear Meeting of the year the candidate announces his/her candidacy.

6. A candidate shall not sponsor, or permit others to sponsor on the candidate’s behalf, any reception, or organized social function, in support of his or her candidacy. This provision is not intended to interfere with business meetings or functions not sponsored by a candidate or on a candidate’s behalf attended by a candidate and member(s) of the Nominating Committee. Staff may secure a conference room for use by a candidate for a non-social function during the Midyear and Annual Meetings. Nothing in these guidelines shall prohibit a candidate from serving non-alcoholic beverages and snacks at a meeting permitted by these guidelines.

7. After a candidate has filed his or her letter of intent, the candidate may speak at the Forums sponsored by the Nominating Committee at the immediately following Midyear and Annual Meetings. The Forums will be open to any member of the Association who wishes to attend and a suitable notice will be given of the time and place of the Forums. At each Midyear and Annual meeting, the Nominating Committee will conduct a session to discuss/consider the announced candidates.
8. A candidate who decides to terminate his or her campaign for office promptly shall supply a signed letter to that effect to the Policy and Planning Division, which promptly will forward such letter to all members of the House of Delegates.

Discussion

The House of Delegates adopted the Principles and Guidelines on the Election Process for Officers of the Association in 1994 in response to a request from the Special Committee on Governance. The Principles have worked well; they level the playing field for those seeking office in the Association by reducing the expenditures of both time and money necessary to campaign.

This resolution seeks to further amend the Principles to address concerns about the timing of public commitments under the current system, and to allow for more thoughtful consideration of candidates by the Nominating Committee as a group. It prohibits candidates from requesting, and Nominating Committee members from making, a commitment in a race before the Midyear Meeting of the year the race begins. It also requires the Nominating Committee to conduct an executive session at each of its meetings to discuss the announced candidates.

These proposals stem from concern about the chilling effect of public commitments that come early in the campaign. Prospective candidates may consider that it is futile to run if an announced candidate seems close to locking up the nomination. The Nominating Committee serves no meaningful role in vetting the candidates if the race is decided before the Committee even meets.

The proposed revisions also encourage Nominating Committee members to seek input from constituents before making a commitment. This provision will remind members that they serve in a representative capacity and will further ensure an open, fair and thoughtful electoral process.

Conclusion

For the reasons discussed, the Steering Committee of the Nominating Committee recommends that the Principles and Guidelines on the Election Process for Officers of the Association be amended as set forth above. A draft of the Principles as revised is appended to this Report.

If adopted, the revised Principles would be effective following the 2019 Annual Meeting.

Respectfully submitted,

Steering Committee of the Nominating Committee
Justice Adrienne Nelson, Chair
August 2019
1. Summary of Resolution(s).

The Recommendation proposes two revisions to the Principles and Guidelines on the Election Process for Officers of the Association. The first revision would prohibit candidates from requesting, and Nominating Committee members from making, a commitment in a race before the Midyear Meeting of the year the race opens. It also requires the Nominating Committee to conduct an executive session at each of its meetings to consider the announced candidates, and encourages Nominating Committee members to seek input from constituents before committing.

2. Approval by Submitting Entity.

The Nominating Committee approved the recommendation during the 2019 Midyear Meeting. In drafting the Report and Recommendation the Steering Committee of the Nominating Committee made minor modifications which require approval by the full Nominating Committee. The final proposal has been circulated to the full Nominating Committee for comment and the Committee will vote at its meeting on August 11, 2019.

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

The Principles and Guidelines on the Election Process for Officers of the Association were originally adopted by the House of Delegates in August 1994. They were amended in February 2001 and August 2008.

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

The proposed resolution revises the current Principles and Guidelines on the Election Process for Officers of the Association.

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.)

Does not apply.
7. Brief explanation regarding plans for implementation of the policy if adopted by the House.
   If adopted, the revised *Principles* would be effective following the 2019 Annual Meeting.

8. Cost to the Association (Both direct and indirect costs.)
   No cost to the Association.

9. Disclosure of Interest. (If applicable.)
   Does not apply.

10. Referrals
    The recommendation was circulated to the full Nominating Committee, current and former officers and candidates for office of the Association, and other leaders of the Association.

11. Contact Person (Prior to the meeting.)
    Justice Adrienne Nelson
    Oregon Supreme Court
    1163 State Street
    Salem, OR 97301
    (503)276-0952

12. Contact Person (Who will present the report to the House.)
    Justice Adrienne Nelson
    Oregon Supreme Court
    1163 State Street
    Salem OR 97301
    (503)276-0952
EXECUTIVE SUMMARY

1. Summary of the Resolution

2. Summary of the Issue that the Resolution Addresses
   Members are concerned about the effect of early commitments on the election process and the role of the Nominating Committee.

3. Please Explain How the Proposed Policy Position Will Address the Issue
   The proposed resolution revises the current Principles and Guidelines on the Election Process for Officers of the Association to address both concerns.

4. A Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
   None to date.
RESOLVED, That the Association policies set forth in Attachment 1 to Report 400A, dated August 2019, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such;

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such; and

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.
5. Grant approval, reapproval to several paralegal education programs
   February 2009
   Standing Committee on Paralegals

8. Reaccredits the Juvenile Law - Child Welfare Program
   February 2009
   Standing Committee on Specialization

27. Deleting of Standard 104 from Standards for Approval of Law Schools
   August 2009
   Section of Legal Education and Admission to the Bar

28. Grant approval, reapproval and extension of paralegal education programs
   August 2009
   Paralegals

31. Grant reaccreditation to the Family Law Trial Advocacy Civil Law Trial
   August 2009
   Standing Committee on Specialization

54. Guidance in patenting decisions
   August 2009
   Section of Intellectual Property Law
5. Grant approval, reapproval to several paralegal education programs

February 2009

Standing Committee on Paralegals (Report 100-09MY100)

RESOLVED, That the American Bar Association grants approval to John F. Kennedy University, Legal Studies Department, Pleasant Hill, CA; Delaware Technical and Community College, Legal Assistant/Paralegal Technology Program, Georgetown, DE; College of Lake County, Paralegal Studies Program, Grayslake, IL; Salt Lake Community College, Paralegal Program, Salt Lake City, UT; and Madison Area Technical College, Paralegal Program, Madison, WI.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal programs: University of Alaska Fairbanks, Paralegal Studies Program, Fairbanks, AK; Lamson College, Paralegal Program, Tempe, AZ; Coastline Community College, Paralegal Studies Program, Fountain Valley, CA; El Camino Community College, Paralegal Studies Program, Torrance, CA; Fremont College fka Western College of Southern California, Paralegal Studies Program, Cerritos, CA; Pasadena City College, Paralegal Studies Program, Pasadena, CA; University of California Santa Barbara, Paralegal Professional Certificate Program, Goleta, CA; Nova Southeastern University, Paralegal Program, Fort Lauderdale, FL; Vincennes University, Paralegal Program, Vincennes, IN; University of Louisville, Paralegal Studies Program, Louisville, KY; Minnesota State University Moorhead, Paralegal Department, Moorhead, MN; University of Montana Missoula, Paralegal Program, Missoula, MT; College of Saint Mary, Paralegal Studies Program, Omaha, NE; Brookdale Community College, Paralegal Studies Department, Lincroft, NJ; Fairleigh Dickinson University, Paralegal Studies Department, Madison, NJ; Middlesex County College, Paralegal Studies Program, Edison, NJ; Berkeley College of New York City, Paralegal Studies Program, New York, NY; Genesee Community College, Paralegal/Legal Assistant Program, Batavia, NY; Mercy College, Paralegal Studies Program, Dobbs Ferry, NY; Queens College, Paralegal Studies Program, Flushing, NY; Sinclair Community College, Paralegal Studies Program, Dayton, OH; Central Pennsylvania College, Paralegal Studies Program, Summerdale, PA; Technical College of the Low Country, Paralegal Program, Beaufort, SC; and University of Memphis, Paralegal Studies Program, Memphis, TN.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the August 2009 Annual Meeting of the House of Delegates for the following programs: Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; University of Arkansas Ft. Smith, Legal Assistant/Paralegal Program, Ft. Smith, AR; Cerritos Community College, Paralegal Program, Norwalk, CA; Cuyamaca College, Paralegal Studies Program, El Cajon, CA; Miramar College, Legal Assistant Program, San Diego, CA; Mount
Paralegal Studies Program, Toledo, OH; Rose State College, Legal Assistant Program, Midwest City, OK; University of Oklahoma Law Center, Legal Assistant Education, Norman, OK; Central Carolina Technical College, Legal Assistant/Paralegal Program, Sumter, SC; Greenville Technical College, Paralegal Program, Greenville, SC; Midlands Technical College, Paralegal Program, Columbia, SC; Orangeburg-Calhoun Technical College, Paralegal Program, Orangeburg, SC; Kaplan Career Institute fka Southeastern Career College, Paralegal Studies Program, Nashville, TN; South College, Paralegal Studies Program, Knoxville, TN; Lee College, Legal Assistant Program, Baytown, TX; Utah Valley University fka Utah Valley State College, Paralegal Studies Program, Orem, UT; J. Sargeant Reynolds Community College, Paralegal Studies Program, Richmond, VA; Edmonds Community College, Paralegal Program, Lynnwood, WA; Chippewa Valley Technical College, Paralegal Program, Eau Claire, WI; Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI; Western Technical College fka Western Wisconsin Technical College, Paralegal Program, LaCrosse, WI; and Marshall Community and Technical College, Legal Assistant Program, Huntington, WV.

8. Reaccredits the Juvenile Law-Child Welfare Program
February 2009
Standing Committee on Specialization (Report 104-09MY104)

RESOLVED, That the American Bar Association reaccredits the following designated specialty certification program for lawyers: Juvenile Law – Child Welfare program of the National Association of Counsel for Children of Denver, Colorado.

FURTHER RESOLVED, That the American Bar Association extends the accreditation of the following designated specialty certification program for lawyers until the adjournment of the next House of Delegates meeting: Family Law Trial Advocacy program of the National Board of Trial Advocacy, a division of the National Board of Legal Specialty Certification of Wrentham, Massachusetts.

27. Deleting of Standard 104 from Standards for Approval of Law Schools
August 2009
Legal Education and Admission to the Bar (Report 100-09AM100)

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the SCRA, (i) to clarify that a private right of action exists under the SCRA, pursuant to which servicemembers or covered dependents may bring civil suits, independent of or in conjunction with Department of Justice enforcement actions, for damages or injunctive relief arising from violations of the SCRA, and (ii) to provide that a prevailing plaintiff in such an action may recover reasonable attorney’s fees.

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the SCRA, (i) to clarify that a private right of action exists under the SCRA, pursuant to which servicemembers or covered dependents may bring civil suits, independent of or in conjunction with Department of Justice enforcement actions, for damages or injunctive relief arising from violations of the SCRA, and (ii) to provide that a prevailing plaintiff in such an action may recover reasonable attorney’s fees.

8. Reaccredits the Juvenile Law-Child Welfare Program
February 2009
Standing Committee on Specialization (Report 104-09MY104)

RESOLVED, That the American Bar Association reaccredits the following designated specialty certification program for lawyers: Juvenile Law – Child Welfare program of the National Association of Counsel for Children of Denver, Colorado.

FURTHER RESOLVED, That the American Bar Association extends the accreditation of the following designated specialty certification program for lawyers until the adjournment of the next House of Delegates meeting: Family Law Trial Advocacy program of the National Board of Trial Advocacy, a division of the National Board of Legal Specialty Certification of Wrentham, Massachusetts.

27. Deleting of Standard 104 from Standards for Approval of Law Schools
August 2009
Legal Education and Admission to the Bar (Report 100-09AM100)

FURTHER RESOLVED, That the American Bar Association urges Congress to amend the SCRA, (i) to clarify that a private right of action exists under the SCRA, pursuant to which servicemembers or covered dependents may bring civil suits, independent of or in conjunction with Department of Justice enforcement actions, for damages or injunctive relief arising from violations of the SCRA, and (ii) to provide that a prevailing plaintiff in such an action may recover reasonable attorney’s fees.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in deleting from the Standards for Approval of Law Schools Standard 104, Seek to Exceed Requirements, and Interpretation 104-1.

28. Grant approval, reapproval and extension of paralegal education programs

Standing Committee on Paralegals (Report 101-09AM101)

RESOLVED, That the American Bar Association grants approval to Wilmington University (New Castle and Dover Campuses), Legal Studies Program, New Castle, DE.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal programs: Miramar College, Paralegal Program, San Diego, CA; Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL; Northwestern College (f/k/a Northwestern Business College) (Naperville, Chicago and Bridgeview Campuses), Institute for Legal Studies, Chicago, IL; Kirkwood Community College, Paralegal Studies Program, Cedar Rapids, IA; Tulane University (Uptown and Elmwood Campuses), Paralegal Studies Program, New Orleans, LA; Missouri Western State University (f/k/a Missouri Western State College), Legal Assistant Program, St. Joseph, MO; Mercy County Community College, Paralegal Program, Trenton, NJ; Long Island University Brooklyn Campus, Legal Studies Institute, Brooklyn, NY; Nassau Community College, Paralegal Program, Garden City, NY; Suffolk County Community College (Ammerman and Grant Campuses), Paralegal Studies Program, Selden, NY; Capital University Law School, Paralegal and Legal Nurse Consultant Programs, Columbus, OH; Lake Erie College, Legal Studies Program, Painesville, OH; Midlands Technical College (Airport and Beltline Campuses), Paralegal Program, Columbia, SC; Orangeburg-Calhoun Technical College, Paralegal/Legal Assistant Program, Orangeburg, SC; Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI (and additional location at Fox Valley Technical College, Appleton, WI); and Marshall Technical and Community College, Legal Assistant Program, Huntington, WV.

FURTHER RESOLVED, That the American Bar Association withdraws the approval of Avila University, Paralegal Program, Kansas City, MO, and Central Texas College, Paralegal Studies Program, Killeen, TX, at the requests of the institutions, as of the adjournment of the August 2009 Annual Meeting of the House of Delegates.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the February 2010 Midyear Meeting of the House of Delegates for the following programs: University of Alaska Anchorage, Paralegal Certificate Program, Anchorage, AK; Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; University of Arkansas Ft. Smith, Legal Studies Institute, Brooklyn, NY; Nassau Community College, Paralegal Program, Garden City, NY; Suffolk County Community College (Ammerman and Grant Campuses), Paralegal Studies Program, Selden, NY; Capital University Law School, Paralegal and Legal Nurse Consultant Programs, Columbus, OH; Lake Erie College, Legal Studies Program, Painesville, OH; Midlands Technical College (Airport and Beltline Campuses), Paralegal Program, Columbia, SC; Orangeburg-Calhoun Technical College, Paralegal/Legal Assistant Program, Orangeburg, SC; Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI (and additional location at Fox Valley Technical College, Appleton, WI); and Marshall Technical and Community College, Legal Assistant Program, Huntington, WV.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal programs: Miramar College, Paralegal Program, San Diego, CA; Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL; Northwestern College (f/k/a Northwestern Business College) (Naperville, Chicago and Bridgeview Campuses), Institute for Legal Studies, Chicago, IL; Kirkwood Community College, Paralegal Studies Program, Cedar Rapids, IA; Tulane University (Uptown and Elmwood Campuses), Paralegal Studies Program, New Orleans, LA; Missouri Western State University (f/k/a Missouri Western State College), Legal Assistant Program, St. Joseph, MO; Mercy County Community College, Paralegal Program, Trenton, NJ; Long Island University Brooklyn Campus, Legal Studies Institute, Brooklyn, NY; Nassau Community College, Paralegal Program, Garden City, NY; Suffolk County Community College (Ammerman and Grant Campuses), Paralegal Studies Program, Selden, NY; Capital University Law School, Paralegal and Legal Nurse Consultant Programs, Columbus, OH; Lake Erie College, Legal Studies Program, Painesville, OH; Midlands Technical College (Airport and Beltline Campuses), Paralegal Program, Columbia, SC; Orangeburg-Calhoun Technical College, Paralegal/Legal Assistant Program, Orangeburg, SC; Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI (and additional location at Fox Valley Technical College, Appleton, WI); and Marshall Technical and Community College, Legal Assistant Program, Huntington, WV.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal programs: Miramar College, Paralegal Program, San Diego, CA; Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL; Northwestern College (f/k/a Northwestern Business College) (Naperville, Chicago and Bridgeview Campuses), Institute for Legal Studies, Chicago, IL; Kirkwood Community College, Paralegal Studies Program, Cedar Rapids, IA; Tulane University (Uptown and Elmwood Campuses), Paralegal Studies Program, New Orleans, LA; Missouri Western State University (f/k/a Missouri Western State College), Legal Assistant Program, St. Joseph, MO; Mercy County Community College, Paralegal Program, Trenton, NJ; Long Island University Brooklyn Campus, Legal Studies Institute, Brooklyn, NY; Nassau Community College, Paralegal Program, Garden City, NY; Suffolk County Community College (Ammerman and Grant Campuses), Paralegal Studies Program, Selden, NY; Capital University Law School, Paralegal and Legal Nurse Consultant Programs, Columbus, OH; Lake Erie College, Legal Studies Program, Painesville, OH; Midlands Technical College (Airport and Beltline Campuses), Paralegal Program, Columbia, SC; Orangeburg-Calhoun Technical College, Paralegal/Legal Assistant Program, Orangeburg, SC; Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI (and additional location at Fox Valley Technical College, Appleton, WI); and Marshall Technical and Community College, Legal Assistant Program, Huntington, WV.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal programs: Miramar College, Paralegal Program, San Diego, CA; Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL; Northwestern College (f/k/a Northwestern Business College) (Naperville, Chicago and Bridgeview Campuses), Institute for Legal Studies, Chicago, IL; Kirkwood Community College, Paralegal Studies Program, Cedar Rapids, IA; Tulane University (Uptown and Elmwood Campuses), Paralegal Studies Program, New Orleans, LA; Missouri Western State University (f/k/a Missouri Western State College), Legal Assistant Program, St. Joseph, MO; Mercy County Community College, Paralegal Program, Trenton, NJ; Long Island University Brooklyn Campus, Legal Studies Institute, Brooklyn, NY; Nassau Community College, Paralegal Program, Garden City, NY; Suffolk County Community College (Ammerman and Grant Campuses), Paralegal Studies Program, Selden, NY; Capital University Law School, Paralegal and Legal Nurse Consultant Programs, Columbus, OH; Lake Erie College, Legal Studies Program, Painesville, OH; Midlands Technical College (Airport and Beltline Campuses), Paralegal Program, Columbia, SC; Orangeburg-Calhoun Technical College, Paralegal/Legal Assistant Program, Orangeburg, SC; Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI (and additional location at Fox Valley Technical College, Appleton, WI); and Marshall Technical and Community College, Legal Assistant Program, Huntington, WV.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal programs: Miramar College, Paralegal Program, San Diego, CA; Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL; Northwestern College (f/k/a Northwestern Business College) (Naperville, Chicago and Bridgeview Campuses), Institute for Legal Studies, Chicago, IL; Kirkwood Community College, Paralegal Studies Program, Cedar Rapids, IA; Tulane University (Uptown and Elmwood Campuses), Paralegal Studies Program, New Orleans, LA; Missouri Western State University (f/k/a Missouri Western State College), Legal Assistant Program, St. Joseph, MO; Mercy County Community College, Paralegal Program, Trenton, NJ; Long Island University Brooklyn Campus, Legal Studies Institute, Brooklyn, NY; Nassau Community College, Paralegal Program, Garden City, NY; Suffolk County Community College (Ammerman and Grant Campuses), Paralegal Studies Program, Selden, NY; Capital University Law School, Paralegal and Legal Nurse Consultant Programs, Columbus, OH; Lake Erie College, Legal Studies Program, Painesville, OH; Midlands Technical College (Airport and Beltline Campuses), Paralegal Program, Columbia, SC; Orangeburg-Calhoun Technical College, Paralegal/Legal Assistant Program, Orangeburg, SC; Northeast Wisconsin Technical College, Paralegal Program, Green Bay, WI (and additional location at Fox Valley Technical College, Appleton, WI); and Marshall Technical and Community College, Legal Assistant Program, Huntington, WV.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the February 2010 Midyear Meeting of the House of Delegates for the following programs: University of Alaska Anchorage, Paralegal Certificate Program, Anchorage, AK; Auburn University Montgomery, Paralegal Education Program, Montgomery, AL; University of Arkansas Ft. Smith, Legal
Assistant/Paralegal Program, Ft. Smith, AR; Pima Community College, Paralegal/Legal Assistant Program, Tucson, AZ; Centros Community College, Paralegal/Legal Assistant Program, Norwalk, CA; Connecticut Community College, Paralegal/Legal Assistant Program, Norwalk, CT; El Cajon, CA; Mount San Antonio College, Paralegal Studies Program, Walnut, CA; MTI College, Paralegal Studies Program, Sacramento, CA; San Francisco State University, Paralegal Studies Program, San Francisco, CA; Santa Ana College, Paralegal Studies Program, Santa Ana, CA; University of California Irvine, Paralegal Certificate Program, Irvine, CA; University of California UCLA Ext., Attorney Assistant Training Program, Los Angeles, CA; University of LaVerne, Legal Studies Program, LaVerne, CA; West Valley College, Paralegal Program, Saratoga, CA; Arapahoe Community College, Paralegal Program, Littleton, CO; Pikes Peak Community College, Paralegal Program, Colorado Springs, CO; Norwalk Community College, Legal Assistant Program, Norwalk, CT; Widener University Law Center, Paralegal Studies Program, Wilmington, DE; Georgetown University, Paralegal Studies Program, Washington, DC; Broward Community College, Legal Assistant Program, Pembroke Pines, FL; Edinboro University, Paralegal Studies Program, Fort Myers, FL; Florida Community College at Jacksonville, Legal Studies Institute, Jacksonville, FL; South University, Paralegal/Legal Studies Program, West Palm Beach, FL; Athens Technical College, Paralegal Studies Program, Athens, GA; South University, Paralegal/Legal Studies Program, Savannah, GA; Loyola University Chicago, Institute for Paralegal Studies, Chicago, IL; Roosevelt University, Paralegal Studies Program, Chicago, IL; Southern Illinois University, Paralegal Studies Program, Carbondale, IL; William Rainey Harper College, Paralegal Studies Program, Palatine, IL; Daymar College, Paralegal Studies Program, Owensboro, KY; Eastern Kentucky University, Paralegal Program, Richmond, KY; Morehead State University, Paralegal Program, Morehead, KY; Sullivan University, Paralegal Studies Program, Lexington, KY; Western Kentucky University, Paralegal Studies Program, Bowling Green, KY; Herzing College, Legal Assistant Program, Kenner, LA; Elms College, Paralegal and Legal Studies Program, Chicopee, MA; Community College of Baltimore County, Legal Assistant Program, Baltimore, MD; Oakland Community College, Paralegal Program, Farmington Hills, MI; Oakland University, Paralegal Program, Rochester, MI; Webster University, Legal Studies Program, St. Louis, MO; Missouri University for Women, Paralegal Studies Program, Columbus, MS; Metropolitan Community College, Legal Assistant Program, Omaha, NE; Central Piedmont Community College, Cabo Campus, Paralegal Studies Program, Charlotte, NC; Fayetteville Technical Community College, Paralegal Technology Program, Fayetteville, NC; Cumberland County College, Paralegal Studies Program, Vineland, NJ; Montclair State University, Paralegal Studies Program, Upper Montclair, NJ; Long Island University C. W. Post Campus, Paralegal Program, Brookville, NY; New York University, Institute of Paralegal Studies, New York, NY; The College of New Rochelle, Paralegal Program, New Rochelle, NY; (f/k/a David N. Myers University), Paralegal Education Program, Cleveland, OH; College of Mount St. Joseph, Paralegal Studies Program, Cincinnati, OH; Columbus State Community College, Legal Assisting Program, Columbus, OH; RETS College, Legal Assisting/Paralegal Program, Centerville, OH; University of
31. Grant reaccreditation to the Family Law Trial Advocacy Civil Law Trial August 2009 Standing Committee on Specialization (Report 104-09AM104)

RESOLVED, That the American Bar Association reaccredit the following designated specialty certification program for lawyers: Business Bankruptcy, Consumer Bankruptcy, and Creditors' Rights programs of the American Board of Certification of Cedar Rapids, Iowa. Family Law Trial Advocacy, Civil Law Trial Advocacy and Criminal Law Trial Advocacy program of the National Board of Legal Specialty Certification of Wrentham, Massachusetts. Estate Planning Law program of the Estate Law Specialist Board of Cleveland, Ohio. DUI Defense Law program of the National College for DUI Defense, Inc. of Montgomery, Alabama.


RESOLVED, That the American Bar Association supports the existing principle that laws of nature, physical phenomena, and abstract ideas are not patentable, even if they are new and non-obvious.

FURTHER RESOLVED, That the American Bar Association supports application by the Supreme Court of the United States of the common-law tradition of incremental development of jurisprudential doctrine for determining patent-eligible subject matter under 35 U.S.C. § 101.
FURTHER RESOLVED, That the American Bar Association opposes formulations by courts of tests to determine patent-eligible subject matter under 35 U.S.C. § 101 in a manner that articulates fixed and specific requirements that adversely affect yet-to-be conceived but deserving inventions in emerging or unknown technologies.

FURTHER RESOLVED, That the American Bar Association opposes a requirement that a process be explicitly tied to a particular machine or apparatus, or transform a particular article into a different state or thing (i.e., the "machine-or-transformation" test), in order to be eligible for patenting under 35 U.S.C. § 101, but favors, in principle, an evenly applied and more generalized subject-matter bar on claims that would preempt the use of an abstract idea, thereby better effectuating the broad statutory grant of patent eligibility under 35 U.S.C. § 101 and Supreme Court precedent declining to limit that grant, while ensuring the unfettered use of abstract ideas.

FURTHER RESOLVED, That the American Bar Association opposes formulations by courts of tests to determine patent-eligible subject matter under 35 U.S.C. § 101 in a manner that articulates fixed and specific requirements that adversely affect yet-to-be conceived but deserving inventions in emerging or unknown technologies.

FURTHER RESOLVED, That the American Bar Association opposes a requirement that a process be explicitly tied to a particular machine or apparatus, or transform a particular article into a different state or thing (i.e., the "machine-or-transformation" test), in order to be eligible for patenting under 35 U.S.C. § 101, but favors, in principle, an evenly applied and more generalized subject-matter bar on claims that would preempt the use of an abstract idea, thereby better effectuating the broad statutory grant of patent eligibility under 35 U.S.C. § 101 and Supreme Court precedent declining to limit that grant, while ensuring the unfettered use of abstract ideas.
At the 1996 Annual Meeting, the House of Delegates adopted a set of Recommendations establishing a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant and is to be presented to the House at the Annual Meeting. See Report 400 attached as Appendix A. The Resolution now before the House affects policies 10 years old or older. The Board of Governors or House of Delegates adopted these policies in 2009.

To accomplish this objective, the Division for Policy and Planning compiled an index of such policies set forth in either the ABA Policy and Procedures Handbook or the American Bar Association Legislative Issues list maintained by the Governmental Affairs Office. Some 55 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 32 entities to which the policies were sent are listed in Appendix B.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received.

In adopting Recommendation 400 in 1996, the House realized that there might be old and outdated policies which would not be identified through this process. The House, therefore, included a provision to deal with this issue by providing that such policies would also be archived. See Appendix A, paragraph 6. The second Resolved clause in this Resolution implements that provision with respect to all policies 20 years old or older.

Policies that are archived pursuant to the Resolution are not considered to be rescinded. Rather, the Association will retain them for historical purposes, however, they cannot be expressed as ABA policy. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in Appendix C.

Respectfully submitted,

Mary L. Smith, Secretary
American Bar Association
August 2019
RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

FURTHER RESOLVED, That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.

2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second, year policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.

3. Prior to each Annual meeting, a list of affected policies will be compiled and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.

4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.

5. Those policies which are not archived will be subject to review every ten years thereafter.

6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.

7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.

RESOLVED, That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

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FURTHER RESOLVED, That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.
The entities below reviewed and recommended disposition of the policies contained in the report:

**Sections and Divisions**
- Business Law
- Civil Rights and Social Justice
- Criminal Justice
- Dispute Resolution
- Environment, Energy and Resources
- Family Law
- Health Law
- Intellectual Property Law
- International Law
- Judicial Division
- Legal Education and Admissions to the Bar
- Litigation
- Pro Bono and Public Service
- State and Local Governments
- Tort Trial and Insurance Practice

**Standing Committees**
- American Judicial System
- Election Law
- Ethics and Professional Responsibility
- Legal Aid and Indigent Defendants
- Legal Assistance for Military Personnel
- Paralegal
- Public Education
- Specialization

**Commissions**
- Center on Human Rights
- Immigration
- Law and Aging
- Lawyer Assistance Programs
- Youth at Risk

**State, Local and Territorial Bar Associations**
- Bar Association of the District of Columbia
- Ohio State Bar
- Connecticut Bar Association
- New York State Bar Association

**APPENDIX B**
1. U.S Courts grant to detainees all rights granted to habeas petitioners
   February 2009
   New York State Bar Association

2. Amending Title 28
   February 2009
   Connecticut Bar Association

3. Opposition to the Sunshine in Litigation Act of 2007
   February 2009
   Ohio State Bar Association

4. Complete Enactment of legislation S.160 granting a vote to the Representative from
   District of Columbia
   February 2009
   Bar Association of the District of Columbia

6. Urges congress to revise laws, policies that require youth to register as sex
   offenders
   February 2009
   Criminal Justice Section

7. ABA-EPA
   February 2009
   Section of Environment, Energy and Resources

9. Child Custody Cases
   February 2009
   Section of Family Law

10. Private Insurance
    February 2009
    Tort Trial and Insurance Practice Section

11. Natural Catastrophes
    February 2009
    Tort Trial and Insurance Practice Section

12. Study on Catastrophic Risk
    February 2009
    Tort Trial and Insurance Practice Section
13. Liquidity needs of Individual and businesses after natural disasters  
   February 2009  
   Tort Trial and Insurance Practice Section

14. Availability and affordability of insurance for natural disasters  
   February 2009  
   Tort Trial and Insurance Practice Section

15. Mega-Catastrophes Emergency Plan  
   February 2009  
   Tort Trial and Insurance Practice Section

16. Standards for residents and small businesses in Catastrophic Insurance Claims  
   February 2009  
   Tort Trial and Insurance Practice Section

17. Legislation enabling a U.S. citizen or lawful permanent resident to sponsor his or her  
    same-sex partner for permanent residence in the United States  
    February 2009  
    Section of Civil Rights and Social Justice

18. Amend Model Rule of Professional Conduct  
    February 2009  
    Standing Committee on Ethics and Professional Responsibility

19. Government funded training, research and exchanging of information in adult  
    guardianship  
    February 2009  
    Commission on Law and Aging

20. Mandatory binding pre-dispute arbitration agreements between long-term care  
    facility and residents  
    February 2009  
    Commission on Law and Aging

21. Administrative law judges  
    February 2009  
    Judicial Division

22. Judicial Career  
    February 2009  
    Standing Committee on American Judicial System

23. Servicemembers Civil Relief Act  
    February 2009  
    Legal Assistance for Military Personnel
24. Attorney Client Privilege  
   February 2009  
   Section of Litigation

25. Health Care  
   August 2009  
   Ohio State Bar Association

26. Imposing restriction on bankruptcy related legal advice from attorneys  
   August 2009  
   Connecticut Bar Association

29. Urges corporate counsel to work with corporation and outside counsel  
   August 2009  
   Standing Committee on Pro Bono and Public Service

30. Unmet legal needs of low income residents in major disasters  
   August 2009  
   Standing Committee on Pro Bono and Public Service report

   August 2009  
   Section of State and Local Government

33. Renewal the Mandate of the of internet Governance Forum of the United Nation  
   August 2009  
   Section Business Law

34. Oppose the elimination of the defense of unenforceability of a Patent  
   August 2009  
   Section of Intellectual Property Law

35. Defense of unenforceability of patent bases upon inequitable conduct  
   August 2009  
   Section of Intellectual Property Law

36. Patent unenforceability and statutory and standards applicable  
   August 2009  
   Section of Intellectual Property Law

   August 2009  
   Section of Intellectual Property Law
38. Amendment to Model Rule on Conditional Admission to Practice Law  
   August 2009  
   Commission on Lawyers Assistance Program
39. Amendment to Model Rule of Professional Conduct  
   August 2009  
   Standing Committee on Ethics and Professional Responsibility
40. Endorsement of Nations World Summit Outcome Document  
   August 2009  
   Center on Human Rights
41. Administration of the Criminal Justice System  
   August 2009  
   Center on Human Rights
42. Congress should Repeal Federal Marital Benefits which denies Protections to  
   Same Sex Spouses  
   August 2009  
   Section of Civil Rights and Social Justice
43. Immigration Consequences of past Criminal Convictions  
   August 2009  
   Commission on Immigration
44. Commercial Arbitration  
   August 2009  
   Section of International Law
45. Amend ABA Election Administration Guidelines  
   August 2009  
   Standing Committee on Election Law
46. Rights of Children  
   August 2009  
   Commission on Youth at Risk
47. Support for the national, state and local  
   August 2009  
   Commission on Youth at Risk
48. Policies that support the right of children to return to school to complete their  
   Education  
   August 2009  
   Commission on Youth at Risk
49. Eight Guidelines of Public Defense Related to Excessive Workload
   August 2009
   Standing Committee on Legal Aid and Indigent Defendants

50. Uniform guidance in human clinical trials
    August 2009
    Health Law Section

51. National Assessment of Educational Progress for Civics
    August 2009
    Standing Committee on Public Education

52. Mediation
    August 2009
    Section of Dispute Resolution

53. Reform the nation’s financial regulatory system
    August 2009
    Section of Business Law

55. Non-regulatory insurance information office
    August 2009
    Section of Tort Trial and Insurance Practice
1. Summary of Resolution:

In an ongoing effort to keep the Association's policies up to date, this resolution consists of policies 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as current policy of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. Approval by Submitting Entity:

The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

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

Although the Association has from time to time culled its records, the policies on the archival list have not been subject to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

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

The archiving of any policy would have no effect on existing policies.

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

Resolution 400 adopted August 1996 mandates the annual review of policies 10 years old or older.

6. Status of Legislation:

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

The Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

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

None.

9. Disclosure of Interest: N/A.

10. Referrals.

The policies identified in the Resolution with Report have been circulated to 32 entities as noted in Appendix B and will also be sent to the Government Affairs Office.

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

Mary L. Smith
321 North Clark Street
Chicago, Illinois 60654-7598
(312) 988-5161
FAX (312) 988-5153
marysmith828@hotmail.com

Richard Collins
American Bar Association
321 North Clark Street
Chicago, Illinois 60610
312/988-5162
Richard.Collins@americanbar.org

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

Mary L. Smith
321 North Clark Street
Chicago, Illinois 60654-7598
(312) 988-5161
FAX (312) 988-5153
marysmith828@hotmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution archives Association policies that are 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. Summary of the Issue which the Recommendation Addresses

The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association’s positions were adopted decades ago and are no longer relevant or effective.

3. An Explanation of How the Proposed Policy will Address the Issue

The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

4. A Summary of Any Minority Views or Opposition Which Have Been Identified

None at this time.
RESOLVED, That the Association policies adopted in 1999 which were previously considered for archiving but retained as set forth in Attachment 1 to Report 400B dated August 2019, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such;

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such; and

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.
3. ERISA  
   February 1999  
   Health Law Section

4. Goal IX  
   February 1999  
   Commission on Disability Rights

13. Phase Out  
   February 1999  
   Section of Taxation

14. Guaranteed Payments  
   February 1999  
   Section of Taxation

15. Value Added Tax  
   February 1999  
   Section of Taxation

16. Partnership Items  
   February 1999  
   Section of Taxation

17. Senior Outreach Projects  
   February 1999  
   Young Lawyers Division

23. Specialty Certification Programs for Lawyers  
   August 1999  
   Standing Committee on Specialization

24. Re-Accreditation  
   August 1999  
   Standing Committee on Specialization
3. ERISA
February 1999
Health Law Section (Report 106-99MY106)

RESOLVED, That the American Bar Association supports enactment of federal legislation to amend the federal Employee Retirement Income Security Act (ERISA) to allow causes of action to be brought in the state and territorial courts against employer-sponsored health care plans under state and territorial health care liability laws.

4. Goal IX
February 1999
Commission on Disability Rights (Report 108-99MY108)

RESOLVED, That the American Bar Association amends the Association’s Goal IX to state: To promote full and equal participation in the legal profession by minorities, women and persons with disabilities., That the American Bar Association amends the Association’s Goal

13. Phase Outs
February 1999
Section of Taxation (Report 104A-99M-99MY104A)

RESOLVED that the American Bar Association recommends to the Congress that:

(i) it repeals section 68 and subsection 151 (d)(e) of the Internal Revenue Code of 1986, which phaseout itemized deductions and personal exemptions if an individual taxpayer has adjusted gross income over a given threshold, and
(ii) it replaces the revenue currently raised by subsection 151(d)(3) and section 68 with adjustments to the explicit tax rates in the tax brackets of section 1 (a)-(d) to raise the same amount of revenue, distributed in substantially the same way among tax brackets.

14. Guaranteed Payments
February 1999
Section of Taxation (Report 104B-99MY104B)

RESOLVED that the American Bar Association recommends to the Congress that it repeal section 707(c) of the Internal Revenue Code of 1986 (“Code”), which provides that, to the extent determined without regard to the income of the partnership, payments to a partner for services or for the use of capital will be treated for certain purposes as though made to a partner who is not a member of the partnership
RESOLVED, That the following resolutions adopted by the ABA House of Delegates in February 1986 are rescinded:

RESOLVED, That it is the position of the American Bar Association that if the Congress of the United States should impose a value added tax of general application (Whether denominated as a Business Transfer Tax or otherwise), it should:

(i) employ the tax credit method of avoiding duplication of tax; i.e. the tax due on goods and services sold should be diminished by a credit for VAT paid on purchases; and

(ii) levy the tax at a single uniform rate, with a zero rate for exports and certain necessities, and as few exemptions as possible.

FURTHER RESOLVED, That whether the Business Transfer Tax such as S.1102 now proposed for consideration in the Congress employs the tax credit method referred to above or the subtractive method (tax levied on sales receipts less selected expenses), the Section is authorized to render technical assistance to the staffs of Congressional members and committees, and to the U.S. Treasury and Internal Revenue Service, with respect to the Business Transfer Tax and its variants.

FURTHER RESOLVED, That the Section of Taxation is authorized following consultation with such Sections as the President may specify to urge on the proper committees of Congress provisions that achieve the results stated in the first resolution above.

RESOLVED that the American Bar Association recommends to the Congress that it:

(i) Simplify section 702(a) of the Internal Revenue Code of 1986, by substituting a requirement that each partner shall take into account separately his distributive share of any partnership item which, if separately taken into account by any partner, would result in an income tax liability for that partner different from that which would result if that partner did not take the item into account separately; and

(ii) substituting a requirement that each partner shall take into account separately his distributive share of any partnership item which, if separately taken into account by any partner, would result in an income tax liability for that partner different from that which would result if that partner did not take the item into account separately; and
(ii) repeal section 702(c), which provides that, in any case where it is necessary to determine the gross income of a partner, a partner shall include his distributive share of the gross income of the partnership.

17. Senior Outreach Projects
February 1999
Young Lawyers Division Report (112A-99MY112A)

RESOLVED, That the American Bar Association encourages state, local, and territorial bar associations, and affiliated state, local, and territorial bar young lawyer organizations, to establish and implement Senior Outreach Projects to provide free legal services to homebound senior citizens without sufficient means to hire counsel.

23. Specialty Certification Programs for Lawyers
August 1999
Standing Committee on Specialization Report 107-99AM107

RESOLVED, That the American Bar Association amends Section 5 of the Standards for Accreditation of Specialty Certification Programs for Lawyers to extend the period of accreditation from three years to five years, as follows:

SECTIONS: ACCREDITATION PERIOD AND RE-ACCREDITATION

5.01 Initial accreditation by the Association shall be granted for five years.

5.02 To retain Association accreditation, a certifying organization shall be required to apply for re-accreditation prior to the end of the fifth year of its initial accreditation period and every fifth year thereafter. The organization shall be granted re-accreditation upon a showing of continued compliance with these Standards.

24. Re-Accreditation
August 1999
Standing Committee on Specialization (Report 114-99AM114)

RESOLVED, That the American Bar Association re-accredit the following designated specialty certification programs for lawyers:

Business Bankruptcy, Consumer Bankruptcy and Creditors’ Rights programs of the American Board of Certification of Alexandria, Virginia; Civil Trial Advocacy and Criminal Trial Advocacy programs of the National Board of Trial Advocacy of Boston, Massachusetts.
Pursuant to Report 400, adopted by the House of Delegates in 1996, the Association is annually required to review policies adopted by the House of Delegates that have been in existence ten years or more. See Report 400 attached as Appendix A. Those policies that are outdated, duplicative, inconsistent with current policy or no longer relevant are to be archived. The review process operates from the premise that any policy on the list will be archived unless there is a request to remove it from the archival list and retain it as current policy. Once archived, it may no longer be cited as current policy. An archived policy is not considered to be rescinded, but rather is retained by the Association for historical purposes only.

Several years ago, the Resolution and Impact Review Committee reviewed the current archiving procedure and determined that it was time to revisit policies that were originally considered for archiving but retained. To date, every policy that is at least ten years old has been considered for archiving once. In the first several years after the procedure was instituted, over 1000 policies were examined. Of those, about one-third were archived. In subsequent years, policies were examined when they became 10 years old. The vast majority of policies that were passed in the last twenty years have been retained at the request of the sponsoring entity, the Office of Governmental Affairs or a member of the House.

This year, the policies adopted in 1999 which were previously considered for archiving but retained were reviewed. The process of reviewing previously retained policies began in spring of 2012 and will continue annually. To accomplish this objective, the Division for Policy and Planning compiled an index of such policies set forth in either the ABA Policy and Procedures Handbook or the American Bar Association Legislative Issues list maintained by the Governmental Affairs Office. Some 38 policies were thus identified. Each entity, which had been the original sponsor, was sent a list of the policies it had sponsored. In cases where the original sponsoring entity was no longer in existence, the policies were sent to an appropriate successor entity. The 23 entities to which the policies were sent are listed in Appendix B.

Each entity was asked to identify which of the policies should be archived and which should be retained as current policy. In addition, each was requested to identify and include a recommended disposition for any other policies that had been generated which were not in the materials they received. Those retained as current policy through this process will be reviewed again in 10 years. Retained policies are listed in Appendix C.

Respectfully submitted,
Mary L. Smith, Secretary
American Bar Association
August 2019
The resolution was approved as amended as follows:

**RESOLVED,** That the American Bar Association adopts a procedure to archive policies which are 10 years old or older and which are outdated, duplicative, inconsistent or no longer relevant. Such archived policies will be retained for historical purposes but shall not be considered current policy for the Association and shall not be expressed as such.

**FURTHER RESOLVED,** That the archiving shall be implemented as follows:

1. All policies adopted by the House of Delegates shall be reviewed, with the exception of uniform state laws, model codes, guidelines, standards, ABA Constitution and Bylaws, and House Rules of Procedures.
2. To phase in this process, the periodic mandated review will in the first year, 1997, address policies 20 years old or older; in the second year, policies 15 years old or older; and in the third year and each year thereafter, policies 10 years old or older.
3. Prior to each Annual meeting, a list of affected policies will be complied and circulated to the original sponsoring entities and to each member of the House identifying those policies which will be placed on the archival list.
4. At each Annual Meeting, a recommendation will be submitted to archive certain policies and the House will vote on the recommendations.
5. Those policies which are not archived will be subject to review every ten years thereafter.
6. Any policy 10 years old or older that is not contained within the ABA Policy and Procedures Handbook (The Green Book) or any Legislative Issues list published by the ABA and that has not been subject to the review set forth in these principles is considered to be archived.
7. This archival process is not intended to affect the rights of any member of the House to propose amendments or rescission of any policies as presently permitted under House rules.

**FURTHER RESOLVED,** That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.

**FURTHER RESOLVED,** That an approved Uniform Act promulgated by the National Conference of Commissioners on Uniform State Law (NCCUSL) shall be placed on the archival list only when such an Act has been removed from the active list of the NCCUSL.
APPENDIX B

The entities below reviewed and recommended disposition of the policies contained in the report:

Standing Committees
Election Law
Environmental Law
Professional Discipline
Specialization

Sections and Divisions
Administrative Law and Regulatory Practice
Civil Rights and Social Justice
Criminal Justice Section
Dispute Resolution
Family Law
Health Law Section
International Law
Judicial Division
Law Student Division
Litigation
Public Contract Law
Public Sector Lawyers Division
Taxation
Young Lawyers Division

Commissions
Disability Rights
Immigration
Law and Aging

State, Local and Territorial Bar Associations
The Florida Bar
Bar Association of San Francisco
APPENDIX C
Retained Policies

1. Campaign Contributions
   February 1999 - Standing Committee on Election Law Report 118

2. District Court
   February 1999 - Standing Committee on Federal Judicial Improvements

5. Amends ABA Model Rules for Lawyer Discipline Enforcement
   February 1999 - Standing Committee on Professional Discipline

6. Independent Counsel
   February 1999 - Criminal Justice Section

7. Black Letter Amendments
   February 1999 - Criminal Justice Section

8. Health Care Due Process Protocol
   February 1999 - Section of Dispute Resolution

9. Right to Privacy of Health Care Information
   February 1999 - Section of Individual Rights and Responsibilities

10. Adoption
    February 1999 - Section of Individual Rights and Responsibilities

11. U.S trade Agencies
    February 1999 - Section of International Law

12. Principles for Resolving Controversies in Public Procurements
    February 1999 - Section of Public Contract Law

18. National Voter Registration Act
    August 1999 - Standing Committee on Election Law

19. Brownfields Program
    August 1999 - Standing Committee on Environmental Law

20. Ninth Circuit Court of Appeals
    August 1999 - Judicial Division

21. Judicial Branch
    August 1999 - Judicial Division

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1. **Summary of Resolution:**
   In an ongoing effort to bring the Association’s policies up to date, this resolution consists of the review of policies adopted in 1999 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA. The Secretary recommends that the policies set forth in Attachment 1 of the resolution be archived.

2. **Approval by Submitting Entity:**
   The policies that have been placed on the archival list were reviewed by the entities that originally submitted them. In cases in which the submitting entity is now defunct, a successor entity was given the policy to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
   Although the Association has from time to time culled its records, the policies on the archival list have not been subject to review. They were originally approved by either the Board of Governors or the House of Delegates on the dates they were adopted.

4. **What existing Association policies are relevant to this resolution and how would they be affected?**
   The archiving of any policy would have no effect on existing policies.

5. **What urgency exists which requires action at this meeting of the House?**
   Resolution 400 mandates the review of policies 10 years old or older.

6. **Status of Legislation (If applicable)**
   N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Policy and Procedures Handbook will be updated to reflect those policies that have been archived.

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

None.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

The policies identified in the Resolution with Report have been circulated to 23 entities as noted in Appendix B, and also will be sent to the Government Affairs Office.

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

Mary L. Smith
321 North Clark Street
Chicago, Illinois 60654-7598
(312) 988-5161
FAX (312) 988-5153
marysmith828@hotmail.com

Richard Collins
American Bar Association
321 North Clark Street
Chicago, Illinois 60610
312/988-5162
Richard.Collins@americanbar.org

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

Mary L. Smith
321 North Clark Street
Chicago, Illinois 60654-7598
(312) 988-5161
FAX (312) 988-5153
marysmith828@hotmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution archives Association policies adopted in 1999 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. Summary of the Issue Which the Resolution Addresses

The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association’s positions were adopted decades ago and are no longer relevant or effective.

3. An Explanation of How the Proposed Policy will Address the Issue

The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

4. A Summary of Any Minority Views or Opposition Which Have Been Identified

None at this time.
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