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Resolutions with Reports numbered 100A through 200 can be found in this book. Additional Resolutions with Reports submitted by state and/or local bar associations will be numbered in the “10” series and late Resolutions with Reports submitted will be numbered in the “300” series. These reports will be distributed at the opening session of the House of Delegates meeting. Informational Reports can be found on the ABA’s website at https://www.americanbar.org/groups/leadership/house_of_delegates/2020-midyear-meeting/ (click on Informational Reports).
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PRELIMINARY CALENDAR
of the
HOUSE OF DELEGATES
of the
AMERICAN BAR ASSOCIATION

JW Marriott Austin
JW Grand Ballroom, Level 4
Austin, Texas

February 17, 2020

All sessions of the House of Delegates will be held on Monday, February 17, 2020, at the JW Marriott Austin Hotel, JW Grand Ballroom, Level 4, in Austin, Texas. It is anticipated that the House meeting will begin at 9:00 a.m., and will adjourn no later than 5:30 p.m., or when the House has completed its agenda.

The Final Calendar of the House of Delegates meeting will be placed on House members' desks at the opening session on Monday morning, February 17. Sections, committees, delegates, affiliated organizations and bar associations, which have submitted Resolutions with Reports, oral information or late reports authorized by the Committee on Rules and Calendar, will be calendared.

The index, which appears at the end of this book, will assist House members in finding reports received by the November 20, 2019 filing deadline. Resolutions with Reports numbered 100A through 200 appear in this book. Informational Reports can be found on the ABA’s website at https://www.americanbar.org/groups/leadership/house_of_delegates/2020-midyear-meeting/ (click on Informational Reports).

Any late Resolutions with Reports, those received after November 20, 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 voting. Late Resolutions with Reports will be distributed at the opening session of the House, along with any additional Resolutions with Reports submitted by state or local bar associations.

The preliminary calendar of the House of Delegates meeting is as follows:
The Chair of the House of Delegates,  
William R. Bay, Presiding

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  
   Judy Perry Martinez, Louisiana

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 Resolutions with Reports of Sections, Committees and Other  
   Entities  
   100A-200 Resolutions with Reports  
   300 Late Resolutions with Reports

ADJOURNMENT
AMERICAN BAR ASSOCIATION
2019-2020
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Fifth District 2021 Charles ‘Buzz’ English, Jr.,
Sixth District 2020 Lee A. DeHihns III, Marietta, GA
Seventh District 2022 William K. Weisenberg, Westerville, OH
Eighth District 2022 Laura B. Sharp, Austin, TX
Ninth District 2021 Susan M. Holden, Minneapolis, MN
Tenth District 2022 Patrick Goetzinger, Rapid City, SD
Eleventh District 2022 Beverly J. Quail, Denver, CO
Twelfth District 2020 Randall D. Noel, Memphis, TN
Thirteenth District 2022 Charles J. Vigil, Albuquerque, NM
Fourteenth District 2021 Andrew J. Demetriou, Los Angeles, CA
Fifteenth District 2021 Mark H. Alcott, New York, NY
Sixteenth District 2021 David W. Clark, Jackson, MS
Seventeenth District 2021 Rew R. Goodenow, Reno, NV
Eighteenth District 2022 Christine H. Hickey, Indianapolis, IN
Nineteenth District 2020 David L. Brown, Des Moines, IA
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<th>Position</th>
<th>Year</th>
<th>Name</th>
<th>City, State</th>
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<tr>
<td>Goal III LGBT Member-at-Large</td>
<td>2022</td>
<td>James J.S. Holmes</td>
<td>Los Angeles, CA</td>
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<tr>
<td>Goal III Minority Members-at-Large</td>
<td>2020</td>
<td>Myles V. Lynk</td>
<td>Phoenix, AZ</td>
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<td></td>
<td>2021</td>
<td>Michele Wong Krause</td>
<td>Dallas, TX</td>
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<td>Goal III Women Members-at-Large</td>
<td>2020</td>
<td>Lynn M. Allingham</td>
<td>Anchorage, AK</td>
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<td></td>
<td>2021</td>
<td>Eileen A. Kato</td>
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<td>Judicial Member-at-Large</td>
<td>2021</td>
<td>Hon. Frank J. Bailey</td>
<td>Boston, MA</td>
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<td>2020</td>
<td>Michaela Posner</td>
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<td>Section Members-at-Large</td>
<td>2020</td>
<td>Lynne B. Barr</td>
<td>Boston, MA</td>
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<tr>
<td></td>
<td>2020</td>
<td>Tom Bolt</td>
<td>St. Thomas, VI</td>
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<td></td>
<td>2020</td>
<td>Michael H. Byowitz</td>
<td>New York, NY</td>
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<td>2022</td>
<td>Michael W. Drumke</td>
<td>Chicago, IL</td>
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<td>2022</td>
<td>James M. Durant</td>
<td>Lemont, IL</td>
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<td>Bonnie E. Fought</td>
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<td></td>
<td>2021</td>
<td>H. Russell Frisby, Jr.</td>
<td>Washington, DC</td>
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<tr>
<td></td>
<td>2021</td>
<td>Howard T. Wall</td>
<td>Franklin, TN</td>
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<tr>
<td></td>
<td>2021</td>
<td>Steven J. Wermiel</td>
<td>Washington, DC</td>
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<tr>
<td>Young Lawyer Members-at-Large</td>
<td>2020</td>
<td>Sheena R. Hamilton</td>
<td>St. Louis, MO</td>
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<tr>
<td></td>
<td>2021</td>
<td>C. Edward Rawl, Jr.</td>
<td>North Charleston, SC</td>
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REPORT OF THE
ABA PRESIDENT
TO THE
HOUSE OF DELEGATES

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

TO THE

HOUSE OF DELEGATES

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

(Submitted December 6, 2019)

This report highlights American Bar Association activities from May 29, 2019 to November 22, 2019.

Introduction

When the “Disney Plus” online streaming subscription service launched in November, it was the latest chapter in a brand that’s achieved remarkable success in its 96-year history. What started as a small film company featuring a cartoon mouse grew and diversified in the following decades to include major movie studios, television channels, and theme parks. Today Disney is the world’s second-largest media conglomerate, and its decision to provide popular content on-demand sets it up for continued growth into the future.

Describing his successful business model, Walt Disney explained: “Do what you do so well that they will want to see it again and bring their friends.” Just as he created unique characters and stories that brought families back to Disney parks and movies, the American Bar Association offers valuable benefits for lawyers no other organization can provide. Our legal resources and services, which have been enhanced through the new value proposition, provide compelling reasons for attorneys to retain membership throughout their careers -- and to share that positive experience with others.

Like Disney, this year the ABA has made it easier for our members to access our exceptional content online. Perhaps the “crown jewel” of our expanded benefits is the Association’s growing and improved CLE Library. Free to members, it was launched as part of the new value proposition on May 1, 2019 as we began the billing cycle for Fiscal Year 2020. Our CLE Library currently has more than 450 online/on-demand titles, and we expect to increase that to 650 courses by the end of the fiscal year.

The CLE Library is proving to be a popular offering because it has a real and tangible benefit. For example, we learned about a solo attorney in her 80s who had let her license lapse and needed it renewed. For $150, the cost of her solo membership, she was able to take all of her CLE credits and regain her license at a fraction of what she would have otherwise paid. The CLE benefit is also drawing positive attention from larger practices. One of our latest Full Firm members, Peckar & Abramson (National Law Journal #351), joined in large measure because the CLE Library is a no-cost member benefit, adding 60 new lawyer members to the Association.

The early results we’ve seen from the CLE Library further highlight its promise to attract and retain members. Between May 1 and October 31, on-demand program views have increased dramatically -- 4½ times more than the prior year. During that same
period, the percentage of our members who took online CLE has grown; more than 5 percent of ABA members have recently taken advantage of our CLE offerings. While that is still a relatively small number of members, it’s a 23 percent increase from the previous year and demonstrates tremendous potential for growth.

While we anticipated CLE revenues would drop with the launch of our vast new free CLE library, the decrease has been far less than projected. ABA’s CLE staff had estimated $52,000 in revenues between May and October of this year, an 85 percent drop from the same time last year. The actual decrease was far less severe -- during that period our CLE Library earned more than $306,000 in revenues. While this was down from the $475,000 generated between May and October 2018, it was nearly six times greater than the 2019 projections.

A significant factor in the CLE Library’s initial success has been the large selection of relevant programs. It’s more than simply helping to comply with MCLE requirements - - the breadth of the Library offers opportunities for attorneys to increase their knowledge and enables them to become better lawyers. Our members now have many more choices, all as a benefit of their membership in the Association. Solo practitioners can learn how to build expertise in a new specialty and how to grow their business. New associates at larger firms, tasked with an assignment in an area they have not worked, can get up-to-speed quickly. The CLE Library is available to lawyers whenever and however they need it, whether it’s to enhance their professional knowledge or simply to meet credit requirements. It’s notable that with such a large volume of courses in our free CLE Library, 98 percent of the programs have already been utilized.

The CLE Library would not have been possible, or as successful as it has become, without the exceptional contributions of the ABA Sections, Divisions, Forums, and other entities. From the beginning, the ABA collaborated extensively with our entities to seek their guidance on what sorts of CLE programs would appeal to and benefit their members. So far, 47 different ABA entities have provided content for the Library, and every month they provide an additional 20 to 30 programs. This steady stream of submissions ensures fresh content across practice areas. The close coordination with our entities will also help drive up membership for both the ABA and the entities. Lawyers who take a Section-submitted program not only receive the benefit it provides -- many will thereafter pursue entity membership.

While the quantity of courses is important for the CLE Library’s success, so is providing quality offerings to meet our members’ needs. On September 1, the ABA launched a second phase that added dynamic content and personalization to the Library. Visitors to our online CLE courses now see recommended programs based on their entity memberships and areas of interests. With the help of advanced technology, we will continue to obtain a better understanding of member preferences and improve our ability to enhance our members’ personalized CLE experience.

We are also examining how members who utilize the Library interact with the ABA overall. Do they act differently than members who don’t access the Library? Are they
more likely to renew their memberships, buy ABA products, or join Sections? Through the use of analytics, we hope to enhance our members’ CLE experience and access to other ABA opportunities.

Membership

As I noted in my remarks to the House of Delegates at the 2019 Annual Meeting, we are monitoring three key metric targets to help determine the new value proposition’s progress and effectiveness: total dues paying members; new dues paying members; and dues revenue. As of November 30, we were 84 percent of the way toward our target of 179,359 dues paying members; we have surpassed our target of 10,696 new dues paying members; and we were at 86 percent of the target of $42.7 million in dues revenue. The three metrics are to be reached by the end of Fiscal Year 2020, almost nine months from now, which means the new value proposition is off to a very promising start. I’ll update this data when I address the House in February.

As we monitor our progress, we continue to enhance the new initiatives launched this year as we develop new ones. Following the Board’s approval at the 2019 Annual Meeting, we added ABA Member Logos as a benefit. This allows members to proudly display their affiliation in the ABA with our new contemporary logo, along with their name and membership year, on various communications portals such as social media, websites, letterhead, presentations, and business cards. The logos come at no additional cost for all dues paying members of the Association in good standing. Details on the precise licensing terms of using the logo are available here.

The ABA has established a Group Agency Membership Program to bring federal legal professionals into the Association. This program allows federal agencies to pay for a specific number of ABA membership seats at $150 each for designated attorneys on their staff. We are optimistic this innovative approach will yield positive results as we tap into this important sector of the legal community.

As of November 22, Full Firm membership stood at 26,436 total members, a 5.5 percent increase from the same time last year. Overall Group Program membership is at 67,313 total members, down 1 percent from the same period in 2018. Through that date, FY 2020 Full Firm dues revenue was at $4.6 million, down 4.8 percent from this time last year. FY 2020 Group dues revenue is at $14.7 million, a decrease of 13.7 percent from last year. It’s important to note-some Full Firm and Group payments, including ones from large firms, have historically been paid later in the year and that will result in greater dues receipts for this fiscal year.

Membership and CLE staff members are developing a plan to contact current and prospective Full Firms to promote the free CLE Library benefit as part of their membership. As part of outreach efforts, six ABA officers, including President Judy Perry Martinez and President-elect Trish Refo, have been contacting 60 Full Firm managing partners and chairs to thank them for their commitment to the ABA.
Full Firm and Group staff continues to support a revitalized State Membership Chair program. State chairs are promoting membership in their state by writing articles in local publications, attending events including bar swearing-in ceremonies, and distributing brochures that we have provided about the ABA's new value proposition. Currently, there are only four state membership chair vacancies (Alabama, Colorado, North Carolina, and Texas).

The ABA is also in the process of improving our email outreach through dynamic messaging targeted to members’ interests. In the past, our overreliance on the quantity rather than quality of messages often irritated members, who too often came to perceive ABA emails as spam and understandably blocked or ignored them. Through better business practices and enhanced staff training, we have begun to address these concerns. We reduced the number of ABA emails from 300 million three years ago to about 100 million in FY 2019.

We have more to do. In September, we initiated the deployment of a new email platform based on artificial intelligence, so members get content they want to receive – relevant to their areas of interest and areas of practice. We conducted the first test of the new platform on Thursday, September 26 when we sent emails consisting of ABA books, CLE, and other products curated to the interests of 21,000 randomly selected members. The Thursday test emails continued as we calibrated the process and increased the number of members that received them. Our goal is for members to eventually have curated messages sent every business day relating to their practices and careers. We anticipate the following schedule:

- Mondays: General ABA news and updates
- Tuesdays: Curated content geared to members’ interests
- Wednesday: Entity-specific content
- Thursdays: CLE, Publishing, and other products
- Fridays: ABA Journal news

Our new email program is a giant step forward in our efforts to improve and personalize the member experience. Advanced consumer technology will allow us to monitor the effectiveness of our messages and adjust accordingly. We are also developing a new email Preference Center that will empower members to customize their ABA experience based on their interests.

**Website**

We continue to work on the website. Analytics conducted both by staff and also by external experts show the site is functioning at 97 percent effectiveness. While that may sound positive, it is not nearly good enough. We continue to finalize improvements to the website’s architecture and other enhancements that will improve the site’s functionality. Those changes will enable the site to perform a bit faster and with substantially improved accuracy. We are also working on improvements to e-commerce, the search function, and the paywall.
Advocacy

On October 28, GAO and the National Creditors Bar Association met with a representative of the House Office of the Legislative Counsel and with the Legislative Director for Representative Alex Mooney (R-West Virginia) -- the principal sponsor of the “Practice of Law Technical Clarification Act” (H.R. 5082; 115th Congress) -- to discuss strategies for advancing a revised version of the bill in the 116th Congress. The ABA-supported bill would help restore traditional state court regulation and oversight of attorneys engaged in litigation by exempting attorneys and their law firms from liability under various federal statutes and from federal agencies’ regulatory jurisdiction for the attorneys’ litigation-related activities.

By unanimous vote on October 16, the U.S. House Committee on Veterans Affairs reported out favorably H.R. 3749, the Legal Services for Homeless Veterans Act. In evaluating the importance of the bill in opening remarks, Chairman Mark Takano (D-California) stated that the ABA and several veteran service organizations supported it. The ABA Governmental Affairs Office (GAO) had gathered support from 40 other national, state, and local organizations that was entered into the record.

On October 22, ABA President Martinez sent a letter to all members of the House of Representatives opposing H.R. 2513, the Corporate Transparency Act of 2019, which would require millions of small businesses and their attorneys to submit detailed information about the businesses’ “beneficial owners” to the Treasury Department and require the Department to disclose the information to governmental agencies and financial institutions upon request and without a subpoena. If enacted, the bill would impose burdensome and costly new regulations on small businesses and their attorneys, create serious privacy concerns, and not be as effective as other existing tools designed to fight money laundering and terrorist financing.

On October 8, President Martinez wrote to House Speaker Nancy Pelosi (D-California) and Republican Leader Kevin McCarthy (R-California) urging their support for H.R. 4018 -- a bipartisan technical corrections bill concerning the Elderly Offender Home Detention Pilot Program. The First Step Act (P.L. 115-391) offers nonviolent elderly and terminally ill inmates an opportunity to serve the remainder of their sentence on home detention. If enacted, H.R. 4018 would ensure that when calculating whether a person has served a sufficient portion of their sentence to become eligible for the pilot program, the length of their original sentence is reduced by any “good time” credits he or she earned.

On October 8, President Martinez submitted a letter to the Chairman and Ranking Member of the Senate Subcommittee on Commerce, Justice, Science, and Related Agencies, congratulating them on getting a bill through the full Appropriations Committee, which if passed would increase Legal Services Corporation (LSC) funding by $10.5 million. The ABA urged the Subcommittee to make LSC a top priority in reconciling
the differences with the House bill and to move as close to the higher House funding level as possible.

GAO and leaders of the ABA Gatekeeper Task Force met with a senior Treasury Department Counsel on September 16 to reiterate the ABA’s concerns regarding several different anti-money laundering bills pending in Congress and related proposals by the Financial Action Task Force and the Treasury Department that could interfere with the confidential attorney-client relationship and impose excessive regulatory burdens on many small businesses and their attorneys. They also briefed the Treasury Counsel on the ABA’s ongoing efforts to develop new beneficial ownership reporting policies, better enforce and strengthen existing lawyer ethics rules, and take other affirmative steps to combat money laundering and terrorist financing in a manner consistent with attorneys’ legal, and ethical duties to protect client confidentiality.

On September 4, President Martinez sent a letter to the House and Senate Judiciary Committees to express the ABA’s serious concern over recent reports concerning the implementation of Presidential Proclamation 9645, known as the “Travel Ban.” The ABA urges Congress and the Administration to take measures to ensure that the waiver provision of the Ban is implemented consistent with the rule of law.

The September edition of Newsweek magazine referenced an article on the Violent Against Women Act (VAWA) that had been published in May edition of GAO’s Washington Letter. That article addressed GAO’s assessment of the VAWA reauthorization effort pending in Congress; Newsweek quoted GAO’s article: “The Senate is not expected to pass the House version of the legislation due to partisan differences. These differences have centered largely around process disputes and disagreements on provisions including firearms and civil rights protections. We expect the Senate to release its version of the VAWA reauthorization soon.”

As a new initiative, GAO introduced an Advocacy Pop-Up Booth at the Annual Meeting to recruit members for the ABA’s Grassroots Action Team. Staffed showed members how they can make a difference by engaging in campaigns designed to amplify the Association’s voice on behalf of the legal profession. GAO’s Director of Grassroots and Digital Advocacy staffed the booth, which featured a bank of iPads loaded with several actions that members could take on the spot, including sending a letter or social media post directly to their elected officials; registering to vote in the 2020 elections; and signing up to receive curated content on specific issues. Over 150 ABA members sent letters to Congress during the Annual Meeting’s weekend on issues such as immigration, funding for the LSC, and Public Service Loan Forgiveness. More signed up to participate in the future.

On August 16, the GAO participated in a meeting at the National Congress of American Indians to discuss the impact of 2017 regulations by the Department of Veterans Affairs (VA) on Tribal Veteran Service Officer (TVSO) accreditation. Despite having the highest participation of military service of any ethnic group, Native American veterans have among the lowest rates for filing or appealing VA disability claims, making
the presence of an accredited advocate important. According to Federal Bar Association representatives, tribes are unable to meet the new VA standards for accreditation of their TVSOs. On September 19, GAO met with the VA Office of General Counsel to discuss problems that TVSOs have had in becoming accredited by the VA to assist veterans in their tribe.

On June 19, then-ABA President Bob Carlson sent a letter to the Senate Banking, Housing, and Urban Affairs Committee expressing concerns over key provisions in the draft ILLICIT CASH Act that would require attorneys representing clients in real estate transactions to report confidential client information to the Treasury Department and impose burdensome beneficial ownership reporting requirements on small businesses. The ABA’s letter was submitted for the record of the Committee’s June 20 hearing on “Outside Perspectives on the Collection of Beneficial Ownership Information.”

On June 17, then-President Carlson sent a letter to the Senate Judiciary Committee expressing the ABA’s opposition to S. 1494, the Secure and Protect Act of 2019, which would strip critical legal and other protections from immigrant children. That same day, he also sent a letter to the Senate and House Appropriations Committees expressing support for the passage of supplemental appropriations to the Department of Health and Human Services’ Office of Refugee Resettlement to ensure the appropriate treatment and care of unaccompanied immigrant children in government custody.

On June 13, GAO met with the Prosecutor Working Group (PWG) on Capitol Hill. The PWG is a bipartisan group of Members of Congress who previously served as prosecutors. The PWG seeks to inform Congress on the impact of criminal justice system improvements from the perspective of those charged. The National District Attorneys Association helped create the PWG and arranged this meeting with GAO to discuss bail reform, collateral consequences of convictions, and access to legal services for expungements to support housing and employment opportunity.

On June 4, then-President Carlson sent a letter to all members of the House of Representatives in support of H.R. 6, the American Dream and Promise Act. This legislation would provide a path to legal status and citizenship for Deferred Action for Childhood Arrivals (“DACA”) recipients and other deserving young immigrants (collectively “Dreamers”). The ABA believes H.R. 6 is consistent with American ideals of fairness and opportunity.

Media Relations

Media Relations (MR) placed an opinion editorial by ABA President Martinez which was published on October 22 by The Hill. In it, she urged support for the Copyright Alternative in the Small-Claims Enforcement Act of 2019. Explaining the measure would create an alternative forum for content creators to pursue low-value claims of copyright infringement, she said, “Congress has an opportunity to join together and pass legislation that will provide authors, artists and other creators with a meaningful way to protect their work.”
Also in October, President Martinez participated in a MR-organized one-on-one interview with Bloomberg Big Law Business, in which she discussed various active measures across the country aimed to promote access to justice. She said the ABA is exploring ways to leverage technology to help bridge the justice gap and acknowledged the urgency of the concern. “There’s no greater intractable problem right now in the legal arena than the fact that many people can’t afford legal services and don’t know how to access them,” she said, as reported by the publication.

Following a Division-issued news release on the ABA’s weeklong Celebration of Pro Bono in October, Forbes quoted President Martinez in its coverage of the annual observance, explaining the significance of this year’s focus on addressing domestic violence concerns. “Research shows the likelihood of domestic violence is greatly reduced in communities when civil legal services are available, but when it comes to domestic violence there simply are not enough lawyers to meet the overwhelming legal needs of those who can’t afford an attorney,” she said. Several other news outlets published stories on local volunteering efforts, including the Jacksonville Daily Record, Connecticut Law Tribune, (Champaign, Illinois) News-Gazette, and Harvard Law Today, among several others. Also of note, President Martinez’s participation in a Pro Bono Celebration event was highlighted in an MR-prepared story shared with social media followers.

After the ABA Standing Committee on the Federal Judiciary issued a “not qualified” rating for a nominee to 9th US Circuit Court of Appeals, the MR Division managed the media interest that followed, developing a statement for the Standing Committee Chair and assisting nearly two dozen reporters, including those from the Wall Street Journal, National Review, CNN, and Washington Post. MR also drafted background materials for the ABA Service Center to help operators appropriately handle any inquiries on the matter.

On October 4, the MR Division distributed a news release on an ABA amicus brief that asks the Nevada Supreme Court to rule that persons suffering from severe mental illness should not be sentenced to death under the state or U.S. constitutions. The ABA brief focused on the death penalty conviction of a gunman with severe mental illness who killed a Reno police officer, and was noted in media coverage of the case, including local dailies the Las Vegas Review Journal and the Las Vegas Sun, as well as from the national press, such as Newsweek.

The Division also published two new articles on ABA Legal Fact Check. With recent news headlines focused on the possible impeachment of President Donald Trump, MR posted an October 4 entry that explores the history and law of congressional impeachments. A second article on October 29 examines the history and law of separation of powers. Journalist Dan Abrams offers the entire catalog of ABA entries on his Law & Crime news site.
ABA President Martinez was quoted by the Associated Press from her comments delivered at a September 27 press conference on immigration held at the National Press Club. The AP story, picked up by outlets such as The New York Times, Minneapolis Star-Tribune, and U.S. News & World Report, noted that Martinez believes the immigration court system should be independent from the Department of Justice. Martinez’s support was echoed in a separate feature story published by The Marshall Project, which quoted her as saying that “the courts cannot be fully impartial while they are subordinate to the Attorney General, the nation’s top prosecutor.” Also at the forum, President Martinez discussed her recent visit to the U.S.-Mexico border to do pro bono immigration work and expressed concerns regarding due process after seeing firsthand how cases are handled there. “What I can tell you is that I saw something that does not in any way approach justice,” she told the American Prospect, Catholic Spirit, and other news outlets.

MR continues to produce stories each week for the ABA’s online homefront. In October, the Division prepared nearly a dozen front-page stories for the website. An archive of these posts is available on the ABA News webpage, behind the Top Stories tab.

Media outreach on the 2019 Annual Meeting resulted in extensive coverage, with the inaugural debut of the ABA Profile of the Legal Profession, produced by the MR Division, among the topics that topped reporter interest. Announced in an August 5 news release, the report offers a statistical look at the legal profession through the lens of data offered in nine categories. Called “Everything You Wanted to Know About the Legal Profession But Didn’t Know Where to Ask” by Above the Law, it includes data on lawyer demographics, earnings, diversity, pro bono service, legal education, use of technology, well-being, and discipline. Notable media coverage of the new report included a weeklong series of stories by The National Law Journal on lawyer salaries (August 12), composition of the federal judiciary (August 13), legal education (August 14), women attorneys (August 15), and D.C.-based lawyers (August 16). Additional coverage appeared in several other U.S.-based legal publications, such as Law360, General Counsel News, Bloomberg Law, Lexology, Connecticut Law Tribune, ABA Journal, and National Jurist; mainstream news outlets like the Alabama Media Group and San Antonio Express-News; and international publications, such as the Law Society Gazette (U.K.), Global Legal Post, and Australasian Lawyer. Speaking on the 100-page compendium of statistics and trends, then-President Carlson said that the ABA Profile of the Legal Profession “is an important reference for anyone who wants to understand where the legal profession came from and where it stands today,” as reported in the Law Society of Ireland Gazette.

In September, the Profile continued to receive media coverage. Its diversity and law school admissions statistics were cited in two separate stories in Law360 (September 6, 10); its discipline data was used in a September 24 feature story published by the Connecticut Law Tribune; and its law school admissions statistics informed a National Law Review story on innovations in the legal field over the summer.
In addition to its outreach on the new report, MR distributed a half-dozen subject advisories on other Annual Meeting highlights, including five press releases on programming and high-profile speakers (targeting beat reporters who cover general issues, local Bay Area concerns, diversity and immigration, criminal justice, and business and technology) as well as another focused on the House of Delegates agenda reaching more than 1,300 reporters at more than 760 news outlets. MR also issued more than a dozen other news releases throughout the past few months on significant awards conferred at the meeting, such as ones for the ABA Medal, International Human Rights Award, Thurgood Marshall Award, and the Pro Bono Publico Awards, among many others.

MR’s broad and persistent outreach efforts garnered strong news coverage of several Annual Meeting programs. Law360 filed several stories onsite based on Annual Meeting programs, such as those on lawyer well-being, trial strategies, and judicial independence. The National Law Journal published articles on a panel featuring tech company general counsels and a summary of meeting highlights. Additionally, Corporate Counsel also reported on the tech GCs panel, AlterNet covered a program on efforts to undermine the judiciary, and the Post News Group (eight weekly newspapers serving the Bay Area) and Black Press USA published stories of the 2019 Thurgood Marshall Award being given to Congressman John Lewis (D-Georgia).

With MR broadcasting live on the ABA’s Twitter handle @ABAEsq, the Division kept both members and reporters informed of up-to-the-moment action during the House of Delegates’ two-day session. Along with MR’s summary news release distributed at the conclusion of the policy-making session, reporters from across the country took note of several resolutions, generating more than 100 media calls throughout August and several news stories. Final action on all House resolutions (with links to MR-produced videos and reports) is available here.

As Judy Perry Martinez took the helm of the ABA at the close of the Annual Meeting, several news outlets reported on the change in leadership, including The National Law Journal and Law360, following a Division-issued news release on the new President. In her speech to House delegates, President Martinez emphasized the ABA’s commitment to promoting access to justice as well as diversity and inclusion in the legal industry and its ongoing dedication to help migrants seeking refuge in the United States. “Our Constitution demands, and our laws confirm, that we afford due process rights to immigrants and asylum-seekers who are in or, are seeking entry into the United States,” Martinez said in Bloomberg.

Putting her words into action, President Martinez advocated for the rights of immigrant minors in the custody of the Department of Homeland Security (DHS) in a Division-prepared media statement that was issued following news that DHS and the Department of Health and Human Services would reverse many of the vital protections guaranteed under the Flores Settlement Agreement. “We must address the immigration challenges facing the United States in a humane, fair and effective way that upholds the
law and the values of our country,” Martinez emphasized, urging the two agencies to rescind the new rule.

Immigration matters were a top concern for the ABA in August, beginning with a trip by President Martinez to the Rio Grande Valley, where she performed pro bono work and assessed the unmet legal needs of families separated at the U.S.-Mexico border. Visiting the ABA’s South Texas Pro Bono Asylum Representation Project (ProBAR) program in Harlingen, Texas, Martinez met one-on-one with those in need of assistance and discussed her concerns during several MR-organized media interviews with reporters from national news outlets, such as CNN, BuzzFeed, and NPR.

With credible reports of hundreds of migrant youth being detained in unsafe and overcrowded federal facilities, MR distributed a June 25 media statement on behalf of then-ABA President Carlson that condemned the conditions as violations of federal and state law, court settlements, and common decency. “We urge Congress to pass supplemental appropriations to ensure the appropriate treatment and care of unaccompanied immigrant children in government custody,” Carlson said, as reported by news outlets such as The Hill and Law & Crime.

Also in June, MR issued two other media statements on the immigration crisis on behalf of then-President Carlson. The first on May 31 expressed the ABA’s concern over the excessively long detention of unaccompanied children seeking refuge in the United States and urged the federal government toward more humane alternatives. The second, distributed a week later, centered on the Association’s opposition to funding cuts for legal and educational services for the migrant youth.

Carlson participated in a MR-organized interview with his hometown newspaper, the Montana Standard, concerning his time as our Association’s leader. Published on June 10, the feature story was also printed by several other news outlets in Montana and Idaho, such as the Billings Gazette, Independent Record Online, Ravalli Republic, and the local television affiliates for NBC-TV in Pocatello, Idaho, and ABC-TV in Missoula.
Center for Member Practice Groups

Digital Content

The Digital Content Team continues to accumulate data for the ongoing efforts to activate our digital content strategy as part of the new value proposition. A primary focus of this strategy is the promotion and amplification of member content. Between October 2018 and October 2019, 100 articles written by entity members were published to the americanbar.org homepage. The entity articles comprise 40 to 60 percent of promoted homepage stories every week. Topics have included ABA Areas of Interest on government; civil and constitutional rights; diversity and inclusion; courts and judiciary; access to justice; general practice; children’s rights; legal education; and professional development.

On the social media front, the Digital Content Team continues to emphasize both day-to-day scheduled posts on Facebook, Twitter, Instagram, and LinkedIn alongside long-term planning for campaign-style posts across the channels. The team is publishing about 75 posts every week across the main ABA social media channels and typically runs two larger-scale campaigns each month. Using the campaign calendaring tool Opal, the team has built 60 campaigns on topics such as the Profile of the Profession, Rule of Law, and Pro Bono Week, and Mental Health.

The Mental Health campaign, which launched October 1, exceeded all benchmarks for video views, link clicks, and shares/retweets. It secured 17,300 video views (765 above the benchmark of 2,000), 435 link clicks (74 percent above the benchmark of 250), and 281 shares/retweets (274 percent above the benchmark of 75). The benchmarks are calculated based on the success of previous ABA campaigns. With a new data scientist on the team, it continues to contextualize performance metrics using statistical methods using thousands of data points scraped from ABA Facebook, Twitter, LinkedIn, and Instagram.

We have also seen success by reposting (or “resurfacing”) popular content that proved popular when it was first published and remains relevant to members. One recent example involves the resurfacing of MR’s Civic Literacy Survey and Quiz that was originally published May 1. The resurfacing campaign ran September 17-22 and resulted in 984 completions of the quiz over the five-day period -- 73 percent more than the 571 participants that had taken the quiz over the previous four and a half months. This campaign illustrates the power of resurfacing relevant content, which also increases the ABA’s return on investment.

The Digital Content Team has aligned with the Career Center to oversee all their social posts and run them through the main ABA accounts. Following a successful pilot test in August, the Career Center is providing materials to the Digital Content Team as it becomes available for posting on social media. The goal is to deliver material four to six weeks before a CLE or webinar goes live. Events will be promoted on Facebook along
with posts on Twitter and LinkedIn. The team will optimize the process as we continue to monitor performance.

Meanwhile, the Digital Content Team continues to keep a close eye on the balance of free and premium content on americanbar.org as it looks to optimize the ABA’s paywall strategy. Accessibility to content is decided by entity authors when they load information to the site. The team is exploring options for allowing the ABA to take a more strategic approach by leveraging out-of-the-box technologies. One firm, Piano, which works with digital content providers such as NBC and The Economist, has emerged as a possible great partner for the ABA as we evolve the paywall strategy based on data to drive more conversions.

Digital Engagement

The Digital Engagement Team has launched a website cleanup project aimed at improving search results on the website; facilitating user navigation and web author experience; and enhancing system performance. The project involves deleting deactivated content, tagging live pages, and cleaning up abandoned content. The team will be working in close cooperation with the entity authors throughout the cleanup and offering assistance with specific phases of the project. Recent major accomplishments include launching a new ad server, fixing issues on approximately 2,000 web pages, and hosting a special Adobe Experience Manager User Group meeting.

Career Center

The Career Center and Early Career Strategy Group sent staff to the Equal Justice Works Conference and Career Fair in Washington, D.C., on October 18-19. The staff members served as exhibitors to showcase the value of ABA membership for law students and young lawyers. The conference includes about 1,400 law students from over 150 law schools and 200 employers in the public interest realm. The ABA representatives explained to law students what was included in free law student membership, including membership in five ABA Sections or Divisions; leadership opportunities; and certain articles and webinars from the Law Student Division, Young Lasers Division, and Career Center. They also discussed value of paying $25/year for a Premium Law Student Membership, which include discounts on BARBRI, Themis; West Academic textbooks; Quimbee; and access to the new Korn Ferry Advance prep tools which include interview tips powered by artificial intelligence and resume advice.

The Career Center is an important facet of our efforts to improve the member experience, and it currently has nearly 3,000 jobs and some 10,200 resumes of legal professionals. It held its first webinar in the new Free CLE Library on September 13, "A Trusted Advisor Starts with Business Intelligence," which did well with 171 registrants. Its next webinar featured two Korn Ferry career coaches on October 11, “Ask Me Anything with Career Coaches Hamaria and Josh,” which had 80 registrants.

Antitrust Law Section
In August, the Section launched its Global Tech Enforcement Tracker, which provides a publicly-accessible dashboard of the current state of antitrust and consumer protection/privacy enforcement actions in the form of a spreadsheet. The Tracker provides factual, publicly available status information for Section members, the media, and the public to use as a resource to follow the enforcement efforts of jurisdictions around the world. The Tracker is not intended to and does not take a position on the validity of any allegations.

Also in August, the Section launched its weekly podcast, Our Curious Amalgam. The program highlights a wide range of issues including competition, consumer protection, data, and privacy. Its target audience includes Antitrust Section members, less experienced lawyers, and members of the public who are interested in these issues. The programs are about 20-25 minutes in length and published every Monday.

Business Law Section

The Section hosted two free CLE programs of note in October. On October 10 it presented “Director Roles in Mergers and Acquisitions (M&A) Transactions” which was part of the Section’s “In the Know,” a series of monthly webinars focusing on in-depth coverage of legal issues. The program had 455 registrants. On October 30, the Section also offered “Dealmaker's Guide to Managing M&A Closings,” part of its Business Law Basics webinar series focused on the fundamentals of key practice areas. The program had 483 registrants.

The Section’s Leadership Academy Program CLE series kicked off at its Annual Meeting in Washington, D.C. on September 13. The Leadership Academy aims to provide its members with the knowledge and skills necessary to enhance their ability to attain leadership roles in the ABA; charitable, community and civic organizations; and their places of employment. Over 30 lawyers attended the CLE programs.

Over 40 law students participated in the inaugural Law Student Scholar Program held at the Business Law Section Annual Meeting which took place from September 12-14. The law students were provided a checklist of events to attend, including the Law Student Institute and a CLE program. After they completed the checklist, they were recognized as “Business Law Section Student Scholars” and paired with a lawyer member who served as their mentor. Over 75 percent of the attendees were diverse law students.

Civil Rights and Social Justice Section

The Section held its quarterly Fall Council Meeting on October 24-26 in Atlanta, Georgia. In addition to the regular business meetings, the Section held several noteworthy events for its membership. The first, entitled ‘Planning for the Future: A Focus on Membership and Development,” focused on strategies for increasing our value proposition and was led by an experienced consultant who developed several action
items for increasing engagement and membership. Following the strategy session, the Section hosted a first-time New Officer and Council Member Orientation which briefed the new leaders on the inner workings of the ABA and the Section.

Following the Council Meeting on October 25, the “Fair Elections and Voting Rights” workshop was conducted. Council members met with voting rights advocates in Atlanta to discuss the challenges they face, including controversial voter ID requirements and instances of voter suppression. Workshop participants strategized on how the Section can help support grassroots efforts to ensure fair elections.

Also in October, the Section published the latest issue of Human Rights Magazine, Volume 44, Issue 2: Housing. It featured such topics as affordable housing, rural America’s drinking water crisis, and homelessness. The issue received the most hits of any recent magazine.

A highlight of the Annual Meeting was the Section’s Thurgood Marshall Award Dinner honoring of Congressman John Lewis on August 10. The Congressman was the first non-lawyer to receive the award, which honors those who contribute to the advancement of civil rights, civil liberties, and human rights. While Congressman Lewis was unable to attend in person, he taped a message for the gathering, and Grammy award-winning artist Rhiannon Giddens performed for the audience. The event was a great success, with more than 520 people in attendance and $288,000 raised to support Section activities in the coming year.

**Criminal Justice Section**

The Section hosted seven CLE programs during the Annual London White Collar Crime Institute in London, United Kingdom on October 14-15. The programs included such topics as cyber crisis management, white-collar crime sentencing, and international money laundering enforcement. About 130 participants attended the event.

In recent months the Section has posted more than a dozen episodes to “The JustPod” podcast, which reports on issues such as criminal justice reform, policy, and the Supreme Court. “The JustPod” is available on Spotify and iTunes.

The Section hosted seven CLE programs during the Southeastern White-Collar Crime Institute in Braselton, Georgia from September 5-6. The two-day Institute featured leading practitioners from around the nation covering topics such as healthcare fraud; the Justice Department; internal investigations; criminal discovery and procedure; and ethics. More than 150 people attended the programs.

**Environment, Energy and Resources Section**

The Section held its 27th Fall Conference on September 11-13 in Boston. Jeffrey B. Clark, Assistant Attorney General for the Department of Justice’s Environment and Natural Resources Division; Matthew Z. Leopold, the EPA’s General Counsel; and Mary
B. Neumayr, Chair of the White House Council on Environmental Quality; were among the speakers. The event was the most attended conference in over five years with over 425 participants.

**Forum on Construction Law**

The Forum’s 2019 Fall Meeting entitled “Building a Better Construction Industry through Inclusion, Diversity, and Professionalism” was held on October 23-25 in Philadelphia. The meeting featured industry leaders and legal experts who discussed the business implications of inclusion, diversity, and professionalism across the construction sector. Over 30 percent of the 418 registrants were diverse attorneys and about 12 percent were first-time attendees and non-ABA members.

**Government and Public Sector Lawyers Division**

On October 18, the Government and Public Sector Lawyers Division (GPSLD) presented its Legal Skills Conference in Richmond, Virginia. There were 78 attendees, including faculty members. The Criminal Justice Section, Young Lawyers Division, Local Government Attorneys of Virginia, Inc., the Office of the Virginia Attorney General, and the Virginia Indigent Defense Commission were conference co-sponsors. The skills building sessions offered opportunities to participate in exercises with faculty guidance on topics including legal writing, deposition skills, negotiation tactics, interviewing strategies, and ethics.

On October 17, GPSLD members participated in a volunteer service project at the Hunter Holmes McGuire Veterans Affairs Medical Center in Richmond, Virginia. Government lawyers served coffee and offered encouraging words to veterans and their loved ones. GPSLD members provided lawyer referral information to those who inquired about legal assistance.

**Health Law Section**

The Section’s Physicians Legal Issues: Healthcare Delivery & Innovation Conference was held from September 12-14 at the Hotel Intercontinental in Chicago and had 185 participants. The conference was co-sponsored by the Chicago Medical Society and involved attendees from both organizations. Keynote speakers included U.S. Senators Bill Cassidy (R-Louisiana) and Dick Durbin (D-Illinois).

The Section helped fund and co-sponsor the production of the Anti-Stigma video campaign on mental health matters with the ABA’s Coalition on Lawyer Assistance Programs.

The Section launched a new mobile app for their periodicals, the Burton Award winning The Health Lawyer (published six times per year) and ABA Health eSource (published monthly). Available as a benefit to all Section members, full audio versions of all new articles will now be accessible via their mobile phones. Members who still prefer
a print version of The Health Lawyer will sustain this benefit by having access to a PDF printable version once each edition is published.

*International Law Section*

The Section held its Asia-Pacific Forum in Hong Kong on “Navigating the Life Cycle of a Cross-Border Deal” on October 24-25. The programming covered topics such as the unique features of international transactions and the intricacies of Western and Asian cultural differences. Leading experts provided a road map and cutting-edge strategies to navigate the minefields of negotiating, structuring, and completing a deal, as well as resolving disputes that can obstruct a resolution. The Forum had over 110 attendees representing 21 different countries.

The Section held a program on “International Startup and Emerging Companies Forum: Pushing the Boundaries,” in San Francisco on September 12-13. The programming featured experts from around the world who provided cutting-edge strategies to navigate international legal issues for emerging companies. The panels included in-house counsels, venture capitalists, and private practitioners. Speakers at the program included: Tammy Albarrán, Deputy General Counsel at Uber Technologies; Olga V. Mack, Vice President of Strategy at Quantstamp; Hans Tung, Managing Partner at GGV Capital; Amit Bhatti, Principal at 500 Startups; Phil Rothenburg, General Counsel at Sonder; and Doug Mandell of the Mandell Law Group and First General Counsel at LinkedIn. The program also included lawyers from the Department of Justice, Department of Defense, and Department of State. The 95 attendees represented 12 different countries.

The International Law Section held its “Leadership in Law and Practice Conference” June 30-July 3 in Oxford, United Kingdom. The conference, hosted in conjunction with the Law Society of England and Wales, had a high-level line-up of speakers, including the Honorable Neil M. Gorsuch, Associate Justice of the U.S. Supreme Court; the Right Honorable Lord Briggs, Justice of the Supreme Court of the United Kingdom; the Right Honorable Lady Arden, Justice of the Supreme Court of the United Kingdom; the Honorable Iseult O’Malley; Justice of the Supreme Court of Ireland; the Right Honorable Sir Ernest Ryder, Senior President, Tribunals in the United Kingdom; and the Right Honorable Lord Dyson, Justice of the Supreme Court of the United Kingdom. ABA President Carlson spoke at the conference, along with four former ABA Presidents: William C. Hubbard, Stephen N. Zack, Hilarie Bass, and Jim Silkenat. The Presidents of the Law Society of England and Wales, Law Society of Northern Ireland, and Law Society of Scotland, also spoke.

*Intellectual Property Law Section*

The Section held its third annual Intellectual Property (IP) West Fall Meeting in San Antonio, Texas in early October. The meeting included two full days of CLE programming for attendees, and guest speakers at the event included Kurt Hammerle, an IP attorney
with NASA, and Hope Shimabuku, Director of the U.S. Patent and Trademark Regional Office in Dallas. About 175 people attended the meeting.

In October, the Section published a new digital issue of Landslide® magazine. The new issue features a cover story about legal implications of public spaces in virtual reality. It also has articles about fan works and fair use; arbitration in the age of Amazon; practical tips for trademark protection in China; ethical representation of inventors; and patenting artificial intelligence inventions in Canada.

Litigation Section

The 23rd Annual National Institute on Class Actions took place October 17-18 in Nashville, Tennessee. The Institute, hosted by the Section, drew over 150 attendees and featured nationally recognized speakers including circuit and district court judges; noted law professors; and prominent plaintiffs’ and defense class-action attorneys.

Solo, Small Firm & General Practice Division

On October 8, the Section held its first CLE webinar for the ABA free CLE Library, “Expert Witnesses: Balancing Costs and Credibility for Solo and Small Firm Practitioners,” which had 321 registrants and 188 participants. One of the speakers, Karen Goodman, wrote an article on the topic for the e-Report, the Section’s monthly electronic newsletter. A link to the on-demand program was included in the article.

Taxation Section

On October 28-29, the Section held the 30th Annual Philadelphia Tax Conference at the Union League Club in Philadelphia. IRS Commissioner Charles Rettig presented the keynote speech on the opening day of the conference, which drew 240 attendees.

On October 3-5, the Section, in conjunction with the Section of Real Property, Trusts, and Estates Law, hosted the 2019 Fall Tax Meeting in San Francisco. The event drew 1,016 participants and featured remarks by tax policy expert Martin Sullivan and Chief Judge of U.S. Tax Court Maurice Foley.

The Section, Federal Bar Association Section on Taxation, and ABA Young Lawyers Division cosponsored the Fifth Annual Young Tax Lawyers Symposium on July 19 at the law offices of Jones Day in Washington, D.C. The symposium provided young attorneys and law students an opportunity to hear from practitioners and government officials on a variety of issues not covered in most law school courses. The 54 registrants heard from a mix of senior and young lawyer panelists who presented four topics: tax controversy and the insurance industry; international taxation; choice of entity in a post-tax reform era; and ethical aspects of technology and social media use by lawyers.

Tort, Trial and Insurance Practice Section
The Section kicked off its annual slate of CLE programing with the ABA’s first-ever national gathering on cannabis law entitled “From Regs to Riches: Navigating the Rapidly Emerging Fields of Cannabis & Hemp Law,” which took place September 19–20 at the Intercontinental Hotel in Chicago. The event brought together lawyers, policymakers, researchers, and others on the frontlines of this emerging new industry. The two-day conference programming focused on federal laws, legal ethics, and employment issues and included nearly 200 attendees.

**Law Student Division**

The Division held its Assembly at the Annual Meeting, where some 150 students voted to advocate for two House of Delegates resolutions. One expanded law students’ voice through an additional three seats in the House (for a total of six) and the other encouraged states to adopt a program allowing law students to take the bar exam a semester early if they complete pro bono requirements. Both resolutions were approved by the House.

Over the summer, the Division launched a three-week campaign targeting incoming 2-Ls who are in the midst of On Campus Interviews (OCIs). This campaign shared tips, tricks, and best practices for preparing for and participating in OCIs, with topics ranging from resume tips to interview preparation. In partnership with Career Center, the Division also used this opportunity to introduce students to the new ABA Career Forward app, powered by Korn Ferry. Career Forward is a free benefit of ABA membership which offers guidance on resumes, job interviews, and other tips to become a professional success.

**Young Lawyers Division**

During Mental Health Week in October, the Division implemented a major multi-channel campaign to highlight the importance of mental health awareness, particularly for legal professionals. Over the course of the week, 44 posts were made across Facebook, Twitter, and Instagram, including a series of short video vignettes of Division members sharing their own strategies for maintaining mental wellness. The campaign performed extremely well, generating 88,120 total impressions across all platforms, and sparking a number of positive conversations.

On October 21, ABA lawyers shared advice on how young attorneys can make the most out of their summer associate experience and land a job offer after the “three-month interview” with over 50 students from Stetson University College of Law. This event was held in partnership with the Litigation Section.

The Summer 2019 issue of TYL, the Division’s magazine, focused on diversity in the legal profession and the Division’s Men of Color Project. Notable stories included Robert Grey’s article about the purpose and impact of the Leadership Council on Legal Diversity; an interview with Desmond Meade, Executive Director of the Florida Rights
Restoration Coalition and an honoree for Time magazine’s 100 Most Influential People for 2019; and an article from Andrew VanSingel and Linda Anderson Stanley on disaster legal services in preparation for September’s National Preparedness Month.

**Governance and Public Services Group**

To commemorate the centennial anniversary of women’s right to vote, the ABA Standing Committee on the Law Library of Congress has launched a 19th Amendment traveling exhibit, "100 Years After the 19th Amendment: Their Legacy, and Our Future." The six-banner exhibit features historic photos and artifacts and details the story of the battle for ratification along with the challenges that remain. Demand for the exhibit has been high; some 100 stops have been lined up to display it over the coming year. It will be featured at events such as the National Association of Women Judges Conference, the Association of American Law Schools conference, the Bar Leadership Institute, the Equal Justice Conference, and venues including federal and state court houses.

Numerous other events are celebrating the anniversary of women’s constitutional voting rights. On October 28, ABA President Martinez gave opening remarks at the Harvard Forum on the 19th Amendment, which was presented in collaboration with the ABA. The Office of the President, Division for Public Education, and Meetings & Travel staff are exploring the idea of having a commemorative bike ride or walk during the 2020 Annual Meeting. The National Conference of Bar Presidents (NCBP) will have a program on the 19th Amendment during the 2020 Midyear Meeting. In addition, numerous law schools have expressed an interest in working with the ABA to observe the centennial, including the Berkeley School of Law, which will host a program on March 17, 2020.

The Division for Public Education collaborated with the Digital Content Team to develop a social media campaign to raise public awareness and understanding of the rule of law. The campaign launched on October 1 on the ABA’s social media channels. It featured short videos that highlighted key rule of law concepts. Within a week, the social media campaign had 19,727 views and in terms of engagement it was the most successful the Digital Content Team has done, with more than 300 shares and retweets generated from just 15 posts. The campaign will be resurfaced on a monthly basis through the end of the bar year.

On October 23, ABA representatives met with staff of Diversity Lab to discuss its newly-launched “Move the Needle Fund.” The Diversity Lab is an incubator for innovative ideas and solutions that boost diversity and inclusion in law. The fund will include more than two-dozen general counsels, along with five large law firms -- each will donate close to $1 million to implement metrics-driven solutions to address their law firms’ diversity and inclusion goals. The law firms plan to utilize the ABA’s expertise on best practices and suggested changes to business processes outlined in current and future reports published within the Center for Diversity and Inclusion in the Profession.
On October 9, the Standing Committee on Legal Assistance for Military Personnel held a CLE program on current developments within military and veterans’ law at the law firm of Greenberg Traurig LLP in Los Angeles. The CLE, also available via webinar, was free for all in-person attendees, military attorneys, military paralegals, and civilians employed by the military. Eighteen attorneys attended the in-person CLE at the law firm and 365 individuals registered for the webinar.

On October 8, the Commission on Disability Rights and the American University Washington College of Law (AUWCL) hosted a symposium at the law school entitled “Creating Opportunities for Law Students with Disabilities in the 21st Century: Inclusivity on Campus and in the Workplace.” More than 100 attendees participated, including law students with disabilities, law student disability organizations, law school deans, and other professionals who work with students and law firm diversity staff. There were four panels, and topics discussed included accommodations in law school and at work; the pros and cons of disclosing disability to prospective employers; best practices for law school career services staff in counseling students with disabilities about career choices; and challenges experienced by law students and recent graduates with disabilities. The Honorable Tony Coelho, who spent 10 years serving in the House of Representatives and was the primary sponsor and author of the Americans with Disabilities Act of 1990, was the keynote speaker. He donated $1 million to Loyola Marymount University in Los Angeles for a disability group housed at the law school called the Coelho Center for Disability Law, Policy and Innovation, which will work with the university’s seven schools to build a pipeline of lawyers who have disabilities.

On October 11, the Commission on Racial and Ethnic Diversity in the Profession (CREDP) held a demonstration and business process meeting on the Model Diversity Survey at the ABA Offices in Chicago. The Model Diversity Survey is an initiative where General Counsels of Fortune 1000 companies, that have signed on to support Resolution 113, request that law firms providing them legal services share their diversity data via the survey, which is owned and operated by the CREDP. Microsoft recently donated a new online software platform to help manage the program. The survey has two main goals -- provide a standardized format for companies to measure progress and use the data as a factor in deciding whether to retain a law firm and to publish aggregate diversity data to provide an honest nationwide snapshot of diversity and inclusion in U.S. law firms. To date, 106 companies are participating and the CREDP is slated to publish a national report with the aggregate diversity data in FY 2020.

As part of the new ABA value proposition, the Center for Professional Responsibility (CPR) produces monthly one-hour webinars on a professional responsibility topic that is free to Association members. In October, CPR members presented a webinar titled “Lawyer Mental Health: The Numbers, the People, and the Support Systems” that had 242 registrants.

The Standing Committee on Professional Responsibility hosted its “Young Professionals in the City” annual event geared toward young professionals on June 6 at Dentons US in Chicago. The keynote session featured Senator Kirsten Gillibrand (D-
New York) whose presentation included tips on how young professionals can develop a better work/life balance and legislation she has proposed on issues important to young professionals. The Young Professionals program included sessions on claims against attorneys for failure to notify their client’s insurance carrier about certain costs, a crash course in probate and estate planning legal malpractice claims, and professional responsibility implications in evolving technology and emerging trends.

Center for Member Operations and Finance

As of October 31, in FY 2020, the Association generated consolidated operating revenues of $32.3 million and incurred operating expenses of $32.4 million, which resulted in a deficit of $100,000. Operating revenue was $3.8 million below budget, however this shortfall was more than offset by operating expenses $4.2 million below budget. Consequently, results were better than budget by $400,000. For a more detailed analysis of the ABA’s financial and budgetary picture, please refer to the Treasurer’s report.

Fund for Justice and Education (FJE)

The FJE Council had a busy October 21 meeting in Chicago. Among the items on the agenda:

• **Planning for ABA Giving Day:** Slated for May 1, 2020, the FJE Council received a software demonstration that would enhance the donor experience on ABA Giving Day and year-round. Blackbaud, the donor software currently being used, offers Giving Day platforms that encourage excitement and competition among individuals. The cost of the software is built into the current FJE budget and the staff will pursue next steps with IT and General Counsel.

• **Drafting a Gift Acceptance Policy (GAP):** Most nonprofits have a GAP to protect the organization from financial or reputational risk by addressing what it is willing to accept and from whom it will accept gifts. Although the FJE has not had any issues to contend with, recent media developments around Jeffery Epstein and the Sackler Family Foundation have prompted the Council to explore the need for a GAP, especially as FJE tries to broaden its public reach. Three examples being reviewed are from The American Law Institute, Loyola University Chicago, and Princeton University.

• **Educating ABA Leaders About Their Role in Fundraising:** The Council discussed whether leaders elected through the Presidential appointment process should be informed of their role in fundraising for their entity before or after they accept the position. Section Officers also should be educated about the importance of seeking outside support (charitable or sponsorship) for their entity and the larger ABA.

• **External Evaluation of ABA Free Legal Answers (FLA):** The ProSocial Valuation® measured the program’s 2018 outcomes and found the project created $7.3 million in social capital in just one year. It also determined every $1 invested in FLA creates $7 worth of social capital. The evaluation was finalized in September and the
Council is distributing it to current and prospective funders as evidence of the impact their charitable investments are having on improving access to justice.

As we entered the new bar year, FJE collaborated with entities to submit applications to the American Bar Endowment for Opportunity Grants. Four requests, totaling approximately $80,000, were submitted for the following projects: Miranda Warning technology in Houston for the Center for Innovation, the 19th Amendment Traveling Exhibit for the Standing Committee on the Law Library of Congress, ABA FLA’s Online Dispute Resolution, and a guardianship manual update for the Commission on Law and Aging.

In September, FJE assisted the Homeless Youth Legal Network’s request to receive $100,000 in funding through the American College of Trial Lawyers’ Emil Gumpert Award. The award recognizes programs whose principal purpose is to maintain and improve the administration of justice.

The Robert Wood Johnson Foundation has expressed interest in continuing its support for ProBAR’s on-site social worker intervention. FJE is assisting with the entity’s $600,000 grant proposal, which lasts over a two-year period.

FJE received the first major gift of FY 2020 from David Scheffer who gave $12,400 designated to the Center for Human Rights. This is Mr. Scheffer’s first donation to the ABA’s charitable work.

Meetings and Travel

The Meetings and Travel Department collects more than $3 million in non-dues revenue annually. More than half of that amount is derived from hotel commissions collected by the department for sourcing and contracting internal meetings. Two other Department sources of non-dues revenue also contribute to the Association’s bottom line.

First, there is the ABA Preferred Rate Hotel Program, which offers our members discounted hotel rates for both business and leisure travel at luxury hotels and resorts. The program began in late 1984 with three Chicago hotels -- the Whitehall, the Tremont, and the Best Western Inn. In the years that followed, the program grew rapidly. Today, 35 years later, the program is still going strong with 154 hotels in 36 U.S. cities and 13 countries around the world. In FY 2019, the program contributed about $556,000 in non-dues revenue and has proven to be our members’ most appreciated and longest lasting hotel program.

The Department developed ABA Leverage as another source of non-dues revenue a few years ago. This program allows firms, legal associations, and law schools to use the ABA’s expertise and buying power to book their meetings. ABA Leverage saves the organizations time and money, as we negotiate special pricing, perks, and upgrades on their behalf. There is no charge for the Leverage service as the ABA is compensated via hotel commissions. Every year the program grows its number of clients and room nights.
This increased purchasing power benefits both our internal and external clients with better rates, concessions, and assistance with attrition and cancellation fees.

ABA Leverage currently has more than 60 clients including many of the largest specialty bar associations and law firms. The program generated $481,000 in non-dues revenue in FY 2019.

Global Programs

Rule of Law Initiative (ROLI)

In October, ROLI staff in the Central African Republic (CAR) involved with a Case and Evidence Management program presented their Business Process Review report to a steering committee comprised of judges, judicial inspectors, court presidents, and representatives from the Ministry of Justice. The report analyzes current systems and practices in two CAR courts and provides recommendations for improving efficiency and effectiveness of court procedures. The steering committee approved the findings and recommendations in the report, which ROLI is currently reviewing with other judicial actors, such as bar association members and police, before implementing the recommended improvements.

On October 22-25, ROLI held a working meeting with eight Russian legal experts and one online education expert for the purpose of developing several online courses on freedom of the Internet and financial literacy and security.

ROLI hosted a private sector anti-bribery workshop on October 8 in Bangkok, Thailand for Association of Southeast Asian Nation (ASEAN) anti-corruption agencies to explore emerging trends and best practices in developing effective anti-bribery enforcement systems. Seventy individuals participated, including private sector experts and delegates from Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. The workshop aimed to assist ASEAN anti-corruption agencies in identifying avenues to engage with relevant public and private stakeholders to promote a corruption-free business environment within ASEAN.

In October, ROLI finalized the first objective of a grant to strengthen the judicial training school in Colombia. This effort included the development of a report outlining the findings and recommendations stemming from a baseline assessment conducted in July 2019. ROLI’s Colombia team has translated the report into Spanish and presented the findings of the report to the Superior Council of the Judiciary, a crucial local partner. ROLI also began work on the second objective of the program, drafting an updated work plan to be analyzed in collaboration with the U.S. Department of State, the Bureau of International Narcotics and Law Enforcement Affairs, and local stakeholders.

In September, ROLI began work on a program to support the government of Peru in its transition to an adversarial trial process. The current grant, which commenced August 1, is similar to earlier iterations of the program, which strengthened trial advocacy
skills in an accusatorial trial setting regarding complex crimes. ROLI hosted workshops on oral litigation techniques for cases of illegal mining, gender-based violence, drug-trafficking, and skills related to courtroom management in an accusatorial setting. ROLI Peru also initiated a series of regional technical council working meetings to support judicial reform, an activity which received favorable local press coverage.

On September 30, ROLI was awarded a grant from the U.S. Embassy in Panama to implement an 18-month, $330,000 project to provide trial skills instruction for law students. This project will be modeled after a similar ROLI program in Mexico.

In September, ROLI held workshops on sentencing and appeals for 100 Lebanese judges. These were the first in a series of workshops to be held in support of justice sector capacity development. Lebanon's newly-appointed Chief Judge and Attorney General attended the opening sessions.

On August 28, a ROLI attorney pleaded 12 cases at the Bangassou Court of First Instance in the CAR. It was the first time since 2013 that a lawyer had been present during a hearing at this court, and as a result so many community members attended the hearing that the crowd spilled out onto the street outside of the court.

As part of a program to professionalize African Union staff for rule of law and governance initiatives, ROLI coordinated with several African Union offices to implement the program's first official training activity. It was held in Ethiopia during the first week of August and addressed legal drafting. ROLI received a tremendously positive response from the 20 participants, expressed appreciation the training focused on skills with a high degree of relevance to their day-to-day jobs, and that the workshop focused on examples specifically relevant to the context of the African Union.

On July 14-15, ROLI conducted a judicial symposium in for 32 High Court Judges of Sri Lanka to share their experiences that help strengthen the ability of judicial officers to adjudicate trafficking in persons (TIP) and related offenses. Two U.S. federal judges with TIP expertise co-facilitated the symposium along with their Sri Lankan judiciary counterparts and a Justice of the Sri Lankan Supreme Court.

On July 10, ROLI's ongoing media campaign to raise awareness against child sexual abuse in Pakistan, which includes radio shows and public awareness messages, was featured in a video report prepared by BBC Urdu for its television news show “Sairbeen.”

In July, ROLI hosted an event for a delegation headed by the Egyptian Prosecutor General, senior judges, and prosecutors. Several State department representatives and a representative from the British Embassy also attended. The Egyptian Prosecutor General, has recently been elected head of the African Prosecutors Association, and is interested in continued collaboration with ROLI in regional events.
ROLI hosted a two-day training on Strategic Litigation to Promote Freedom of Religion in Kuala Lumpur, Malaysia on June 15 and 16. Approximately 25 Malaysian human rights defenders and litigators attended the training. The training covered freedom of religion under the Malaysian Federal Constitution and Malaysia’s international law obligations, as well as public advocacy strategies to promote freedom of religion.

In June, ROLI partnered with the Tunisian Ministry of Interior to host a two-day workshop for 25 chiefs of police from across the country to provide an overview of the gender-based violence law, sensitize them to victim approaches, and discuss services for victims. In partnership with the National Commission for Trafficking in Persons and the Institute Superior de la Magistratute, ROLI also hosted a one-day training for approximately 100 judges on the new trafficking in person law, and basic issues with trafficking cases (victim identification, victim sensitive approaches, cross-over with other crimes). ROLI and the Young Lawyer’s Association also hosted two training sessions for lawyers from Tunis on detention issues.

Center for Human Rights (CHR)

CHR continues its work to advance the rule of law and support judicial independence in Poland. On October 18, CHR hosted a local partner from the Polish Helsinki Foundation for Human Rights (HFHR), Malgorzata Szuleka, to discuss the current status of rule of law reforms in Poland. Ms. Szuleka, HFHR’s head of advocacy and research, outlined the current situation and struggles of the judiciary to stay independent from the executive and how the outcome of the recent local elections will affect the legal reforms in the future. Ms. Szuleka underlined the importance of the ABA and CHR’s engagement the last several years.

In October, CHR staff met with representatives of Colombia’s Ministry of the Interior. During the meeting, the Ministry requested technical support for clarifying and improving its policies regarding protection measures for human rights defenders in the country. CHR staff hopes to provide perspective as an international organization and to support consultations between policy makers and the intended beneficiaries of the policy.

In October, CHR engaged in private and public advocacy to raise the profile of a student activist who was serving a 36-month prison sentence for organizing a press conference to address Togo’s poor economic situation. CHR’s Justice Defenders Program coordinated pro bono support in submitting a petition to the United Nations Working Group on Arbitrary Detention, monitored several hearings in the case, and provided case analysis to several civil society organizations who used CHR’s private reports to publicly advocate for the activist’s release. As a result of CHR’s multiple interventions in the case, the activist was pardoned by the president and released from jail.

On September 25, CHR hosted an event to identify current threats against lawyers’ professional rights and guarantees in the Organization for Security and Cooperation in Europe (OSCE) region, which includes countries in Europe, Central Asia, and North
America. The speakers identified and analyzed current trends through a discussion of data collected and specific cases in Kyrgyzstan, Kazakhstan, Tajikistan, Moldova, Ukraine, Azerbaijan, Russia, and Belarus.

In a follow-up to CHR’s preliminary report on its monitoring of a mass trial in Equatorial Guinea, in August the Center assisted Human Rights Watch in creating a video recounting the abuses observed. According to local partners and lawyers, the video has gone viral in Equatorial Guinea and defendants and counsel are using it and the observation report to assist in their appeals.

CHR’s TrialWatch project, which monitors and reports on trials around the world that potentially violate human rights, released two Fairness Reports in July. The first involved the trial of a human rights defender in Algeria which undermined his right to prepare a defense and freedom of expression. The second focused on the arrest, harassment, and trial of a journalist in Belarus. Launched in April 2019, TrialWatch is a joint initiative sponsored by CHR, the Clooney Foundation for Justice, and Columbia Law School.

In July, CHR staff began a vetting process for the judiciary in Guatemala, which was adapted for a Latin American context from the ABA’s Standing Committee on the Judiciary’s practices and procedures. This year, CHR staff is working with more than 20 people in the process, including students and pro bono lawyers. This process is also incorporating new technology that maps out the networks of each candidate to check for conflicts of interests and signs of corruption.

In June, the Justice Defenders Program staff conducted a panel discussion in Mozambique featuring experts in counterterrorism, freedom of expression, and journalism. The event addressed the role of the media in countering violent extremism in Northern Mozambique. Representatives from the Mozambican Bar Association, the U.S. Embassy in Maputo, and the Delegation of the European Union to the Republic of Mozambique were in attendance.

Center for Public Interest Law

Center on Children and the Law

The U.S. Department of Health and Human Services Children’s Bureau has awarded the Center a $3 million extension to expand work on the Capacity Building Center for Courts, the Center’s largest grant. The funding for the initiative has nearly tripled during the five-year grant cycle, with federal FY 2020 representing an increase of $1.1 million for the year. Significantly, this is also a grant that the Center conducts in partnership with the National Center for State Courts and the National Council of Juvenile and Family Court Judges, two legal organizations with whom the ABA has long-standing relationships in a variety of areas.
In September, the ABA Youth Engagement Project team produced a new resource titled “Adolescent Brain Research Toolkit” that includes the following materials to help judges and attorneys incorporate adolescent brain science in child welfare decision-making and advocacy:

- How Adolescent Brain Science Supports Youth Engagement in Court Hearings and Case Planning
- Adolescent Brain Science Case Scenarios
- Brain Frames: How Attorneys Can Engage Youth in Case Planning and Court Hearings
- Quick Reference Guide: Federal Laws Supporting Youth in Foster Care Transitioning to Adulthood

In August, Center staff facilitated three meetings in Westmoreland County, Pennsylvania focused on foster care and education. There were over 25 participants in these meetings including magistrates, solicitors, caseworkers, paralegals, and school district personnel. The meetings focused on the development of a “Foster Care Packet” to be distributed to 17 school districts in Westmoreland County. The “Foster Care Packet” includes 12 documents to assist school districts in their efforts to meet the needs of students in foster care.

Eight years ago, the Center helped launch an initiative that identifies June as “Reunification Month” to celebrate families that successfully reunify after being separated in the child welfare system. Every June since, the ABA and other national partners shine a light on the work it takes to reunify children with their parents. In 2019, the Center honored nine Reunification Heroes from around the country. These Heroes were nominated by their peers, interviewed by Center staff and interns, and their stories are included on the Center’s website and shared through our social media networks.

Death Penalty Representation Project

In October, Project staff participated in a roundtable discussion with a delegation from the Subcommittee on Human Rights in the European Union’s (EU) Parliament. The delegation was visiting the United States to learn about human rights work being done by experts in the field both domestically and internationally, and expressed a particular interest in learning more about the death penalty and work being done to protect fundamental rights and due process in capital cases. Other participants in the roundtable included representatives from leading national and international civil rights and human rights organizations. The discussion focused on the current initiatives of these groups and how the EU could serve as a partner to facilitate their efforts.

In September, the Project celebrated the extraordinary contributions of its pro bono attorneys and capital defender partners at its annual Volunteer Recognition and Awards
Dinner in Washington, D.C. This year’s dinner brought together more than 100 pro bono attorneys, capital defenders, and supporters of the Project. The event brought in nearly $110,000 from law firm sponsors, ticket sales, and individual donors. This funding will be used to support the Project’s core activities of pro bono recruitment, education and training, and systemic reform.

Standing Committee on Election Law

In October, the Committee offered a program, “International Political Influence and Corruption in Elections: Will Recent Events Lead to Stricter U.S. Regulation?” for the free ABA CLE library. The webinar was hosted live for approximately 150 participants and will be available for the next three years on-demand.

Commission on Homelessness and Poverty

In September, Commission staff met with a representative from the U.S. Health and Human Services’ Family Youth Services Bureau to discuss funding opportunities. Participants discussed the Commission’s plans to secure funding for a host home project for youth experiencing homelessness, and for a Homeless Youth Legal Network (HYLN) pilot project. Host home programs provide temporary housing with volunteer families for youth experiencing homelessness. The pilot project will embed several legal fellows across the country in areas lacking access to legal resources for homeless youth, with coordination, guidance, and technical assistance from the HYLN.

On September 16, Florence, South Carolina established a homeless court following assistance from Commission Special Advisor Steve Binder, and ABA Member George Cauthen. Mr. Binder hosted a technical assistance training in Florence the previous month, as well as in Spartanburg and Greenville, South Carolina.

Commission on Immigration

In October, the Commission co-sponsored a webinar with the Section on Civil Rights and Social Justice titled “Remain in Mexico: the Facts, the Fiction, and Methods to Challenge this Unprecedented Rebuke of America’s Asylum System.” This webinar featured experienced panelists from San Diego to Brownsville who recounted the practical realities that impede due process and serve to deter those seeking protection. They also discussed novel arguments to seek bond and challenge the systematic application of this expanding policy. The webinar reached 560 registrations, 247 live views, and 158 post-webinar views of the recording.

This fall, the Children’s Immigration Law Academy (CILA) received numerous recognitions for its work to represent children in immigration proceedings. Children at Risk, a non-partisan research and advocacy organization, nominated CILA for its 2019 Academy Awards of Child Advocacy in the category of Outstanding New Child-Focused Non-Profit/Non-Profit Program. CILA was also chosen as a featured non-profit
organization for the upcoming December issue of Houstonia Magazine’s Top Lawyers edition.

The Commission led a week-long pro bono trip to ProBAR in July. The trip included the President and other officers of the Hispanic National Bar Association as well as lawyers from Maryland, Massachusetts, and California. The lawyers provided legal assistance to 10 detained asylum-applicants from a variety of countries including Honduras, Cuba, and El Salvador. The group also visited the La Posada Providencia shelter for immigrants and refugees as well as crossed the border into Matamoros, Tamaulipas, to provide dinner to asylum-seekers waiting for their turn to seek asylum at the Port of Entry.

Then-ABA President Carlson also travelled to ProBAR in July to engage in a roundtable discussion with ProBAR staff on the impact of their services. He also visited two local migrant shelters and met two former ProBAR clients, a young woman from Honduras and a young man from Guinea who was detained for 20 months before finally winning asylum.

In July, Joe Longley, president of the State Bar of Texas, presented ProBAR with a Presidential Citation at the State Bar’s annual meeting in Austin. The award recognizes ProBAR “for outstanding service in providing access to justice to populations that cannot afford or do not have access to an attorney. The State Bar of Texas applauds your efforts to uphold the rule of law and to improve the quality of legal services and the administration of justice in this state.”

Commission on Law and Aging

In October, the Commission’s annual National Aging and Law Conference was held in Arlington, Virginia. The conference offered 30 workshops and four plenary sessions to an audience of approximately 235 attendees, primarily made up of legal services lawyers and other advocates in the field of aging. A highlight of the Conference was a celebration of the Commission’s 40th anniversary.

Free Legal Answers

Currently, 41 jurisdictions are committed to participate in. Of those jurisdictions, 38 are connected to the site in various stages of access by clients, pro bono attorneys, and/or state administrators. As of the end of October, over 85,100 questions have been submitted and more than 6,400 attorneys are registered as volunteers on the site.

FLA distributed its biannual survey on May 31 to all registered volunteer attorneys to assess their participation experience and the results were tabulated over the summer. Of the 242 total respondents, 93 percent found the website to be very or somewhat easy to navigate and 87 percent found it very or somewhat easy to communicate with the clients. Ninety-six percent would use the site again for pro bono service and 95 percent would recommend FLA to other attorneys interested in providing pro bono services.
Conclusion

Reflecting on the success of his business, Walt Disney once observed, “it all started with a mouse.” Just as Disney built and perfected his company’s content, featuring an expanded business that continues more than 50 years after his passing, new ABA initiatives such as the CLE Library are enhancing our value proposition for current and future generations of lawyers.

Making ABA membership a more personalized experience is an important facet of our efforts. This requires continued development of consumer-centric technology services and products, and we’ve already learned a lot since the ABA Library’s launch in May. Using analytics, we’re focusing our efforts and enhancing metrics to evaluate the Library’s performance and inform our product development strategy. As time goes on, we will have a better understanding of how our members are using the Library, what obstacles they may be encountering with usability, and how happy they are with the programming we provide.

While we’re optimistic the CLE Library is on the right track, we are not complacent. There is competition in the market and if we do not work to continually improve our offerings, we will fall behind. We’ll use the available data to inform our next steps. We’ll measure performance. And we’ll make improvements.

Thank you for your strong support and work on behalf of the ABA. Please let me know of any concerns or questions. I look forward to meeting with you at the Midyear Meeting in Austin.

Respectfully submitted,

Jack L. Rives
Executive Director
The following describe the activities of the Committee on Scope and Correlation of Work (“Scope”) since its last report to the House of Delegates at the American Bar Association’s August 2019 Annual Meeting. Scope has continued to fulfill its constitutional mandate as a Committee of the House of Delegates, and the only one elected by the House, Scope has continued to review the structure, function and activities of the Association committees and commissions to evaluate their effectiveness and to determine if any of their functions overlap.

Scope held its last meeting Saturday, October 26, 2019 in Chicago, Illinois. Scope will meet again at the ABA’s Midyear Meeting on Saturday, February 15, 2020, in Austin, Texas.

Scope concluded that the following entities are active and not engaging in a function that unnecessarily overlaps with or duplicates the activities of other ABA entities:

**Standing Committee on Bar Activities and Services**- Scope commended the Standing Committee on Bar Activities and Services for its upcoming strategic planning process and its good work.

**Standing Committee on Public Education**-Scope commended the Standing Committee on Public Education for its work on Law Day and for its participation in the many Division for Public Education programs and publications and other resources made available to further public education, and in particular programs geared toward teachers and students.

**Standing Committee on Continuing Legal Education**-Scope commended the Standing Committee on Continuing Legal Education for its cost saving measures, its oversight role in the new membership model rollout, and its work leading to the new changes to the Model Rules.

**Standing Committee on Gavel Awards**-Scope commended the Standing Committee on Gavel Awards for its sustained high performance and member involvement.

Scope deferred its review of the following entity:

- Task Force on Gatekeeper and Regulation
Scope's 2020 Midyear Meeting agenda will include:
The following Diversity entities will be reviewed during the 2020 Midyear Meeting:

- Commission on Sexual Orientation and Gender Identity
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Women in the Profession
- Commission on Disability Rights
- Council for Diversity in the Educational Pipeline
- Commission on Racial and Ethnic Diversity in the Profession
- Coalition on Racial and Ethnic Justice
- Diversity and Inclusion Center

Respectfully Submitted,

W. Andrew Gowder, Jr, Chair
Amelia Helen Boss
José C. Feliciano, Sr.
Harry S. Johnson
Linda Randell
Hilary Young, Chair, SOC
Hon. Frank Bailey, ex-officio
Kevin Shepherd, ex-officio
RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2020 to Rules 13, 29, 30 to 36, 37, and 39 of the ABA Standards and Rules of Procedure for Approval of Law Schools:

1. Rule 13. Actions on Determinations of Noncompliance with a Standard
2. Rule 29. Teach-Out Plan
4. Rule 37. Complaints in General
5. Rule 39. Disposition of Complaints
Rule 13. ACTIONS ON DETERMINATIONS OF NONCOMPLIANCE WITH A STANDARD

(a) Following a determination by the Council of non-compliance with a Standard in accord with Rule 11(a)(4), the Council shall:

(1) Require the law school to bring itself into compliance and submit information by a specific date to demonstrate that it has come into compliance with the Standard; and

(2) Direct that representatives of the law school, including any person specifically designated by the Council, appear at a hearing to determine whether to impose sanctions and/or direct specific remedial action in connection with the law school’s non-compliance with the Standard.

(b) The period of time by which a law school is required to demonstrate compliance with a Standard shall not exceed two years from the date of determination of noncompliance, except as provided for in subsection (c).

(c) Upon request of the law school and for good cause shown, the Council may extend the date of compliance.

Rule 29. TEACH-OUT PLAN

(a) If a provisional or fully approved law school or branch decides to close, suspending, or ceasing to operate or suspending or closing all or some of its approved program of legal education operations or close a branch campus, the law school shall promptly provide notice to the public, all students at the law school, make a public announcement of the decision, and shall notify the Managing Director, the appropriate state licensing authority, and the United States Department of Education of the action decision.

(b) A provisional or fully approved law school must submit a teach-out plan for approval upon occurrence of any of the following events:

(1) The law school notifies the Managing Director’s Office that it intends to close, suspend, or cease operations of the law school operations or close a branch campus;

(2) The Council acts to withdraw, terminate, or suspend, the accreditation of the law school;
(3) The United States Secretary of Education notifies the Managing Director's Office that the Secretary has initiated an emergency action against an institution, in accordance with section 487(c)(1)(G) of the HEA, or an action to limit, suspend, or terminate an institution participating in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required;

(4) A state licensing or authorizing agency notifies the Managing Director's Office that an institution's license or legal authorization to provide an educational program has been or will be revoked;

(5) The Executive Committee of the Council determines that the law school is at risk of sudden closure, suspension, or ceasing of some or all of its operations because it is in financial distress, under governmental investigation, or facing other significant challenges.

(c) The law school shall submit the teach-out plan for the law school or branch being closed as required by paragraph (b) to the Managing Director's Office within the time specified by the Managing Director. Upon submission of the teach-out plan, the law school must cease recruiting students, accepting deposits, and to admitting new students.

(d) The Managing Director's Office, in consultation with the Chair of the Council may require a law school to enter into a teach-out agreement as part of its teach-out plan if the law school will not be able to teach out its own students prior to its closure as a law school.

(ed) A law school must submit the “Teach-Out Plan Approval Form,” as adopted by the Council, and address each item in the form.

(fe) If the Council a law school voluntarily enters into a teach-out agreement or if the Managing Director requires a law school to submit a teach-out agreement as part of a teach-out plan, the law school must submit the “Teach-Out Agreement Approval Form,” as adopted by the Council, and address each criterion in the form.

(gf) The Executive Committee of the Council shall either approve or deny the teach-out plan submitted in accordance with (b) and (c).

(1) Approval of the teach-out plan may be conditioned on specified changes to the plan.

(2) If the teach-out plan is denied, the law school must revise the plan to meet the deficiencies identified and resubmit the plan as directed, no later than 30 days after receiving notice of the decision.
Upon approval of a teach-out plan of a law school or branch that is also accredited by another recognized accrediting agency, the Managing Director’s Office shall notify that accrediting agency within 30 days of its approval.

Upon approval of a teach-out plan, the Managing Director shall within 30 days notify all recognized agencies that accredit other programs offered by the institution of which the law school is a part.

For a law school that is suspending or reducing operations, the Council may withdraw approval from the law school if it ceases to operate as an educational institution, if its legal authorization to operate and grant degrees is terminated, or if the Council determines, based on its review, that what remains of the law school is no longer in compliance with the Standards as required to sufficiently provide students with a quality legal education.

In the event a law school closes without an approved teach-out plan or agreement, the Managing Director’s office will work with the United States Department of Education and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

VII. APPEALS PANEL PROCEDURE

Rule 30. NOTICE OF APPEAL OF DECISIONS OF THE COUNCIL APPEALS PANEL

(a) The Appeals Panel shall consist of at least five persons appointed by the Chair of the Council. Members shall serve a one-year term beginning at the end of the Annual Meeting of the Section and continuing to the end of the next Annual Meeting of the Section or until replaced. Appeals Panel members are eligible to serve consecutive terms or non-consecutive multiple terms.

(b) Every member of the Appeals Panel shall be:

(1) A former member of the Council; or

(2) An experienced site evaluator.

(c) Members of the Appeals Panel shall be:

(1) Experienced in and knowledgeable about the Standards, Interpretations and Rules of Procedure;

(2) Trained in the Standards, Interpretations and Rules of Procedure at a retreat or workshop or by other appropriate methods within the 3 years prior to appointment; and

(3) Subject to the Section’s Conflicts of Interest Policy, as provided in IOP 13.
(d) The Appeals Panel shall include:

(1) an academic;
(2) an administrator;
(3) a legal educator;
(4) a practitioner or member of the judiciary; and
(5) a representative of the public.

(e) No more than fifty percent of the members may be persons whose primary professional employment is as a law school, dean, faculty, or staff member. Public members shall have qualifications and representation consistent with the regulations of the United States Department of Education applicable to the accreditation of professional schools.

Rule 31. FORM AND CONTENT OF APPEALS TO THE APPEALS PANEL

(a) A law school may appeal decisions of the Council specified in Rule 3 by filing a written Notice of Intent to Appeal within 10 days of the Managing Director within 30 days of the date of the letter from the Managing Director to the Law School reporting the decision of the Council (“Decision Letter”) to the law school reporting the decision of the Council.

(b) If a law school is required to file a Teach-Out Plan subsequent to the decision of the Council, the time line to file the appeal is stayed until the Teach-Out Plan is filed pursuant to the timetable set by the Managing Director and approved by the Council.

(a) The written appeal shall include:

1. A statement of the grounds upon which the appeal is based; and
2. Argument and documentation in support of the grounds upon which the appeal is based.

Rule 31. GROUNDS FOR APPEAL FORM AND CONTENT OF APPEALS TO THE APPEALS PANEL

(a) The grounds for an appeal are limited to the following:
(1) The decision of the Council was arbitrary and capricious and not supported by the evidence on record; or

(2) The Council failed to follow the applicable Rules of Procedure, and the procedural error prejudiced its decision of the Council was inconsistent with the Rules of Procedure and that inconsistency prejudiced the decision.

Rule 32. MEMBERSHIP OF APPEALS PANEL AND FOR THE PROCEEDING PANEL

(a) The Appeals Panel shall consist of at least five persons appointed by the Chair of the Council. Members shall serve a one-year term beginning at the end of the Annual Meeting of the Section and continuing to the end of the next Annual Meeting of the Section or until replaced. Appeals Panel members are eligible to serve consecutive terms or non-consecutive multiple terms.

(b) Every member of the Appeals Panel shall be:

(1) A former member of the Council; or

(2) An experienced site evaluator.

(c) Members of the Appeals Panel shall be:

(1) Experienced in and knowledgeable about the Standards, Interpretations and Rules of Procedure; and

(2) Trained in the Standards, Interpretations and Rules of Procedure at a retreat or workshop or by other appropriate methods within the 3 years prior to appointment; and

(2) Subject to the Section’s Conflicts of Interest Policy, as provided in IOP 13.

(d) The Appeals Panel shall include at least one person who can fill the following roles:

(1) an academic;

(2) an administrator;

(3) a legal educator;

(4) a practitioner or member of the judiciary; and

(5) a representative of the public.

(e) No more than fifty percent of the members may be persons whose primary professional employment is as a law school, dean, faculty, or staff member. Public
members shall have qualifications and representation consistent with the regulations of the United States Department of Education applicable to the accreditation of professional schools.

By virtue of background and experience, some members may appropriately serve in more than one role. The roles that members can fulfill shall be determined each year when the Panel is appointed.

(a) No more than fifty percent of the members may be persons whose primary professional employment is as a law school, dean, faculty, or staff member. Public members shall have qualifications and representation consistent with the regulations of the United States Department of Education applicable to the accreditation of professional schools.

(e) Within 30 days of the Notice of Intent to Appeal, if it is a written appeal within the scope of authority of the Appeals Panel, the Managing Director shall appoint three members of the Appeals Panel to hear the appeal. The appointed members shall be known as the Proceeding Panel. The Managing Director shall designate one member of the Proceeding Panel as chair. The Managing Director shall also appoint a staff person who will serve as Liaison and provide support to the Proceeding Panel.

(f) For law schools for which the Council is the institutional accreditor, the Managing Director shall appoint an academic, an administrator, and a representative of the public to serve on the Proceeding Panel. For law schools for which the Council is the programmatic accreditor, the Managing Director shall appoint a legal educator, a practitioner or member of the judiciary, and a representative of the public to serve on the Proceeding Panel.

(g) In the event a member of the Appeals Panel cannot be appointed to participate in a decision on appeal so as to ensure that the Proceeding Panel meets the requirements of Rule 32, the Managing Director shall appoint to the Proceeding Panel another person that is not a member of the Appeals Panel who meets those requirements.

(h) Members of the Proceeding Panel will receive training prior to the hearing regarding its responsibilities and in the Standards, Interpretations, and Rules of Procedure.

(i) The Managing Director shall notify the law school of the Liaison and members of the Proceeding Panel and shall afford the law school an opportunity to present objections regarding conflict of interest; Such objections shall be ruled on by the Managing Director within 30 days of the date of the Decision Letter.
Rule 33. **DESIGNATION OF THE RECORD**

(a) The Managing Director shall refer the appeal to the Proceeding Panel within 30 days of receipt of a written appeal within the scope of authority of the Appeals Panel. In referring the appeal, the Managing Director shall provide the Proceeding Panel with copies of:

(1) The written appeal;

(2) The decision of the Council; and

(3) The record before the Council, including any transcript of hearing.

(b) The Managing Director, in consultation with the Chair of the Proceeding Panel, shall set the date, time, and place of the hearing.

(1) The hearing shall be scheduled within 45 days of the Managing Director's referral of the appeal to the Proceeding Panel.

(2) The Managing Director shall inform the law school of the date, time, and place of the hearing at least 30 days in advance of the hearing, unless the law school agrees to the hearing on less than 30 days’ notice.

(a) Within 20 days of the date of the Decision Letter, the Managing Director Council shall deliver to the law school, the Record on Appeal.

(b) The Record on Appeal shall be:

(1) The record before the Council;

(2) The decision letter from which the appeal is taken; and

(3) The transcript of the hearing before the Council.

Rule 34. **FILING OF WRITTEN APPEAL**

(a) The law school appealing to the Appeals Panel has the burden of demonstrating that the Council’s decision was arbitrary and capricious, and not supported by the evidence on record, or inconsistent with the Rules of Procedure and that inconsistency prejudiced the decision.

(b) The appeal shall be decided exclusively on the record before the Council, the transcript of the hearing before the Council, and the decision letter of the Council.
Except as provided in Rule 36(e), no new evidence shall be considered by the Proceeding Panel.

(a) A law school shall file electronically, a written appeal with the Liaison and Council within 40 days of the date of the Decision Letter, unless the time period has been extended.

(b) The written appeal shall include:

(1) A statement of the grounds upon which the appeal is based; and

(2) Documentation in support of the grounds upon which the appeal is based.

(c) The written appeal and supporting documentation may not contain or refer to any new evidence, nor may the law school refer to any new evidence in its written appeal or arguments to the Proceeding Panel unless the only remaining deficiency cited by the Council in support of an adverse decision is the law school’s non-compliance with a Standard dealing with financial resources for the law school. In that case, the process set out in Rule 39(e) applies to new financial information that the law school may want to submit with its appeal.

Rule 35. COUNCIL’S RESPONSE TO THE APPEAL
PROCEDURE IN HEARING
BEFORE PROCEEDING PANEL

(a) The hearing will be a closed proceeding and not open to the public.

(b) The law school shall have a right to have representatives, including legal counsel, appear at the hearing.

(c) The Council shall be represented at the hearing through the Chair, other members of the Council as the Chair of the Council deems appropriate and legal representation for the Council.

(d) The Managing Director or designee shall be present at the hearing. The Managing Director may designate additional staff to be present at the hearing.

(e) The hearing shall be transcribed by a court reporter and a transcript of the hearing shall be provided to the Proceeding Panel, the Council, and the law school.

(a) The Council’s written response to the law school’s written appeal shall be filed by the Council with the law school and the Liaison the latter of 60 days of the date of the Decision Letter, or 20 days of the date of the law school’s Written Appeal.
(b) The Council’s written response and supporting documentation may not contain or refer to any new evidence, nor may the Council refer to any new evidence in its written response or statements to the Proceeding Panel.

Rule 36. SCHEDULING OF HEARINGS

(a) The Managing Director shall refer the appeal to the Proceeding Panel the latter of 70 days of the date of the Decision Letter or 30 days of the date of the law school’s Written Appeal. In referring the appeal, the Liaison shall provide the Proceeding Panel with copies of:

(1) The written appeal;

(2) The Council’s response;

(3) The Decision Letter of the Council; and

(4) The record before the Council, including any hearing transcripts.

(b) The Managing Director, in consultation with the Chair of the Proceeding Panel, shall set the date, time, and place of the hearing.

(1) The hearing shall be held the latter of 100 days of the date of the Decision Letter or 60 days of the date of the law school’s Written Appeal.

(2) The Managing Director shall inform the law school of the date, time, and place of the hearing at least 30 days in advance of the hearing, unless the law school agrees to the hearing on less than 30 days’ notice.

Rule 37. BURDENS

The appealing law school has the burden of demonstrating that the Council’s decision was arbitrary and capricious, and not supported by the evidence on record, or inconsistent with the Rules of Procedure and that inconsistency prejudiced the decision.

Rule 38. HEARING PROTOCOL

(a) The Chair of the Proceeding panel shall conduct the hearing. The Proceeding Panel may ask questions of the law school, Council representatives, and the staff of the Managing Director’s Office.

(b) The hearing will be a closed proceeding and not open to the public.
(c) The law school shall have a right to have representatives, including legal counsel, appear at the hearing, any of whom shall be allowed to make any statement or presentation or to respond to any questions directed to the law school by the Proceeding Panel.

(d) The Council shall have a right to have representatives, including legal counsel, appear at the hearing, any of whom shall be allowed to make any statement or presentation on behalf of the Council or to respond to any questions directed to the Council representatives by the Proceeding Panel.

(e) The Managing Director or designee shall be present at the hearing. The Managing Director may designate additional staff to be present at the hearing.

(f) The hearing shall be transcribed by a court reporter and a transcript of the hearing shall be provided to the Proceeding Panel, the Council, and the law school.

**Rule 39. DECISION OF THE PROCEEDING PANEL**

(a) The Proceeding Panel shall issue a written decision no later than 130 days following the hearing. The decision shall state specifically the grounds upon which it is based.

(b) The Proceeding Panel, following a hearing, has the authority to:

(1) Affirm the decision of the Council;

(2) Reverse the decision of the Council and enter a new decision;

(3) Amend the decision of the Council; or

(4) Remand the decision of the Council for further consideration.

(c) The decision of the Proceeding Panel shall be effective upon issuance. If the Proceeding Panel remands a decision for further consideration or action by the Council, the Proceeding Panel shall identify specific issues that the Council must address.

(d) Decisions by the Proceeding Panel under (b)(1), (2) and (3) are final and not appealable.

(e) When the only remaining deficiency cited by the Council in support of an adverse decision is a law school’s failure to meet the Standards dealing with financial resources for a law school, the law school may request a review of new financial information that was not part of the record before the Council at the time of the adverse decision if all of the following conditions are met:
(1) A written request for review is filed with the Office of the Managing Director within 30 days after the date of the Decision Letter reporting the adverse decision of the Council to the law school;

(2) The financial information was unavailable to the law school until after the adverse decision subject to the appeal was made; and

(3) The financial information is significant and bears materially on the financial deficiencies that were the basis of the adverse decision by the Council.

(f) The request to review new financial information will be considered by the Council at its next meeting occurring at least 30 days after receipt of the request.

(g) A law school may request review of new financial information only once and a decision made by the Council with respect to that review does not provide a basis for appeal.

Rule 4037. COMPLAINTS IN GENERAL

(a) The United States Department of Education procedures and rules for the recognition of accrediting agencies require a recognized accrediting agency to have a process for the reporting of complaints against accredited institutions that might be out of compliance with the agency’s accreditation standards. This is the process for the Council with regard to law schools having J.D. programs approved by the Council.

(b) The process for Complaints under these Rules is designed to bring to the attention of the Council, and the Managing Director, facts and allegations that may indicate that an approved law school is operating its program of legal education out of compliance with the Standards.

(c) This process is not available to serve as a mediating or dispute-resolving process for persons with complaints about the policies or actions of an approved law school. Neither the Council nor the Managing Director will intervene with an approved law school on behalf of an individual with a complaint against or concern about action taken by a law school that adversely affects that individual. The Council will, as a part of this process, provide no individual relief for any person, nor will it order any specific action by a law school with respect to any individual.

(d) If a law school that is the subject of a complaint is due to receive a regularly scheduled sabbatical site evaluation within a reasonable amount of time after the complaint is received, usually within one year, the complaint may be handled as part of the sabbatical site evaluation.

Rule 4239: DISPOSITION OF COMPLAINTS
(a) The Managing Director, upon receiving a complaint submitted in accordance with Rule 37, and not dismissed, shall proceed as follows:

(1) The Managing Director shall acknowledge receipt of the complaint within 14 days of its receipt.

(2) The Managing Director shall determine whether the complaint alleges facts that raise issues relating to an approved law school’s compliance with the Standards. This determination shall be made within six weeks of receiving the complaint. If the Managing Director concludes that the complaint does not raise issues relating to an approved law school’s compliance with the Standards, the matter will be closed.

(3) If the Managing Director determines that the complaint may raise issues relating to an approved law school’s compliance with the Standards, the Managing Director will send the complaint to the law school and request a response within 30 days. The Managing Director may extend the period for response if, in the judgment of the Managing Director, there is good cause for such an extension.

(4) The Managing Director will review any response to a complaint within 45 days of receipt. If the response establishes that the law school is not out of compliance with respect to the matters raised in the complaint, the Managing Director will close the matter.

(b) If the law school’s response to a complaint does not establish that it is in compliance with the Standards on the matters raised by the complaint, the Managing Director, in consultation with the Chair of the Council, may appoint a fact finder to investigate the issues raised by the complaint and the law school’s response.

(c) If the law school’s response to a complaint does not establish that it is in compliance with the Standards on the matters raised by the complaint, then the Managing Director shall refer the complaint, along with the law school’s response, the fact-finder’s report, if any, and any other relevant information, to the Council for further action in accordance with these Rules.

(d) If a law school that is the subject of a complaint is due to receive a regularly scheduled sabbatical site evaluation within a reasonable amount of time after the complaint is received, usually within one year, the complaint may be handled as part of the sabbatical site evaluation.
The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence the attached changes to the Rules of the *ABA Standards and Rules of Procedure for Approval of Law Schools*\(^1\).

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the HOD seeking concurrence of the HOD in any actions of the Council to adopt, revise, or repeal the *ABA Standards and Rules of Procedures for Approval of Law Schools*. The HOD may either concur with the Council’s decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the HOD. The decision of the Council following the second referral shall be final.

The amendments were approved by the Council for Notice and Comment during its meetings held on May 16-18, 2019. A public hearing was held on August 21, 2019. The Council received one written comment on the proposed changes and one person testified at the public hearing on the proposed changes. The Council approved the amendments at its meeting on August 22-24, 2019.

**Rule 13: Actions on Determinations of Noncompliance with a Standard.** Rule 13 currently provides that the Council can extend the date of a law school to come into compliance with the standards for good cause shown, “upon the request of the law school.” The Council believes it should have the power to extend based on its findings and conclusions and that it does not require a request of the law school. The Council approved removal of language “upon the request of the law school.”

In addition, the Council has imposed sanctions on a law school “and” directed a law school to take specific remedial action. Therefore, the language in Rule 13(a)(2) has been change to “and/or.”

**Rule 29.** The Council agreed to review Rule 29, United States Department of Education’s regulations, and the approaches and rules of other accreditors regarding school closures and teach-out plans, given that a few schools have closed in recent years. The Council adopted changes that facilitate the management and process of law school closures and teach-out arrangements and serve well the interests of students, schools, the public.

Specifically, the Council wanted to address situations where a law school is at risk of sudden closure by allowing its Executive Committee to act quickly to approve a teach-out plan. In addition, the Council wanted to respond to instances where a law school loses its legal authorization to operate, giving the Council the ability to withdraw approval from the law school.

Rules 30-36 (Proposed Rules 30-39), Appeals Panel Procedure. The Council agreed to update and improve Rules 30 to 36 relating to procedures for an appeal based on best practices and lessons learned by recent appeals. Specifically, the Council incorporated a separate set of procedures for an appeal into the Rules. The Rules clarify dates for submissions, hearings, and decisions. The Rules also address hearing protocol (right to have representatives speak) for the Council and the Law School. Finally, the Rules make clear that, if a law school is required to file a Teach-Out Plan subsequent to the decision of the Council providing the right to appeal, the timeline to file the appeal is stayed until the Teach-Out Plan is filed.

Rule 37: Complaints in General and Rule 39: Disposition of Complaints. Rule 37 provides that if a law school that is the subject of a complaint is due to receive a site visit within one year of receiving the complaint, the complaint may be handled by the site team. Council discussions conclude that this provision should be moved to Rule 39 since it deals with the disposition of a complaint.

Respectfully submitted,

Diane F. Bosse
Chair, Council of the Section of Legal Education and Admissions to the Bar
February 2020
1. **Summary of Resolution.**

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2020 to Rules 13, 29, 30-36, 37, and 39 of the *ABA Standards and Rules of Procedure for Approval of Law Schools.*

2. **Approval by Submitting Entity.**

The amendments were approved by the Council for Notice and Comment during its meetings held on May 16-18, 2019. A public hearing was held on August 21, 2019. The Council approved the amendments at its meeting on August 22-24, 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 amendments modify the existing *ABA Standards and Rules of Procedure for Approval of Law Schools.*

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

Not applicable.

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

Not applicable.

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

The Council will notify ABA-approved law schools and other interested entities of the approved changes to the *ABA Standards and Rules of Procedure for Approval of Law*
100A

*Schools.* The Council and the Managing Director’s Office will prepare guidance memoranda and training materials regarding the revised Standards.

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

   Not applicable.

9. **Disclosure of Interest.**

   Not applicable.

10. **Referrals.**

    ABA Diversity and Inclusion Center (and related groups)
    ABA Law Student Division
    ABA Section Directors and Delegates
    ABA Standing and Special Committees, Task Forces, and Commission Chairs
    ABA Young Lawyers Division
    AccessLex Institute
    American Association of Law Libraries
    Association of American Law Schools
    Association of Legal Writing Directors
    Clinical Legal Education Association
    Conference of Chief Justices
    Conference of State Delegates
    Deans and Associate Deans of Law Schools
    Law School Admission Council
    Minority Caucus
    National Association for Law Placement
    National Association of Bar Executives
    National Caucus of State Bar Associations
    National Conference of Bar Examiners
    National Conference of Bar Presidents
    SBA Presidents
    Society of American Law Teachers
    University Presidents

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

    Barry A. Currier
    American Bar Association
    Section of Legal Education and Admissions to the Bar
    Ph: (312) 988-6744 / Cell: (310) 400-2702
    Email: barry.currier@americanbar.org
12. Name and Contact Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting)

Joan S. Howland
Associate Dean and Professor
University of Minnesota Law School
Ph: (612) 625-9036
Email: howla001@mnu.edu

The Honorable Solomon Oliver, Jr.
Judge
U.S. District Court for the Northern District of Ohio
Ph: (216) 357-7171 / Cell: (216) 973-6496
Email: solomon_oliver@ohnd.uscourts.gov
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2020 to Rules 13, 29, 30-36, 37, and 39 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

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

   The resolution addresses Rules 13, 29, 30-36, 37, and 39 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. In accordance with Internal Operating Practice 9, the Council engages in an ongoing review of the Standards.

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

   The proposals amend the 2019-2020 *ABA Standards and Rules of Procedure for Approval of Law Schools*.

4. **Summary of Minority Views**

   None.
RESOLVED, That the American Bar Association House of Delegates concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2020 to Standards 202, 307, 310, 502, 509 and Definitions of the ABA Standards and Rules of Procedure for Approval of Law Schools:

Standard 202. Resources for Program
Standard 307. Studies, Activities, and Field Placements Outside the United States
Standard 310. Determination of Credit Hours for Coursework
Standard 502. Educational Requirements
Standard 509. Required Disclosures
Definition of Credit(s) or Credit Hour(s)
Standard 202. RESOURCES FOR PROGRAM

(a) The current and anticipated financial resources available to the law school shall be sufficient for it to operate in compliance with the Standards and to carry out its program of legal education.

(b) A law school that is part of a university shall obtain at least annually from its university an accounting and explanation for all charges and costs assessed against resources generated by the university against law school and for any use of resources generated by the law school to support non-law school activities and central university services.

(c) A law school is not in compliance with the Standards if its current financial condition has a negative and material effect on the school’s ability to operate in compliance with the Standards or to carry out its program of legal education.

(d) A law school is not in compliance with the Standards if its anticipated financial condition is reasonably expected to have a negative and material effect on the school’s ability to operate in compliance with the Standards or to carry out its program of legal education.

(e) A law school shall be given the opportunity to present its recommendations on budgetary matters to the university administration before the budget for the law school is submitted to the governing board for adoption.

Interpretation 202-1

“Resources generated by the law school” include law school tuition and fees generated by the law school, appropriated support, endowment income restricted to the law school, restricted and unrestricted gifts to the law school, and any other revenue generated by the law school, including but not limited to revenue from grants, contracts, and property of the law school.

Interpretation 202-2

A law school satisfies Standard 202(b) if the accounting identifies resources generated by the law school, all charges and costs assessed by the university, and the general disposition of any surplus or source of any deficit. The accounting must provide line-item specificity with regard to resources generated and charges and costs.
Standard 307. STUDIES, ACTIVITIES, AND FIELD PLACEMENTS OUTSIDE THE UNITED STATES

(a) A law school may grant credit for study outside the United States that meets the requirements of the Criteria adopted by the Council.

(b) A law school may grant credit for field placements outside the United States that meet the requirements of Standard 304.

(c) A law school may grant up to two-thirds of the credits required for the J.D. degree for study outside the United States provided the credits are obtained in a program sponsored by an ABA approved law school. Programs sponsored by an ABA-Approved law school include programs held in accordance with the Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools in a Location Outside the United States; programs held in accordance with the Criteria for Approval of Foreign Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools; and field placements outside the United States.

(d) A law school may grant up to a maximum of one-third of the credits required for the J.D. degree for study outside the United States under the Criteria for Accepting Credit for Student Study at a Foreign Institution and 2) credit for courses completed at a law school outside the United States in accordance with Standard 505(c).

(e) Credit hours granted pursuant to subsections (b), (c) and (d) shall not in combination exceed two-thirds of the total credits required for the J.D. degree.

(f) A student participating in study outside the United States must have successfully completed sufficient prerequisites or must contemporaneously receive sufficient training to assure the quality of the student educational experience.

Interpretation 307-1

For purposes of Standard 307, a course including only a brief visit outside the United States is not considered “study outside the United States.” A “brief visit” is one-third or less of the class time in a course that is offered and based primarily at the law school and approved through the school’s regular curriculum approval process.

Standard 310. DETERMINATION OF CREDIT HOURS FOR COURSEWORK

(a) A law school shall adopt, publish, and adhere to written policies and procedures for determining the credit hours that it awards for coursework.
(b) A “credit hour” is an amount of work that reasonably approximates:

(1) not less than 50 minutes of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time; or

(2) at least an equivalent amount of work as required in subparagraph (1) of this definition for other academic activities as established by the institution, including simulation, field placement, clinical, co-curricular, and other academic work leading to the award of credit hours.

Interpretation 310-1

Based on For purposes of this Standard, the fifty minutes suffices for one hour of classroom or direct faculty instruction and two hours per week over the fifteen-week (or its equivalent) period required by the Standard, is sixty minutes. The fifteen-week period may include one week for a final examination. At least 42.5 hours of total in-class instruction and out-of-class student work is required per credit [15 x 50 minutes + 15 x 2 hours]. Time devoted to taking a required final examination may count toward the in-class time required, and time devoted to studying for a required final examination may count toward the out-of-class time required. However, merely scheduling a general "exam week" or "exam weeks" does not permit allocating "exam time" to every class. In order to count time spent studying for and taking a final examination, an exam of appropriate length must be required for the particular class.

Interpretation 310-2

A school may award credit hours for coursework that extends over any period of time, if the coursework entails no less than the minimum total amounts of classroom or direct faculty instruction and of out-of-class student work (42.5 hours) specified in Standard 310(b).

Standard 502. EDUCATIONAL REQUIREMENTS

(a) A law school shall require for admission to its J.D. degree program a bachelor’s degree that has been awarded by an institution that is accredited by an accrediting agency recognized by the United States Department of Education.

(b) Notwithstanding subsection (a), a law school may also admit to its J.D. degree program:

(1) an applicant who has completed three-fourths of the credits leading to a bachelor’s degree as part of a bachelor’s degree/J.D. degree program if the institution is accredited by an accrediting agency recognized by the United States Department of Education; and
(2) a graduate of an institution outside the United States if the law school assures that the quality of the program of education of that institution is equivalent to that of institutions accredited by an accrediting agency recognized by the United States Department of Education.

(c) In an extraordinary case, a law school may admit to its J.D. degree program an applicant who does not satisfy the requirements of subsections (a) or (b) if the applicant's experience, ability, and other qualifications clearly demonstrate an aptitude for the study of law. For every such admission, a statement of the considerations that led to the decision shall be placed in the admittee's file.

(d) Within a reasonable time after a student registers—Except in extraordinary circumstances, a law school shall have on file the each enrolled student's official transcripts verifying all academic credits undertaken and degree(s) conferred by the following deadlines:

(i) for students matriculating in the fall, by October 15; and

(ii) for students matriculating at any other time, within 4 weeks of the date classes begin.

Standard 509. REQUIRED DISCLOSURES

(a) All information that a law school reports, publicizes, or distributes shall be complete, accurate and not misleading to a reasonable law school student or applicant. A law school shall use due diligence in obtaining and verifying such information. Violations of these obligations may result in sanctions under Rule 15 of the Rules of Procedure for Approval of Law Schools.

(b) A law school shall publicly disclose on its website, in the form and manner and for the time frame designated by the Council, the following information:

(1) admissions data;

(2) tuition and fees, living costs, and financial aid;

(3) conditional scholarships;

(4) enrollment data, including academic, transfer, and other attrition;

(5) numbers of full-time and part-time faculty, professional librarians, and administrators;

(6) class sizes for first-year and upper-class courses; number of seminar, clinical and cocurricular offerings;
(7) employment outcomes; and

(8) bar passage data.

(c) A law school shall publicly disclose on its website, in a readable and comprehensive manner, the following information on a current basis:

(1) refund policies;

(2) curricular offerings, academic calendar, and academic requirements; and

(3) policies regarding the transfer of credit earned at another institution of higher education. The law school’s transfer of credit policies must include, at a minimum:

(i) A statement of the criteria established by the law school regarding the transfer of credit earned at another institution; and

(ii) A list of institutions, if any, with which the law school has established an articulation agreement.

(d) A law school shall distribute the data required under Standard 509(b)(3) to all applicants being offered conditional scholarships at the time the scholarship offer is extended.

(e) If a law school makes a public disclosure of its status as a law school approved by the Council, it shall do so accurately and shall include the name and contact information of the Council in a form and manner approved by the Council.

Definitions

As used in the Standards, Interpretations, and Rules of Procedure:

(5) “Credit(s) or Credit Hour(s)” means semester hour credits as defined in Standard 310. Law schools that use academic schedules other than semesters, such as a quarter system, shall convert these credits in a manner that is consistent with the provisions of Standard 310 or as otherwise provided in a particular Standard or Interpretation.
REPORT

The Council of the Section of Legal Education and Admissions to the Bar (Council) submits to the House of Delegates (HOD) for its concurrence the attached changes to Standards and Definitions of the *ABA Standards and Rules of Procedure for Approval of Law Schools*¹.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the Council of the Section of Legal Education and Admissions to the Bar files a resolution to the HOD seeking concurrence of the HOD in any actions of the Council to adopt, revise, or repeal the *ABA Standards and Rules of Procedures for Approval of Law Schools*. The HOD may either concur with the Council’s decision or refer the decision back to the Council for further consideration. A decision by the Council is subject to a maximum of two referrals back to the Council by the HOD. The decision of the Council following the second referral shall be final.

The amendments were approved by the Council for Notice and Comment during its meetings held on May 16-18, 2019. A public hearing was held on August 21, 2019. The Council received one written comment on the proposed changes and one person testified at the public hearing on the proposed changes. The Council approved the amendments at its meeting on August 22-24, 2019.

**Standard 202 and Interpretation 202-2.** The proposed amendment to Standard 202 clarifies a university’s responsibility under the Standard to provide an accounting of all the charges and costs by the university against the resources generated by the law school. The current Standard 202(b) provides that a law school that is part of a university shall obtain at least annually from its university an accounting and explanation for all charges and costs assessed against resources generated by the Law School. The Council would receive various responses from law schools trying to demonstrate compliance with this standard. The Council wants to make clear to law schools that it needs to see line-item specificity in the accounting. Proposed Interpretation 202-2, which is new, makes clear that the Standard requires a line-item specificity in the accounting.

**Standard 307.** Standard 307 addresses studies, activities, and field placements outside the United States and identifies when a law school may grant credit for such study. The proposed amendment adds an interpretation clarifying that a course including only a brief visit outside the United States is not considered “study outside the United States.” A “brief visit” is one-third or less of the class time in a course that is offered and based primarily at the law school and approved through the school’s regular curriculum approval process.

**Standard 310.** Standard 310 currently provides that a “credit hour” is an amount of work that reasonably approximates not less than 50 minutes of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time. The proposed amendment

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¹ “2019-2020 ABA Standards and Rules of Procedure for Approval of Law Schools,”
clarifies that at least 42.5 hours of total in-class instruction and out-of-class student work is required per credit [15 x 50 minutes + 15 x 2 hours]. The proposed amendment also explains that time devoted to taking a required final examination may count toward the in-class time required, and time devoted to studying for a required final examination may count toward the out-of-class time required. However, merely scheduling a general “exam week” or “exam weeks” does not permit allocating “exam time” to every class. In order to count time spent studying for and taking a final examination, an exam of appropriate length must be required for the particular class.

Standard 502. The current Standard requires law schools to have student transcripts on file “within a reasonable time after a student registers.” This requirement was vague and caused some confusion for law schools. The proposed amendment clarifies this ambiguity by making October 15 the bright-line date by which a law school must comply with the transcript requirement. An additional question arose as to the appropriate requirement when a student matriculates in a program that has start dates in the winter, spring, or summer. The proposed amendment to (d)(ii) will ensure that students enrolling at those times have sufficient time to obtain official transcripts, while still imposing a reasonable bright-line requirement.

Standard 509. The standard currently provides that if a law school makes a public disclosure of its status as a law school approved by the Council, it shall do so accurately and shall include the name and contact information of the Council. The name and contact information of the Council is now provided on the Required Disclosures form a law school must publish annually. This proposed revision reflects that change.

Definitions for Credit or Credit Hour. A new definition has been added for “Credit(s) or Credit Hour(s)” that means semester hour credits as defined in Standard 310. Law schools that use academic schedules other than semesters, such as a quarter system, shall convert these credits in a manner that is consistent with the provisions of Standard 310 or as otherwise provided in a particular Standard or Interpretation.

Respectfully submitted,

Diane F. Bosse
Chair, Council of the Section of Legal Education and Admissions to the Bar
February 2020
GENERAL INFORMATION FORM

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

Submitted By: Diane F. Bosse, Chair

1. Summary of Resolution.

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2020 to Standards 202, 307, 310, 502, and 509 of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. Approval by Submitting Entity.

The amendments were approved by the Council for Notice and Comment during its meetings held on May 16-18, 2019. A public hearing was held on August 21, 2019. The Council approved the amendments at its meeting on August 22-24, 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 amendments modify the existing ABA Standards and Rules of Procedure for Approval of Law Schools.

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

Not applicable.


Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
The Council will notify ABA-approved law schools and other interested entities of the approved changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. The Council and the Managing Director’s Office will prepare guidance memoranda and training materials regarding the revised Standards.

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

Not applicable.

9. **Disclosure of Interest.**

Not applicable.

10. **Referrals.**

AB&A Diversity and Inclusion Center (and related groups)  
ABA Law Student Division  
ABA Section Directors and Delegates  
ABA Standing and Special Committees, Task Forces, and Commission Chairs  
ABA Young Lawyers Division  
AccessLex Institute  
American Association of Law Libraries  
Association of American Law Schools  
Association of Legal Writing Directors  
Clinical Legal Education Association  
Conference of Chief Justices  
Conference of State Delegates  
Deans and Associate Deans of Law Schools  
Law School Admission Council  
Minority Caucus  
National Association for Law Placement  
National Association of Bar Executives  
National Caucus of State Bar Associations  
National Conference of Bar Examiners  
National Conference of Bar Presidents  
SBA Presidents  
Society of American Law Teachers  
University Presidents

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

Barry A. Currier  
American Bar Association  
Section of Legal Education and Admissions to the Bar  
Ph: (312) 988-6744 / Cell: (310) 400-2702
12. **Name and Contact Information.** (Who will present the Resolution with Report to the House? Please include best contact information to sue when on-site at the meeting)

Joan S. Howland
Associate Dean and Professor
University of Minnesota Law School
Ph: (612) 625-9036
Email: howla001@mnu.edu

The Honorable Solomon Oliver, Jr.
Judge
U.S. District Court for the Northern District of Ohio
Ph: (216) 357-7171 / Cell: (216) 973-6496
Email: solomon_oliver@ohnd.uscourts.gov
EXECUTIVE SUMMARY

1. Summary of the Resolution

Under Rule 45.9(b) of the Rules of Procedure of the House of Delegates, the resolution seeks concurrence in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendments dated February 2020 to Standards 202, 307, 310, 311, 502, 509 and Definitions of the ABA Standards and Rules of Procedure for Approval of Law Schools.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses 202, 307, 310, 311, 502, 509 and Definitions of the ABA Standards and Rules of Procedure for Approval of Law Schools. In accordance with Internal Operating Practice 9, the Council engages in an ongoing review of the Standards.

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

The proposals amend the 2019-2020 ABA Standards and Rules of Procedure for Approval of Law Schools.

4. Summary of Minority Views

None.
RESOLVED, That the American Bar Association: supports recognition of a rebuttable presumption of irreparable harm for purposes of the availability of injunctive relief in a trademark infringement action in which there is a finding of a likelihood of success on the merits of an infringement claim (for a preliminary injunction or temporary restraining order) or a finding of infringement (for a permanent injunction); and

FURTHER RESOLVED, That the American Bar Association further supports amending Section 34 of the Lanham Act, 15 U.S.C. § 1116, to provide for such a presumption.
REPORT

This Resolution supports recognition of a rebuttable presumption of irreparable harm for purposes of the availability of injunctive relief in a trademark infringement action in which there is a finding of a likelihood of success on the merits of an infringement claim (for a preliminary injunction or temporary restraining order) or a finding of infringement (for a permanent injunction). This Resolution also supports an amendment to the salient remedial section of the Lanham Act, 15 U.S.C. § 1116, to codify such a presumption. The Resolution therefore will allow the Association to take a position on an issue as to which there is a split in the federal circuits.

Injunctive Relief and the Underlying Principles of Trademark Law

The test for infringement of a trademark or service mark is whether confusion is likely between the parties’ respective marks.1 In cases in which infringement is proven, the Lanham Act grants courts “the power to grant injunctions, according to the principles of equity.”2 The grant of injunctive relief is within the equitable discretion of the court and is based on a balance of equitable factors.3 A movant seeking permanent injunctive relief must demonstrate that: (i) it has suffered an irreparable harm; (ii) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (iii) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (iv) the public interest would not be disserved by a permanent injunction.4 Similarly, a movant seeking preliminary injunctive relief must demonstrate that: (i) it is likely to succeed on the merits; (ii) it is likely to suffer irreparable harm in the absence of preliminary relief; (iii) the balance of equities tips in the movant’s favor; and (iv) an injunction is in the public interest.5 As is apparent, the standards for preliminary and permanent injunctive relief are essentially the same, with the exception that the plaintiff must show a likelihood of success on the merits for preliminary relief rather than actual success as required for permanent injunctive relief.6

Trademark owners frequently seek injunctive relief in infringement cases, and courts have long considered the above factors when weighing whether injunctive relief is

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2 Id. § 1116(a).
3 5 J THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION, § 30:30 (4th ed. 2012) (citing numerous federal cases); see e.g., Fed. Exp. Corp. v. Fed. Espresso, Inc., 201 F.3d 168, 174 (2d Cir. 2000) (“[P]roof of a likelihood of confusion would create a presumption of irreparable harm, and thus a plaintiff would not need to prove such harm independently …. By the same token, however, if the plaintiff does not show likelihood of success on the merits, it cannot obtain a preliminary injunction without making an independent showing of likely irreparable harm.”); Opticians Ass’n of Am. v. Ind. Opticians of Am., 920 F.2d 187, 196–97 (3d Cir. 1990) (once a showing of likely confusion is made, the “inescapable conclusion is that there was also irreparable injury”); Gen. Mills, Inc. v. Kellogg Co., 824 F.2d 622, 625 (8th Cir. 1987) (irreparable injury is presumed once the moving party demonstrates probable success in proving a likelihood of confusion).
appropriate in the trademark infringement context. Until 2006, the presumption of irreparable harm was largely uncontroversial.\textsuperscript{7} For decades, courts in trademark infringement cases have presumed the element of irreparable harm upon a demonstration of infringement.\textsuperscript{8} Courts and commentators favored its application because of the basic underlying principles of trademark law and the specific damage resulting from trademark infringement.\textsuperscript{9}

Unlike patent and copyright law, both of which reward and motivate the rights holder, trademark law rests on the protection of a single, distinct source designator for a mark owner’s products or services, which also protects consumers from confusion, deceit, and inferior products. Through long-standing and continuous use of particular marks in connection with specific goods or services, trademark owners build up goodwill in their marks. This goodwill, in turn, reduces consumer search costs as consumers learn over time to recognize and rely on certain trademarks and brands as representations of high quality and favorable products or services. Thus, trademark law protects consumers by guaranteeing that the products or services they purchase under particular trademarks encompass certain qualities and attributes they expect. Furthermore, trademark law protects trademark owners by allowing them to build and maintain positive reputations among consumers through exclusive use of a single source designator for their products or services in the marketplace.\textsuperscript{10}

An infringer’s entry into the marketplace threatens protections afforded by trademark law. Consumers who encounter new products or services under a recognizable or familiar trademark are likely to believe those products or services emanate from or are related to the original source. This likelihood of confusion reflects the trademark owner’s loss of control over its mark. If the infringer’s products or services do not adhere to the quality or standard that originally imposed by the trademark owner, consumers will reconsider their loyalty to the brand. This loss in consumer confidence harms the trademark owner’s investment in its mark and can ultimately destroy or severely damage the trademark owner’s reputation. As the Seventh Circuit has explained in a post-\textit{eBay} and post-\textit{Winter} opinion affirming the entry of a preliminary injunction and without expressly relying on the plaintiff’s factual showing of irreparable harm:

If a significant number of consumers confused the [parties’] names and thought [the defendant’s] products were made by [the plaintiff], [the plaintiff] could be badly hurt. A trademark’s value is the saving in search costs made possible by the information that the trademark conveys about the quality of the trademark owner’s brand. The brand’s reputation for quality depends on the owner’s expenditures on product quality and quality control, service, advertising, and so on. Once the reputation is created, the firm will obtain greater profits because repeat purchases and word-of-mouth endorsements will add to sales and because consumers will be willing to

\textsuperscript{7} MCCARTHY, \textit{supra} note 3, § 30:47.
\textsuperscript{8} Id. (citing cases).
\textsuperscript{9} Id.
pay a higher price in exchange for a savings in search costs and an assurance of consistent quality. These benefits depend on the firm’s ability to maintain that consistent quality. When a brand’s quality is inconsistent, consumers learn that the trademark does not enable them to predict their future consumption experiences from their past ones. The trademark does not then reduce their search costs. They become unwilling to pay more for the branded than for the unbranded good, and so the firm no longer earns a sufficient return on its expenditures on promoting the trademark to justify them.¹¹

Once the owner has lost the ability to control its reputation and use of its mark in commerce, no amount of money can regain consumer confidence and put a trademark owner back in the position it was in prior to an infringer’s activity in the marketplace.¹²

While a trademark owner’s actual damages or a defendant’s profits gained from infringement may be quantifiable, the continuing damage to the trademark owner’s reputation, goodwill and consumer base is impossible to remedy without injunctive relief.¹³ Courts therefore have held a “likelihood of damage to reputation is by its nature ‘irreparable’” and traditionally presumed irreparable harm in trademark infringement cases upon a finding of a likelihood of confusion.¹⁴

Codification of this long-standing practice is especially important in light of the United States Supreme Court decisions in eBay v. MercExchange, LLC,¹⁵ which rejected an “automatic” application of permanent injunctive relief in patent infringement cases upon a finding of liability,¹⁶ and in Winter v. Natural Res. Def. Council, Inc.,¹⁷ which extended eBay into the preliminary injunction context. While eBay dealt with patent infringement and Winter arose under federal environmental law, some of the Supreme Court’s language has led numerous federal courts to reconsider the applicability of the irreparable harm presumption to trademark infringement cases.¹⁸ Other courts, however, have continued to apply the presumption, creating the split in the circuits addressed by this resolution.¹⁹

¹² McCarthy, supra note 3, § 30:2 (citing cases).
¹³ Id. § 30:47 (comparing monetary damages to “trying to un-ring a bell”).
¹⁴ Id.
¹⁶ 547 U.S. at 393–94.
¹⁹ See, e.g., Cmty. of Christ Copyright Corp. v. Devon Park Restoration, 634 F.3d 1005, 1012 (8th Cir. 2011) (“[The plaintiffs] face[] irreparable harm from [the defendants’] use of the [plaintiffs’] marks because in trademark law, injury is presumed once a likelihood of confusion has been established.”); Deckers Outdoor Corp. v. Does 1-100, 105 U.S.P.Q.2d 1894, 1898 (N.D. Ill. 2013)(“There is a ‘well-established presumption that injuries arising from Lanham Act violations are irreparable, even absent a showing of business loss.’” (quoting Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 16 (7th Cir. 1992)); Diamonds Direct USA, Inc. v. BJF Holdings, Inc., 895 F. Supp. 2d 752, 761 (E.D. Va. 2012) (“In Lanham Act cases


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**eBay and Subsequent Cases**

In 2006, the U.S. Supreme Court held in eBay that courts should not automatically grant injunctive relief upon a finding of patent infringement.\(^{20}\) Two years later, the Court held in Winter, that plaintiffs seeking preliminary relief must demonstrate that irreparable harm in the absence of an injunction is not just a possibility.\(^{21}\) eBay dealt with the specific issue of non-practicing patent “trolls,” (i.e., patent owners that use patents “not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.”),\(^{22}\) while Winter addressed whether the Navy’s use of sonar during training exercises would harm marine mammals in the vicinity.\(^{23}\)

The eBay Court based its decision on the language of the Patent Act of 1952, which provides for injunctive relief in accordance with “principles of equity.”\(^{24}\) Ultimately, the Court confirmed the long-standing principle that courts must consider and weigh the traditional four-part test for permanent injunctive relief set forth above before deciding whether that relief is warranted.\(^{25}\)

Notably, there is no issue in trademark law analogous to the facts at issue in eBay (or Winter). A patent involves the right to “exclud[e] everyone from making, using or vending the patented article, without the permission of the patentee.”\(^{26}\) The purpose behind a patent is not only to reward the inventor, but to “encourage a public disclosure of inventions so that after the [patent] expires, the public is free to take unrestricted advantage of the invention.”\(^{27}\) The invention of new devices or processes is beneficial to society, and the profit incentive for patent holders therefore induces creativity.

On the other hand, trademark laws prevent consumer confusion and damage to the trademark owner’s good will. Unlike patent rights, trademark rights do not exist unless the mark is actually being used in commerce. Therefore, the concerns about patent trolls are not as prevalent in the trademark context. Thus, the injury in the trademark involving trademark infringement, a presumption of irreparable injury is generally applied once the plaintiff has demonstrated a likelihood of confusion, the key element in an infringement case.” (quoting Scotts v. United Indus. Corp., 315 F.3d 264, 273 (4th Cir. 2002) (internal quotation marks omitted)); Pure Fishing, Inc. v. Redwing Tackle, Ltd., 888 F. Supp. 2d 726, 737 (D.S.C. 2012) (“Generally, in the Fourth Circuit, the trademark owner is entitled to injunctive relief against an infringer because, ‘regardless of any potential injury to sales or to the mark itself, trademark infringement primarily represents an injury to reputation.’ The Fourth Circuit, therefore, holds that a permanent injunction may be granted without a specific hearing on the issue when there already have been findings on liability.” (quoting Lone Star Steakhouse & Saloon v. Alpha of Va., 43 F.3d 922, 939 (4th Cir. 1995)); Hanley-Wood LLC v. Hanley Wood LLC, 783 F. Supp. 2d 147, 151 (D.D.C. 2011) (“Generally, trademark infringement, by its very nature, carries a presumption of harm.”)).

\(^{20}\) 547 U.S. at 393–94.

\(^{21}\) 555 U.S. at 22.

\(^{22}\) 547 U.S. at 396.

\(^{23}\) 555 U.S. at 7.


\(^{25}\) 547 U.S. at 394.

\(^{26}\) Bloomer v. McQuewan, 55 U.S. 539, 549 (1852).

\(^{27}\) EARL W. KINTNER & JACK L. LAHR, AN INTELLECTUAL PROPERTY PRIMER 7-11 (2d ed. 1982).
infringement context is fundamentally different from the injury in the patent infringement context, which eBay addressed.

In fact, the eBay Court elected to compare the Patent Act to the Copyright Act, not the Lanham (Trademark) Act. The Court held its rejection of a presumption of irreparable harm in patent cases was "consistent with our treatment of injunctions under the Copyright Act." Furthermore, the Court acknowledged that it had "consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed," and concluded that it was appropriate to apply the same principles from copyright cases to patent cases.

By contrast, the presumption of irreparable harm in trademark infringement cases only applies to one of four factors properly taken into account in the inquiry into whether injunctive relief is appropriate. The presumption only applies once the trademark owner proves infringement (for a permanent injunction) or a likelihood of success of the same (for a preliminary injunction). Even then, a defendant may rebut the presumption by, for example, documenting the mark owner’s delay in seeking relief. Likewise, courts will deny injunctive relief if legal remedies such as an award of actual damages will make the mark owner whole or if the balance of hardships weighs in the defendant’s favor. By its nature, the presumption of irreparable harm is not a categorical or automatic rule. Therefore, consistent with the Court’s decision in eBay, injunctions do not automatically follow a determination of trademark infringement.

Despite these distinctions, and the special importance of the presumption in the trademark context, federal courts have since grappled with the issue of whether the rule from eBay should extend to the presumption of irreparable harm in trademark cases. Although most opinions continuing to apply a presumption of irreparable harm have not expressly addressed the implications of eBay, some have held either that eBay is inapplicable in trademark cases altogether, or that it does not apply outside of the permanent injunction context.

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28 Id.
29 Id. at 392–93.
32 See, e.g., Reservoir, Inc. v. Truesdell, 1 F. Supp. 3d 598, 617 (S.D. Tex. 2014) (denying injunctive relief because "monetary damages can adequately compensate Plaintiffs for past injury they prove they have suffered").
34 See, e.g., Basis Int’l Ltd. v. Research in Motion Ltd., 827 F. Supp. 2d 1302, 1310 n.5 (D.N.M. 2011) ("I agree with [the plaintiff] that [eBay] does not change the analysis here. Unlike patent cases, trademark cases involve intangibles like the trademark owner’s reputation and goodwill.")
In contrast, many courts have held that the presumption of irreparable harm no longer applies after *eBay* and *Winter*, and others dealing with injunctive relief in trademark infringement cases since these decisions have questioned the validity of the presumption of irreparable harm, without affirmatively taking a position one way or the other.

In fact, courts “rejecting” the presumption often find irreparable harm using the same evidence and analysis used to find a likelihood of or success on the merits. If the presumption of irreparable harm rests on a finding of infringement, and establishing actual irreparable harm rests on likelihood of success on the merits of an infringement claim, then, there is no difference in either analysis. This duplicative analysis may prove inefficient, but application of the presumption eliminates this additional step.

In some cases, plaintiffs have resorted to demonstrating their entitlement to injunctive relief through independent factual showings of irreparable harm, often arising from the loss of control over their reputations. These additional showings increase the

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36 See, e.g., *Paulsson Geophysical Servs.*, 529 F.3d at 312 (holding there is “no need to decide whether a court may presume irreparable injury upon finding a likelihood of confusion in a trademark case . . . . [Plaintiff] had lost control of the quality of the technology that was being associated with its mark. Such damage to [Plaintiff’s] goodwill . . . could not be quantified. Thus, the damage to [Plaintiff] could not be undone by monetary remedies.”); *Country Fare LLC v. Lucerne Farms*, 102 U.S.P.Q.2d 1311, 1314 (D. Conn. 2011) (finding it “unnecessary” to address continued viability of presumption in light of plaintiff’s factual showing of irreparable harm); *Happy Sumo Sushi Inc. v. Yapona*, 89 U.S.P.Q.2d 1380, 1386 (D. Utah 2008) (declining to pass on continued viability of presumption of irreparable harm after *eBay* on ground that “[the plaintiff] has shown irreparable harm by the loss of good will, business reputation, and loss of control over its trade dress”); *TGI Friday’s Inc. v. Great Nw. Rests., Inc.*, 652 F. Supp. 2d 763, 771 (N.D. Tex. 2009) (granting preliminary injunction and noting that court “need not presume irreparable injury because . . . [the plaintiff] has established a substantial threat of irreparable injury without such a presumption”).

37 See, e.g., *Seed Servs., Inc. v. Winsor Grain, Inc.*, 868 F. Supp. 2d 998, 1005 (E.D. Cal. 2012) (rejecting the presumption but nevertheless finding a likelihood of irreparable harm based on the threat of the loss of the trademark owner’s control over its business reputation as a result of the infringer’s activity; see also, e.g., *CJ Prods. LLC v. Snuggly Plushes LLC*, 809 F. Supp. 2d 127, 156 (E.D.N.Y. 2011) (rejecting presumption but nevertheless finding that “[d]ue to the high likelihood of confusion—and instances of actual confusion—between defendants’ and plaintiffs’ products, plaintiffs’ reputation and goodwill will be substantially damaged without the issuance of a preliminary injunction.”); *Sound Surgical Techs., LLC v. Leonard A. Rubenstein, M.D., P.A.*, 734 F. Supp. 2d 1262, 1277-78 (M.D. Fla. 2010) (“[E]ven if Plaintiff is not entitled to a presumption of irreparable harm, the Court finds that Plaintiff has shown a substantial threat of consumer confusion and resulting irreparable harm to its reputation and the goodwill represented by its marks.”); *Montblanc-Simplo Gmbh v. Colibri Corp.*, 692 F. Supp. 2d 245, 258 (E.D.N.Y. 2010) (finding that prevailing plaintiffs had successfully demonstrated *eBay’s* requirements for permanent injunctive relief
cost of litigation, delay access to justice and make the issuance of injunctions inconsistent. While for others, the unavailability of the presumption has proven fatal to their requests for injunctive relief.\(^{38}\)

**Conclusion**

Infringement of a trademark harms the mark’s owner in a manner that strikes at the very nature of the owner’s rights to the mark; it also risks deceiving the public into making mistaken purchasing decisions. When infringement occurs, the mark owner therefore should receive the benefit of a rebuttable presumption of irreparable harm for purposes of the mark owner’s entitlement to injunctive relief to avoid further damage to its goodwill and reputation, as well as confusion among the public.

The policy underlying this Resolution does not conflict with the Supreme Court’s decisions in *eBay* or *Winter*, because the mark owners still will need to satisfy the other prerequisites for injunctive relief. Moreover, because the presumption of irreparable harm in trademark cases is not and never has been an automatic or categorical rule, defendants will continue to have the opportunity to rebut it and thereby defeat the availability of injunctive relief even if the other relevant factors favor the entry of that relief. Implementation of the policy underlying this Resolution would merely confirm the long-standing role of the presumption in trademark litigation.

Respectfully submitted,

George W. Jordan III, Chair  
Section of Intellectual Property Law  
February 2020

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\(^{38}\) See, e.g., *Mirina Corp. v. Marina Biotech*, 770 F. Supp. 2d 1153, 1162 (W.D. Wash. 2011) (finding that plaintiff had raised serious questions going to the merits of its infringement claim but nevertheless denying preliminary injunction on ground that “[p]laintiff has entirely failed to submit any proof [of irreparable harm] beyond speculation as to its reputation or goodwill in the relevant market, which leaves the court with no basis upon which to evaluate any intangible harm”).
1. Summary of the Resolution(s).

This Resolution supports a rebuttable presumption of irreparable harm for a preliminary or permanent injunction in trademark infringement cases. This Resolution also supports amending Section 34 of the Lanham Act, 15 U.S.C. § 1116, to provide for such a presumption.

2. Approval by Submitting Entity.

The Section of Intellectual Property Law Council approved the Resolution on August 9, 2014.

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

No.

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

None.

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

Not applicable.

6. Status of Legislation. (If applicable)

None yet.

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

This Resolution will provide Association support for amending the remedial section of the Lanham Act, 15 U.S.C. § 1116, regarding injunctive relief, as well as for the submission of an amicus brief in an appropriate case addressing the showing of irreparable harm necessary to support the entry of injunctive relief in trademark infringement or unfair competition litigation.
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.** (If applicable)

There are no known conflicts of interest regarding this Resolution and Report.

10. **Referrals.**

The Resolution and Report will be 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. **Name and Contact Information (Prior to the Meeting).** Please include name, telephone number and e-mail address. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

William L. LaFuze  
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12. **Name and Contact 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 a rebuttable presumption of irreparable harm for purposes of preliminary or permanent injunctive relief in trademark infringement cases. This Resolution also supports amending Section 34 of the Lanham Act, 15 U.S.C. § 1116, to provide for such a presumption.

2. Summary of the issue that the resolution addresses.

This Resolution supports that when a trademark owner seeks injunctive relief in an infringement case, a rebuttable presumption of irreparable harm shall exist when there is a finding of reasonable likelihood of success on the merits of the mark owner’s infringement claim (for a preliminary injunction or temporary restraining order) or a finding of infringement (for a permanent injunction).

3. Please explain how the proposed policy position will address the issue.

This Resolution would allow the ABA to file an amicus brief to support resolution of a pronounced split in the federal circuits on a substantial question of federal law and to support an amendment to the remedial section of the Lanham Act, 15 U.S.C. § 1116, regarding injunctive relief.

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

The Section of Intellectual Property Law is unaware of any ABA or non-ABA minority views or opposition.
RESOLVED, That the American Bar Association supports a right that would legally compel the disclosure of internet domain name registrant contact information by any U.S. entity that administers and maintains such contact information, upon receipt of a notice alleging a legitimate interest based on the registrant’s violations of applicable laws relating to intellectual property protections.
REPORT

This Resolution supports a public access system ensuring the right of intellectual property owners to access contact information for registrants of domain names in the WHOIS database\(^1\) administered by the Internet Corporation for Assigned Names and Numbers (ICANN), for the limited purpose of enforcing rights against violations of applicable law relating to intellectual property protections. Under such an access system, relevant entities maintaining domain registrant contact information would be legally compelled to disclose pertinent contact information once an intellectual property owner establishes a legitimate interest in a legal right potentially violated by the domain registrant at issue.

For decades, a straightforward process was available to intellectual property owners to obtain the contact information for an entity that registered a domain name confusingly similar to a registered trademark, or whose website offered counterfeit, pirated or otherwise infringing content, products or services. After the May 25, 2018 effective date of the European Union’s General Data Protection Regulation (“GDPR”), it has become difficult, if not impossible, to locate such information even from registrars and registry services located outside of the European Economic Area.\(^2\)

The GDPR set a precedent in data privacy law, and a number of states in the U.S. have since introduced new legislation inspired by the GDPR.\(^3\) However, the GDPR and other similar legislation overlook the need for intellectual property owners, among others, to identify and contact entities engaging in infringing activities online that violate applicable intellectual property laws.

Congress appears to be considering comprehensive federal legislation regarding data privacy and the processing of personal information.\(^4\) Discussions are still in the early stages, yet a complicated patchwork of state laws is emerging in the area of data privacy. The new California Consumer Privacy Act (“CCPA”), effective 2020, figures to be a prominent component of this patchwork. Similar to the GDPR, the current version of the CCPA overlooks the need for intellectual property owners to enforce their rights against online infringers. The CCPA does allow the state’s attorney general to adopt regulations establishing “any exceptions necessary to comply with state or federal law, including, but not limited to, those relating to trade secrets and intellectual property rights, within one year of passage of this title and as needed thereafter.”\(^5\) However, the initial set of proposed regulations for the CCPA were released in October 2019, and the regulations do not address intellectual property in any way.\(^6\)

\(^1\) See generally https://whois.icann.org/en/about-whois.
\(^2\) The European Economic Area includes the twenty-seven European Union Member States, Iceland, Lichtenstein and Norway.
\(^3\) For example, Illinois H.B. 3358, Massachusetts Bill S.120, Minnesota H.F. 2917, New Jersey A-4902, Pennsylvania H.B. 1049, and Hawaii S.B. 418.
\(^5\) Cal. Civil Code § 1798.185(a)(3).
Any forthcoming data privacy legislation should consider the right of intellectual property owners to have access to registrant contact information upon the showing of a legitimate interest in enforcing intellectual property rights against a registrant engaged in violations of applicable law relating to intellectual property protections, including, but not limited to, cybersquatting, trademark or copyright infringement, dilution, piracy, counterfeiting, or unfair competition. For example, under trademark law, such a legitimate interest could be established by showing ownership of a name or mark that is confusingly similar to the domain name at issue with the relevant registrar or registry service. Under copyright law, an individual or entity could establish a similar legitimate interest by showing ownership of a copyright protected work that is copied in website content available through the domain at issue, along with any other claims or evidence necessary to make the disclosure of registrant information permissible under applicable law.

**Impact of Data Privacy Regulations on the Enforcement of Intellectual Property Rights Online**

The WHOIS database is a protocol administered by ICANN and used to make a variety of information about a given domain name available to the public. For example, most WHOIS queries disclose the date a domain name was registered, the date it was last updated with the registrar, and the date the domain’s registration will expire if not renewed.

Until the GDPR’s effective date in May 2018, contact information for most domain registrants was also generally available to the public unless the registrant paid for a privacy or proxy service. Privacy services have allowed persons or entities to be listed as the registered domain name holder, but alternative and reliable contact information such as an anonymized mail-forwarding email address is substituted for the true registrant’s personal contact information. Proxy services similarly have provided alternate contact information for the registrant, but proxy service providers also are listed as the registered domain name holder. Both privacy and proxy services are still available to domain registrants after the GDPR.

**Settlement Discussions Only Occur When the Domain Registrant Can Be Contacted**

When a privacy or proxy service is used, the registrant at least can be notified of the trademark or copyright owner’s concerns about any alleged violations of applicable law relating to intellectual property protections. Communications with such registrants can often lead to a cost-effective settlement of the matter.

Such settlement of a trademark dispute might include a transfer or cancellation of the domain registration, without any need for costly litigation or the filing of a complaint under ICANN’s Uniform Domain Name Dispute Resolution Policy (“UDRP”), which requires a fee of at least $1,500 USD. Further, a successful UDRP proceeding is determined based on a record set forth solely by the complaint and any formal response
by the registrant. Therefore, a UDRP complaint should include evidence establishing that, among other things, the registrant had no rights or legitimate interest in the domain name, and that the domain name was registered and used in bad faith. The content of communications with domain registrants, among other evidence that could only be accessible after learning the registrant’s email address, can be important to proving such factors in a UDRP proceeding. For example, communications can reveal whether the registrant has plans to use the domain name in connection with a bona fide offering of goods or services in a way that could show registrant has a legitimate interest in the domain. Similarly, communications revealing the registrant’s location in a jurisdiction where the complainant is not active may indicate the domain was not registered in bad faith because the registrant may not have been aware of the complainant’s mark when the domain was registered.

With respect to online copyright violations, communications with a domain registrant are crucial for copyright owners to protect their exclusive rights and exercise the notice and takedown procedure available under the Digital Millennium Copyright Act (“DMCA”) in a cost-effective manner. When a copyright owner simply wants infringing content removed from a website, oftentimes a letter or email correspondence to the domain registrant is enough to cause the removal. If the registrant posted the infringing content, the registrant may not know such content violated someone’s copyright and be more than willing to remove it to avoid ongoing liability. If a user of the registrant’s website posted the infringing content, then the DMCA provides for immunity from copyright infringement for website operators removing infringing content upon receipt of a formal notice from the copyright owner. Accordingly, registrants operating websites with infringing user-generated content are incentivized to comply with copyright-based takedown requests. However, these simple options are not available if the registrant cannot be contacted by a copyright owner concerned about infringement. If a copyright owner is unable to contact a registrant potentially involved with infringing content, litigation becomes the only recourse even if a simple takedown is all the copyright owner seeks. Such litigation leads to additional legal measures, such as a subpoena or other court order, to compel disclosure of a domain registrant’s contact information, often accompanied by a significant financial burden in comparison to a simple exchange of correspondence between cooperative parties.

Before the GDPR, even if the registrant paid for a privacy or proxy service, such services would list an anonymized email address that could be used reliably to direct communications to the registrant. While there is no guarantee the registrant would respond, these anonymized email addresses still provide a means to communicate concerns over an alleged dispute before initiating costly legal action that may not be necessary.

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8 Uniform Domain Name Dispute Resolution Policy, Paragraphs 4(a-c).
9 See 17 U.S.C. § 512(c).
Unavailability of Domain Registrant Information After the GDPR

Due to large potential penalties under the GDPR for the unauthorized disclosure of personal data, numerous registrars now automatically hide or redact registrant names and contact information entirely. ICANN also is struggling to implement a GDPR-compliant replacement access model for the WHOIS database.

Without any clear obligation to disclose registrant contact information, obtaining access to such information is now at the discretion of each of the thousands of ICANN-accredited registrars and registry services. Some registrars, such as eNom, an affiliate of the Canadian company Tucows, provide a tiered access system where enforcement entities can provide “name, legitimate interest for access, and domain name(s) for which access is desired” as part of an application process to request access to a “tiered registration directory.” Other registrars, such as the French company OVH, use anonymized email addresses to direct communications to registrants without disclosing their identity, similar to how many paid privacy services work.

Other registrars are less forthcoming about an alternate means of accessing registrant information and may bury trademark and copyright complaint procedures in website policies and agreements. Certain registrars expressly prioritize the privacy concerns of customers over the interests of intellectual property owners and other enforcement entities. For example, Namecheap has a published policy stating it will forward “a valid and formal notice of a trademark complaint,” provided the notice meets five specific requirements, to the allegedly infringing customer. However, Namecheap is also clear that after the GDPR, it “will not disclose any personal information about our customers unless required by law or pursuant to a court order or subpoena.”

10 Council Regulation 2016/679, General Data Protection Regulation, art. 83, 2016 O.J. (EU) (“Non-compliance … shall … be subject to administrative fines up to 20 000 000 EUR, or … up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher”).
11 Examples include Alibaba Cloud, DENIC, EURid, Namegear, Namecheap, Network Solutions and OVH.
13 Id. (“Many registrars are not even complying with the continuing mandatory minimum information requirements of ICANN … many have redacted every single WHOIS data field relating to registrant contact information as the default”).
14 https://www.enom.com/help/abusepolicy.aspx#fragment-4
15 See, e.g., https://www.ovh.co.uk/domains/owo_service.xml.
17 https://www.namecheap.com/about/privacy-commitment/.
Emerging Patchwork of State Consumer Privacy Laws and Registrar Access Models for WHOIS Information

In the wake of the GDPR, at least nineteen states in the U.S. have introduced legislation\textsuperscript{18} or enacted broad data privacy laws that could have a similar impact on the availability of contact information through WHOIS in the U.S., to the extent it was not already affected by the GDPR.\textsuperscript{19} Consent requirements in these new state laws generally rest on opt-outs rather than the affirmative opt-in consent required under the GDPR, but in theory would still provide violators of intellectual property rights with a cost-free means of avoiding detection for acts violating federal or state law should they choose to exercise the opt-out.

There is a reasonable compromise between the interests of intellectual property owners and privacy rights with respect to domain registration and the information available through the WHOIS protocol. The many competing ways in which registrars handle this issue have caused WHOIS, administered by ICANN since 1998, to become far less useful for the enforcement of intellectual property rights.

The table below illustrates representative samples of the numerous ways registrars in jurisdictions around the world use different models for granting access to domain registrant contact information since the GDPR became effective. ICANN still contractually requires accredited registrars to provide an email contact for reports of abuse, including illegal activity such as violations of applicable intellectual property laws, but it does not compel registrars to do anything more than a cursory investigation based on such reports.\textsuperscript{20} Some registrars seem to have no intention of cooperating with access requests based on intellectual property violations, and advise intellectual property owners to initiate a UDRP proceeding or seek a subpoena or court order if there is interest in obtaining an infringing registrant’s contact information. The tiered access model offered by eNom and Tucows appears to be the most practical compromise between privacy and intellectual property interests, but very few registrars appear to have adopted such an access model.

<table>
<thead>
<tr>
<th>Registrar</th>
<th>Location</th>
<th>Access Model</th>
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<tbody>
<tr>
<td>Alibaba Cloud</td>
<td>China</td>
<td>Email registrar abuse contact</td>
</tr>
<tr>
<td>DENIC</td>
<td>Germany</td>
<td>Submit paper application form</td>
</tr>
<tr>
<td>eNom/Tucows</td>
<td>Canada</td>
<td>Tiered access based on legitimate interest</td>
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</tbody>
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\textsuperscript{18} See \url{http://www.ncsl.org/research/telecommunications-and-information-technology/consumer-data-privacy.aspx}.

\textsuperscript{19} See Justin P. Webb and Sarah A. Sargent, \textit{An American Perspective on the GDPR One Year In}, 11 LANDSLIDE 5, A.B.A. Sec. Intell. Prop. L. (May/June 2019), \url{https://www.americanbar.org/groups/intelectual_property_law/publications/landslide/2018-19/may-june/an-american-perspective-the-gdpr-one-year-in/} ("Similar to the GDPR, U.S. companies will be forced to choose between providing the more robust privacy protections in the CCPA only to California residents or spending more money and time to provide those rights to all individuals").

\textsuperscript{20} Internet Corporation for Assigned Names and Numbers, 2013 Registrar Accreditation Agreement, available at \url{https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en}.
<table>
<thead>
<tr>
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<th>Submitter</th>
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<tbody>
<tr>
<td>EURid</td>
<td>Belgium</td>
<td>Submit email request</td>
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<tr>
<td>GoDaddy</td>
<td>U.S.</td>
<td>Available depending on location of registrant</td>
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<tr>
<td>Namecheap</td>
<td>U.S.</td>
<td>Subpoena/court order/UDRP</td>
</tr>
<tr>
<td>Namegear</td>
<td>Japan</td>
<td>Submit request to “Privacy Information Support Contact”</td>
</tr>
<tr>
<td>Network Solutions</td>
<td>U.S.</td>
<td>Submit “Report Abuse” web form</td>
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<tr>
<td>OVH</td>
<td>France</td>
<td>Anonymized auto-forwarding email address</td>
</tr>
<tr>
<td>Public Domain Registry</td>
<td>India</td>
<td>Subpoena/court order/UDRP</td>
</tr>
</tbody>
</table>

**Right of Access to WHOIS Information for Dispute Resolution**

Any new law on data privacy should grant an express right to intellectual property owners for access to domain registrant information in the WHOIS database for the limited purposes of enforcement against persons or entities engaged in violations of applicable law relating to intellectual property protections.

The Resolution does not suggest any specific information access model given that any form of access likely will need to be compliant in jurisdictions outside the U.S., and particularly in Europe under the GDPR. Regardless of the form of access model, access to registrant information in the WHOIS database should be restored for the effective enforcement of intellectual property rights online. The restoration of WHOIS access upon a showing of a legitimate intellectual property dispute would provide opportunities for amicable resolution that are not currently available. Parties could negotiate a transfer of the domain name at issue, allow the domain name to expire without renewal, alter or remove problematic content, or clarify a good faith basis for registering and using the domain name. Under current circumstances, there is little opportunity to initiate an amicable dispute resolution.

The current need to litigate, obtain a court order, or initiate a UDRP proceeding just to identify an infringing entity is overly expensive and burdensome to parties—justifiably seeking to enforce rights granted to them under law—while making it easier for infringers to hide from the parties they damage.

An access model allowing enforcers of intellectual property rights to view contact information for an allegedly infringing registrant for the limited purposes of intellectual property enforcement would respect individual privacy rights while also ensuring that intellectual property owners can reach entities that are violating applicable laws, such as the Lanham Act and the Copyright Act. Under U.S. data privacy laws, of which the CCPA is the most restrictive, such an access model would identify the enforcement of intellectual property rights as among the specific reasons an opt-out request can be refused. The
proposed Resolution does not intend to comment on European law, but in theory, such an access model would also help establish that a violation of applicable intellectual property rights is a legitimate interest which is not overridden by the interests or fundamental rights or freedoms of the registrant under the GDPR.\footnote{Council Regulation 2016/679, General Data Protection Regulation, art. 6, 2016 O.J. (EU) (“Processing shall be lawful only if and to the extent that … processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data…”).}

**Conclusion**

The American Bar Association supports a public access system that would legally compel relevant entities to disclose contact information for persons or entities plausibly alleged to have engaged in violations of applicable law relating to intellectual property protections. Under such an access system, entities including, but not limited to, registrars and registry services should be legally required to disclose such contact information once the requesting party has established a legitimate interest in a legal right potentially violated by the domain registrant at issue.

Respectfully submitted,

George W. Jordan III  
Chair, Section of Intellectual Property Law  
February 2020
1. **Summary of the Resolution.**

   This Resolution supports a right that would legally compel the disclosure of domain registrant contact information by any U.S. entity that administers and maintains such contact information, upon receipt of a notice alleging a legitimate interest based on the registrant’s violations of applicable laws relating to intellectual property protections.

2. **Approval by Submitting Entity.**

   The Section of Intellectual Property Law Council approved the resolution on November 5, 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?**

   At the 2002 Midyear Meeting, the House of Delegates adopted Resolution 111a, which favors in principle a requirement by the Internet Corporation of Assigned Names and Numbers ("ICANN") that all accredited domain name registrars provide continued, free access to WHOIS information, consisting of basic contact information obtained from domain name registrants. The resolution is consistent with that policy.

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

   Not applicable.

6. **Status of Legislation.**

   No federal legislation yet. The California Consumer Privacy Act (CCPA) becomes effective in 2020, and is subject to amendment.

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

   This Resolution will provide Association support for any forthcoming federal or state
legislation or regulations regarding data privacy, including regulations or amendments to the California Consumer Privacy Act.


Adoption of the recommendations will not result in additional direct or indirect costs to the Association.


There are no known conflicts of interest regarding this recommendation.

10. Referrals.

The Resolution and Report will be 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. Name and Contact Information
   (Prior to the Meeting. Please include name, telephone number and e-mail address). Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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12. Name and Contact 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.

Lisa A. Dunner  
Section of Intellectual Property Law Delegate to the House of Delegates  
Dunner Law PLLC  
Washington, DC
EXECUTIVE SUMMARY

1. **Summary of the Resolution.**

The Resolution supports a right that would legally compel the disclosure of domain registrant contact information by any U.S. entity administering and maintaining such contact information, upon receipt of a notice alleging a legitimate interest based on the registrant’s violations of applicable laws relating to intellectual property protections.

2. **Summary of the issue that the resolution addresses.**

The Resolution proposes that intellectual property owners challenging violations of applicable law relating to intellectual property protections should have a right to access the contact information of a domain registrant based upon plausible allegations of an intellectual property violation by such registrant. In this way, the parties would have an opportunity to address the dispute directly without costly litigation or a costly proceeding under the Uniform Domain Name Dispute Resolution Policy.

3. **Please explain how the proposed policy position will address the issue.**

The Resolution would allow the ABA to provide comments to support the consideration of intellectual property rights in any federal or state legislation or regulations regarding data privacy, including regulations or amendments to the California Consumer Privacy Act.

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

The Section of Intellectual Property Law is unaware of any ABA or non-ABA minority views or opposition.
RESOLVED, That the American Bar Association approves the following paralegal education programs: Pikes Peak Community College, Paralegal Program, Colorado Springs, CO; Palm Beach State College, Paralegal Program, Palm Beach Gardens, FL; and Montgomery College, Paralegal Studies Program, Rockville, MD; and

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal education programs: American River College, Legal Assisting Program, Sacramento, CA; Community College of Aurora, Paralegal Program, Denver, CO; Miami Dade College, Paralegal Studies Program, Miami, FL; Ball State University, Legal Studies Program, Muncie, IN; Louisiana State University, Paralegal Program, Baton Rouge, LA; Lansing Community College, Paralegal Program, Lansing, MI; Hamline University, Legal Studies Program, St. Paul, MN; Winona State University, Paralegal Program, Winona, MN; New Hampshire Technical Institute, Paralegal Studies Program, Concord, NH; Rowan College at Burlington County, Paralegal Program, Mount Laurel, NJ; Rowan College of South Jersey, Paralegal Program, Sewell, NJ; Union County College, Paralegal Studies Program, Cranford, NJ; Hilbert College, Legal Studies Program, Hamburg, NY; LaGuardia Community College, Paralegal Studies Program, Long Island City, NY; Schenectady County Community College, Paralegal Studies Program, Schenectady, NY; Lakeland Community College, Paralegal Studies Program, Kirtland, OH; Peirce College, Legal Studies Program, Philadelphia, PA; Highline College, Legal Studies Program, Des Moines, WA; and Lakeshore Technical College, Legal Assistant Program, Cleveland, WI; and

FURTHER RESOLVED, That the American Bar Association withdraws the approval of the following paralegal education programs: Midstate College, Paralegal Studies Program, Peoria, IL; Sullivan University, Lexington, Legal Studies Program, Lexington, KY; University of Louisville, Paralegal Studies Program, Louisville, KY; East Central University, Legal Studies Program, Ada, OK; University of Tulsa, Paralegal Studies Program, Tulsa, OK; and Volunteer State Community College, Paralegal Studies Program, Gallatin, TN; and

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the August 2020 Annual Meeting of the House of Delegates for the following paralegal
education programs: California State University, East Bay, Paralegal Studies Program, East Bay, CA; De Anza College, Paralegal Studies Program, Cupertino, CA; Fullerton College, Paralegal Studies Program, Fullerton, CA; University of California, Riverside, Paralegal Studies Program; Riverside, CA; West Los Angeles College, Paralegal Studies Program, Culver City, CA; Manchester Community College, Paralegal Studies Program, Manchester, CT; University of Hartford, Paralegal Studies Program, West Hartford, CT; Wesley College, Legal Studies Program, Dover, DE; Valencia College, Paralegal Studies Program, Orlando, FL; University of North Georgia; Paralegal Program, Gainesville, GA; Illinois Central College, Paralegal Program, Peoria, IL; MacCormac College, Paralegal Studies Program, Chicago, IL; South Suburban College, Paralegal/Legal Assistant Program, South Holland, IL; Bay Path University, Legal Studies Program, Longmeadow, MA; North Shore Community College, Paralegal Program, Danvers, MA; Suffolk University, Paralegal Studies Program, Boston, MA; Harford Community College, Paralegal Program, Bel Air, MD; Atlantic Cape Community College, Paralegal/Law Program, Reno, NV; Marist College, Paralegal Program, Poughkeepsie, NY; Westchester Community College (SUNY), Paralegal Studies Program, Valhalla, NY; Meredith College, Paralegal Program, Raleigh, NC; Kent State University, Paralegal Studies Program, Kent, OH; Rhodes State College, Paralegal/Legal Assisting Program, Lima, OH; Clarion University, Paralegal Studies Program, Clarion, PA; Villanova University, Paralegal Program, Villanova, 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 Community College, Paralegal Studies Program, Harriman, TN; Amarillo College, Legal Studies Program, Amarillo, TX; 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; and Milwaukee Area Technical College, Paralegal Program, Milwaukee, WI.
REPORT

In August 1973, the House of Delegates of the American Bar Association adopted the Guidelines for the Approval of Legal Assistant Education Programs as recommended by the Special Committee on Legal Assistants, now known as the Standing Committee on Paralegals (https://www.americanbar.org/content/dam/aba/administrative/paralegals/ls_prlgs_2018_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.

Approval

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.
Pikes Peak Community College, Paralegal Program, Colorado Springs, CO
Pikes Peak Community College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Legal Technician Certificate.

Palm Beach State College, Paralegal Program, Palm Beach Gardens, FL
Palm Beach State College is a four-year college accredited by the Southern Association of Colleges and Schools. The College offers a Paralegal Associate of Science Degree and a Paralegal Post-Baccalaureate Certificate.

Montgomery College, Paralegal Studies Program, Rockville, MD
Montgomery 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 Paralegal Studies Certificate.

Reapproval
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:

American River College, Legal Assisting Program, Sacramento, CA
American River College is a community college accredited by the Western Association of Schools and Colleges. The College offers an Associate of Arts in Legal Assisting Degree and a Legal Assisting Certificate.

Community College of Aurora, Paralegal Program, Denver, CO
Community College of Aurora is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies, an Associate of Applied Science Degree in Management with Paralegal Emphasis and a Paralegal Certificate.

Miami Dade College, Paralegal Studies Program, Miami, FL
Miami Dade College is a four-year college accredited by the Southern Association of Colleges and Schools. The College offers an Associate of Science Degree in Paralegal Studies.

Ball State University, Legal Studies Program, Muncie, IN
Ball State University is a four-year university accredited by the Higher Learning Commission. The University offers a Bachelor of Arts Degree in Public Law, a Bachelor of Arts Degree in Business Law, a Bachelor of Science Degree in Public Law and a Bachelor of Science Degree in Business Law.

Louisiana State University, Paralegal Program, Baton Rouge, LA
Louisiana State University is a four-year university accredited by the Southern
Association of Colleges and Schools. The University offers a Post-Baccalaureate Certificate in Legal Studies.

Lansing Community College, Paralegal Program, Lansing, MI
Lansing Community College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Business Degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.

Hamline University, Legal Studies Program, St. Paul, MN
Hamline University is a four-year university accredited by the Higher Learning Commission. The University offers a Paralegal Certificate in conjunction with a Bachelor's degree and a Paralegal Post-Baccalaureate Certificate.

Winona State University, Paralegal Program, Winona, MN
Winona State University is a four-year university accredited by the Higher Learning Commission. The University offers a Bachelor of Science Degree in Legal Studies.

New Hampshire Technical Institute, Paralegal Studies Program, Concord, NH
New Hampshire Technical Institute is a community college accredited by the New England Commission of Higher Education. The College offers an Associate of Applied Science Degree in Legal Studies, a Certificate in Legal Studies and a Legal Nurse Consultant Certificate.

Rowan College at Burlington County, Paralegal Program, Mount Laurel, NJ
Rowan College at Burlington County 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.

Rowan College of South Jersey, Paralegal Program, Sewell, NJ
Rowan College of South Jersey 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 Paralegal Certificate.

Union County College, Paralegal Studies Program, Cranford, NJ
Union County College is a community college accredited by Middle States Association of Colleges and Schools. The College offers an Associate of Science Degree in Paralegal Studies, an Associate of Applied Science Degree in Paralegal Studies and a Paralegal Studies Certificate.

Hilbert College, Legal Studies Program, Hamburg, NY
Hilbert College is a four-year college accredited by Middle States Association of Colleges and Schools. The College offers a Bachelor of Science Degree in Legal Studies and an Associate of Applied Science Degree in Legal Studies.

LaGuardia Community College, Paralegal Studies Program, Long Island City, NY
LaGuardia 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 Paralegal Studies Certificate.

Schenectady County Community College, Paralegal Studies Program, Schenectady, NY
Schenectady County 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.

Lakeland Community College, Paralegal Studies Program, Kirtland, OH
Lakeland Community College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Business Degree in Paralegal Studies and a Paralegal Studies Certificate.

Peirce College, Legal Studies Program, Philadelphia, PA
Peirce College is a four-year college accredited by Middle States Associate of Colleges and Schools. The College offers a Bachelor of Science Degree in Paralegal Studies, an Associate of Science Degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.

Highline College, Legal Studies Program, Des Moines, WA
Highline College is a community college accredited by the Northwest Commission on Colleges and Universities. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.

Lakeshore Technical College, Legal Assistant Program, Cleveland, WI
Lakeshore Technical College is a community college accredited by the Higher Learning Commission. The College offers an Associate of Applied Science Degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.

Withdrawal of Approval
The following paralegal education programs are recommended for withdrawal of ABA approval, at the request of the institutions:

Midstate College, Paralegal Studies Program, Peoria, IL
Midstate College was a four-year college accredited by the Higher Learning Commission. The College offered an Associate of Applied Science Degree in Paralegal Studies.

Sullivan University, Lexington, Legal Studies Program, Lexington, KY
Sullivan University 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, an Associate of Applied Science Degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.

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

East Central University, Legal Studies Program, Ada, OK
East Central University is a four-year university accredited by the Higher Learning Commission. The University offers a Bachelor of Science Degree in Legal Studies.

University of Tulsa, Paralegal Studies Program, Tulsa, OK
University of Tulsa is a four-year university accredited by the Higher Learning Commission. The University offers a Certificate in Paralegal Studies.

Volunteer State Community College, Paralegal Studies Program, Gallatin, TN
Volunteer State 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 Studies, an Associate of Applied Science Degree in Paralegal Studies and a Post-Baccalaureate Certificate in Paralegal Studies.

**Term of Approval Extended**
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 Annual Meeting of the American Bar Association House of Delegates.

- California State University, East Bay, Paralegal Studies Program, East Bay, CA;
- De Anza College, Paralegal Studies Program, Cupertino, CA;
- Fullerton College, Paralegal Studies Program, Fullerton, CA;
- University of California, Riverside, Paralegal Studies Program; Riverside, CA;
- West Los Angeles College, Paralegal Studies Program, Culver City, CA;
- Manchester Community College, Paralegal Studies Program, Manchester, CT;
- University of Hartford, Paralegal Studies Program, West Hartford, CT;
- Wesley College, Legal Studies Program, Dover, DE;
- Valencia College, Paralegal Studies Program, Orlando, FL;
- University of North Georgia; Paralegal Program, Gainsville, GA;
- Illinois Central College, Paralegal Program, Peoria, IL;
- MacCormac College, Paralegal Studies Program, Chicago, IL;
- South Suburban College, Paralegal/Legal Assistant Program, South Holland, IL;
- Bay Path University, Legal Studies Program, Longmeadow, MA;
- North Shore Community College, Paralegal Program, Danvers, MA;
- Suffolk University, Paralegal Studies Program, Boston, MA;
- Harford Community College, Paralegal Program, Bel Air, MD;
- Atlantic Cape Community College, Paralegal Studies Program, Mays Landing, NJ;
- Truckee Meadows Community College, Paralegal/Law Program, Reno, NV;
- Marist College, Paralegal Program, Poughkeepsie, NY;
- Westchester Community College (SUNY), Paralegal Studies Program, Valhalla, NY;
- Meredith College, Paralegal Program, Raleigh, NC;
Kent State University, Paralegal Studies Program, Kent, OH;
Rhodes State College, Paralegal/Legal Assisting Program, Lima, OH;
Clarion University, Paralegal Studies Program, Clarion, PA;
Villanova University, Paralegal Program, Villanova, 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 Community College, Paralegal Studies Program, Harriman, TN;
Amarillo College, Legal Studies Program, Amarillo, TX;
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;
and
Milwaukee Area Technical College, Paralegal Program, Milwaukee, WI.

Respectfully submitted,

Chris S. Jennison
Chair, Standing Committee on Paralegals
February 2020
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 paralegal education programs, grants reapproval to 19 programs, withdraws the approval of 6 programs at the requests of the institutions, and extends the term of approval to 38 programs.

2. **Approval by Submitting Entity.**

This resolution was approved by the Standing Committee on Paralegals in October 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  
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    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  
    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 paralegal education programs, grants reapproval to 19 programs, withdraws the approval of 6 programs at the requests of the institutions, and extends the term of approval to 38 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 groups.
RESOLVED, That the American Bar Association adopts the amendments to the ABA Guidelines for the Approval of Paralegal Education Programs dated February 2020.
As Used In The Guidelines:

(a) “Program” means the entity or unit within the institution that provides the paralegal education;
(b) “Committee” means the American Bar Association Standing Committee on Paralegals;
(c) “Approval Commission” means the Approval Commission of the Standing Committee on Paralegals;
(d) A legal assistant or paralegal is a person, qualified by education, training, or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible. For the purposes of the Guidelines, the terms “legal assistant” and “paralegal” are used interchangeably.
REPORT

Background


The Standing Committee, through its Approval Commission, is continually working to update and modify the Guidelines to meet the challenge of creating improved standards for the education of paralegals. In July 2018, the National Federation of Paralegal Associations requested the Standing Committee review the current definition of a paralegal as outlined in the ABA Guidelines (G-103.d). The Standing Committee requested feedback from all ABA Approved Paralegal Education Programs, NALA...The Paralegal Organization, local, state and national paralegal associations, and bar association leaders (through ABA Bar Services) regarding terminology used for non-lawyer legal professionals.

The Standing Committee determined that the term “legal assistant” should be removed from the definition in order to clarify the work done specifically by paralegals. In the past the titles of “paralegal” and “legal assistant” have been used interchangeably, but the legal community has recognized a distinction between the work done by paralegals and that of legal assistants. In filing the amendment to the ABA Guidelines, the Standing Committee is asking the House of Delegates to approve a revised definition of paralegal (G-103.d).

The proposed amendment is the work product of the Standing Committee and Approval Commission, in consultation with paralegal educators, professional paralegal organizations and other interested parties. They are intended to ensure that the ABA Guidelines continue to represent and promote high standards of quality in paralegal education.

Respectfully submitted,

Chris S. Jennison
Chair, Standing Committee on Paralegals
February 2020
1. **Summary of Recommendation(s).**

The Standing Committee on Paralegals is recommending that the House of Delegates adopt amendments to the ABA Guidelines for the Approval of Paralegal Education Programs, eliminating the term “legal assistant” from the definition of “paralegal.”

2. **Approval by Submitting Entity.**

The Recommendation was approved by the Standing Committee at its meeting on October 19, 2019.

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

This recommendation has not been previously submitted.

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


5. **What urgency exists which requires action at this meeting of the House?**

N/A

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

Not Applicable

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

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

Not Applicable

9. **Referrals.**

In July 2018 the National Federation of Paralegal Associations requested the Standing Committee review the current definition of a paralegal as outlined in the ABA Guidelines (G-103.d). The Standing Committee requested feedback from all ABA Approved Paralegal Education Programs, NALA...The Paralegal Organization, local, state and national paralegal associations, and bar association leaders (through ABA Bar Services) regarding terminology used for non-lawyer legal professionals.

10. **Contact Person.** (Prior to the meeting.)

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   E-Mail: Jessica.Watson@americanbar.org

11. **Contact Person.** (Who will present the report to the House.)

   Chris Jennison, Chair  
   Silver Spring, MD 20906  
   Phone: (301) 538-5705  
   E-Mail: chris.s.jennison@gmail.com
EXECUTIVE SUMMARY

1. **Summary of the Recommendation(s)**

   The Standing Committee on Paralegals is recommending that the House of Delegates adopt the amendment to the ABA Guidelines for the Approval of Paralegal Education Programs, eliminating the term “legal assistant” from the definition of “paralegal.”

2. **Summary of the Issue which the Recommendation(s) Address**

   The amendment will update the ABA Guidelines for the Approval of Paralegal Education Programs by revising the definition of a paralegal to be more reflective of current terminology used by the legal community. In the past the titles of “paralegal” and “legal assistant” have been used interchangeably.

3. **An Explanation of How the Proposed Policy Position Will Address the Issue**

   The adoption of the amendment will update the Guidelines for the Approval of Paralegal Education Programs so that they keep pace with current terminology used by the legal community.

4. **A Summary of any Minority Views or Opposition which have been Identified**

   No other positions on this recommendation have been taken by other Association entities, affiliated organizations or other interested groups.
RESOLUTION

RESOLVED, That the American Bar Association urges all federal, state, local, territorial, and tribal legislative bodies to enact laws, and governmental agencies to adopt policies, that provide law enforcement officers with comprehensive animal encounter training on the reasonable use of force necessary to better secure the safety of such officers, protect public health, reduce legal liability, and ensure the humane treatment of the animals encountered.
REPORT

This resolution builds upon existing ABA Criminal Justice Standards on Urban Police Function that focus on limiting the excessive or unnecessary use of force by law enforcement officers. In the United States, the number one reason a police officer discharges their weapon is to shoot at a dog. In some cities, police firing their guns at dogs accounts for a full 75% of all service weapon use. The U.S. Department of Justice has recognized the dangers posed by these incidents and produced materials to help address them. However, such resources remain voluntary and often are not utilized widely enough. This report will discuss the numerous public health and safety hazards, financial and legal liability, insurance issues, and animal welfare concerns resulting from the lack of current federal, state, and territorial laws on the subject of animal encounter training for law enforcement officers. A recommendation by the ABA will assist decision makers seeking to address these concerns through enacting comprehensive and consistent laws that provide adequate and necessary animal encounter training to law enforcement officers in order to better ensure the amount of force deployed during such encounters is reasonably necessary to protect all involved from unjustifiable harm.

I. PUBLIC HEALTH & SAFETY

When law enforcement officers shoot at family pets or other animals, they risk causing injuries and even death to innocent human bystanders. Police officers firing their guns at animals in heavily populated areas further increases the risk of accidentally shooting members of the public, either directly, or indirectly as bullets ricochet off hard surfaces. Humans injured in these unfortunate accidents have included a four-year-old girl in Ohio, whom an officer shot in her leg after firing at her dog; a Los Angeles woman who was shot in the leg when officers fired at a dog in a crowded area; and an Illinois man whom officers mistakenly shot in the leg as they fired nineteen rounds at a dog in the backyard of the home next door.

1 Standards on Urban Police Function §§ 1-2.4(d), 1-10.1(c) (Dec. 5, 2018), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_urbanpolice/.
3 Id. (“Nearly three-quarters of the police shootings in Milwaukee, Wis., from 2000 to 2002 involved dogs.”).
5 C.J. Ciaramella, Why Are Detroit Cops Killing So Many Dogs?, Reason (Nov. 15, 2016)(citing to a Detroit attorney who claims that “none of the officers he’s deposed has watched them”).
7 Earl Rinehart, Columbus Police Officer Injures 4-Year-Old While Shooting at Dog, COLUMBUS DISPATCH (June 19, 2015).
Unfortunately, when police officers fire lethal weapons at encountered animals, the potential harm to nearby humans can exceed physical injury. One such instance involved an Iowa officer who attempted to intervene in a domestic dispute between a woman and her husband who was holding the couple’s three-year-old son. When the family’s dog tried to protect the woman, the officer fired his gun at the dog but slipped in the snow and missed, accidentally shooting and killing the young mother instead. In another case in Los Angeles County, sheriffs opened fire at a dog at a loud party and killed a seventeen-year-old boy when the bullets ricocheted and hit him in the chest.

In some of the cases referenced above, using deadly force against the dog in question may have been objectively reasonable under the circumstances. However, if the officers had been trained in animal behavior and nonlethal tactics, they instead may have been able to manage the perceived threats without causing harm to any of the individuals involved. As statistics from several major cities now demonstrate, when police officers are provided with such training they are more likely to react in ways that preserve public safety without incurring the significant emotional, physical, and financial costs associated with unnecessarily using deadly force against animals they encounter in the line of duty.

Most commonly, law enforcement officers discharge their weapons at dogs to protect themselves or their fellow officers. Yet numerous examples exist of police officers firing their guns at dogs and accidentally shooting themselves, their partners, or even their own K9 police dogs. In contrast, comprehensive records dating back to 1791 contain not a single documented case of a police officer ever being killed in a dog attack. Indeed, the only police officers who have died in relation to dog bites did so as a result of subsequently contracting rabies—which since has been eradicated in dogs long after the last such incident in 1936. By comparison, during that

10 Jason Clayworth, Lawyer for family of mother slain by Iowa cop: ‘Burlington covered up a murder,’ DES MOINES REGISTER (Oct. 18, 2018).  
11 Id.  
12 Maya Lau et al., L.A. Sheriff’s Deputies Shoot at Dog, Firing Bullets That Bounce and Kill Teen, Officials Say, L.A. TIMES (June 22, 2017). One of the officers also was injured by the ricocheting bullets fired at the party. Id.  
16 Sheriff’s Deputy Hospitalized After Accidentally Shooting Himself In Leg, CBS LA (Apr. 16, 2014).  
17 Police officer shot by partner trying to kill dog, FOX 16 NEWS (Nov. 8, 2012).  
19 Jose Cardenas, Parolee, Police Dog Killed, L.A. TIMES (Aug. 26, 2003). The first LA County Sheriff’s Department dog killed in the line of duty was Marco, a 9-year old Malinois who was ordered to bite a 23-year-old domestic violence suspect. Before the dog could reach the man, the officers mistook a flip-flop in his hand for a weapon and fired a total of 81 bullets that killed both Deondre Brunston and Marco. Id.  
21 Id. See Christine Petersen, Modeling Infectious Disease Research Using Canine Models, NATIONAL ACADEMIES OF SCIENCES, ENGINEERING AND MEDICINE (May 7, 2019).
same 228-year span at least 69 police officers were killed by horses, three by bees, two by cows, one by lions, one by a spider, and one by a cat.\textsuperscript{22}

Notably, many other service professionals encounter dogs in the daily course of their jobs. These include mail carriers, meter readers, cable installers, delivery drivers, and real estate agents. Yet despite not carrying firearms or other lethal weapons, only 1% of U.S. Postal Service workers are bitten by dogs.\textsuperscript{23} This is primarily due to the fact that postal employees receive comprehensive training in animal encounters and dog-bite prevention.\textsuperscript{24} Such instruction uses live dogs and sample scenarios to educate postal workers on how to interpret a dog’s body language to determine whether the dog is angry, afraid, or friendly. It also teaches mail carriers how to calm, distract, and subdue dogs with voice commands, or fend them off using non-lethal methods.\textsuperscript{25} This in-person training is kept current by annually requiring postal workers to watch a 2-hour video on canine behavior.\textsuperscript{26} As described by U.S. Postal Service Safety Director, Linda DeCarlo, “Dog bite prevention training and continuing education are important to keep pet owners, pets and those who visit homes—like letter carriers—happy and healthy.”\textsuperscript{27}

II. FINANCIAL AND LEGAL LIABILITY FOR GOVERNMENTS AND INSURERS

When innocent bystanders are killed or wounded by police firing lethal weapons at dogs, the financial liability can be substantial for the municipal, county, or state governments that employ those officers. In 2019, a claims board approved a $3 million settlement for the aforementioned teenager killed when two L.A. Sheriff’s deputies fired at a loose dog.\textsuperscript{28} In 2018, the City of Burlington, Iowa agreed to pay $2 million\textsuperscript{29} to settle a federal lawsuit brought by the family of the young mother killed by an officer firing at her dog.\textsuperscript{30} Financial liability also can be significant when bystanders are injured, rather than killed. In 2016, the Columbus City Council approved a $780,000 settlement after a four-year-old child was shot in her living room by a police officer firing his gun at her family’s dog from their front doorway.\textsuperscript{31}

Even when police officers kill or wound dogs and other pets without harming humans, significant legal and financial liability can arise if those shootings are found to be unjustified. In 2013, the Minneapolis City Council approved a $225,000 settlement to a

\begin{footnotes}
\item[22] “Animal Related” officer deaths 1791-2019 supra note 20.
\item[24] \textit{GUNNED DOWN}, supra note 6, at 5.
\item[26] \textit{GUNNED DOWN}, supra note 6, at 5.
\item[27] U.S. Postal Service, \textit{supra} note 23.
\item[31] Lu Ann Stoia, \textit{Family Awarded $780k from City After Daughter Accidentally Shot by Columbus Officer}, WSYX ABC 6 (Sept. 12, 2016). The traumatic event required Ava Ellis to undergo multiple surgeries. \textit{Id.}
\end{footnotes}
family whose two dogs were killed by police in such close proximity to the couple’s young children that the dogs’ blood splattered on their 3-year-old daughter while she was eating breakfast at her kitchen table.\textsuperscript{32} As one commenter notes, “While dogs do not have civil rights, their owners do.”\textsuperscript{33} Accordingly owners whose pets have been killed by police can bring federal claims against both the officers and their employers for illegal seizures under the Fourth Amendment to the United States Constitution.\textsuperscript{34} In such situations, a citizen alleging the deprivation of a constitutional right due to official state action is able to bring a lawsuit under 42 U.S.C. § 1983.\textsuperscript{35} And as the Seventh Circuit determined in one such 2008 case, “the use of deadly force against a household pet is reasonable only if the pet poses an immediate danger and the use of force is unavoidable.”\textsuperscript{36}

That standard of reasonableness applies in situations when police officers happen to encounter dogs during their routine daily duties. However, many fatal shootings of dogs occur when police officers are serving search or arrest warrants and have the added benefit of time to prepare. In such cases, courts have adopted an even stricter standard of reasonableness.\textsuperscript{37} In the most notorious of such cases, \textit{San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose},\textsuperscript{38} the Ninth Circuit ruled in 2005 that “the Fourth Amendment forbids the killing of a person’s dog, or the destruction of a person’s property, when that destruction is unnecessary—i.e., when less intrusive, or less destructive, alternatives exist.”\textsuperscript{39} The court further declared, “We have recognized that dogs are more than just a personal effect. The emotional attachment to a family’s dog is not comparable to a possessory interest in furniture.”\textsuperscript{40} In the wake of the Ninth Circuit’s ruling, both the City of San Jose and San Jose County settled with the Hells Angels members for $2 million ($1 million each).\textsuperscript{41}

Last year the \textit{ABA Journal} reported on multiple large payouts resulting from recent lawsuits filed after police officers wrongfully shot family pets. The feature quotes the director of one law enforcement-related organization who states, “Law enforcement agencies across the country are getting slammed with settlements and judgments that are costing them thousands of dollars that could be better spent within their agencies.”\textsuperscript{42}

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\textsuperscript{32} Matt McKinney, \textit{April 6: Family wins $225,000 settlement against Minneapolis police}, Star Tribune, (June 1, 2013).

\textsuperscript{33} Carter, \textit{supra} note 2.

\textsuperscript{34} Lee, \textit{supra} note 14, at 179.


\textsuperscript{36} Viilo v. Eyre, 547 F.3d 707, 710 (7th Cir. 2008).

\textsuperscript{37} Kaatz, \textit{supra} note 15, at 847.

\textsuperscript{38} San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 968–69 (9th Cir. 2003). The Supreme Court denied certiorari in the case. Kaatz, \textit{supra} note 15, at 847, fn 142.

\textsuperscript{39} Hells Angels, 402 F.3d at 977-78.

\textsuperscript{40} Id. at 975.

\textsuperscript{41} Karen Snell, \textit{The Police Shot My Dog}, 2013 Animal Law Conference presentation (Oct. 27, 2013) (Of the $2,000,000 total settlement, $800,000 was for the shooting of the dogs), https://www.youtube.com/watch?v=b5r3vmDEFAw&list=PLB20uPYJaEJ5SknZ8fZCqslK81K8pr1o.

\textsuperscript{42} Arin Greenwood, \textit{Courts are awarding significant damages to families whose dogs are killed by police}, \textit{ABA JOURNAL} (April 2018).
One such case in 2017 led to a $1.26 million jury award against a Maryland county and police officer who shot a Chesapeake Bay retriever in his own yard while the family was home unable to hear the officer knocking at their door.43 That same year the City of Hartford, Connecticut, settled for $885,000 with a family whose dog was shot and killed during an unlawful search.44 Also in 2017, San Diego County paid $225,000 to a family for shooting their puppy behind a fence that prominently displayed “Beware of Dog” signs,45 while in Las Vegas, Police approved a settlement of $199,000 in an excessive force lawsuit in which five officers burst into a home and killed the family dog.46 And these are only a few examples from one single year.47 More recently, in July 2019, St. Louis County settled for $750,000 with a family whose dog was killed when a SWAT team charged into their home merely to investigate unpaid utility bills.48 In addition to these federal cases filed under the U.S. Constitution, large jury verdicts for dog shootings by police are being secured in state courts as well. One Maryland case, Brooks v. Jenkins, ultimately resolved in 2014 with a $207,500 award to a family whose chocolate Lab survived being shot by a county Sheriff’s Deputy.49

The costs of defending such lawsuits, and of paying any resulting damage awards or settlements, most often are borne by local taxpayers50 and the insurance companies who underwrite the governmental entities involved.51 In the Colorado case that resulted in a $262,500 settlement after a dog was shot in her family’s garage while secured with a snare pole, a municipal spokeswoman all but boasted that, “The city’s out-of-pocket cost was a $50,000 deductible. Our insurance agent covered the rest.”52 The city’s own legal

43 Reeves v. Davis, No. C-02-CV-15-002956, 2017 WL 2723614, at *1 (Md. Cir. Ct. Sept. 27, 2016) (the jury awarded $500,000 in economic damages, $750,000 in noneconomic damages, and $10,000 for trespass to chattel). The $1.26 million award is believed to be “the largest civil judgment in U.S. history for a pet’s death at the hands of police.” Greenwood, supra note 42. A judge later reduced the damage award to a total of $207,500 after citing a Maryland statute that limits local governments’ liability. Id.
44 Greenwood, supra note 42. The 2nd Circuit deemed the search to have been “unlawful.” Id.
45 Greg Moran, County pays $225,000 to settle lawsuit over deputy shooting pit bull puppy, SAN DIEGO UNION-TRIBUNE (Jan. 25, 2017).
47 For example, in 2018, Detroit, Michigan settled one federal lawsuit in for $225,000 and another in 2016 for $100,000, both for police killing pet dogs that already were safely restrained in fenced yards. C.J. Ciaramella, Detroit to Pay $225,000 After Cops Shoot Three Dogs in Marijuana Raid, REASON (Mar. 22, 2018). In 2016, a smaller Colorado municipality also agreed to settle a federal lawsuit for $262,500 for a dog shot and killed in her owner’s driveway after already being snared on a catch-pole. Greenwood, supra note 42.
48 Tony Messenger, St. Louis County settles for $750,000 in case where SWAT team shot family dog, ST. LOUIS POST-DISPATCH (July 2, 2019). The settlement came one week into the federal trial over the incident.
50 Nick Wing, We Pay A Shocking Amount For Police Misconduct, and Cops Want Us Just to Accept It. We Shouldn’t., HUFF. POST (May 29, 2015) (“That money [used to pay settlements to victims of police misconduct], like the rest of the police department’s budget, comes from taxpayers.”).
51 Meme Moore, Police Controversies Affecting Coverage: Underwriters are taking a harder look at insurance terms and conditions for police departments in the wake of highly publicized deaths, RISK & INSURANCE (May 5, 2015).
52 Jesse Paul, Commerce City Pays $262,500 to Family Whose Dog Was Killed by Cop, DENVER POST (July 27, 2016), (quoting Michelle Halstead, spokeswoman for Commerce City, Colorado).
expenses in that case totaled an additional $125,227.53. Given that most of these family pet shooting lawsuits are filed as federal civil rights claims, “even nominal payoffs to the plaintiff can balloon when the defendant officers and agencies have to pay attorney fees for the winners.”

Under the relevant statute, plaintiffs’ recoverable legal fees are set at the prevailing rate for private attorneys in the community. In just one such dog shooting case, the plaintiffs’ attorneys’ fees alone totaled over $530,000.

III. SCOPE AND SEVERITY OF THE PROBLEM

“The Department of Justice estimates that U.S. law enforcement officers kill roughly 10,000 companion dogs per year, or twenty-five to thirty per day.” One DOJ official has gone so far as to describe the occurrence as an “epidemic.” Over the past decade, Chicago police fired their guns at dogs a total of 700 times, killing an average of 2 dogs every single week in one five-year span. Given that just one of those 700 shootings led to a $333,000 judgment against the city, the potential financial liability is immense. Nearby, in much smaller Milwaukee, police shot and killed 434 dogs during a recent nine-year period—equating to roughly one dog killed by police every single week for nearly a decade. In Buffalo, NY, one officer alone shot as many dogs in a two-year period as all 34,000 members of the New York City Police Department. Police officers in Detroit have also been subject to scrutiny for shooting and killing a startling number of animals in the line of duty—with official records revealing that as of 2017 one Detroit police officer alone had shot at least “80 dogs.”

a. Unjustified Shootings Can Damage Police-Community Relations

Beyond causing physical harm to people and animals, and serious financial liability for governments and their insurers, when the police kill a family dog it can lead to the

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54 David Griffith, Can Police Stop Killing Dogs?, POLICE MAG. (Oct. 29, 2014); see also, Mike Carter, Owners of Dog Slain by Police Are Awarded Attorney Fees, SEATTLE TIMES (Apr. 25, 2013).
55 Snell, supra note 41.
57 Lee, supra note 14, at 176 (citing Laurel Matthews, a supervisory program specialist with the Department of Justice’s Community Oriented Policing Services).
58 Griffith, supra note 54.
59 Frank Main, 700 dogs have been shot or shot at by police in Chicago in the past decade, CHICAGO SUN-TIMES (Mar. 23, 2018).
61 David Heinzmann, Family gets $333,000 for 2009 raid in which cops killed dog, CHICAGO TRIB. (Aug. 19, 2011). The Chicago officers shot and killed the family’s 9-year old Labrador retriever, Lady, after refusing the two teenage sons’ request to secure their “tail-wagging” dog before conducting a search “that found no criminal activity in the apartment.” Id.
63 Id.
64 C.J. Ciaramella, Detroit Police Shot 54 Dogs Last Year—Twice as Many as Chicago, REASON (Sept. 4, 2018). In a 2016 lawsuit two other Detroit officers stated they each had shot roughly 19 or 20 dogs. Id.
deterioration of police-community relations that already may be strained.65 As the head of the Milwaukee Fire and Police Commission, observed, “Even one dog shooting generates so much outrage that it can take years to repair the damage to community relations.”66 The former Deputy Executive Director of the National Sheriffs’ Association further implored, “[W]hen an officer ends up shooting a dog it rips right at the fabric of the community. This problem needs to be solved.”67

Even members of the general public without direct connections to the animals killed by police frequently become incensed and mobilized by these stories.68 In a 2014 Cleburne, Texas incident, footage was obtained via FOIA of a police officer whistling two dogs over to him then shooting them as they arrived—the resulting viral video immediately became international news.69 The public outrage against the officer, department, and city was swift and severe. It started with a petition to terminate Officer Kevin Dupre that generated 65,000 signatures within the first week.70 That was followed by several public protests, multiple death threats against the officer, and the City of Cleburne’s website being shut down by hackers in possible retaliation.71

When police wrongfully shoot any pet, it can cause a great deal of community agitation, but when police shoot a service animal, it can spark even more societal indignation.72 In 2017, a Minneapolis officer shot two tail-wagging dogs in their backyard that were service animals for the owner’s children, assisting them with seizures and anxiety.73 Both dogs ultimately survived, but again the public backlash against the police was fast and scathing. Before long an online petition calling for the officer to be fired gathered over 138,000 signatures,74 and a webpage soliciting donations for the dogs’ care collected over $37,000.75

b. All Types of Pets Are Shot by Police—And All Owners Can Be Impacted

While some may assume that police only use lethal force on large or intimidating dogs, records show that officers across the U.S. have killed family dogs of almost every type,

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65 See Griffith, supra note 54 (describing the “PR Nightmare” that can result when police kill dogs).
66 Dinesh Ramde, Milwaukee Police No Longer Shooting as Many Dogs, Thanks in Part to Training, ST. PAUL PIONEER PRESS (June 14, 2014).
68 Hal Herzog, Why People Care More About Pets Than Other Humans, WIRED (Apr. 13, 2015).
70 Dan Solomon, Horrible Video Shows a Cleburne Police Officer Calling To, Then Shooting, a Tail-Wagging Dog, TEXAS MONTHLY (Oct. 20, 2014).
72 See, e.g., Greg Hadley, She Called 911 Because Someone in her Yard Was on Drugs. Police Shot her Service Dog., MIAMI HERALD (Apr. 20, 2017).
74 Aaron V., Justice for Ciroc and Rocko: Fire Trigger-Happy Minneapolis Police Officer, CARE2 PETITIONS.
75 Karli Jones, Justice For Our Dogs, GOFUNDME, https://www.gofundme.com/43u375s.
size, shape, or breed. Numerous examples exist where police officers have shot small dogs like Chihuahuas, Miniature Dachshunds, and even puppies, as well as breeds widely considered to be family-friendly, such as Labrador Retrievers, Cocker Spaniels, and Golden Retrievers. Police officers also have shot and killed several other species of domesticated animals, including pet pigs, goats, and even cats. Many instances further have come to light where police officers killed animals that clearly posed no threat to anyone—such as dogs who were shot after being tied up outside, secured behind closed doors, or even while they were attempting to run away. Several of these incidents have been captured by police officers’ own cameras, such as a 2016 Detroit incident involving a tethered dog that led to a $100,000 judgment against the city.

Similarly, contrary to what some may mistakenly assume, the unjustified shooting of pets by law enforcement impacts families across the socio-economic spectrum. This point was underscored in the episode that occurred in the tranquil suburb of Berwyn Heights, Maryland, where the town’s Mayor had his own two black Labrador retrievers shot and

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76 Lee, supra note 14, at 176-78.
77 See, e.g., Christopher Brito, Arkansas deputy fired after shooting a barking chihuahua in the face, CBS NEWS (Jan. 8, 2019). After video of the incident surfaced, angry citizens made over 300 calls in one day to the Faulkner County Sheriff’s Office and the officer later was charged with animal cruelty. Id.
78 See, e.g., Danville Police Shoot, Kill Growling Miniature Dachshund, RICHMOND TIMES-DISPATCH (June 11, 2009).
80 See, e.g., Dog Shooting in Coeur d’Alene Violated Policy, Police Chief Says, THE OREGONIAN (Sept. 6, 2014) (noting that an Idaho officer was found to have acted unreasonably when he shot a Labrador shut inside a van with partially-opened windows).
81 See, e.g., Rick Hurd, Concord: Owners of Cocker Spaniel Shot by Police Seek Apology, MERCURY NEWS (June 24, 2013) (describing how an officer in California shot and wounded a thirteen-year-old cocker spaniel who barked at him from within a yard).
82 See Bixby Police Officer Loses Job Over Gesture Made on Camera, THE OKLAHOMAN (July 1, 2004) (describing the firing of a police officer in Oklahoma who shot a Golden Retriever tethered in a yard).
83 See Frank Warner, Slatington Pot-Bellied Pig Shot to Death by Police Officer; Chief Defends Action, THE MORNING CALL (Aug. 2, 2017) (describing how officers shot a pet pig named Oscar after he escaped his property and allegedly chased the officers)
84 Lizzy Acker, It Took 4 Shots and 2 Guns to Kill an Aggressive Goat in Portland, OREGONLIVE (Aug. 10, 2017) (chronicling the shooting of a goat who police claim was behaving aggressively, but who the owner claims would submit to his children).
85 Donald Bradley & Glenn Rice, Raymore Police Mistakenly Kill Family Cat, KANSAS CITY STAR, Sept. 11, 2009, at A4 (recounting the shooting of Tobey, an elderly, declawed, deaf, six-pound, “cuddly” pet cat whom officers shot twice in the head and dumped in a city trash can).
86 See, e.g., Abigail Curtis, Maine Man Fighting Back After Police Allegedly Shot, Killed His Dog in Louisiana, BANGOR DAILY NEWS (Apr. 30, 2014) (summarizing an incident in Louisiana where an officer shot a dog after permitting the owner to tie his dog to a fence with a short leash.
87 C.J. Ciaramella, Why Are Detroit Cops Killing So Many Dogs?, REASON (Nov. 15, 2016) (reviewing several dog shootings by Detroit police officers, including one where a dog was shot through the back door of a home and another where a dog was shot through a closed bathroom door inside the house).
88 Id. (reviewing another incident where Detroit police shot a dog, but the bullets entered from behind).
90 OF DOGS AND MEN (Ozymandias Media 2015) (profiling a wide range of dog owners whose pets were killed by police, including single mothers, young urban couples, suburban families, elderly women).
killed in his home by Prince George’s County Deputies. The police’s justification for the raid was that a box containing marijuana had been addressed to the Mayor’s wife who was a state finance officer. A few days later police arrested a FedEx driver and an accomplice who had been mailing such boxes to other unsuspecting addresses. The Mayor described the ordeal as “the most traumatic experience of his life.” To Mayor Calvo’s credit, he recognized that what happened to him was part of a broader problem of policy, not of individual officers. “I don’t think they’re bad people,” the Mayor said. “Just poorly trained.” As a result, Mayor Calvo sued Prince George’s County. The lawsuit was settled for an undisclosed sum, but the agreement importantly mandated “better training in dealing with the pets [county police] encounter in raids, as well as treating them more humanely.” Calvo also was instrumental in helping pass state legislation requiring police agencies to report information on all SWAT team deployments including whenever a SWAT team injures or kills a pet.

IV. SOLUTIONS ALREADY EXIST—ANIMAL ENCOUNTER TRAINING WORKS

a. Comparing Apples to Big Apples

When the City of Chicago instituted non-lethal animal encounter training for its utility meter readers, the number of employee dog bites dropped by 90%. Yet until recently the city still did not provide comprehensive animal encounter training to its 12,474 sworn officers—the nation’s second-largest police force. One commentator succinctly points out that, “it is not unreasonable to ask police departments to train cops at least as well as meter readers when the failure to do so predictably results in needlessly killed pets and endangered humans. But many police departments don’t care enough to go to the trouble.” Consequently Chicago police historically have shot roughly ten times more pets than have officers in either New York or Los Angeles. Indeed, records show that while NYPD shot nine dogs in 2014, and LAPD shot eight dogs in 2015, in just the first nine months of 2015 Chicago police already had fired their weapons at animals at least 84 times.

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92 SWAT team kills 2 dogs in raid on Md. mayor’s home, POLICEONE.COM (Aug. 1, 2008).
93 Md. mayor’s dogs shot dead, supra note 90.
94 SWAT team kills 2 dogs in raid on Md. mayor’s home, supra note 92.
95 Sarah Brumfield, County Settling Suit Over Raid of Md. Mayor’s Home, NBC NEWS 4 WASHINGTON (Jan. 24, 2011).
96 Alan Suderman, Berwyn Heights mayor sues Prince George’s County over SWAT raid that killed his dogs, WASHINGTON EXAMINER (June 22, 2009).
97 Radley Balko, Militarized police overreach: “Oh, God, I thought they were going to shoot me next,” Salon (July 10, 2013).
98 Brumfield, supra note 95.
101 Friedersdorf, supra note 13.
102 Ciaramella, Why Are Detroit Cops Killing So Many Dogs?, supra note 5.
The difference is that the NYPD and LAPD provide some of the most comprehensive animal encounter training to their law enforcement officers, coupled with department-wide accountability to make sure such training is implemented and adhered to. The ASPCA calls the NYPD one of the “shining examples” of what animal training can do for a police department. “We have been involved in training NYPD officers for many years. On a per capita basis, New York is far lower in incidents than that of lot of other cities.” The ASPCA’s assistant director for law enforcement also served twenty-one years with the NYPD. He states that, “There are some individual departments in other parts of the country that avail themselves of our training, but not many. Not enough.”

b. Accountability is Key

The City of Los Angeles has one of the lowest per-capita rates of officers shooting dogs. Beyond providing ongoing mandatory animal encounter training to its officers every single use of force in the 450 square miles covered by the LAPD is reviewed by a department headed up by Captain Scott Sargent, who not only is an attorney, but also was a K-9 dog handler for several years. He states that, “Law enforcement officers are authorized to use deadly force only to protect themselves or others from what is reasonably believed to be an imminent threat of death or serious bodily injury.” LAPD officers also cannot use lethal force against a dog to protect property, including other animals. According to Sargent, LAPD officers are “absolutely forbidden to use force arbitrarily” and the department “simply will not stand for it.” This is not just for the safety of the public and their animals, but also for the safety of the officers themselves, as failing to anticipate and resolve animal encounters immediately with the proper equipment can interrupt or slow an entry down and put the entire unit at risk.

c. The Successful Results of Animal Encounter Training

Now that several U.S. cities and states have implemented non-lethal animal encounter training in recent years, they provide instructive comparisons to judge the effectiveness such training has had on the number of dogs shot by their law enforcement officers. Notably, the City of Chicago achieved a 67% drop in the number of police officers shooting at dogs after it instituted comprehensive animal encounter training along with updated

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103 Danny Spewak and Megan Blarr, Collateral Damage: Police shooting dogs in line of duty—Buffalo Police have opened fire on 92 dogs since 2011, killing the vast majority of them. Is it time to start training?, Marshfield News Herald (Nov. 14, 2014)(Quoting Dr. Randall Lockwood, a senior vice president for the American Society for the Prevention of Cruelty to Animals).


105 Id. (quoting Joseph Pentangelo, the ASPCA’s assistant director for law enforcement).


107 For an example of an LAPD review, see http://assets.lapdonline.org/assets/pdf/104-11%20PR%20(0IAS).pdf.

108 Sargent, supra note 106.

109 Id.

policies and procedures—falling from 73 incidents in 2014 to 24 in 2017.\textsuperscript{111} This change in policy did not come easy and resulted primarily from a “scathing” Department of Justice report on Chicago Police Department practices commissioned in the wake of the controversial police shooting of Laquan McDonald.\textsuperscript{112} The DOJ report stated, “During our review of officer-involved shootings we saw shootings at dogs that appeared to be unnecessary, retaliatory or reckless. We also observed that there were many complaints from community members that officers unnecessarily or recklessly killed their dogs and that, like other civilian complaints, these complaints were not adequately investigated.”\textsuperscript{113}

In addition to providing training for officers on how to de-escalate interactions with dogs they perceive to be hostile, in 2017 the department adopted a new use-of-force policy that clearly declares a Chicago police officer “is justified in using deadly force to stop a dangerous animal only when the animal reasonably appears to pose an imminent threat to the safety of the sworn member, another person, or another animal and no reasonably effective alternatives appear to exist.”\textsuperscript{114} As part of this new policy, the Civilian Office of Police Accountability now investigates every dog shooting by Chicago police officers—something that previously happened only “rarely, if ever.”\textsuperscript{115}

Impressively, after Texas passed statewide legislation in 2015 requiring officers to have 4 hours of animal encounter training, the number of dogs shot by TX police fell from 281 in 2014 to 32 in 2018, with only 17 shot as of November 2019—a drop of over 90%.\textsuperscript{116} One Texas tale exemplifies the broad positive impact that instituting animal encounter training can achieve. Such training brought accolades to the town of Arlington, Texas after calls came into police of an “aggressive pit bull” chasing people around a neighborhood, with one caller pleading, “This dog is so vicious, please get him.”\textsuperscript{117} When officers arrived, however, they observed the dog’s behavior, and based on their recently added training determined the dog was just “thirsty and lost.”\textsuperscript{118} The officers then coaxed the dog into their patrol car with a protein bar. A quick scan for microchip later revealed that “Jeffery” had been adopted from a local shelter just the week before and simply escaped his new back yard.\textsuperscript{119} Photos of the officers calmly petting the dog through the window of their cruiser posted to the Arlington Police Department’s Facebook page reached over 2 million people in less than 24 hours. Today that post boasts 176,000 likes.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{111} Main, supra note 59.
\item \textsuperscript{112} Id.
\item \textsuperscript{114} Chicago Police Department, \textit{Use of Force, General Order G03-02}, (2017) at 2 (available at https://home.chicagopolice.org/use-of-force-policy/).
\item \textsuperscript{115} Main, supra note 59 (quoting Mia Sissac, a spokeswoman for Chicago’s Civilian Office of Police Accountability).
\item \textsuperscript{116} Email Communication with Shelby Bobosky, Interim Executive Director, Texas Humane Legislation Network, Oct. 17, 2019.
\item \textsuperscript{117} Arlington Officer Praised For Rescuing ‘Aggressive’ Pit Bull, CBS DFW (June 27, 2014). https://dfw.cbslocal.com/2014/06/27/arlington-officer-praised-for-rescuing-aggressive-pit-bull/
\item \textsuperscript{118} Elisa Black-Taylor, Arlington PD officers use their mandatory dog behavior training to save lost dog, ELISA’S EXAMINER (June 30, 2014), https://elisasexaminer.wordpress.com/2016/07/08/arlington-pd-officers-use-their-mandatory-dog-behavior-training-to-save-lost-dog/.
\item \textsuperscript{119} Id.
\end{enumerate}
\end{footnotesize}
18,000 comments, and has been shared over 71,000 times. Police Chief Johnson responded saying, “This is exactly the type of compassion we love to see our employees exhibit and credit their good judgment and our significant investment that our organization has made in providing training to officers on how to deal with dogs.”

VI. LEGISLATION IS THE ANSWER

While the New York, Los Angeles, and Chicago police departments provide good models for others, far too many law enforcement officers in the United States still are forced to engage with citizens and their pets without the benefits of such training—putting themselves, their fellow officers, and local citizens at risk. As one commenter has noted, “Although the need for adequate training is readily apparent nationwide, it is an institutional problem that exceeds a single department.”

To address the issue, in 2011 The Department of Justice’s Community Oriented Policing Services released a publication entitled, The Problem of Dog-Related Incidents and Encounters, to help law enforcement better prepare to handle encountering dogs in the field. In the introduction, the Director of the DOJ-COPS office notes, “There are a variety of circumstances where a dog could be involved in a police call, and it is critical that police departments not only develop effective departmental strategies advocating for the proper handling of dog-related incidents and encounters, but also proactively create tactical-response strategies, ensuring humane treatment of dogs and safety for the public and officers.” The DOJ-COPS office later produced an accompanying series of five animal encounter training videos entitled, Police & Dog Encounters: Tactical Strategies and Effective Tools to Keep Our Communities Safe and Humane, that it has made available online at no cost.

Although these resources are quite valuable, and many departments have put them to good use, they still are voluntary, meaning that the police officers who likely could benefit from them most often do not use them. In response, following the lead of Colorado’s “Dog Protection Act”, several other states, counties, and municipalities have recognized the need to prepare officers for such interactions and thus have enacted laws that either

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121 Arlington Officer Praised For Rescuing ‘Aggressive’ Pit Bull, supra note 117.
123 Kaatz, supra note 15, at 853.
124 Bathurst et al., supra note 4, at 10.
125 Center for Public Safety & Justice, Police and Dog Encounters, YOUTUBE (June 18, 2014), https://www.youtube.com/playlist?list=PLhE9QvBTLKy5KG7GVSu5M5QxtWQkvXTKS; See also, Donald Cleary & Melissa Bradley, Police and Dog Encounters: Tactical Strategies and Effective Tools to Keep Our Communities Safe and Humane, 6 COMMUNITY POLICING DISPATCH (Dec. 2013). Narrated by retired Chicago police superintendent, Terry Hillard, the videos feature dog behavior expert Brian Kilcommons demonstrating real-life scenarios with SWAT and street officers. Id.
126 Ciaramella, Why Are Detroit Cops Killing So Many Dogs?, supra note 5 (citing to a Detroit attorney who claims that “none of the officers he’s deposed has watched them”).
require or encourage the completion of animal encounter training programs along with accountability procedures to make sure that training is properly implemented and adhered to. As noted above, the 2015 Texas legislation successfully reduced officer-involved shootings of dogs by over 90% across the state.

VI. CONCLUSION

All interested parties benefit from the reduction of unnecessary harmful accidents: members of the public, families and their pets, police officers, the governmental entities they work for, and the taxpayers or insurance companies who bear the ultimate financial liability for mistakes. When police officers are provided comprehensive animal encounter training, not only are they better prepared to protect themselves from dog bites, they also are less likely to resort to using deadly force that may unjustifiably harm or kill innocent human bystanders and family pets. Conversely, when insufficiently trained officers are thrust into situations where they have to make split-second decisions without the benefit of education about animal behavior and non-lethal options, the consequences can be catastrophic for the entire community impacted, physically, emotionally, legally, and financially.

One former officer who now has provided animal encounter training to over 2,100 other law enforcement officers, states that, “The only reason why there are a lot of shootings is that [police officers] don’t have the training.” The former Deputy Executive Director for the National Sheriffs’ Association, John Thompson, further explains, “Law enforcement officers want to handle their calls safely and go home at the end of their shift, while not causing any needless harm. [Training] will give them much needed tools to recognize and address possible conflict with dogs instead of simply shooting an animal.”

As described by the National Sheriffs’ Association, the goal of animal encounter training “is not to make each law enforcement officer a canine behavior expert. Rather, the intent of [such] training is to give police officers the knowledge and tools to safely handle dog encounters during their daily duties, and to keep officers, the public, and pets as safe as possible.” Accordingly, to encourage the consistent

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128 Bobosky, supra note 116.
129 Esther Robards-Forbes, Austin police get hands-on training to reduce dog shootings, Austin-American Statesman (Sept. 10, 2014) (quoting Jim Osorio, senior law enforcement specialist for the National Humane Law Enforcement Academy).
131 National Sheriffs’ Association, About Law Enforcement Dog Encounters Training (LEDET), available at https://www.sheriffs.org/ledet. The National Sheriffs’ Association helped develop an immersive animal encounter simulator to provide exactly this type of training. Mark Roper, Deputies learn how to handle dogs with virtual reality training, ABC2 BALTIMORE (June 6, 2018).
implementation of such training, the American Bar Association should urge all federal, state, local, territorial, and tribal legislative bodies to enact laws, and governmental agencies to adopt policies, that provide law enforcement officers with comprehensive animal encounter training on the reasonable use of force necessary to better secure the safety of such officers, protect public health, reduce legal liability, and ensure the humane treatment of the animals encountered.

Respectfully submitted,

Dorothea M. Capone
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February 2020
1. **Summary of Resolution(s).**

   The Resolution urges all federal, state, local, territorial, and tribal legislative bodies and/or governmental agencies to enact laws that provide for comprehensive animal encounter training to law enforcement officers on the reasonable use of force necessary to better secure the safety of such officers, protect public health, reduce legal liability, and ensure the humane treatment of the animals encountered.

2. **Approval by Submitting Entity.**

   TIPS Council voted to support the resolution and report on October 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?**

   This resolution builds upon existing ABA Criminal Justice Standards on Urban Police Function that focus on limiting the excessive or unnecessary use of force against individuals encountered by law enforcement officers.

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 Resolution will support legislative efforts and assist decision makers to enact uniform laws that provide comprehensive non-lethal animal encounter training to law enforcement officers in those jurisdictions that lack such training.
8. **Cost to the Association.** (Both direct and indirect costs)

   None.

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

   Not applicable.

10. **Referrals.**

    This Report and Recommendation is referred to the Chairs and Staff Directors of all ABA Sections and Divisions including, specifically, the Criminal Justice Section.

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges all federal, state, local, territorial, and tribal legislative bodies and/or governmental agencies to enact laws that provide for comprehensive animal encounter training to law enforcement officers on the reasonable use of force necessary to better secure the safety of such officers, protect public health, reduce legal liability, and ensure the humane treatment of the animals encountered.

2. Summary of the Issue that the Resolution Addresses

The number one reason U.S. police officers discharge their weapons is to fire at dogs, and in some cities, police shooting guns at dogs accounts for 75% of all service weapon use. When insufficiently trained officers are thrust into situations where they have to make split-second decisions without the benefit of education about animal behavior and non-lethal options, the physical, emotional, legal, and financial consequences can be catastrophic for the entire community impacted. All interested parties benefit from the reduction of unnecessary harmful accidents: members of the public, families and their pets, police officers, the governmental entities they work for, and the taxpayers or insurance companies who bear the ultimate financial liability for fatal mistakes. But despite the documented success of existing non-lethal animal encounter training programs in reducing unnecessary harmful accidents in the states, counties, and municipalities that have implemented them, most police officers in the U.S. still are not afforded such training.

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

When police officers are provided comprehensive animal encounter training, not only are they better prepared to protect themselves from dog bites, they also are less likely to resort to using deadly force that may unjustifiably harm or kill innocent human bystanders and family pets. By encouraging legislative action to provide such training, the proposed policy position will assist implementation of a consistent U.S. legal regime that better secures the safety of such officers, protects public health, reduces legal liability, and ensures the humane treatment of the animals encountered in accordance with the goals of the American Bar Association. This resolution builds upon existing ABA Criminal Justice Standards on Urban Police Function that focus on limiting the excessive or unnecessary use of force against individuals encountered by law enforcement officers.

4. Summary of Minority Views

None.
RESOLUTION

RESOLVED, That the American Bar Association urges Congress to enact legislation to clarify and explicitly ensure that it shall not constitute a federal crime for lawyers, consistent with state, territorial, and tribal ethical rules, to provide legal advice and services to clients regarding marijuana-related activities that are in compliance with state, territorial, and tribal law.
INTRODUCTION

This Resolution addresses the current uncertainty facing lawyers in the provision of advice and legal services to clients within the cannabis industry resulting from the tension between state and federal law over marijuana regulation. 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 tension and uncertainty relating to the criminal prosecution of activity in or relating to marijuana. Regardless of current federal prohibitions, the state-legalized marijuana industry was estimated at $10.4 billion as of the end of 2018, employing some 250,000 Americans.1

This Resolution addresses the provision of advice and legal services in jurisdictions where marijuana has been legalized, many of which have amended or interpreted their ethical rules of professional responsibility to explicitly allow lawyers to provide advice and legal services relating to conduct expressly permitted by state law.2 However, such advice and legal services may nonetheless constitute a violation of federal criminal law. Lawyers are concerned by the very real possibility of criminal prosecution and, at minimum, by ethical qualms arising from the current legally ambiguous nature of providing such legal services. As a result, lawyers and law firms are deterred from representing clients involved in the state-legalized marijuana trade or representing ancillary companies providing services to companies directly involved in the state-legalized marijuana trade.

This policy is necessary to clarify that such provision of advice and legal services in compliance with state law does not constitute unlawful activity pursuant to federal law. This policy is crucial for allowing lawyers to advise clients without fear of criminal liability, assist such clients to comply with both state and federal laws, allow for the development

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of laws and regulations, and will align with the ultimate objectives of the Department of Justice: adherence to the rule of law.

BACKGROUND ON STATE REFORMS

Over the past two decades, a majority of states have 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 11 states (12, if we include the District of Columbia) had adopted “Adult and Medical Use” laws.

Each of these reform states has adopted a comprehensive body of regulations to replace outright prohibition. 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. Among many other things, this Retail Marijuana Code requires vendors to apply for a special license 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.

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3 The following sections until the section titled “THE UNCERTAINTY FACING LAWYERS” are extracts from the August 2019 report submitted by Lucian Dervan, Chair of the Criminal Section, repurposed here for consistency on addressing issues with related backgrounds.

4 The first states to legalize recreational marijuana were Colorado and Washington, followed by Alaska, Oregon and the District of Columbia in 2014. As of today, those states have been joined by California, Maine, Massachusetts, Nevada, Vermont, Michigan, and Illinois. Numerous other states have legalized or decriminalized medicinal marijuana. See CRS Report, The Marijuana Policy Gap and the Path Forward, R44782, at Figure 2.

5 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 (C131), a non-psychoactive produced by the cannabis plant. Id.

6 For a thorough discussion of how states now regulate marijuana, see Robert A. Mikos, MARIJUANA LAW, POLICY, AND AUTHORITY (2017).

7 1 Code of Colorado Regulations 212-2.
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 LEGAL QUAGMIRE

There is an obvious tension between marijuana’s federal 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 deference to state policy as a matter of policy (not law). While those memos were rescinded by then-Attorney General Sessions, and then apparently re-adopted by

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8 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).
9 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. Mikos, See New Congressional Farm Bill Legalizes Some Marijuana, Marijuana Law, Policy and Authority Blog, https://my.vanderbilt.edu/marijuanalaw/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 0.3% THC by dry weight).
10 21 U.S.C. § 812(b). These criteria include the substance’s accepted medical use (if any), its potential for abuse, and its physical and psychological effects on the body. Id.
11 See id. at §841 (criminalizing marijuana trafficking); Id. at § 844 (criminalizing marijuana possession).
12 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).
Attorney General Barr,\textsuperscript{13} the Congress has not changed the Controlled Substances Act, nor has the Drug Enforcement Agency re-scheduled Cannabis. Within the last few years, Congress has written some temporary bars against federal criminal enforcement into appropriations 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.”\textsuperscript{14} The federal courts have interpreted these riders to bar federal prosecution of persons acting in conformity with state medical marijuana laws.\textsuperscript{15}

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).\textsuperscript{16} Moreover, anyone out of compliance with state regulations would also be subjected to criminal sanction, even if their violations of state regulations were \textit{de minimis}.

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 lawsuits under federal law, because the federal RICO statute considers growing and selling marijuana to be actionable racketeering activities.\textsuperscript{17}

\textsuperscript{13} See Memorandum from Jefferson B. Sessions, III, Attorney General, to All United States Attorneys (Jan. 4, 2018).
\textsuperscript{14} 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.
\textsuperscript{15} E.g., United States v. McIntosh, 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.”).
\textsuperscript{16} McIntosh, 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.”).
\textsuperscript{17} 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).
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.\(^{18}\) 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.\(^{19}\)

In short, despite State law, Cannabis remains an illegal controlled substance everywhere in the United States.

No one should be satisfied with the legal and 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.

**THE UNCERTAINTY FACING LAWYERS**

This tension between federal and state laws directly impacts attorneys with clients in or interested in entering state-authorized marijuana business activities. Regardless of state law, so long as marijuana remains a Schedule I controlled substance such client’s marijuana business activities remain federally criminal conduct. Thus, the provision of

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\(^{19}\) 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).
legal advice and services to assist clients in such conduct may also in itself constitute a criminal offense, whether under a theory of conspiracy or aiding and abetting.

This presents two primary types of difficulties for lawyers. The first is that lawyers providing legal services to state-legal cannabis clients must undertake a real, if (at the moment) small risk of actually being prosecuted for felony violations of the Controlled Substances Act. The second is an ethical concern, and touches on the core of the profession. Many lawyers believe, as an ethical matter, that they should not engage in conduct that violates a criminal law, even if the chance of prosecution is slim, perhaps even vanishingly small. This belief is unrelated to the probability of prosecution, the potential revenue from such regulation, or belief that the law as written is ill-advised.

This potential exposure of lawyers to criminal liability merely for providing legal advice and services deters the provision of accurate counsel and clarity that is desperately needed by businesses operating in the marijuana industry to understand and comply with the state laws and navigate the tension between state and federal laws.

THIS RESOLUTION

Clear statutory guidance is needed that explicitly ensures that attorneys who adhere to their state ethics rules do not risk federal criminal prosecution simply for providing legal counsel to clients operating marijuana businesses in compliance with their state law. This Resolution accomplishes this elegantly by harmonizing federal criminal liability with States’ ethical rules regarding the provision of advice and legal services relating to marijuana business. If a state has legalized some form of marijuana activity and explicitly permitted lawyers to provide advice and legal services relating to such state-authorized marijuana activity, such provision of advice and legal services shall not be unlawful under the Controlled Substances Act or any other federal law.

Technically, this Resolution accomplishes this objective by defining both “State Authorized Marijuana Activity” and “State Authorized Marijuana-related Advice and legal services” and then providing that the latter shall not constitute a federal crime.

CONCLUSION

The right to seek the assistance of counsel, in civil and criminal matters, is a bedrock constitutional principle and a vital component of any system that adheres to the rule of

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20 “Section 846 of Title 21 prohibits conspiracies and attempts to violate any substantive offense established by Subchapter I of Title 21 (“Control and Enforcement”)—in other words, Section 846 makes it a crime to conspire to violate or attempt to violate any substantive offense set forth in 21 U.S.C. §§ 801-904. Analogously, Section 963 of Title 21 prohibits conspiracies and attempts to violate any substantive offense established by Subchapter II of Title 21 (“Import and Export”)—in other words, Section 963 makes it a crime to conspire to violate or attempt to violate any substantive offense set forth in 21 U.S.C. §§ 951-971.” Cited in U.S. Attorney’s Manual, § 9-100.020.

21 See 18 U.S.C. § 2(a): “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”
law. Legal counsel is vital to the development of law and regulations. Because of the central importance of the rule of law to the American system of government and the conflict between federal and state laws related to marijuana, it is the purpose of this Resolution to ensure attorneys working in states that have chosen to legalize marijuana are permitted to represent clients, in accordance with state law, without fear of federal criminal prosecution. Until such fear is addressed, lawyers will continue to be deterred from advancing the rule of law and clients will continue to be deprived of much needed legal guidance and counsel.

Respectfully submitted,

Dorothea M. Capone
Chair, Tort Trial and Insurance Practice Section
February 2020
1. **Summary of the Resolution(s).**
This Resolution resolves the current uncertainty facing lawyers in the provision of advice and legal services to clients within the cannabis industry resulting from the tension between state and federal law over marijuana regulation. A majority of states have legalized marijuana in at least some circumstances, while the federal government continues to ban the drug outright. Because marijuana-related activities remain federally criminal conduct, the fear of prosecution for conspiring to commit a crime or aiding and abetting a crime is currently deterring lawyers from advising clients operating state-authorized marijuana businesses, who are thus deprived of desperately needed counsel and guidance. This Resolution is necessary to clarify that such provision of advice and legal services in compliance with state law does not constitute unlawful activity pursuant to federal law. This Resolution is crucial for allowing lawyers to advise clients without fear of criminal liability, assist such clients to comply with both state and federal laws, allow for the development of laws and regulations, and will align with the ultimate objectives of the Department of Justice: adherence to the rule of law.

2. **Approval by Submitting Entity.**
This resolution was been approved by the Tort Trial and Insurance Practice Section Council during the Section’s Fall Leadership Meeting on October 19, 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?**
19A104 called for marijuana to be removed from Schedule 1 of the Controlled Substances Act. This Resolution seeks to build on 19A104 by calling on Congress to ensure that lawyers advising clients operating marijuana businesses permitted under state law are not charged with criminal conduct for providing legal advice to their clients.

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.**
   Work with Congress to introduce legislation.

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

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

10. **Referrals.**
    Business Law Section
    Center for Professional Responsibility
    Section of Civil Rights & Social Justice
    Criminal Justice Section
    Health Law Section
    Intellectual Property Law Section
    Labor & Employment Law Section
    Section of Litigation
    Real Property, Trust and Estate Law Section
    Section of Taxation

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

   This Resolution resolves the current uncertainty facing lawyers in the provision of advice and legal services to clients within the cannabis industry resulting from the tension between state and federal law over marijuana regulation. A majority of states have legalized marijuana in at least some circumstances, while the federal government continues to ban the drug outright. Because marijuana related activities remain federally criminal conduct, the fear of prosecution for conspiring to commit a crime or aiding and abetting a crime is currently deterring lawyers from advising clients operating state-authorized marijuana businesses, who are thus deprived of desperately needed counsel and guidance. This Resolution is necessary to clarify that such provision of advice and legal services in compliance with state law does not constitute unlawful activity pursuant to Federal law. This Resolution is crucial for allowing lawyers to advise clients without fear of criminal liability, assist such clients to comply with both state and federal laws, allow for the development of laws and regulations, and will align with the ultimate objectives of the Department of Justice: adherence to the rule of law.

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

   This Resolution addresses the lack of clarity as to whether lawyers may be prosecuted for violating or conspiring to violate any federal act merely by providing advice and legal services to a client relating to a state-authorized marijuana activity or business. Statutory clarity will remove the fear of prosecution, allowing lawyers to advance the rule of law by providing such clients with much needed counsel and guidance on adhering to state laws and navigating the tension between state and federal law.

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

   This Resolution will provide explicit statutory clarity that exempts from criminal prosecution the provision of advice and legal services relating to statute-authorized marijuana activity or business, consistent with the ethical rules of that state.

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

   Not applicable / None.
RESOLVED, That the American Bar Association urges state, territorial, and federal courts to apply the modern incorporation doctrine standards to the Seventh Amendment to the Constitution of the United States and make its formulation of the fundamental right to trial by jury in civil cases applicable to all states of the Union.
Historical Background

When the States considered ratification of the Constitution of the United States, the most salient argument against replacement of the Articles of Confederation with the newly drafted Constitution was the absence of a bill of rights. The right to trial by jury was contained in each of the state declarations of rights that preceded the U.S. Constitution and was the right most urgently advocated for the Bill of Rights. The importance of juries, both generally and in civil cases in particular, is well recognized in the policies of the Association. Even so, the guarantee of the fundamental right to a civil jury trial currently depends on state constitutions. Three states, Colorado, Louisiana, and Wyoming, have no civil-jury trial guarantee in their state constitutions. All other state constitutions guarantee a civil-jury trial, but apply it unevenly and sometimes less rigorously than the federal courts apply the Seventh Amendment right to trial by jury in civil cases.

Originally, the provisions of the federal Bill of Rights applied only to the federal government and not the states. Under the organic acts, only those parts of the U.S. Constitution obligatory on the states apply as well to territories. For that reason, the resolution, if implemented, would also extend Seventh Amendment rights to territories. However, tribal courts, as the judicial branch of a separate sovereign are not subject to the Bill of Rights or the Fourteenth Amendment, and the resolution makes no change to those arrangements.

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1 *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636-37 (1943) (“Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification.”).
3 Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 858-59 (2013). Louisiana follows a civil-law tradition, rather than the common law, unique among states. Because the Seventh Amendment preserves the jury-trial right as it existed at common law, federal law will determine eligibility for the application of the Seventh Amendment. *Parsons v. Bedford*, 28 (3 Pet.) U.S. 433, 447 (1830), established that the Seventh Amendment’s reference to suits under common law embraced cases in which “legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized.” In addition, the Supreme Court held that “the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). The federal district courts already have experience applying this principle to Louisiana statutory causes of action because the Seventh Amendment applies in federal courts sitting by diversity. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996).
5 See, e.g. *Newby v. Gov’t of Guam*, 2010 Guam 4, ¶ 45 (Guam Mar. 5, 2010), (“the Seventh Amendment’s guarantee of a civil jury trial has never been extended to the States, and because the Organic Act only extends the Seventh Amendment to Guam as it applies to the States, see 48 U.S.C. § 1421b(u) (2008)”).
Near the turn of the twentieth century, the Supreme Court began a project of selective incorporation, by which individual clauses or whole amendments of the Bill of Rights were determined to apply to the states. Relying on the Fourteenth Amendment, the Supreme Court began to apply the individual liberties recognized in the Bill of Rights to the States. After a period of dormancy in the project, the Supreme Court has once again undertaken the concept of incorporation, applying the Second Amendment’s right to bear arms and the Eighth Amendment’s Excessive Fines Clause to the states. This term, the Supreme Court will consider whether the Sixth Amendment’s unanimous jury-trial requirement in criminal cases applies to the states. The ABA filed an amicus curiae brief that urged the Supreme Court “to hold that the Fourteenth Amendment fully incorporates the Sixth Amendment’s requirement of jury unanimity.”

The renewed interest among the justices of the Supreme Court in the Incorporation Doctrine makes this a ripe time to urge that the Seventh Amendment be applicable to the States as well. As with Timbs, in which the Supreme Court “incorporated” the Excessive Fines Clause, there is no current circuit split because of existing Supreme Court precedent, in this case of more than a century ago. Yet, the Supreme Court’s willingness to revisit the incorporation of the Second, Sixth, and Eighth Amendment suggests that it may be prepared to examine incorporation of the Seventh Amendment.

The Association has joined the many voices that have bemoaned the “disappearing jury trial.” In fact, the availability and use of juries in civil cases has been a constant concern of the Association, dating back to at least 1891 and continuing to today. With nearly all other provisions of the Bill of Rights now incorporated, the time to give full status to the Seventh Amendment is long overdue. This resolution would enable the Association to file an amicus curiae brief in support of a case that asks that the Seventh Amendment be applied to applicable common-law causes of action that originate in state courts.

The Meaning of the Seventh Amendment

The Seventh Amendment provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States,

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7 The Supreme Court has uniformly held that the Fourteenth Amendment’s Due Process Clause provides the means by which incorporation takes place, Timbs v. Indiana, 139 S. Ct. 682, 687 (2019), although there is sentiment in both academia and among some justices that the Fourteen Amendment’s Privileges and Immunities Clause is a better vehicle for incorporation. See, e.g., Ahkil Amar, The Bill of Rights: Creation and Reconstruction 163–214 (1998); Timbs, 139 S.Ct. at 691 (Gorsuch, J., concurring); 139 S.Ct. at 691-92 (Thomas, J. concurring).
8 McDonald v. Chicago, 561 U.S. 742 (2010).
9 Timbs, 139 S. Ct. 682.
12 See Note, Meeting of the American Bar Association – Trial by Jury, 5 Harv. L. Rev. 202 (1891); 2014 AM Res. 105a (opposing the “suspension or delay of the fundamental right to a civil jury trial, in the face of difficult fiscal circumstances.”); 2005 Principles for Juries and Jury Trials.
than according to the rules of the common law.” The Amendment is generally acknowledged to contain two complimentary provisions: the Preservation Clause and the Reexamination Clause. The Preservation Clause protects the right to trial by jury as it existed under the English common law when the Amendment was adopted. More broadly, the Preservation Clause protects a litigant’s rights to a jury trial and all the prerogatives that come with it. The Reexamination Clause, on the other hand, prevents substitution of judicial factfinding for the jury’s determinations.

The test for a Seventh Amendment violation is fundamentally historical in nature and consists of two questions: 1) “whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was;” and, 2) whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.

The Incorporation Doctrine

Under the Incorporation Doctrine, a federal right is applicable to the States “if it is ‘fundamental to our scheme of ordered liberty,’ or ‘deeply rooted in this Nation’s history and tradition.’” In 2019, the Supreme Court unanimously applied the Excessive Fines Clause of the Eighth Amendment to the States for the first time. Also, recently, the Second Amendment’s right to bear arms was incorporated.

Unquestionably, civil jury trials are a “fundamental” feature of our justice system. Moreover, it is essential to a fair trial. It thus qualifies under the first alternative test for incorporation. Still, it qualifies as well for incorporation under the second alternative test.

Like the Excessive Fines Clause incorporated in Timbs, the civil-jury right “traces its venerable lineage back to at least 1215” and Magna Carta. William Blackstone wrote that Magna Carta’s acknowledgement of trial by jury was “the principal bulwark of our

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16 Markman, 517 U.S. at 376 (citations omitted).
17 Timbs, 139 S. Ct. at 687.
18 Id.
19 McDonald v. Chicago, 561 U.S. 742 (2010).
22 Cf. Timbs, 139 S. Ct. at 687. See also Magna Carta ch. 39 (1215).
23 Sir William Blackstone’s commentaries on English common law, published on the eve of the American Revolution in 1765 had a profound impact on American legal thinking and were widely accepted as “the most satisfactory exposition of the common law of England .... [U]ndoubtedly, the framers of the Constitution were familiar with it.” Schick v. United States, 195 U.S. 65, 69 (1904).
liberties,” “the glory of the English law,” and “the most transcendent privilege which any subject can enjoy.”

British attempts to restrict the jury right in the American colonies, along with taxation without representation, was a primary complaint against British rule. As Justice Story wrote: “trial by jury in all cases, civil and criminal, was as firmly and universally established in the colonies as in the mother country.” As a result, trial by jury was the only right universally secured by all 13 original American state constitutions. Today, only Louisiana, (which adheres to a civil law tradition), Wyoming, and Colorado lack a constitutional civil-jury guarantee.

The guarantee was also essential to approval of the U.S. Constitution; its absence the strongest objection to its ratification. The Seventh Amendment was added to ensure, among other things, that neither legislators nor judges interfered with the jury-trial right. The Seventh Amendment thus establishes that the “[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”

In evaluating a right’s deep roots in history and tradition, the Supreme Court has looked to whether state constitutions had adopted a similar right. In considering Second Amendment incorporation, the Supreme Court recognized that a majority of states, “22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms” when the Fourteenth Amendment was ratified. By comparison, at that time, “[t]hirty-six out of thirty-seven states . . . guaranteed the right to jury trials in all civil or common law cases.” In fact, “[f]ully 98% of all Americans in 1868 lived in jurisdictions where they had a fundamental state constitutional right to jury trial in all civil or common law cases.”

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25 See Declaration of Independence ¶ 20 (U.S. 1776) (charging England with “depriving us in many cases, of the benefit of trial by jury.”).
26 1 Joseph Story, Commentaries on the Constitution of the United States, § 165 at 117 (Melville M. Bigelow, 5th ed. 1905) (1833).
29 Parsons, 28 U.S. at 445.
33 Calabresi & Agudo, 87 TEXAS L. REV. at 77.
34 Id.
Just as \textit{Timbs} said of the excessive-fines prohibition, the jury-trial right “has been a constant shield throughout Anglo-American history.”\textsuperscript{35} Indeed, as with excessive fines, “the historical and logical case for concluding that the Fourteenth Amendment incorporates the [Amendment] is overwhelming.”\textsuperscript{36} Given the modern approach to the Incorporation Doctrine, arguments against application of the Seventh Amendment, as the Supreme Court recognized in incorporating the Second Amendment, are “nothing less than a plea to disregard 50 [now 60] years of incorporation precedent and return . . . to a bygone era.”\textsuperscript{37}

The precedents against incorporation long predate incorporation precedent. Seventh Amendment incorporation was only reviewed in \textit{Walker v. Sauvinet}, 92 (2 Otto) U.S. 90 (1875) and \textit{Minneapolis & St. Louis R. Co. v. Bombolis}, 241 U. S. 211 (1916). Both decisions precede the Supreme Court’s first articulation of what is now called the Incorporation Doctrine in \textit{Gitlow v. New York}, 268 U.S. 652 (1925), which held that the Fourteenth Amendment’s Due Process Clause made the First Amendment’s free-speech guarantee applicable to the States. Today’s Supreme Court has criticized reliance on the cases from that earlier era, because they “did not engage in the sort of Fourteenth Amendment inquiry required by our later cases,” and has invited courts to undertake that analysis.\textsuperscript{38}

Although it may be anticipated that some states may oppose incorporation of a civil jury trial right because of the added expense that more jury trials may involve, however, as the Ninth Circuit has held, “the availability of constitutional rights does not vary with the rise and fall of account balances in the Treasury.”\textsuperscript{39} That statement reflects, as well, the ABA’s position adopted in 2014 AM Res. 105a, where the report favorably quoted the Ninth Circuit on this issue and opposed the “suspension or delay of the fundamental right to a civil jury trial, in the face of difficult fiscal circumstances.”

\textbf{Conclusion}

The resolution urges state, territorial, and federal courts to apply the modern incorporation doctrine standards to the Seventh Amendment to the Constitution of the United States and make its formulation of the fundamental right to trial by jury in civil cases applicable to all states and territories of the Union. It is an issue the Supreme Court has not revisited since 1916. In the time since then, the Supreme Court has applied the Incorporation Doctrine to nearly every other provision of the Bill of Rights. In 2019, it applied, for the first time, the Eighth Amendment’s Excessive Fines Clause and, this term, is considering incorporation of the Sixth Amendment’s unanimous criminal jury requirement, a position that the ABA urged the Supreme Court to adopt in an amicus brief. If the unanimous criminal jury requirement is incorporated, only the Seventh Amendment’s civil-jury guarantee and the Third Amendment’s quartering of troops provision will remain.


\textsuperscript{36} \textit{Timbs}, 139 S.Ct. at 689.

\textsuperscript{37} \textit{McDonald}, 561 U.S. at 780.


\textsuperscript{39} \textit{Armster v. United States District Court for the District of Alaska}, 792 F.2d 1423, 1429 (9th Cir. 1986).
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unincorporated. Because the Third Amendment has not figured in litigation, the decision will effectively treat the civil jury as an orphan from the rest of the Bill of Rights, even though its claim for importance and its place in our history and traditions is second to none. This resolution seeks to remedy that and help restore the civil jury trial right to its proper place in the pantheon of rights guaranteed by the Bill of Rights. The Tort Trial and Insurance Practice Section urges the adoption of this resolution seeking support for the incorporation of the Seventh Amendment right to trial by jury in civil cases.

Respectfully submitted,

Dorothea M. Capone
Chair, Tort Trial and Insurance Practice Section
February 2020
1. Summary of the Resolution(s).

This resolution urges state and federal courts to apply the modern incorporation doctrine standards to the Seventh Amendment to the Constitution of the United States and make its formulation of the fundamental right to trial by jury in civil cases applicable to all states of the Union.

2. Approval by Submitting Entity.

Approved by the Tort Trial and Insurance Practice Section on November 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?

Not applicable.

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 resolution would enable the Association to file an amicus curiae brief in support of a case that asks that the Seventh Amendment be applied to applicable common-law causes of action that originate in state courts.

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

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

TIPS Delegate Robert S. Peck has argued cases seeking incorporation of the Seventh Amendment. Currently, pending in the Colorado Court of Appeals is *Smith v. Surgery Center*, No. 2019CA186, in which Mr. Peck is counsel, which asks that the Seventh Amendment be incorporated.

10. **Referrals.**

This Report and Resolution is referred to the Chairs and Staff Directors of the Section of Litigation and Civil Rights and Social Justice.

11. **Name and Contact Information** (Prior to the Meeting. Please include name, telephone number and e-mail address). Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Robert S. Peck  
(202) 944-2874  
robert.peck@cclfirm.com

12. **Name and Contact 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.

Robert S. Peck  
(202) 277-6006  
robert.peck@cclfirm.com
EXECUTIVE SUMMARY

1. Summary of the Recommendation

This resolution urges state, territorial, and federal courts to apply the modern incorporation doctrine standards to the Seventh Amendment to the Constitution of the United States and make its formulation of the fundamental right to trial by jury in civil cases applicable to all states and territories of the Union.

2. Summary of the Issue that the Recommendation Addresses

The Supreme Court has not revisited incorporation of the Seventh Amendment since 1916. In the time since then, the Supreme Court has applied the Incorporation Doctrine to nearly every provision of the Bill of Rights. In the past decade, it has incorporated the Second Amendment’s right to bear arms and the Eighth Amendment’s Excessive Fines Clause. This term, it is considering the Sixth Amendment’s unanimous criminal jury requirement. If the latter is incorporated, it leaves only the Seventh Amendment’s civil-jury guarantee and the Third Amendment’s quartering of troops provision as unincorporated. That Third Amendment has not figured in litigation, so that it effectively treats the civil jury as an orphan from the rest of the Bill of Rights, even though its claim for importance and its place in our history and traditions is second to none. This resolution seeks to remedy that and help restore the civil jury trial right to its proper place in the pantheon of rights guaranteed by the Bill of Rights.

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

This resolution will permit the Association to participate as amicus curiae on the incorporation question involving civil juries as it has, most recently, on the incorporation of the Excessive Fines Clause.

4. Summary of Minority Views or Opposition Which Have Been Identified

At this time, the sponsors do not know of any opposition.
RESOLUTION

RESOLVED, That the American Bar Association urges Congress to enact legislation to clarify and ensure that it shall not constitute a federal crime for banking and financial institutions to provide services to businesses and individuals, including attorneys, who receive compensation from the sale of state-legalized cannabis or who provide services to cannabis-related legitimate business acting in accordance with state, territorial, and tribal laws; and

FURTHER RESOLVED, That the American Bar Association urges that such legislation should clarify that the proceeds from a transaction involving activities of a legitimate cannabis-related business or service provider shall not be considered proceeds from an unlawful activity solely because the transaction involves proceeds from a legitimate cannabis-related business or service provider, or because the transaction involves proceeds from legitimate cannabis-related activities.
INTRODUCTION

This Resolution addresses the current banking uncertainties facing lawyers who provide services to, and other businesses operating in, the legitimate cannabis industry resulting from the tension between state and federal law over marijuana regulation. A majority of states have legalized marijuana for medical or recreational use, 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 tension and uncertainty relating to the criminal prosecution of activity in, or relating to, marijuana. Regardless of current federal prohibitions, the state-legalized marijuana industry was estimated to reach $10.4 billion as of the end of 2018, employing some 250,000 Americans.\(^1\) By 2025, the U.S. cannabis market is estimated to nearly triple, reaching $30 billion.\(^2\)

This Resolution addresses the provision of banking services in jurisdictions where marijuana has been legalized for medicinal or other purposes. Lawyers are key to upholding the rule of law. Legal advice is particularly necessary for an emerging industry such as cannabis, especially given the divergence of state and federal laws and the multiplicity of local, state, and federal regulations. Concerns about banking keep many lawyers and law firms from representing clients involved in the state-legalized marijuana trade or representing ancillary companies providing services to companies directly involved in the state-legalized marijuana trade.

Currently, the threat of criminal prosecution prevents most depository institutions from banking clients, including lawyers, who are in the stream of commerce of state-legalized marijuana.\(^3\) This Resolution is necessary to clarify that such provision of legal and other services in compliance with state law should not constitute unlawful activity pursuant to

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federal law. This Resolution is crucial for allowing lawyers to advise clients without fear of criminal liability or private repercussions such as the loss of their banking and credit relationships. Ensuring qualified and competent counsel can advise clients without fear of such repercussions will assist clients to comply with both state and federal laws, allow for the development of laws and regulations, and will align with the ultimate objectives of the Department of Justice: adherence to the rule of law.

BACKGROUND ON STATE REFORMS

The myriad state laws, state and local regulations, and federal laws dealing with the state-legalized cannabis industry is truly a thicket that competent counsel must help companies, individuals, and investors wade through.

Over the past two decades, a majority of states have 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 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 the consumption of alcohol by adults following the repeal of Prohibition. As of October 2019, 23 states had adopted “Medical Only” laws, and another 11 states (12, if we include the District of Columbia) had adopted “Adult and Medical Use” laws.

Each of these states has adopted, is adopting, and continues to refine a comprehensive body of regulations to replace outright prohibition. 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. Among many other things, this Retail Marijuana Code requires vendors to apply for a special license from the state, maintain detailed records of inventory, limit their advertising, and apply warning labels to all marijuana products. The state has even

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4 The following sections until the section titled “THE UNCERTAINTY FACING LAWYERS” are extracts from the August 2019 report submitted by Lucian Dervan, Chair of the Criminal Section, repurposed here for consistency on addressing issues with related backgrounds.

5 See 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 (C131), a non-psychoactive component produced by the cannabis plant. Id. See also German Lopez, Illinois is the 11th state to legalize marijuana for recreational purposes, Vox (June 25, 2019), https://www.vox.com/2019/6/25/18650478/illinois-marijuana-legalization-governor-jb-pritker.

6 For a thorough discussion of how states now regulate marijuana, see Robert A. Mikos, MARIJUANA LAW, POLICY, AND AUTHORITY (2017).

7 1 Code of Colorado Regulations 212-2.
created a Marijuana Enforcement Division within its Department of Revenue to regulate the state’s more than 1,000 licensed marijuana facilities. Many states also allow local municipalities and counties to determine whether marijuana can be legally produced or sold within the jurisdiction’s boundaries.8

BACKGROUND ON FEDERAL PROHIBITION

Even as these state reforms have proliferated—and public support for them has ballooned,9 federal law governing marijuana has remained essentially unchanged since the passage of the Controlled Substances Act (CSA) in 1970.10

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.11

Congress itself placed marijuana on Schedule I when it passed the CSA.12 It did so based, in part, on a recommendation from the Assistant Secretary of the U.S. Department of Health, Education, and Welfare that cannabis be placed on Schedule I, “at least until the completion of certain research.”13 The Drug Enforcement Administration has the authority to issue licenses for such research. Indeed, the CSA provides a mechanism to administratively reschedule cannabis, based on such new research and discoveries demonstrating marijuana’s medical efficacy.14 The DEA has repeatedly rejected requests to reschedule cannabis, most recently, in August 2016, when it denied a petition from the states of Rhode Island and Washington.15 The agency’s rationale for refusing to reschedule is always the same: the dearth of clinical trials demonstrating cannabis’s medical efficacy: “there are no adequate and well-controlled studies proving efficacy; the drug is not accepted by qualified experts; and the scientific evidence is not widely available.”16 The 33 states and various countries, including Canada, that have legalized

8 See, e.g., Oregon Laws 2017, Chapter 475B Section 461 (ORS 475B.461) (allowing a referendum to prohibit an applicant for a license for the production, processing or sale of marijuana items to operate in a city or county); Oregon Laws 2017, Chapter 475B Section 928 (ORS 475B.928) (allowing for local time, place and manner regulations).
9 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).
10 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. Mikos, See New Congressional Farm Bill Legalizes Some Marijuana, Marijuana Law, Policy and Authority Blog, https://my.vanderbilt.edu/marijuanalaw/2018/12/new-congressional-farm-bill-legalizes-some-marijuana/ (Dec. 13, 2018) (noting that the 2018 Farm Bill excludes from the definition of marijuana cannabis that contains less than 0.3% THC by dry weight).
11 21 U.S.C. § 812(b). These criteria include the substance’s accepted medical use (if any), it’s potential for abuse, and its physical and psychological effects on the body. Id.
12 Gonzales v. Raich, 545 U.S. 1, 13-14 (2005).
13 Id.
16 Id. at 53688.
cannabis for medicinal purposes, disagree with the DEA’s assessment. Nevertheless, marijuana remains a Schedule I drug in the United States.

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.17

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 that 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 deference to state policy as a matter of policy (not law).18 While those memos were rescinded by then-Attorney General Sessions, and then apparently re-adopted by Attorney General Barr,19 Congress has not changed the Controlled Substances Act, nor has the Drug Enforcement Agency rescheduled Cannabis. Within the last few years, Congress has written some temporary protections against federal criminal enforcement into appropriations 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.”20 The federal courts have interpreted these riders to bar federal prosecution of persons acting in conformity with state medical marijuana laws.21

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

17 See 21 U.S.C. at § 841 (criminalizing marijuana trafficking); id. at § 844 (criminalizing marijuana possession).
18 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).
19 See Memorandum from Jefferson B. Sessions, III, Attorney General, to All United States Attorneys (Jan. 4, 2018).
21 E.g., United States v. McIntosh, 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.”).
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 sanctions, even if their violations of state regulations were de minimis.

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 lawsuits under federal law because the federal RICO statute considers growing and selling marijuana to be actionable racketeering activities.

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. 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.

In short, despite State law, Cannabis remains an illegal controlled substance everywhere in the United States.

No one should be satisfied with the legal and regulatory quagmire that has resulted from the unresolved tension between state reforms and federal law. Although many of the

22 McIntosh, 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.”).

23 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).


25 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).
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 the targets of crime and significantly hampers the work of the state regulators and tax collectors who govern them.

THE EFFECTS ON BANKING AND THE UNCERTAINTY FACING LAWYERS

This tension between federal and state laws affects all those working in or for the state-legalized marijuana industry, including attorneys. Regardless of state law, so long as marijuana remains a Schedule I controlled substance, an attorney accepting funds from a client’s marijuana business activities remains criminal conduct under federal law. Thus, remunerations from the provision of legal advice and services to assist clients in such conduct may also in itself constitute a criminal offense, whether under a theory of conspiracy or aiding and abetting.

Because “the possession, distribution, or sale of marijuana remains illegal under federal law, any contact with money that can be traced back to state marijuana operations could be considered money laundering. . . .” This exposes banks and financial institutions to significant legal, operational, and regulatory risk. “In addition to growers and retailers, there are vendors and suppliers, landlords and employees[,] [lawyers and consultants] that are indirectly tied to the cannabis industry, thus posing legal risk for banks serving such entities and individuals. . . .”

The Federal Reserve System and the Office of the Comptroller of the Currency within the U.S. Treasury Department primarily regulate banks. Because cannabis is federally illegal, few banks are willing to allow those interacting with the industry to continue to maintain accounts. Lawyers and others regularly lose their accounts for working with the cannabis industry. Even one group dedicated to lobbying Congress to reform marijuana laws has had its long-term banking relationship interrupted by a bank’s fear of prosecution, directly threatening the group’s First Amendment right to petition the

26 “Section 846 of Title 21 prohibits conspiracies and attempts to violate any substantive offense established by Subchapter I of Title 21 (“Control and Enforcement”)—in other words, Section 846 makes it a crime to conspire to violate or attempt to violate any substantive offense set forth in 21 U.S.C. §§ 801-904. Analogously, Section 963 of Title 21 prohibits conspiracies and attempts to violate any substantive offense established by Subchapter II of Title 21 (“Import and Export”)—in other words, Section 963 makes it a crime to conspire to violate or attempt to violate any substantive offense set forth in 21 U.S.C. §§ 951-971.” Cited in U.S. Attorney’s Manual, § 9-100.020.
27 See 18 U.S.C. § 2(a): “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”
29 Id.
31 See, e.g., Note 3, supra.
government. This is because banks risk losing their master account with the Federal Reserve or having their assets seized under criminal and civil asset forfeiture laws for failing to comply with federal laws, including the Bank Secrecy Act, that prohibit, which requires banking institutions to maintain comprehensive compliance programs designed to prevent money laundering—criminal activity that involves the transformation of illegally obtained funds into the appearance of legitimate funds.

Ironically, by preventing banks from working with the cannabis industry, current law fosters potential money laundering. Most transactions with cannabis companies must be done in cash. This includes paying taxes, bills, and payrolls. This has spawned an industry of off-the-books alternative payment systems. Payments in cash and through alternative payment systems only cloud investigators' abilities to trace transactions and inhibit law enforcement from determining whether transactions and businesses are legitimate or fronts for illegal activity. This erodes the rule of law in and of itself.

In 2014, the Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”) issued guidance for banks working with the cannabis industry. Unfortunately, this did not provide sufficient safety for many financial institutions. Out of approximately 12,000 banks and credit unions in the United States, only 633 provide services to the cannabis industry, including attorneys. Federal Reserve Chairman Jerome Powell testified that banking the cannabis industry “puts financial institutions in a very difficult place and puts

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the supervisors in a difficult place, too. It would be nice to have clarity on that supervisory relationship.”

On September 25, 2019, the U.S. House of Representatives passed the Secure And Fair Enforcement Banking Act of 2019 (H.R. 1595) by a vote of 321-103. The Act would explicitly allow depository institutions to bank attorneys and others serving the cannabis industry without fear of legal violations. This would allow banking regulators to provide the clearer rules and guidelines Federal Reserve Chairman Powell feels are necessary. The bill awaits action in the U.S. Senate.

THIS RESOLUTION

Clear statutory guidance is needed that explicitly ensures that financial institutions can provide services to firms, companies, and individuals, particularly attorneys, who provide services to the Cannabis industry consistent with state law. This Resolution accomplishes this by supporting ongoing Congressional action. Passage of the SAFE Banking Act or similar legislation will provide security for lawyers and firms acting to advise companies in the industry against having their accounts closed or deposits seized. This will also foster the rule of law by ensuring that those working in the state-legalized legitimate cannabis industry can seek counsel and help prevent money laundering and other crimes associated with off-the-books cash transactions.

CONCLUSION

The right to seek the assistance of counsel, in civil and criminal matters, is a bedrock constitutional principle and a vital component of any system that adheres to the rule of law. Legal counsel is vital to the development of law and regulations. Yet, too many attorneys refuse to represent business or individuals in the stream of commerce of the cannabis industry for fear of having their own bank accounts closed or seized. Because of the central importance of the rule of law to the American system of government and the conflict between federal and state laws related to marijuana, it is the purpose of this Resolution to ensure attorneys and others working in states that have chosen to legalize marijuana can represent clients, in accordance with state law, without fear of having their bank accounts closed or seized. Until such fear is addressed, lawyers will continue to be deterred from advancing the rule of law, and clients will continue to be deprived of much needed legal guidance and counsel.

Respectfully submitted,

Dorothea M. Capone  
Chair, Tort Trial and Insurance Practice  
February 2020

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GENERAL INFORMATION FORM

Submitting Entity: Tort Trial and Insurance Practice
Submitted By: Dorothea M. Capone, Chair

1. Summary of Resolution(s).

This Resolution encourages Congress to enact legislation to ensure financial institutions, attorneys, and others may provide services to individuals and businesses operating in, or as part of, the state-legalized cannabis industry, consistent with state or tribal law in jurisdictions where cannabis has been legalized, without fear of federal prosecution. The Resolution further encourages Congress to ensure that proceeds from transactions involving cannabis-related businesses in such jurisdictions are not considered proceeds from an unlawful activity solely because the transaction involves proceeds from the state-legalized cannabis industry.

2. Approval by Submitting Entity.

This resolution was approved by the Tort Trial and Insurance Practice Section Council during the Section’s Fall Leadership Meeting on October 19, 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?

19A104 called for marijuana to be removed from Schedule I of the Controlled Substances Act. This Resolution seeks to supplement 19A104 by calling on Congress to clarify that banking institutions serving the cannabis industry, and serving those who serve the state-legalized legitimate cannabis industry, may do so without fear of regulatory or legal repercussions.

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)

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

Provide the ABA’s support to ongoing efforts to secure Congressional passage of legislation to address cannabis banking, including passage of the SAFE Banking Act (H.R. 1595) or similar legislation.

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

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Business Law 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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EXECUTIVE SUMMARY

1. Summary of this Resolution

This Resolution encourages Congress to enact legislation to ensure financial institutions, attorneys, and others may provide services to individuals and businesses operating in, or as part of, the state-legalized cannabis industry, consistent with state or tribal law in jurisdictions where cannabis has been legalized, without fear of federal prosecution. The Resolution further encourages Congress to ensure that proceeds from transactions involving cannabis-related businesses in such jurisdictions are not considered proceeds from an unlawful activity solely because the transaction involves proceeds from the state-legalized cannabis industry.

2. Summary of the Issue that this Resolution Addresses

This resolution addresses the main issues that cause depository institutions to close accounts owned by lawyers and others providing services to the state-legalized cannabis industry by supporting congressional legislation to provide statutory and regulatory clarity to depository institutions. Statutory and regulatory clarity will remove the fear of prosecution or regulatory violations, allowing banks to provide services to lawyers and others who advise clients in the state-legalized cannabis industry. The provision of banking services to attorneys serving the state-legalized cannabis industry will advance the rule of law by removing a major barrier that has prevented many attorneys and law firms from providing such clients with much needed counsel and guidance on adhering to state and federal laws and regulations.

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

This resolution will support congressional action to provide explicit statutory clarity that exempts from criminal prosecution the provision of banking services to the state-legalized cannabis industry. This will allow attorneys and law firms to provide legal services relating to statute-authorized marijuana activity or business, without fear of having their accounts closed and lines of credits revoked.

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

Not applicable / None.
RESOLVED, That the American Bar Association urges all nations, including the United States, to become party to and implement the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Mediation Convention); and

FURTHER RESOLVED, That the American Bar Association urges the United States executive branch and Senate to regard the Singapore Mediation Convention as self-executing under U.S. law and urges that any U.S.-implementing legislation considered necessary be federal legislation.
I. Introduction

On August 7, 2019, forty-six countries, including the United States, signed the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Mediation Convention. This is a multilateral treaty negotiated under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). It essentially provides means by which a mediated settlement may be enforced directly in the country where the breaching party is, rather than having to bring an action and then seek recognition and enforcement in the foreign jurisdiction, or commence a new proceeding to enforce the contract. It applies only to settlement agreements concluded after the date that the Convention entered into force for the relevant nations. The primary goals of the Convention are to facilitate international trade and to promote the use of mediation in resolution of cross-border commercial disputes.

This Convention could be an important element in convincing companies and other private parties to attempt to achieve mediated settlements of disputes. A 2014 Survey by the International Mediation Institute asked whether respondents would be more likely to mediate a dispute with a party from another country if they knew that country ratified an UN Convention on the Enforcement of Mediated Settlements and that consequently any settlement could easily be enforced there; 92.9% responded that they would be much more likely or probably more likely to do so. Mediation in certain circumstances can be quicker and less expensive than either arbitration or litigation. However, parties may be reluctant to use mediation because of the current absence of a means to enforce settlement agreements achieved by this process. The Convention would address that issue.

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3 See https://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements/. This 2014 survey focused on the private sector (internal counsel, corporate managers and other roles), with over half of the participants working in companies with more than 10,000 employees. Participants indicated that 28% of considered that the main obstacle for the development of mediation is that there is no universal mechanism to enforce a mediated settlement agreement; the same survey also showed that 84% of participants would be more likely to use mediation in a cross-border dispute, if there were a Convention on mediation akin to the NY Convention. Compare a 2015 Queen Mary survey, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (pages 31-32).

II. The Structure of the Convention

The Convention applies to a settlement agreement resulting from mediation of a commercial dispute and confirmed in writing, where at least two parties have their places of business in different countries or if both parties are in one country, the substantial part of the obligations is performed in a different country or a different country is more closely connected with the subject matter. It does not apply to consumer, family, inheritance or employment settlement agreements, nor to court-approved settlement agreements that are enforceable as a judgment in the country’s courts, or those that are recorded and enforceable as arbitration awards. The writing may be an electronic communication. Mediation itself is defined as “a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (‘the mediator’) lacking the authority to impose a solution upon the parties to the dispute.”

Each nation that is party to the Convention must enforce a settlement agreement meeting the criteria of the convention, provided the settlement agreement is signed by the parties to the settlement, resulted from mediation, is signed by the mediator who confirms the mediation was carried out, the institute administering it attests to it, or in the absence of any of these criteria, “other evidence acceptable to the competent authority.” Relief may be denied if (1) one of the settling parties is shown to have operated under an incapacity, (2) the settlement agreement is null and void, inoperable or incapable of performance under the applicable law, is not binding or final under its terms, or has been modified, (3) the obligations have been performed or are not clear or comprehensible, (4) granting the relief would be contrary to the settlement agreement, (5) the mediator breached applicable standards, or (6) the mediator’s impartiality was compromised due to a failure to disclose circumstances having a material impact or undue influence. In addition to these factors, a country where enforcement is sought may decline to grant relief on the basis of its public policy or if the dispute could not have been settled by mediation under its laws.

Other provisions relate to parallel applications or claims, the availability of other laws or treaties, certain reservations, participation by regional economic integration organizations, and ability of a nation with a non-unified legal system to apply it to those territorial units.

The Convention permits only two reservations. A party to the Convention may declare that: (a) it shall not apply the Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration; (b) it shall apply the Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.
The Convention will enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

In sum, for the Convention to apply, the settlement agreement must have been the result of an international commercial mediation, and not otherwise excluded (e.g., consumer or family law disputes). Notably, mediated settlements that are otherwise enforceable as judgments are excluded to avoid interference with the Hague Choice of Court Convention and the recently adopted Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

III. U.S. Implementation

The Singapore Convention requires implementing legislation in the United States. Currently, the enforcement of settlement agreements in the U.S. is largely a matter of state law. There is no mechanism for automatic enforcement of such an agreement in a foreign jurisdiction. It does not have the status of a judgment; in fact, its purpose is to provide enforcement of a contract in a legally binding way, similar to that afforded to an arbitration award, within the parameters of the Convention. Unlike the New York Convention that relates to arbitration awards, the settlement agreement that results from mediation is addressed in terms of the result, not the process.

The Singapore Convention was modelled on the New York Convention. There is a strong argument that the New York Convention is self-executing under U.S. law, and thus the Singapore Convention should be considered self-executing. Further, the New York Convention was implemented in the United States by the Federal Arbitration Act (chapters 1 and 2 of title 9 of the U.S. Code). To the extent implementing legislation is considered necessary or appropriate for the Singapore Convention, it would make sense for the United States also to implement it by federal legislation. The Hague Choice of Court Convention, which was signed by the United States on January 1, 2009, has not yet been ratified by the United States, despite support for ratification by the ABA because of disagreements on whether it should be implemented by U.S. state or federal legislation, or a combination. Efforts to achieve a compromise approach have been unavailing. The United States practice is not to deposit an instrument of ratification until it is able to implement the obligations it will become bound to. Following the tested precedent of how the New York Convention would avoid this problem and more quickly allow the United States to ratify the Singapore Convention.


6 See 2010 MY 108C, in which the ABA urged the Executive Branch and Senate to identify treaties that are self-executing under U.S. law.
Respectfully submitted,

Lisa Ryan
Chair, Section of International Law
February 2020
1. **Summary of Resolution(s).**
   This Resolution supports the prompt ratification and implementation of the Singapore Convention.

2. **Approval by Submitting Entity.**
   The Council of the Section of International Law Council approved the resolution on October 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?**
   This Resolution does not affect any existing policies of the Association. It promotes the proper application of the well-established doctrine of comity and its approach is consistent with the approach of 2006 AM Resolution 123A in support of the Hague Convention on Choice of Court Agreements. This Resolution also is consistent with the policies motivating ABA support for a multilateral judgments convention in 1993 MY Resolution 109A and with 2010 MY 108C, in which the ABA urged the Executive Branch and Senate to identify treaties that are self-executing under U.S. law. Urging other governments to act is also consistent with prior Association policy. For example, the Section’s resolutions adopted in August 2019 (113B on human dignity and 120 on the Rohingya) made comparable calls to other governments.

5. **What urgency exists which requires action at this meeting of the House?**
   The Convention has been signed by the United States and forty-five other countries. It is in the interest of the United States to move expeditiously.

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.**
   Subject to consultation with the State Department and with their assistance, if the House of Delegates adopts the resolution, we would work with ABA Government Affairs for implementation of the Resolution.

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

10. Referrals.
This resolution is being provided to other ABA entities for support.

Section of Litigation
Section of Dispute Resolution
Section of Business Law
Judicial Division

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges governments, including the U.S. government, promptly to adhere to the 2019 United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Mediation Convention). The Convention provides that a mediated settlement may be enforced directly in any other country that is party to the Convention.

2. Summary of the Issue that the Resolution Addresses

Currently, a party to a mediated settlement agreement would need to bring an action to enforce that agreement in the United States and then seek recognition and enforcement in the foreign jurisdiction, or commence a new proceeding to enforce the contract. This convention will provide an expedited and simpler method for enforcement of such agreements.

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

The resolution will urge governments, including the U.S. government, to adhere to the Singapore Convention and to implement it.

4. Summary of Minority Views

None known at this time.
RESOLVED, That the American Bar Association, urges the U.S. federal government and other national governments, as well as multinational and international organizations around the world, to amend existing laws or enact new enforceable laws, policies and procedures that protect and provide for the health and well-being of all Military Working Dogs, whether deployed in service, armed forms or deployed to armed forces through contracts with governments, to:

- provide for military transportation back to their home country at decommission or retirement;
- grant priority of first adoption at retirement to their veteran soldier handlers;
- ensure the provision of skilled veterinary care while in military service, and fund the coverage of veterinary care costs in retirement for their lifetimes; and
- designate specific government oversight for compliance and enforcement of provisions for veterinary care, transportation and adoption processes at decommission or retirement.
Introduction

Military Working Dogs (MWDs) are increasingly deployed today by the United States and nations around the world to serve in warfare and international security details. Their keen abilities have proven to be highly effective for military duties and life-saving missions; and the bonds they share with their human soldier partners valiantly serve their regiments during deployment. These life-long ties of loyalty continue into mutually-supporting civilian life when veterans are able to adopt their MWDs in retirement.

So while an issue of international animal welfare, MWD well-being is a concurrent issue of veterans’ welfare with the accompanying respect for military personnel and their service, both for human and canine soldiers.

In serving and protecting the well-being of MWDs in law and in policy, legal prescriptions are also providing vital support to the welfare of military personnel and retired veteran soldier partners who have served with their MWDs. In the United States, there are recent legislative and policy developments underway to promote MWDs’ and their veterans’ welfare, and a few other nations are similarly increasing their awareness on these issues. For effective and sustainable welfare protections, codifications of welfare protocols are necessary. The support of the legal community is vital at this time to advance the promulgation of such codes and to assist in the oversight of protocols.

By the factual nature of MWDs being deployed worldwide, serving in international deployments and involving rules of warfare, international legal principles are necessarily and practically applied to their military service along with national codes. Thus, the International Law Section, as the ABA’s leader in the development of policy in the international arena urges the acceptance of this resolution by the ABA.
Background

Dogs have been serving in warfare with their human partners for thousands of years – from protecting early settlements from invasions to participating in modern day elite special forces actions against terrorism.¹ The bond shared by human and dog has evolved and strengthened over centuries of domesticated living together; and one of the strongest human-canine bonds may be that of the human soldier and the Military Working Dog (MWD) who serve side by side protecting one another, their fellow soldiers and civilians on a daily basis in some of the most dangerous conditions of warfare and security efforts around the world.²

MWDs, with their keen senses and tactical prowess, carry out explosives detection, search and rescue, sentry, and other military duties for which their canine attributes cannot be replicated by human or machine.³ MWDs have been saving countless human lives including directly saving their human soldier handlers through their profound devotion, even sacrificing their own lives.⁴

United States Senator Richard Blumenthal (D-CT), a member of the Senate Committee on Armed Services observed “these heroic dogs deserve respect, care, and loyal companionship after their service, preferably from the handlers they protected in combat.”⁵

⁵ Concurrent Resolution, S.Con.Res.58, 115th Congress, 2D Session, Dec. 6, 2018, "Recognizing the honorable service of military working dogs and soldier handlers in the tactical explosive detection dog program of the Army and encouraging the Army and other government agencies, including law enforcement agencies, with former tactical explosive detection dogs to prioritize adoption of the dogs to former tactical explosive detection dog handlers," available at: https://www.congress.gov/bill/115th-congress/senate-concurrent-resolution/58/text
In his April 2018 video address to the American Bar Association (“ABA”) International Animal Law Committee panel “Applying the Rule of Law to Protect Military Dogs as Deserving Heroes of War,” Senator Blumenthal called upon the gathered ABA legal community to continue efforts to improve the welfare of MWDs stating that “the U.S. can and should serve as a global model” in this area.6

Aimed at precisely this objective, this Resolution details such a global model for the health and well-being7 of MWDs.

The Deployment of MWDs – U.S. and International Perspectives

U.S. armed forces, as well as other national militaries around the world, multinational and international forces such as NATO, and United Nations peacekeeping details are increasingly depending upon MWDs where on-the-ground military and para-military presences are required.8 Comprehensive training is required to prepare dogs to serve as MWDs, including certifying them for certain duties, and often significant resources are expended by military and international agencies on canine forces.9 Considered as ‘force multipliers’10 by armed forces worldwide, details about the deployment of MWDs can often be part of classified or confidential military strategies; and thus, the information that follows in this report is limited to that which is publicly accessible.

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7 The standard of “well-being” is proposed here as focusing on the needs of the animal and the individual with whom the animal resides/provides the care. The federal PETS Act of 2006 has a similar concept provided in terms of emergency action plans; whereby, operative language directs “such plans take into account the needs of households with pets and service animals” Public Law 109-308, Section 2 (2). State law developments are codifying the “well-being” of animals in family law and custody proceedings, notably first in Alaska (HB 147, available at: http://www.legis.state.ak.us/PDF/29/Bills/HB0147Z.PDF) and then Illinois (Public Act 100-0422, effective Jan. 1, 2018, available at: http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=100-0422&GA=100). See, Nicole Pallotta, "Illinois Becomes Second State to Require Courts to Consider Well-being of Companion Animals in Custody Disputes," Animal Legal Defense Fund, Animal Law Update, March 20, 2018, available at: https://aldf.org/article/illinois-becomes-second-state-require-courts-consider-wellbeing-companion-animals-custody-disputes/


9 "Soldiers support regional operations as canine ambassadors,” (U.S. Army website), Jan. 7, 2019, available at: https://www.army.mil/article/215783/soldiers_support_regional_operations_as_canine_ambassadors

United States

Published government reports indicate there were about 1,800 MWDs deployed in military service by the U.S. as of a 2016 assessment;\(^{11}\) although the number is likely higher if privately-contracted details as well as special mission dogs, such as those deployed by the Central Intelligence Agency, are also included in an expanded count of all military and para-military working dogs.\(^{12}\) The U.S. Air Force is the executive agent charged with the responsibility for recruiting and assigning MWDs to all military branches, and the U.S. Army is responsible for their medical care under federal directives.\(^{13}\) Most MWDs for Department of Defense assignments worldwide are trained at and deployed from the Military Working Dog Center of the 341st Training Squadron at Lackland Air Force Base in Texas.\(^{14}\) There is significant investment in the U.S. MWD program each year as expert training is upwards of $40,000 for each dog.\(^{15}\)

Examples of other MWD Programs Around the World:

- In the United Kingdom, the Royal Army Veterinary Corps trains up to 170 dogs every year who go on to serve in the military and police forces for a variety of protection tasks ensuring bases and military sites are secure, and detecting arms and explosives.\(^{16}\)

- In China, press reports indicate that over 10,000 military dogs are deployed by China’s military through its MWD program which was formally initiated in 1991.\(^{17}\)

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\(^{13}\) See supra note 11 at 2, GAO Highlights, "Why GAO Did This Study", available at: [https://www.gao.gov/assets/690/683308.pdf](https://www.gao.gov/assets/690/683308.pdf)

\(^{14}\) See supra note 10.


\(^{16}\) Tim Cooper and Imogen Holland, "UK vs US: How Are Military Animals Used," July 31, 2018, available at: [https://www.twforces.net/news/uk-vs-us-how-are-military-animals-used](https://www.twforces.net/news/uk-vs-us-how-are-military-animals-used)

• **Russia**, with a long history of deploying military dogs since the Soviet era, news reports note presently over 3,000 dogs serve in Russia’s border patrol and military.\(^{18}\)

• **France**, the ‘chiens du guerre’ (dogs of war) have a significant place in military services; and are currently deployed in the country’s army, air force and marines with over 250 dogs trained annually.\(^{19}\)

• **Israel**, the elite MWD program named Okezt (meaning “sting”) was formally created in its present form in 1974, and currently serves all units of their army.\(^{20}\) Specialized training for these dogs and their handlers lasts over 17 months.\(^{21}\)

• **Australia**, the MWD program was instituted in 1943 to protect its air force fleet; today MWDs are deployed for security and emergency response missions.\(^{22}\)

• **Germany**, German Shepherds (as well as Belgian Malanois and similar Shepherd breeds) have long been deployed during war time.\(^{23}\) These breeds are the preferred MWD breeds of many nations due to their keen senses and agility, particularly for bomb detection.\(^{24}\)

• **Mexico**, which operates the largest canine center in Latin America, over 1,800 sniffer dogs have been trained for its army in the past decade.\(^{25}\)


In India, MWDs started to be deployed after recent terrorist attacks in that country, and are increasing in numbers along with high recognition of their valiant service.\(^{26}\)

Given the rigors of the service required by these dogs, their health and well-being require ongoing expert care since their lives are often shortened by the battle wounds, both physical and mental, including injuries and diseases, sustained during their deployments.\(^ {27}\) But while the deployments of MWDs have increased substantially worldwide, particularly today with the war on terrorism, the legal protections for MWDs and their welfare often have not moved at a tandem pace with their expanded military service.

**Legal Status of MWDs**

- Domestic laws and policies under national military codes and defense appropriations provide for the recruitment, training, handling, and care of MWDs.\(^ {28}\)

- While there is not yet a specific international treaty covering animal welfare during warfare or otherwise, there are international legal and global norms codes proposed as applicable to the welfare of MWDs by the nature of their military service, accepted rules of warfare and combatant engagement in international conflicts, and deployment of canine forces by numerous nations, multinational and international organizations across borders in the modern era.\(^ {29}\)

By way of historical context in the United States, the military’s use of MWDs shaped their status under law in the modern era. During World War II, there was a large citizens’ effort to volunteer their pets for the war and then attempts were made to return the dogs to their families at war’s end;\(^ {30}\) so the dogs seemingly retained their pet status. By the time of the Vietnam War, a more concentrated program to train and deploy MWDs was carried out by the military directly, and the dogs were thereafter classified as ‘military


\(^{27}\) See supra note 11


\(^{30}\) See supra note 21, Shira Anderson, “Canine Combatants”
equipment.\textsuperscript{31} It was at this time, and seemingly due to their status as military equipment, the lack of proper procedures and the associated costs, that a corresponding effort to bring the MWDs home from war was not carried out once the U.S. withdrew from Vietnam. Tragically, MWDs were either euthanized or left behind. \textsuperscript{32}

Since that time, a number of progressive steps have been made in U.S. law and policy to implement welfare protections for MWDs.\textsuperscript{33} This includes “Robby’s Law” enacted in 2000 in the U.S.\textsuperscript{34} Named after the case of a former military dog handler who made all efforts to adopt his military dog Robby, this law initiated the requirements for formal adoption processes for retiring MWDs and the ability for their former handlers to adopt them.\textsuperscript{35} Following this law, subsequent policy changes were made in Department of Defense policies to address welfare concerns for retiring MWDs.\textsuperscript{36} In 2016, there was a very productive step forward made in the legal status of MWDs, whereby Title 10 of the U.S. Code was amended to codify the change in their military classification status from “military equipment” to “military animals”\textsuperscript{37}. Most recently, defense appropriations have required that the military provide transportation back to the U.S. for decommissioned MWDs.\textsuperscript{38} Efforts for the provision of veterinary care for retired MWDs are still ongoing with legislative provisions currently proposed in Congress.\textsuperscript{39}

Today United States military protocols hold MWDs in high regard. In the U.S., MWDs are often given military ranks one station above their handlers to signify their importance to their troops as well as to provide for their welfare; any mistreatment towards them will be

\textsuperscript{31} See supra note 1, Sarah D. Cruse, “Military Working Dogs"
\textsuperscript{32} Id.
\textsuperscript{35} Id.
\textsuperscript{37} 10 U.S.C. Sec 2583 - Military animals: transfer and adoption, available at: https://www.govregs.com/uscode/10/2583
considered an offense against a senior officer.” Similarly in other nations deploying MWDs, there are more norms-based protocols of respectful treatment of MWDs during their service.

However, the lack of formal legal prescriptions for their welfare and rule of law applications for the legal status of MWDs worldwide impacts the consistent application of their welfare protections – both during their deployment, when in combat, and then at their decommission. The absence of globally-recognized basic legal welfare protections for these canine soldiers particularly impacts the MWDs at the time of their retirement and for their remaining ‘civilian’ lives after their service, in terms of lifetime veterinary care needs, transportation back to their home country, and adoption rights of their handlers. And most often military dogs deployed through contracts with federal government can fall outside of the direct purview of the national armed forces regulation; thus, while serving in the same capacity and with military dogs directly trained and deployed by branches of the armed forces, these contracted MWDs do not always have the same guarantees for their welfare.

**Securing the Welfare of MWDs**

Over the past two decades with the increasing deployments of MWDs and the nature of their service in combat akin to their human soldiers, there has been accompanying increased public attention to the treatment of MWDs, their veteran handlers’ concerns for their adoption, as well as overall elevated public consciousness of animal welfare and animals’ interests. The United States has undertaken efforts on some of the following recommendations for MWD well-being. We are unable to comment on the specific for the state of the law in other nations as often this information is not publicly available due to its relation to military matters and/or factors precluding disclosure.

- **Transportation for MWDs Back to Home Country**

Unfortunately, the historical record has numerous instances where canine soldiers were not brought home from wars – either euthanized due to lack of policy or funding, or worse, left in deployed countries to fend for themselves. Nonprofit organizations often have undertaken rescue missions to bring war dogs home through fund-raising efforts to cover the thousands of dollars in costs per dog for commercial flights back to their home country. But increased recent public attention to the service of military dogs and an outcry “to leave no soldier behind” have brought some policy changes, particularly to U.S. protocols, directing military forces to return MWDs back to their home country after

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41 See supra note 1, Sarah D. Cruse, “Military Working Dogs”
42 See supra note 39, Mission K9 Rescue
deployments. Most recently, the 2019 National Defense Authorization Act in the U.S. details that the Department of Defense provide transportation back to the U.S. for decommissioned military dogs. Rule of law should be applicable on an international basis in this instance, as the impacts of MWDs not being returned home from deployments in other countries are also international in scope.

- **First Priority MWD Adoption to Handlers**

MWD retirement adoptions by handlers have mostly been facilitated in some cases in the U.S. and internationally by tradition, not by any formal process. In the U.S., it wasn’t until Robby’s Law was enacted in 2000 that there was a beginning legal recognition of a handler’s interest and priority in adopting his/her retired MWD. With this developing legal precedent for adoptions, there has also been a changing mindset about MWDs -- to see the importance at decommission and adoption for their own welfare, as well as for the mutual benefits of their reunions with their veteran soldier handlers in retirement. However, there are still few procedures in place to ensure the first priority adoptions to veteran handlers are offered and carried out appropriately, and all adoption review procedures are vetted; and to date there are especially few accountability procedures for private contractors with governments to ensure the adoptions of contracted MWDs.

This concern was highlighted most recently in a Department of Defense Inspector General Report that cited the lack of proper procedures for the disposition of retired military dogs under the Tactical Explosive Detection Dog (TEDD) program, a temporary MWD contract for such specialized MWDs deployed with the U.S. Army from 2010-2014.

A 2018 award-winning short film entitled *Finding Satan*, depicts the story of one TEDD handler’s persistent and prolonged search for his retired MWD when the first priority adoption process was not properly followed by a military contractor. Sgt. Ryan Henderson searched for five years for his dog, Satan when he had been retired from duty, only to discover Satan had been sent to an adoption event open to the public without Henderson ever being contacted. With the pro bono assistance of North Carolina attorney Marilyn Forbes, Satan was finally reunited with Sgt. Henderson after the initiation of precedent-setting legal action to enforce his first priority for adoption as his

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43 See supra note 38, John S. McCain 2019 National Defense Authorization Act, see Sec 253 amending Sec 2583 (f) of Title 10 “(3) (A) In the case of a military working dog located outside the continental United States at the time of retirement that is suitable for adoption at that time, the Secretary of the military department concerned shall undertake transportation of the dog to the continental United States (including transportation by contract at United States expense)...”; note that military working dog includes contracted MWDs under Section 2583(h) of Title 10.


45 ”FINDING SATAN (Military Dog short film),” LJM Productions, LLC (2018) available at: https://www.youtube.com/watch?v=AHlqGPwzW4; Short Film Winner: Los Angeles Film Awards "Best Documentary" (January 2019), Top Shorts Online Film Festival "Best Documentary" (November 2018), Impact DOCS "Award of Merit" (January 2019)
This film demonstrates how the welfare of both MWDs and their handlers can be enhanced by ensuring the proper first priority of adoption processes for reuniting human and canine soldiers in retirement through the implementation of necessary legal protocols.

- **Provision of Veterinary Care for MWDs**

During their military service, veterinary care is provided to MWDs by armed forces personnel; however, at retirement, most often the cost of their vet care becomes the responsibility of the individual who adopts the dog. The prospect of high medical costs can be a deterrent to adoption.

Retired MWDs have special medical needs that can significantly impact their prospects of adoptability. Unless discharged early due to injury or medical condition, these highly-trained canines are usually retired no earlier than 7 years of age, and often at 10 years of age or older. Typical medical conditions that result from their courageous military service can include cancer, gastrointestinal disorders, degenerative bone conditions, and severe allergies necessitating special attention including surgery as well as long-term care; and their medical needs are exacerbated by their mature age. Debilitating behavioral conditions can also manifest as a direct result of their military service, including Canine Post-Traumatic Stress Disorder (“C-PTSD”).

The National Defense Authorization Act for FY 2013 authorized the Secretary of Defense to contract with a private nonprofit entity to establish and maintain a system funded by private donations to provide veterinary care for retired canine soldiers adopted pursuant to statute. Regrettably, the statute does not specify a timeline to accomplish this goal. Moreover, the law clearly states that "no funds may be provided by the federal government for this purpose."

A few established non-profit organizations have sought to fill the financial gaps for adopters by offering limited financial assistance for veterinary care to individuals who have adopted war dogs, including some prescription costs and emergency medical care;

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46 Henderson v. Richardson, Case No. 17 CVS 409, General Court of Justice, Superior Court Division, Richmond County, North Carolina (April 18, 2017)
47 See supra note 34, Tech Sgt. Amaani Lyle, "Officials outline adoption process for military working dogs"
52 Id.
but these are small amounts as compared with overall annual vet care costs to cover care for deployment injuries and illnesses for each dog.\textsuperscript{53}

In the U.S., additional proposals are currently underway for legislation to cover at least the initial veterinary screening and care at decommission for retiring MWDs through military resources.\textsuperscript{54}

As an example of another effort aimed at enhancing veterinary care for MWDs, a recent fairly comprehensive veterinarian-produced U.S. study of MWD deaths during two major deployments concludes veterinary care and other protective measures provided to MWDs could be greatly enhanced by the establishment of a MWD Trauma Registry to consistently record, compile and analyze deployment-related injuries, illnesses/diseases and mortalities.\textsuperscript{55} This uniform recordkeeping could lead to better veterinary care, handler and dog training, development of new treatment methodologies, as well as design of new protective gear and other measures to protect and save MWD and soldier handler lives.\textsuperscript{56}

- **Government Oversight of MWD Welfare Processes/Procedures**

Unfortunately, most of the handlers from the Army’s surge deployment under the TEDD program have not had the same success in locating or adopting their “battle buddies” at retirement.\textsuperscript{57} In December 2018, a Senate Resolution was adopted to honor the TEDD military dogs and their handlers, recognizing the lack of proper adoption protocols under the TEDD program contract, while also calling upon efforts to facilitate the adoption of the remaining TEDD dogs by their soldier handlers.\textsuperscript{58}

\textsuperscript{53} U.S. War Dogs Association, Inc., “Rx Program for Retired MWDs,” available at: https://www.uswardogs.org/rx-program-for-retired-mwds/

\textsuperscript{54} Proposed legislation in FY2020 U.S. National Defense Authorization Act; approved by Senate, pending conference review by both houses during 2020 Appropriations review process (as of December 2019 update); see Press Release from Senator Richard Blumenthal (CT), May 23, 2019, excerpt as follows: “Caring for Military Working Dogs: As a longstanding champion for animal welfare, Blumenthal secured legislative language to ensure access to veterinary screening and care for military working dogs. This care will allow military working dogs to receive immediate, appropriate healthcare to address issues resulting from deployment – enabling military working dogs to better transition to civilian life – while relieving some of the immediate financial burdens of veterinary costs for adopters.”


\textsuperscript{56} Id.

\textsuperscript{57} Concurrent Senate Resolution (TEDD)

\textsuperscript{58} Concurrent Senate Resolution (TEDD)
The TEDD program is just one instance that demonstrates that a norms-based or traditions-based process is not sufficient to guarantee their welfare. While the U.S. has taken a leading role by recently changing their status away from equipment, their welfare protections must be guaranteed in law in tandem with their status, accompanied by the proper and appropriate government oversight so that their care as living creatures is ensured.

Conclusion

In recognition of the valiant and vital service of MWDs in the armed forces in the U.S. and in nations worldwide, the ABA urges the U.S. government, other national governments, and multinational and international organizations around the world to amend existing laws or enact new laws and/or enforceable policies and procedures: (1) to provide military transportation back to home country at decommission or retirement; (2) to guarantee first priority adoption to military dog handlers; (3) to ensure that MWDs receive the necessary veterinary care during their deployments, and funded veterinary care upon decommission or retirement throughout their lifetimes, and (4) to designate government oversight of veterinary care, transport home and adoption processes at decommission or retirement.

Providing for the health and well-being of MWDs in turn also supports the welfare of their soldier partners during military service and their veteran handlers in retirement, and is consistent with legal precedents developing on both the national and international levels. Apart from accolades and medals, these canine soldiers who have served and protected us, deserve our guardianship and the guarantee of their welfare in law while in service and in retirement. And their veteran soldier handlers deserve the legal community’s attention to ensure in law their ability to reunite with and care for their canine soldier partners in retirement.

Respectfully submitted,

Lisa Ryan
Chair, International Law Section
February 2020
1. Summary of Resolution

Urges the U.S. government and other national governments, multinational and international organizations to amend existing laws or enact new enforceable laws, policies and procedures that protect and provide for the health and well-being of MWDs in the areas of transportation to the home country at retirement, first priority adoptions by their military handlers, veterinary care, and oversight of compliance and enforcement of such procedures.

2. Approval by Submitting Entity

This resolution is sponsored by the International Animal Law Committee and was approved by the Council of the Section of International Law at the August 10, 2019 Meeting.

This resolution is co-sponsored by the Government and Public Sector Lawyers Division as approved by the Division's Council on August 10, 2019, and is co-sponsored by the Tort Trial and Insurance Practice Section as approved by the Section’s Council on October 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 does not yet have a specific policies covering MWDs. This would be a timely adoption by the ABA following recent legal developments on MWDs’ welfare in the U.S. and raising international legal awareness for other nations.
104B

This resolution protects the interests of the military service personnel and veterans who partner with canine soldiers, promotes the welfare and well-being of Military Working Dogs deployed in service and retired, is consistent with military protocols, promotes established animal welfare codes.

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)**

Applicable legislation has been enacted over past decade, additional legislation is proposed and pending in the United States.

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

Proposed legislation to Congress with accompanying administrative, policy and regulatory prescriptions; legal and policy changes in nations worldwide – note information on similar actions in other nations is not always publicly-available/released due to military protocols.

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

None.

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

None.

10. **Referrals**

This Resolution with Report was referred to the Chairs and Staff Directors of all ABA Sections and Divisions, especially:

Government and Public Sector Lawyers Division (received unanimous approval for co-sponsorship from Council, August 2019)

Tort Trial and Insurance Practice Section (received unanimous approval for co-sponsorship from Council, October 2019)
Administrative Law & Regulatory Practice

Military Lawyers’ Coordinating Committee

Veterans’ Legal Services Initiative

Standing Committee on Legal Services for Military Personnel (received supportive review)

11. Contact Name and Address Information. (Prior to the meeting, please include the name, address, telephone number and email address)

Jill Mariani, marianig@dany.nyc.gov, work (212) 335-9143
Frances Arricale, farricale@gmail.com, cell (718) 440-0086

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

Frances Arricale, farricale@gmail.com, cell (718) 440-0086
Jill Mariani, marianig@dany.nyc.gov, work (212) 335-9143
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This Resolution urges the U.S. government and other national governments, multinational and international organizations to amend existing laws or enact new enforceable laws, policies and procedures that protect and provide for the health and well-being of MWDs in the areas of transportation to the home country at retirement, first priority adoptions by their military handlers, veterinary care, and oversight of compliance and enforcement of such procedures.

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

   Protect in law both the welfare of military and veteran personnel and their canine military partners while in service and at retirement.

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

   Support from the ABA legal community recognizing that domestic and international laws and codes are coalescing to secure the welfare of Military Workings will assist with promoting the adoption of legislation and laws and/or enforceable policies and procedures with accompanying administrative, policy regulatory action by the U.S. government and by other nations, multinational and international organizations; as well as further the global awareness for legal protections to ensure well-deserved care for the needs of MWDs throughout their lives and recognize the important human-animal bond between MWDs and their soldier handlers.

4. **Summary of Minority Views or Opposing Internal and/or External to the ABA which has been Identified**

   None.
RESOLVED, That the American Bar Association reaccredits for an additional five-year term the following designated specialty certification programs for lawyers:

1) Civil Trial Law program of the National Board of Trial Advocacy of Wrentham, Massachusetts; and

2) Estate Planning Law program of the National Association of Estate Planners & Councils, Estate Law Specialist Board, Inc. of Cleveland, Ohio; and

FURTHER RESOLVED, That the American Bar Association extends the accreditation period of the following designated specialty certification programs for lawyers until the adjournment of the next meeting of the American Bar Association’s House of Delegates in August, 2020:

1) Social Security Disability Law program of the National Board of Trial Advocacy of Wrentham, Massachusetts; and

2) Business Bankruptcy Law, Consumer Bankruptcy Law, and Creditors’ Rights Law programs of the American Board of Certification of Cedar Rapids, Iowa.
Report

Background and Synopsis of the Resolution

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 (93M105), followed an August, 1992, House resolution (92A128) 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 (99A107A), 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 six programs: (1) the Civil Trial Law and (2) Social Security Disability Law programs of the National Board of Trial Advocacy (NBTA); (3) the Estate Planning Law program of the National Association of Estate Planners & Councils, Estate law Specialist Board, Inc. (ELSB); and the (4) Business Bankruptcy Law, (5) Consumer Bankruptcy Law, and (6) Creditors’ Rights Law programs of the American Board of Certification (ABC). In evaluating any programs for reaccreditation, the Standing Committee follows the procedures it adopted on March 2, 1993, as amended thereafter from time to time.

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

1. 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;

2. 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; and

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.

Furthermore, as to the applications of the NBTA programs, in addition to passage of the examinations it administers itself, the NBTA accepts applicants’ passage of examinations administered by the New Jersey Supreme Court’s Board on Attorney Certification, the Texas Board of Legal Specialty Certification, and the Florida State Bar’s Board of Legal Specialization and Education. Recent examinations from all of these programs were made available, on a confidential basis, for review by examination reviewers appointed by the Standing Committee to review the NBTA programs.

The Standing Committee has reviewed the applications for the NBTA Civil Trial Law program and the ELSB Estate Planning Law program and recommends reaccreditation of each program for an additional five-year term.

The Standing Committee cannot recommend reaccreditation of the NBTA Social Security Disability Law program at this time. Upon review of the NBTA Social Security Disability Law application, the Standing Committee has concluded that it and its exam do not meet the Standards. The Standing Committee continues to communicate with the NBTA regarding administration of the program and anticipates being able to make a recommendation regarding reaccreditation by the 2020 Annual Meeting. The Standing Committee thus recommends extending the existing period of accreditation for the NBTA Social Security Disability Law program until the 2020 Annual Meeting, at which time the Standing Committee will make a final recommendation.

The Standing Committee has not yet received the application and materials for the three ABC programs. The Standing Committee anticipates receiving the applications and materials within the next month and anticipates being able to make a recommendation regarding reaccreditation by the 2020 Annual Meeting. The Standing Committee thus recommends extending the existing period of accreditation for the three ABC programs to the 2020 Annual Meeting, at which time the Standing Committee will make a final recommendation.
The Accreditation Review Panels were appointed by the Standing Committee for the Civil Trial Law program of the National Board of Trial Advocacy and the Estate Planning Law program of the National Association of Estate Planners & Councils, Estate Law Specialist Board, Inc., as well as the other four programs for which the Standing Committee is seeking an extension, and consisted of a chair and one or 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 Board of Trial Advocacy**

   **Specialty Area:** Civil 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 advocacy law, criminal trial advocacy law, family law trial advocacy, social security disability law, civil trial law, and truck accident law.

   **Accreditation Review Panel**

   **Samuel Edmunds, Chair.** Mr. Edmunds is a member of the Standing Committee on Specialization. He is an experienced trial attorney and partner of Sieben Edmunds Miller PLLC in Mendota Heights, Minnesota. Mr. Edmunds is a Board Certified Criminal Law Specialist.

   **Leo Figueroa.** Mr. Figueroa is a member of the Standing Committee on Specialization. He serves as Executive Director at the Texas Board of Legal Specialization in Austin, Texas and is Board Certified in Civil Trial Law & Personal Injury Trial Law.

   **Barbara Howard.** Ms. Howard is the Chair of the Standing Committee on Specialization. She is the principal of Barbara J. Howard Co., LPA in Cincinnati, Ohio and is a Certified Family Relations Law Specialist.
**Examination Reviewer**

**Martin Whittaker.** Mr. Whittaker currently serves as Senior Counsel for the Thomas More Society in Chicago, having previously worked in the American Bar Association’s Center for Professional Responsibility and Standing Committee on Specialization.

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.

The Accreditation Review Panel communicated suggested revisions to NBTA leadership regarding its application, related to its standards for recertification and its procedures for the revocation process. Additionally, the Accreditation Review Panel suggested revisions to its certification exam. Based upon this review and its having received satisfactory revisions, the Accreditation Review Panel concluded that the applicant’s program Civil Trial Law continue to comply with the ABA Standards.

By unanimous vote at an October 31, 2019 business meeting in Chicago, the Standing Committee on Specialization accepted the Panel’s recommendation (pending the above mentioned revisions), and the Committee recommends to the House of Delegates that it reaccredit NBTA’s Civil Trial Law certification program for an additional five-year term.

**2. Applicant Organization:** National Board of Trial Advocacy

**Specialty Area:** Social Security Disability 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 advocacy law, criminal trial advocacy law, family law trial advocacy, social security disability law, civil trial law, and truck accident law.

**Accreditation Review Panel**
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 a member of the Standing Committee on Specialization.

Steven Rubin. Mr. Rubin is a solo practitioner who specializes in real estate transactions, real estate related litigation, and condominium and planned development law, and concentrates in other civil matters relating to real estate and commercial law. He is a Florida Bar Board Certified Attorney and is a member of the Standing Committee on Specialization.

Examination Reviewer

Timothy Vrana. Mr. Vrana is a solo practitioner with Timothy J. Vrana LLC in Columbus, Indiana. His practice focuses on Social Security Disability.

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 does not currently comply with the ABA Standards.

The Accreditation Review Panel has communicated suggested revisions to NBTA leadership regarding its application, related to its standards for recertification and its procedures for the revocation process. Additionally, the Accreditation Review Panel made suggestions to revise the certification exam.

By unanimous vote at an October 31, 2019 business meeting in Chicago, the Standing Committee on Specialization accepted the Panel’s recommendation to not approve the NBTA Social Security Disability Law program reaccreditation application until revisions are made to both the application and exam and to extend the program’s accreditation to the 2020 Annual Meeting. The Committee recommends to the House of Delegates that it extend the accreditation of the NBTA Social Security Disability Law program to the 2020 Annual Meeting.


Specialty Areas: Estate Planning Law

The Estate Law Specialist Board, Inc. (ELSB), an ABA-accredited, attorney-run subsidiary of the National Association of Estate Planners & Councils in Cleveland, Ohio, administers the only national, board certification of an attorney as an Estate Planning Law Specialist.
The ELSB has one program accredited by the American Bar Association to certify lawyers in the specialty area of estate planning law.

Estate Planning Law Accreditation Review Panel

Samuel Edmunds, Chair. Mr. Edmunds is a member of the Standing Committee on Specialization. He is an experienced trial attorney and partner of Sieben Edmunds Miller PLLC in Mendota Heights, Minnesota. Mr. Edmunds is a Board Certified Criminal Law Specialist.

Meg Hyatt. Ms. Hyatt is the Executive Director of the National Elder Law Foundation.

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

Lawrence Lebowsky. Mr. Lebowsky is an Estate & Trust Litigation attorney in the Law Office of Lawrence M. Lebowsky in Los Angeles, California.

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 Review Panel requested the 2016 financial statement, which were not in the application for reaccreditation, be submitted. Based upon this review, and receipt of the 2016 financial statement, the Accreditation Review Panel concluded that the applicant’s program continues to comply with the ABA Standards.

By unanimous vote at an October 31, 2019 business meeting in Chicago, the Standing Committee on Specialization accepted the Panel’s recommendation (pending the above mentioned information request), and the Committee recommends to the House of Delegates that it reaccredit ELSB’s Estate Planning Law certification program for an additional five-year term.

4. Applicant Organization: American Board of Certification

Specialty Areas: Business Bankruptcy Law, Consumer Bankruptcy Law, and Creditors’ Right Law

The American Board of Certification (ABC) is a non-profit organization dedicated to serving the public and improving the quality of the bankruptcy and creditors’ rights law bars. ABC has certified nearly 1,000 attorneys in consumer and business bankruptcy and creditor’s rights law nationwide. ABC certification serves the public by allowing potential clients to make an informed decision in choosing bankruptcy and creditors rights counsel.
In addition, ABC certification encourages attorneys to strive toward excellence and recognizes those attorneys who have met the rigorous ABC standards.

ABC has three programs accredited by the American Bar Association to certify lawyers in the specialty area of business bankruptcy, consumer bankruptcy, and creditors’ rights.

Business Bankruptcy, Consumer Bankruptcy, and Creditors’ Rights Law Accreditation Review Panel

Barbara Howard, Chair. Ms. Howard is the Chair of the Standing Committee on Specialization. She is the principal of Barbara J. Howard Co., LPA in Cincinnati, Ohio and is a Certified Family Relations Law Specialist.

Hon. Melissa May. Judge May was appointed to the Indiana Court of Appeals by Governor Frank O’Bannon in April of 1998. Prior to her appointment to the Court, Judge May practiced law for fourteen years in Evansville, Indiana, where she focused on insurance defense and personal injury litigation. From 1999 until December 2004, Judge May was a member of Indiana’s Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee and is a member of the Standing Committee on Specialization.

Martin Whittaker. Mr. Whittaker currently serves as Senior Counsel for the Thomas More Society in Chicago, having previously worked in the American Bar Association’s Center for Professional Responsibility and Standing Committee on Specialization.

Examination Reviewers
Not yet assigned.

While the applications for reaccreditation for all three ABC programs were received in August, and panelists were assigned to the Accreditation Review Panel, the Standing Committee experienced a staffing change and the Accreditation Review Panel did not receive the materials in a timely manner. Therefore, by unanimous vote at an October 31, 2019, business meeting in Chicago, the Standing Committee on Specialization voted to recommend to the House of Delegates that it extend the accreditation period of the ABC Business Bankruptcy, Consumer Bankruptcy and Creditors’ Rights Law programs to the 2020 Annual Meeting.

Respectfully submitted,

Barbara J. Howard
Chair, Standing Committee on Specialization
February, 2020
APPENDIX

(Excerpted provisions of the Standards for Accreditation of Specialty Certification Programs For Lawyers)
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.

(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.

# # # # # #
GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Standing Committee on Specialization
Submitted By: Barbara Howard, Chair

1. Summary of Resolution.

The resolution will grant reaccreditation to the Civil Trial Law program of the National Board of Trial Advocacy and the Estate Planning Law program of the National Association of Estate Planners & Councils, Estate Law Specialist Board, Inc.

The resolution will grant an extension of the accreditation period until the adjournment of the next meeting of the American Bar Association’s House of Delegates in August, 2020 for the NBTA Social Security Disability Law program and the Business Bankruptcy Law, Consumer Bankruptcy Law, and Creditors’ Rights Law programs of the American Board of Certification.

2. Approval by Submitting Entity.

At its meeting on October 31, 2019, the Standing Committee on Specialization voted unanimously that it submit this resolution to the House of Delegates for consideration at the 2020 Midyear Meeting.

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

Yes. NBTA’s Civil Trial Law program was last reaccredited in February, 2015. ELSB’s Estate Planning Law program was last reaccredited in August, 2014 and the ABC programs were last reaccredited in August, 2014.

4. What existing Association policies are relevant to this Resolution 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. 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.

Implementation will be self-executing if the program is reaccredited by the House of Delegates.

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

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


None.

10. Referrals.

None.

11. Name and Contact Information. (Prior to the Meeting. Please include name, telephone number and e-mail address.) Be aware that this information will be available to anyone who views the House of Delegates agenda online.

Barbara Howard
Chair, Standing Committee on Specialization
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Email: bhoward@barbarajhoward.com

Erin Ruehrwein
Section Director, Section of Legal Education and Admissions to the Bar
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12. **Name and Contact 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.*

Barbara Howard  
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on Specialization  
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EXECUTIVE SUMMARY

1. **Summary of the Resolution.**

   The resolution will grant reaccreditation to the Civil Trial Law program of the National Board of Trial Advocacy and the Estate Planning Law program of the National Association of Estate Planners & Councils, Estate Law Specialist Board, Inc.

   The resolution will grant an extension of the accreditation period until the adjournment of the next meeting of the American Bar Association’s House of Delegates in August, 2020 for the NBTA Social Security Disability Law program and the Business Bankruptcy Law, Consumer Bankruptcy Law, and Creditors’ Rights Law programs of the American Board of Certification.

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

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

3. **Please explain how the proposed policy position will address the issue.**

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

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

   The Standing Committee on Specialization approved the proposed recommendation unanimously. No opposition has been identified.
RESOLVED, That the American Bar Association urges Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and to provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the costs of the action to plaintiffs who prevail in civil discrimination actions.
I. Introduction

In today’s global economy, air travel is vital for everyone—including individuals with disabilities—to fully participate in society, compete in the job market, and enjoy traveling for recreation and for visiting family and friends. The U.S. Census Bureau estimates that approximately 56.7 million people in the United States have one or more disabilities—18.7 percent of the population.¹ People with disabilities experience discrimination by air carriers on the basis of their disabilities.

People with disabilities routinely report problems in gaining equal access to travel by commercial aviation. The most recent report from the Department of Transportation (DOT) indicates that in 2017, 34,701 complaints were filed with 35 domestic carriers and 155 foreign air carriers regarding disability-related incidents.² The 35 U.S. carriers reported receiving 29,662 disability-related air travel complaints; the 155 foreign carriers, 5,039 complaints during the same time period. This compares with the previous year’s report showing 32,445 complaints, with 34 domestic carriers receiving 27,842 complaints and 150 foreign carriers receiving 4,603 complaints—an increase of 2,256 (6.5 percent).³ As in 2016, nearly half of the complaints reported (15,206) concerned the failure to provide adequate assistance to persons using wheelchairs. Other top complaints received by domestic carriers included seating accommodations and service animals. Since 2005, the number of complaints filed has been on the rise.

In 1986, Congress passed the Air Carrier Access Act (ACAA),⁴ which prohibits disability-based discrimination in air travel. The Act was passed in response to the U.S. Supreme Court’s ruling in Department of Transportation v. Paralyzed Veterans of America⁵ that air carriers are not subject to Section 504 of the Rehabilitation Act of 1973,⁶ as amended, unless they receive direct federal financial assistance. The need for widespread civil rights protections for people with disabilities in air travel led Paralyzed

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Veterans of America and the broader disability community to advocate for the passage of a statute that would end disability-based discrimination.

Although the ACAA has improved the air travel experience of people with disabilities, they continue to encounter frequent and significant violations of their civil rights.7 Substantial barriers include

- damaged assistive devices;
- inaccessible aircraft, lavatories, and communication media;
- delayed assistance;
- inequitable treatment of service animals;
- inadequate disability cultural competency; and
- a lack of suitable seating accommodations.8

For many years, federal courts recognized an implied private right of action to enforce the ACAA.9 This changed, however, in 2001 when the U.S. Supreme Court decided Alexander v. Sandoval.10 This decision served as the catalyst for several federal circuit courts’ rulings that Congress’s express provision of specific administrative and judicial methods of enforcing the ACAA indicates that Congress did not intend to create a private cause of action.11

Currently, efforts are underway to amend the ACAA in order to create a private right of action. Legislation introduced in the 116th Congress (2019-2020) includes a private right of action for any person aggrieved by an air carrier’s violation of the ACAA or its regulations, and allows courts that find in favor of the plaintiff to award equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the cost of the action to the plaintiff.12 This legislation finds that a private right of action is critical to the enforcement of civil rights.

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8 Id.
11 See Segalman v. Southwest Airlines Co., 895 F.3d 1219 (9th Cir. 2018); Stokes v. Southwest Airlines, 887 F.3d 199, 202–03 (5th Cir. 2018); Lopez v. Jet Blue Airways, 662 F.3d 593, 597 (2d Cir. 2011); Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1270 (10th Cir. 2004); Love v. Delta Air Lines, 310 F.3d 1347, 1354 (11th Cir. 2002).
12 Air Carrier Access Amendments Act of 2019, H.R. 1549, 116th Cong. (Introduced Mar. 6, 2019, referred to the Subcommittee on Aviation Mar. 7, 2019), Sec. 2(b)(6) & Sec. 4(e)(1)(B); Air Carrier Access Amendments Act of 2019, S. 669, 116th Cong. Sec. 2(b)(6) & Sec. 4(e)(1)(B) (Introduced Mar. 6, 2019, read twice and referred to the Committee on Commerce, Science, and Transportation on Mar. 6, 2019); Airline Passengers’ Bill of Rights S. 2341, 116th Cong. Title II, Sec. 210(d)(1) & (2) (Introduced June 30,
This resolution calls for the same legal and equitable relief as the proposed legislation. A private right of action is essential to provide persons with disabilities meaningful redress for their losses, and for enforcement to have a deterrent effect.\textsuperscript{13} Otherwise these are rights without a remedy, which are not rights at all. Civil penalties levied against an airline do nothing to provide redress for individuals who have suffered a loss as a result of discrimination.

Awarding reasonable attorneys’ fees, reasonable expert fees, and costs are essential in order to minimize the cost of litigation to plaintiffs and maximize the incentive of potential defendants to stop discriminatory policies and practices. The reality is that the legal and financial resources of the air carriers are far beyond those of the aggrieved person. Thus, these amendments are necessary to bring the ACAA in line with its original spirit and purpose: the protection of the civil rights of air travelers with disabilities.

\section*{II. \textbf{Current System for Enforcement of ACAA}}

Under the ACAA, the Aviation Consumer Protection Division (ACPD)—part of the DOT’s Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (Enforcement Office)—is primarily responsible for enforcing the ACAA. The Act provides that aggrieved individuals may seek informal resolution of a complaint by contacting an airline carrier's Complaint Resolution Official (CRO), filing a complaint with the airline, or filing a complaint either online or via letter with the ACPD.\textsuperscript{14}

At each airport a U.S. carrier services, and during all times the carrier is operating at the airport, it must make a CRO available, either in person or via telephone, to address complaints.\textsuperscript{15} Carriers are responsible for making passengers aware of the availability of a CRO if the passenger raises a disability-related concern and the carrier’s personnel do not immediately resolve the issue to the customer’s satisfaction.\textsuperscript{16} CROs that find that a violation has occurred must provide the complainant with a written statement setting forth a summary of the facts; what steps, if any, the carrier proposes to take in response to the violation; and the right of the complainant to pursue a DOT enforcement action.\textsuperscript{17} CROs who find no violation must provide the complainant with a written statement including a summary of the facts, the reasons for the determination, and the right to pursue a DOT enforcement action.

\footnotesize{\begin{flushleft} 2019, read twice and referred to the Committee on Commerce, Science, and Transportation on June 30, 2019). \end{flushleft}}

\footnotesize{\begin{flushleft} \textsuperscript{13} NATIONAL COUNCIL ON DISABILITY, LEX FRIEDEN, POSITION PAPER ON AMENDING THE AIR CARRIER ACCESS ACT TO ALLOW FOR PRIVATE RIGHT OF ACTION 2, 4-6 (July 8, 2004), https://ncd.gov/publications/2004/July82004. \end{flushleft}}

\footnotesize{\begin{flushleft} \textsuperscript{14} 14 C.F.R. § 382.159(a); U.S. DEPARTMENT OF TRANSPORTATION, AVIATION CONSUMER PROTECTION, https://www.transportation.gov/airconsumer/file-consumer-complaint. \end{flushleft}}

\footnotesize{\begin{flushleft} \textsuperscript{15} Id. § 382.151(b). \end{flushleft}}

\footnotesize{\begin{flushleft} \textsuperscript{16} Id. § 382.151(c)(1). \end{flushleft}}

\footnotesize{\begin{flushleft} \textsuperscript{17} Id. § 382.154(b). \end{flushleft}}
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enforcement action.\textsuperscript{18} Written statements must be provided to the complainant within 30 calendar days of the complaint.\textsuperscript{19}

Passengers may file a written complaint with the carrier within 45 days of the alleged incident.\textsuperscript{20} The carrier has 30 days to admit or deny that a violation occurred.\textsuperscript{21} The response must inform the complainant of the right to pursue a DOT enforcement action.\textsuperscript{22}

Air travelers who want to file a formal complaint with the DOT must do so in accordance with 14 C.F.R. Part 302’s administrative enforcement procedure.\textsuperscript{23} Those dissatisfied with the DOT’s response may file a petition for review with the United States Court of Appeals for the District of Columbia or in the United States Court of Appeals for the district in which the person lives.\textsuperscript{24} The reviewing court has “exclusive jurisdiction to affirm, amend, modify, or set aside any part” of the Secretary’s order, may order the DOT “to conduct further proceedings” and may “grant interim relief by staying the order or taking other appropriate action when good cause for its action exists.”\textsuperscript{25}

The Secretary of Transportation may issue an order to compel compliance with the ACAA,\textsuperscript{26} revoke an air carrier’s transportation certificate,\textsuperscript{27} and/or impose a penalty of up to $10,000 per violation payable to the government.\textsuperscript{28} Civil fines are rare and typically invoked only in cases involving a pattern or practice of discrimination.\textsuperscript{29} Particularly noteworthy for purposes of this resolution, the DOT is not authorized to order an air carrier to make restitution to a person with a disability who has suffered a physical or economic injury caused by disability-based discrimination in violation of the ACAA.

Initially, federal courts interpreted the ACAA as providing individuals with disabilities aggrieved by the actions of air carriers with an implied private right of action.\textsuperscript{30} However, that changed in 2001 when the U.S. Supreme Court decided \textit{Alexander v.}

\begin{thebibliography}{99}
\bibitem{18} Id. § 382.154(c).
\bibitem{19} Id. § 382.154(d).
\bibitem{20} Id. § 382.155(c).
\bibitem{21} Id. § 382.155(d).
\bibitem{22} Id. § 382.155(d)(3).
\bibitem{23} Id. § 382.159(b); 14 C.F.R. pt. 302.
\bibitem{24} 49 U.S.C. § 46110(a).
\bibitem{25} Id. § 46110(c).
\bibitem{26} Id. § 46101(a)(4).
\bibitem{27} Id. § 41110(a)(2)(B).
\bibitem{28} Id. § 46301(a)(5)(B).
\bibitem{29} Letter from Paralyzed Veterans of America and Allied Organizations (American Council of the Blind, Bazelon Center for Mental Health Law, Disability Rights Education & Defense Fund, Easterseals, National Council on Independent Living, National Disability Rights Network, National Multiple Sclerosis Society, United Spinal Association) to The Honorable Frank LoBiondo, Chairman, and Honorable Rick Larsen (Ranking Member), House Transportation and Infrastructure Committee, Subcommittee on Aviation, at 2-3 (Mar. 23, 2017).
\bibitem{30} See, e.g., \textit{Shinault v. Am. Airlines, Inc.}, 936 F.2d 796 (5th Cir. 1991); \textit{Tallarico v. Trans World Airlines, Inc.}, 881 F.2d 566 (8th Cir. 1989).
\end{thebibliography}
which restricted the circumstances in which a court could determine the existence of an implied private right of action under a federal statute. *Sandoval* held that private rights of action to enforce federal law must be created by Congress, and statutory intent is determinative in deciding whether a statute creates not just a right but also a private remedy. Based on *Sandoval*, the Eleventh Circuit held that the ACAA does not grant litigants a private right of action. The Tenth Circuit agreed. The Second Circuit, Fifth Circuit, and Ninth Circuit have also held that the ACAA does not provide a private right of action.

III. Need for Resolution

**Private Right of Action**

Generally, the DOT pursues an enforcement action against a carrier on the basis of a number of complaints from which it can infer a pattern or practice of discrimination. As resources permit, the DOT will pursue an enforcement action where one or a few complaints describe particularly egregious conduct that is supported by adequate evidence.

This enforcement system provides no redress to the individual who suffers discrimination under the ACAA. Although a complaint to the DOT may eventually result in the carrier being fined—which is rare—it does not reimburse the individual complainant for their loss. For instance, in 2017 the DOT issued a consent order finding that American Airlines had violated the ACAA by failing to properly document the fact that a passenger was traveling with a service animal, and ordered the airline to implement new training for all gate and reservation agents within 30 days to avoid similar documentation problems in the future. The passenger, who had reserved an airline ticket as a passenger with a service animal, was asked to deboard the plane, which he claimed aggravated his post-traumatic stress disorder. Yet, he received no remedy.

In contrast to the ACAA, other federal civil rights statutes include both a private right of action by aggrieved individuals, as well as a fee-shifting provision to serve as incentive for the enforcement of important legal rights. As set forth in this resolution, the ACAA should be amended to provide a private right of action. By doing so, Congress will not only strengthen the protection of civil rights of persons with disabilities, but also bring the ACAA into conformity with similar civil rights laws. As the National Council on Disability

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32 Id. at 286.
33 *Love v. Delta Air Lines*, 310 F.3d 1347, 1359 (11th Cir. 2002).
34 *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1265 (10th Cir. 2004).
36 *Stokes v. Southwest Airlines*, 887 F.3d 199 (5th Cir. 2018).
37 *Segalman v. Southwest Airlines Co.*, 895 F.3d 1219 (9th Cir. 2018).
38 Id.
aptly noted in 1999, “[t]he ultimate test of any civil rights law is the extent to which people in the protected class can count on the law for real protection.”41 By amending the ACAA to allow for a private right of action, “Congress will be ensuring that meaningful redress is available to victims of discrimination,” and that disability-based discrimination by air carriers will be deterred.42

**Fee-Shifting Provision**

More than 150 federal statutes include provisions entitling a successful plaintiff in litigation to recover attorneys’ fees to encourage lawsuits considered in the public interest.43 “If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by involving the injunctive powers of the federal courts.”44 In the civil rights context, fee-shifting statutes provide for complete enforcement of rights Congress has deemed worthy of special protection.

Unless the ACAA is amended to authorize an award of reasonable attorneys’ fees, reasonable expert fees, and costs to plaintiffs who succeed on a private right of action, the cost of filing an ACAA lawsuit will serve as a deterrent to potential plaintiffs. People with disabilities live in poverty at more than twice the rate of people without disabilities.45 The legal and financial resources of the air carriers are far beyond those of people with disabilities

Civil rights lawsuits of this nature often involve significant legal issues, but relatively small monetary amounts. As a result, lawyers have little financial incentive to take such cases on a contingency basis absent an ability by a prevailing plaintiff to recover attorneys’ fees. “The importance of private rights of action as a means of implementing and enforcing public policy has long been recognized in a wide variety of areas. Where the interests advanced by private litigation vindicate important public policies, Congress often authorizes attorney fee awards to remove some of the disincentives for public interest litigation.”46 Amendment of the ACAA to include a provision allowing a successful complainant to recover reasonable attorneys’ fees, reasonable expert fees, and costs would not only encourage individuals protected by the ACAA to enforce their civil rights,

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42 NATIONAL COUNCIL ON DISABILITY, supra note 13, at 4.
46 Percival & Miller, supra note 43, at 239.
but also create a credible threat of enforcement against airlines, encouraging them to comply with the requirements of the ACAA.

IV. Conclusion

There is a dire need for Congress to amend the ACAA, and the ABA can play an instrumental role toward that end by adopting this Resolution.

As the national representative of the legal profession, the ABA has a long history of championing equal rights. In particular, the ABA has a policy that all Americans should have access to the courts. One of the ABA’s missions is to advance the rule of law, which it carries out in part by “assur[ing] meaningful access to justice for all persons”, including access to the courts, “promot[ing] full and equal participation in the justice system by all persons,” and eliminating bias in the justice system.47

The ABA has a responsibility to take a leadership role on the important civil rights issues that are the subject of this resolution. Adoption of this resolution would demonstrate the Association’s commitment to the protection of the civil rights of individuals with disabilities, and set a strong example for other organizations to support legislation to strengthen enforcement of the ACAA. Adoption of the resolution further fosters the ABA’s goal of increasing diversity in the legal system by championing the right under federal law for individuals with disabilities to be free from discrimination during air travel and to have meaningful redress for violations of the ACAA.

Respectfully submitted,

Denise R. Avant
Chair, Commission on Disability Rights
February 2020

47  www.americanbar.org/about_the_aba/aba-mission-goals.html.
1. **Summary of Resolution(s).** This resolution calls on Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the costs of the action to plaintiffs who prevail in civil discrimination actions.

2. **Approval by Submitting Entity.** Approved by the Commission on Disability Rights on August 10, 2019.

3. **Has this or a similar resolution been submitted to the House or Board previously?** Yes in August 2018, but we withdrew the resolution to work with airline representatives from the Tort Trial & Insurance Practice Section and Air & Space Law Forum.

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


7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The policy will allow the ABA to comment on and encourage current and proposed legislation amending the Air Carrier Access Act, as well as interpretations thereof.

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

9. **Disclosure of Interest.** (If applicable) None
10. Referrals.
   - Tort Trial & Insurance Practice Section
   - Air & Space Law Forum
   - Business Law Section
   - Litigation Section
   - Civil Rights and Social Justice Section
   - Commission on Law and Aging

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

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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.

   Denise R. Avant, Chair
   Commission on Disability Rights
   773-991-8050
   davant1958@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution calls on Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the costs of the action to plaintiffs who prevail in civil discrimination actions.

2. Summary of the Issue that the Resolution Addresses

People with disabilities routinely report problems in gaining equal access to travel by commercial aviation. For many years, federal courts recognized an implied private right of action to enforce the ACAA. This changed when the U.S. Supreme Court decided Alexander v. Sandoval, 532 U.S. 275 (2001). This decision served as the catalyst for several federal circuit courts to find that the ACAA does not provide for a private right of action.

However, a private right of action is essential to effectively enforcing the civil rights of persons with disabilities who suffer discrimination by providing them with meaningful redress for their losses. Civil penalties levied against an airline do nothing for individuals who have suffered a loss as a result of discrimination. Plaintiffs who prevail in a civil action brought under the ACAA should be entitled to obtain equitable and legal relief, including compensatory and punitive damages. Further, for the private action to benefit claimants, it must be accompanied by a statutory right to reasonable attorneys’ fees, reasonable expert fees, and costs in order to minimize the cost of litigation to plaintiffs and maximize the incentive of potential defendants to stop discriminatory policies and practices.

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

The policy position will allow the ABA to comment on and encourage current and proposed legislation amending the Air Carrier Access Act, as well as interpretations thereof.

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

Tort Trial & Insurance Practice Section and Air & Space Law Forum do not support a private right of action under the ACAA.
RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that would:

(a) make it unlawful for any person to transfer, sell, trade, give, transport, or deliver any unfinished firearm frame or receiver to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) unless (i) the unfinished frame or receiver is serialized in accordance with federal requirements for the serialization of firearms, (ii) the recipient passes a background check consistent with the federal requirements for a licensed dealer's transfer of a firearm, and (iii) the seller or transferor of the unfinished frame or receiver creates and retains records consistent with the federal record-keeping requirements for licensed firearm dealers related to the disposition of firearms; and

b) prohibit the possession, without a federal firearms license, of a finished or unfinished firearm frame or receiver that has not been serialized.
REPORT

Introduction

On November 14, 2019, a sixteen-year-old student walked into his high school in Santa Clarita, California, pulled out a pistol, and shot five other students, two fatally, before killing himself.¹ As a minor, it was illegal for the shooter to purchase or possess a handgun. But the gun he used was a homemade pistol assembled from parts available online with no background checks and no questions asked. Because such do-it-yourself guns lack serial numbers and cannot be traced, they are known as “ghost guns” — and they have increasingly become weapons of choice for gun traffickers and those legally prohibited from buying firearms, like minors, felons, and domestic abusers.

Federal law requires those engaged in the business of manufacturing, importing or selling firearms to obtain a federal license to do so. And through the chain from manufacture to retail sale, federal firearms licensees are required to comply with a range of regulations designed to protect public safety. These include critical public safety requirements like conducting background checks before transferring guns to ensure that would-be purchasers are not prohibited from possessing firearms. They also include requirements that firearms have serial numbers and that dealers maintain records on gun sales, so that law enforcement can trace and investigate guns when they are recovered at crime scenes.

In recent years, however, an alarming trend has emerged that threatens all of these regulations and the public safety benefits that they confer. A growing number of purveyors of so-called “ghost guns” undermine the intent of federal gun laws by selling — without any background checks — gun parts and kits that allow anyone to build a do-it-yourself gun with no serial number and no record-keeping.

Lacking any serial numbers or other identifying features, ghost guns cannot be traced when they are recovered by law enforcement, making them highly attractive to illegal gun traffickers. And because they are available online with the click of a mouse and no background investigation, they are attractive to criminals, prohibited domestic abusers, and others who would fail a background check and be prevented from purchasing a gun if they tried to buy one at a brick and mortar gun store.

In light of the recent proliferation of ghost guns, the ABA should urge policy makers to enact statutes, rules and regulations that would regulate ghost guns just as ordinary firearms are regulated, ensuring that law enforcement has the tools needed to protect our communities, and that we keep do-it-yourself guns out of dangerous hands just as we do with other firearms.

1. Ghost gun purveyors exploit loopholes in federal law and threaten public safety.

Under federal law, a firearm is defined in relevant part as a weapon that “expel[s] a projectile by the action of an explosive,” as well as “the frame or receiver of any such weapon.” The “frame” (in the case of a handgun) or “receiver” (in the case of a rifle or shotgun) refers to the portion of the weapon that houses the firing mechanism and to which other components (such as a barrel, stock, or grip) are attached.

Under federal law, anyone engaged in the business of manufacturing, importing, or dealing firearms must obtain a federal firearms license, and federal firearms licensees (“FFLs”) must comply with a number of legal obligations. Before a licensed gun dealer may transfer to a would-be buyer a fully functioning gun — or the frame or receiver of a gun, with or without the other parts required for it to function properly — the dealer must conduct a background check on the buyer. And the dealer must keep a permanent record of the sale and the purchaser’s identity.

Regulated firearm manufacturers and importers must affix to each firearm frame or receiver a serial number and markings that identify the manufacturer or importer, make, model, and caliber. These serial numbers play a critical law enforcement role: if a gun is recovered at a crime scene, local authorities provide the serialization information on a recovered gun to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). ATF can then track firearms back to the manufacturer or importer, and then through the distribution chain to the retail dealer, where the dealer’s records identify the first retail purchaser. ATF works extensively with other law enforcement agencies to trace firearms using this technique; in 2017 alone, ATF conducted more than 408,000 traces. Tracing is a powerful investigative tool, but it is dependent on the ability to identify firearms based on their serial numbers.

But certain retailers, operating primarily online and with little to no oversight, have devised a way to skirt federal serialization and background check requirements by marketing “unfinished” frames or receivers that can be turned into fully functioning frames or receivers with minimal tools and effort. These retailers sell “blanks” — nearly complete frames or receivers, often referred to as “80% receivers” or “80% frames” — that require limited additional milling before they can be combined with other unregulated gun components to form a fully functioning gun.

Using the proper drill bits and tools that instruct a user where and how to drill, a buyer can convert an 80% component into a fully functioning frame or receiver in a matter of minutes or hours — and videos abound online that demonstrate these easy techniques. What is more, pre-programmed milling machines are available online that will produce a fully functional receiver from an unfinished receiver with nothing more than the press of a button — not even a hobbyist or tinkerer’s workshop skills is required to complete the manufacture of a deadly assault weapon or concealable semiautomatic handgun.

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But despite the ease of converting an unfinished frame or receiver into a fully functioning one, ATF has ruled that because these items are not 100% completed, they do not meet the relevant definition of “frame or receiver” under federal law. As a result, ATF has ruled that they are not required to carry serial numbers and can be sold without background checks.

Purveyors of ghost gun kits have seized on ATF’s classification to market parts and kits used to make untraceable guns without complying with any of the serialization, background check, or record-keeping requirements that apply in the regulated gun industry. Dozens of online merchants now sell complete kits from which fully functioning semi-automatic handguns or assault weapons can be assembled in a user’s garage or basement with a little elbow grease and a minimal time commitment. Worse, many of these companies sell discounted five- and ten-packs of the parts to make ghost guns, marketing practices that make these products attractive more to those who would traffic illegal guns in bulk than to hobbyists interested in building their own gun for target practice at the local shooting range.

Because ghost gun purveyors maintain that they do not sell or manufacture completed firearms (or completed frames or receivers) they have historically operated without any regulation. The results have been as dangerous as they are predictable. Dangerous individuals whose records prohibit them from legally possessing firearms flock to ghost guns because they are available without a background check. And illegal gun traffickers embrace unserialized ghost guns because, if the guns are seized in crime, law enforcement cannot trace them back to the trafficking networks that produce and illegally distribute them.

II. The threat of ghost guns has proliferated in recent years.

Across the country, criminal gun trafficking rings — and prohibited individuals — have increasingly taken advantage of the availability of ghost guns to arm themselves and their criminal networks. Because ghost guns lack serial numbers and are therefore, by definition, untraceable, authoritative data on their provenance and prevalence is unavailable. But a broad range of anecdotal evidence demonstrates that they are a present danger and a growing threat.

A. Ghost guns are favored by gun traffickers.

In 2015, authorities in New York who took down a ghost-gun trafficking ring in Long Island declared that ghost guns were the “new frontier of illegal firearms trafficking.” This new frontier stretches across the entire nation. In July 2018, for example, across the country from New York, the Los Angeles Police Department broke up a brazen gang-led gun-

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trafficking enterprise based in Hollywood, seizing dozens of untraceable AR-15 style firearms.\textsuperscript{5} Indeed, according to ATF, nearly a third — fully 30 percent — of all guns now recovered at California crime scenes are untraceable ghost guns.\textsuperscript{6}

Illegal traffic in ghost guns is not limited to any one state, and has occurred in every region of the country, from Massachusetts and Connecticut in the Northeast to Southern California and beyond.\textsuperscript{7} The former head of ATF’s Philadelphia Field Office stated in October 2017, for example, that ghost guns were “being used in crimes, they’re being recovered at crime scenes,” and were widely available in Philadelphia.\textsuperscript{8} In 2019, the ATF Special Agent in Charge of the Philadelphia Field Division noted that, in a 12 month period, ATF had recovered nearly four dozen ghost guns in the Philadelphia area alone, and stated that ghost guns were “being taken off of gang members and found at homicide scenes.”\textsuperscript{9}

A non-comprehensive list of additional incidents involving ghost gun trafficking includes the following:

- **April 2013, Corpus Christi, Texas:** Michael Yarbrough was sentenced to 10 years in prison for purchasing more than 900 ghost gun parts kits and firearm receivers, and selling AK-47 ghost guns for transport to Mexico.\textsuperscript{10}

- **February 2015, Sacramento and Fresno, California:** Luis Cortez-Garcia and Emiliano Cortez-Garcia were charged with operating illegal shops in Sacramento and Fresno to sell ghost guns. The brothers did not have a license to sell firearms, did not conduct background checks, and did not require customers to fill out paperwork, as required by federal regulation for those in the business of selling operable firearms.\(^{11}\)

- **2015, Sacramento, California:** Eight men were indicted for manufacturing and selling firearms without a license. ATF agents recovered a total of 238 firearms and silencers, many of which were ghost guns that did not have any identification markings and were made from blank lower receivers.\(^ {12}\)

- **2015, Elk Grove, California:** A man pleaded guilty to selling 92 AR-15-style rifles, five handguns, and 88 silencers, all without serial numbers, for $264,500 over a six-month period.\(^ {13}\)

- **2016-2017, Kissimmee, Florida:** Hector Luis Santiago-Jorge built more than 200 ghost guns and sold them to buyers in Puerto Rico between November 2016 and October 2017. In March 2018, he pleaded guilty to manufacturing and dealing firearms without a federal license. He was sentenced to five years in federal prison.\(^ {14}\)

- **January 2018, Hammonton, New Jersey:** Gregory Carleton was charged with selling a ghost gun in Hammonton. A search of his home yielded 17 ghost guns, 14 unregistered firearms, and equipment for manufacturing firearms. Law enforcement seized a total of 31 weapons.\(^ {15}\)

- **2017-2018, Grass Valley, California:** Between December 1, 2017 and February 15, 2018, Michael Paul Grisham Smith, 44, manufactured and sold eight AR-15-

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style firearms without serial numbers to an undercover agent in exchange for the 
crypto-currency Bitcoin.\textsuperscript{16}

- November 2018, Denver, Colorado: Andrew Luna and Jose Eduardo Trujillo face 
federal charges after undercover ATF agents purchased numerous ghost guns 
from them.\textsuperscript{17}

- March 2019, New Jersey and Pennsylvania: New Jersey authorities busted a 
criminal network based in Camden, New Jersey that trafficked ghost gun 
components. The network planned on trafficking the ghost gun components into 
New Jersey by having them shipped to Bensalem, Bucks County, Pennsylvania. 
Investigators intercepted the shipment of components of two assault rifles to 
Bensalem.\textsuperscript{18}

- March 2019, Plattekill, New York: Gregg Marinelli was arrested after he allegedly 
assembled dozens of ghost guns and sold them to drug-dealing motorcycle groups 
and individuals with criminal convictions. When the State Police and ATF agents 
raided his home, they allegedly found gun parts, tools used to make weapons, and 
several firearms.\textsuperscript{19}

B. Ghost guns have been used in numerous deadly incidents.

Ghost guns have also been used in multiple recent shootings. Just as ghost guns have 
been favored by California gun traffickers, they have also fueled numerous incidents of 
violence in the Golden State:

- In June 2013, in Santa Monica, for example, a deranged man named John Zawahri 
going on a shooting spree with ghost guns and killed five victims. Armed with an 
AR-15-style semi-automatic rifle he’d assembled with components he’d purchased 
from various sources, Zawahri first killed his father and brother. He then took a 
driver hostage and forced her to drive him to the Santa Monica College Campus. 
Along the way, he shot at a public bus, injuring three individuals. After arriving on 
campus, he shot and killed the driver and passenger of a car. He then fatally shot

a woman outside the college library and opened fire on the students inside. The carnage only ended when police fatally shot Zawahri inside the library.\textsuperscript{20}

- In July 2015, in Walnut Creek, California, a domestic abuser named Scott Bertics shot and killed a woman with whom he was involved in a romantic relationship, Claire Orton. He then used a second gun to kill himself. Both of Bertics’ guns were do-it-yourself ghost guns.\textsuperscript{21}

- The same month, in Stockton, California, gunmen used an AK-47-style ghost gun to take three individuals hostage during a bank robbery. They led police on a chase and shootout, ending with the death of a hostage.\textsuperscript{22}

- And in November 2017, in a northern California community known as Rancho Tehama Reserve, a shooter named Kevin Neal went on a shooting spree that resulted in five dead and 12 injured. Neal killed his wife, shot neighbors, attacked an elementary school, and drove through a small rural community while firing at motorists. He was only able to arm himself by obtaining the parts to build two ghost guns, because prior to the shooting, a judge had issued a restraining order against Neal, banning him from possessing firearms.\textsuperscript{23}

As with trafficking in the weapons, the deadly toll of ghost guns is not limited to California. Other tragedies have been narrowly averted. In Pennsylvania, for instance, a police officer responding to a call outside Philadelphia shot and killed a convicted felon who had threatened to shoot the officer with a homemade gun made with parts he ordered online.\textsuperscript{24} The same month, police averted a school shooting outside Philadelphia by a student who had assembled a ghost gun he’d purchased online.\textsuperscript{25} And in West Baltimore, Maryland, in 2016, police came under fire after responding to reports of shots fired near an


These are only some of the deadly incidents that have been perpetrated in recent years with ghost guns. If policy makers do not act now to rein in this threat to the public, it will only grow worse.

III. Promising legislative solutions exist to address the dangers of ghost guns.

Fortunately, there are readily available policy options that can mitigate the threat posed by ghost guns. A comprehensive approach to the problem would impose serialization and record retention requirements on sales of unfinished frames and receivers, require that the recipients of unfinished frames and receivers pass a background check, and prohibit the possession of unserialized frames or receivers, whether finished or unfinished.

In recent years, various federal bills have proposed elements of this approach, and several states and municipalities have implemented some aspects of this regulatory regime. And while, to date, no state has taken a thoroughly comprehensive approach to the problem, comprehensive legislative proposals have been introduced in various states.

A. Serialization and record retention

There are several approaches to imposing a serialization requirement. The first would require the end-user who purchases an unfinished frame or receiver and uses it to assemble a firearm to apply to a law enforcement entity for a serial number (and to affix that serial number to the completed frame or receiver). For example, in California, before building a self-made firearm, a person must apply to the state Department of Justice for a unique serial number; that number must then be affixed to the firearm within ten days of finishing the frame or receiver. Because law enforcement only becomes aware of the firearm if and when the individual submits a serial number application, however, there are likely to be substantial enforcement challenges.

A second approach is to prohibit the purchase of an unfinished frame or receiver that lacks a serial number. For example, New Jersey prohibits the purchase of “a firearm frame or firearm receiver,” including an unfinished frame or receiver, “which is not

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28 E.g., Oregon Senate Committee on Judiciary, Proposed Amendments to Senate Bill 978 §§ 14-21, available at https://olis.leg.state.or.us/liz/2019R1/Downloads/ProposedAmendment/15678.
29 Cal. Penal Code § 29180(b)(1), id. § 29180(b)(2)(A). Connecticut has a similar requirement, although the individual is to apply for the serial number after completing the firearm. Conn. Gen. Stat. § 29-36(2).
imprinted with a serial number registered with a federally licensed manufacturer.” A third, similar approach would additionally prohibit the sale or transfer of an unfinished frame or receiver that lacked a serial number. These approaches prohibit the transfer of unfinished frames and receivers that lack serial numbers, effectively placing the requirement to serialize on the manufacturer of the unfinished frame or receiver.

These latter approaches, particularly when combined with a record retention requirement, are likely to be the most effective. They will enable law enforcement to track unfinished frames or receivers without relying on compliance by the end-user. They eliminate the lag between the completion of a functioning firearm and the serialization of that firearm, during which time the firearm is untraceable. They place the burden of serializing the firearm on the entity with greater manufacturing capabilities. And, perhaps most importantly, by requiring serialization before any transfer, they will prohibit transactions in kits that can be used to produce untraceable guns, denying access to traffickers and others who would ignore any post-manufacture serialization and registration requirements.

B. Background checks

The second key element of comprehensive legislation is requiring that, before any transfer of an unfinished frame or receiver occurs, the would-be purchaser passes a background check consistent with the federal requirements for the transfer of a firearm. For example, Connecticut imposes the background check procedures that apply to completed firearms to the transfer of an unfinished frame or receiver.30

This intervention closes the loophole that allows those who are prohibited from possessing a firearm to obtain all the parts needed to make a firearm, and ensures that anyone buying a kit to make a firearm is legally allowed to possess the firearm he or she intends to make.

C. Prohibition on possession

The third key element is a prohibition on the possession of an unserialized frame or receiver, whether finished or unfinished, unless the possessor holds a federal firearms license. This prohibition complements the aforementioned policies relating to sales or transfers, and would enable law enforcement to pursue appropriate sanctions against individuals who possess untraceable guns, or trafficking rings that possess unserialized frames and receivers. The exception for federal firearms licensees carves out firearm manufacturers to prevent inappropriate application to those involved in the lawful manufacturing of firearms.

Conclusion

Ghost guns, assembled from kits and parts available online with no background checks, are untraceable by law enforcement. These weapons pose a grave threat to public safety,

and people who are legally prohibited from owning firearms are able to create them without consequences in most states.

The carnage that ghost guns can inflict is no less than that which can be perpetrated with completed firearms purchased from licensed gun dealers, yet in most of the country, purveyors of ghost gun parts and kits brazenly evade the extensive regulations that apply to the above-board gun industry.

Fortunately, policy makers in various states have identified promising tools to address the growing threat that ghost guns pose. The ABA should urge legislators at every level of government to act immediately to regulate the production and distribution of ghost guns to address this present, growing danger before it becomes even more widespread.

Respectfully Submitted,

Joshu Harris,
Chair, ABA Standing Committee on Gun Violence
February 2020
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence
Submitted By: Joshu Harris, Chair

1. **Summary of Resolution(s).**
   Urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that would make it unlawful for any person to transfer, sell, trade, give, transport, or deliver any unfinished firearm frame or receiver to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) unless the unfinished frame or receiver is serialized in accordance with federal requirements for the serialization of firearms, the recipient passes a background check consistent with the federal requirements for a licensed dealer’s transfer of a firearm, and records consistent with the federal record-keeping requirements for licensed firearm dealers are created and retained. Also urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that would prohibit the possession, without a federal firearms license, of a finished or unfinished firearm frame or receiver that has not been serialized.

2. **Approval by Submitting Entity.**
   November 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?**
   This resolution would urge legislators to adopt policies that would regulate self-assembled, do-it-yourself firearms in the same manner as traditional firearms that are manufactured and sold by licensed gun makers and sellers. Because it would treat do-it-yourself guns like any other guns, the broad range of Association policies regarding guns are relevant, but this resolution would not affect or supersede any other resolutions.

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)
   There are several federal and state legislative proposals to address ghost guns currently pending, including the following:
   - Ghost Guns Are Guns Act, H.R. 1266 (116th Congress, intro. May 9, 2019)
   - Massachusetts H. 2096 (2019)
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 programs that the Standing Committee on Gun Violence 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
- Commission on Youth at Risk
- Government & Public-Sector Lawyers Division
- Health Law Section
- Judicial Division
- 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
   - 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.)
   - Joshu Harris, Chair
   - Philadelphia, PA 19125-3901
   - (646) 621-4164
EXECUTIVE SUMMARY

1. Summary of the Resolution
Urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that would make it unlawful for any person to transfer, sell, trade, give, transport, or deliver any unfinished firearm frame or receiver to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) unless the unfinished frame or receiver is serialized in accordance with federal requirements for the serialization of firearms, the recipient passes a background check consistent with the federal requirements for a licensed dealer’s transfer of a firearm, and records consistent with the federal record-keeping requirements for licensed firearm dealers are created and retained. Also urges federal, state, local, territorial, and tribal governments to enact statues, rules and regulations that would prohibit the possession, without a federal firearms license, of a finished or unfinished firearm frame or receiver that has not been serialized.

2. Summary of the Issue that the Resolution Addresses
A growing number of purveyors of so-called “ghost guns” undermine the intent of federal gun laws by selling — without any background checks — gun parts and kits that allow anyone to build a do-it-yourself gun with no serial number and no record-keeping.

3. Please Explain How the Proposed Policy Position Will Address the Issue
It would urge federal, state, local, territorial, and tribal governments to adopt laws that regulate do-it-yourself guns just as traditional firearms are regulated, by applying to homemade guns the same background check, serialization, and record keeping requirements that apply to guns made and sold by licensed gun companies.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
None.
RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that:

1. Require any person seeking to acquire a designated firearm to apply for a permit from a designated law enforcement or public safety agency;

2. Require, at a minimum, the applicant to apply in person, be fingerprinted, and be subject to a background and criminal records check; and

3. Prohibit the sale, delivery or transfer of a firearm to anyone who does not possess a valid permit.
I. Introduction

Among the most popular, broadly bi-partisan policies to prevent gun violence are those that seek to prevent dangerous persons from possessing firearms. They are also among the most proven, evidence-based policies in this area. One such policy, supported by this Resolution and today enacted in 11 states, and the District of Columbia, requires a prospective gun buyer to first obtain a permit. These are commonly referred to as “permit to purchase” laws.

II. Short History of Federal Background Checks.

The federal Gun Control Act of 1968 first identified categories of persons who are prohibited from buying guns, such as fugitives, those convicted of crimes punishable by a prison sentence of one year or more, substance abusers, and people convicted of certain domestic violence crimes. Over the years the Act has been amended to add to the list of prohibited purchasers. Today the list includes (1) convicted felons, (2) fugitives, (3) any persons who are unlawful users of or addicted to any controlled substance, (4) any person adjudicated as a mental defective or who has been committed to a mental institution, (5) illegal aliens, (6) persons dishonorably discharged from the Armed Forces, (7) U.S. citizens who have renounced their U.S. citizenship, (8) persons subject to a domestic violence restraint order that was entered after due notice, and (9) persons convicted of misdemeanor domestic violence.¹

The Gun Control Act of 1968 further required that retailers and individuals selling firearms obtain a Federal Firearm License (FFL). In 1993 the Brady Handgun Violence Prevention Act (Pub. L. 103-159) added a new requirement. All Federal Firearm Licensees must run background checks of any prospective gun purchaser through the National Instant Crime Background Check System (NICS) - specially created for this purpose. These are often called point of purchase laws. At the time of purchase the buyer completes an on-line application which the seller runs through the NICS system. The FBI has three days to respond – if a response is not made, then by default the sale can be completed. This has been referred to as the Charleston Loophole. Troublesomely, the background checks that might take the longest to complete involve the most suspect purchasers with long criminal records and red flags. If someone has a clean record, the response can typically be made in minutes.

Over the years, gaps in the federal background check system have allowed many otherwise prohibited purchasers to acquire firearms. By one recent estimate, 22% of recent gun owners acquired their most recent firearm without a background check.²

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¹ 18 U.S.C. Sec. 922(g). This law was in part motivated by the assassination of President Kennedy. Lee Harvey Oswald had used a mail-order gun to murder the President.

Perhaps the most glaring shortfall is what has become known as the private-sale loophole. Under federal law, persons are free to purchase firearms from non-licensed dealers and individuals, including private sellers, at gun shows, and online. Such purchases can be done without the benefit of a background check, allowing obtainment of firearms by persons who, for example, are domestic abusers, have violent criminal records, or are otherwise dangerous to themselves or others.

Another weakness in the federal background system is the NICS system itself. While the federal law gives financial incentives to states to cooperate with this system it remains voluntary. As a result, the NICS records are far from complete and often of poor quality, and the timeliness of state reporting of this information is erratic. Indeed, the ABA in 2011 passed policy urging “applicable governmental agencies to take all appropriate measures to ensure that the National Instant Crime Background Check System is as complete as possible, so that [prohibited gun purchasers] are included in the NICS system.” 11A10A. More recently, the ABA went as far as to support allowing individuals who fear they may inflict harm on themselves or others to voluntarily enter their names in the NICS system, on a temporary basis. 19M106B.

III. States Enhance Background Checks System with Broad Public Support

Under our federal system, states are free to implement their own gun violence prevention laws, provided they do not conflict with the Second Amendment or federal law, which set out their own requirements for the regulation of firearm acquisition. Among measures states have taken to expand upon the federal scheme are (1) expanding the list of categories of prohibited gun purchasers, (2) extending the time period, beyond three days in the federal law, before a gun may be purchased by default, (3) requiring a license for some kinds of firearm possession, and (4) expanding the scope of a background check.

As the nation struggles with the scourge of gun violence, mass shootings, urban shootings, suicides and negligent homicides, reasonable regulation of firearm acquisition, to keep weapons out of the hands of dangerous and unfit persons, and reduce negligent homicides and suicides, has grown in public support. Germane to this Resolution, most notably, is support for closing the “private sale loophole,” through universal background checks. In some surveys, this support is well over 80% and cuts across all party and demographic lines, including race, sex, and gun ownership.3

IV. States Enact Permit-to-Purchase Laws

A growing expansion of the federal background check system is reflected in state permit-to-purchase laws. Under these laws, a prospective gun purchaser, before going to buy a gun, must first apply for and obtain a permit. Usually this requires an in-person application at the local law enforcement agency allowing for a more direct engagement

by the police who may know the applicant and have access to information beyond that contained in the NICS system. While the details of these laws vary, at a minimum they require the prospective purchaser to go to the designated law enforcement agency, apply for a permit, and be subject to a background check. No gun seller, whether federally licensed or not, can sell certain firearms if the purchaser does not present a valid permit, thus effectively closing the private-sale loophole and reducing other risks.

Today permit-to-purchase laws exist in 11 states, and the District of Columbia, and are being considered by several others. These laws are instructive and provide legislators with a menu of options to consider if they wish to exceed the federal regulatory floor. Among the more common options are:

**Definition of Firearm**

State permit-to-purchase laws vary as to which firearms are covered. All states with such laws, at a minimum, cover handguns, which account for 85-90 percent of all gun violence. Some states cover long guns and a few states include ammunition.

**Duration and Effect**

States vary as to how long a permit is valid, ranging from 10 days for a handgun in Hawaii and Michigan, to 10 years in Illinois. Five years appears to be the most common length of time. As long as the permit is still valid, and there have been no intervening disqualifying facts or revocation of the permit for good cause, a purchaser may purchase specified firearms. Some states with short durations such as 10 days limit the permit to a single purchase.

**Scope of Background and Timeliness**

An advantage of state permit-to-purchase laws is they may discover more background information than normally contained in the NICS system, and the authorities have more than three days to approve or disapprove a permit. States vary as to what information they collect or what is included in an application. For example, some states require photo identification, fingerprints, and or waivers of certain types of information such as institutional and mental health records.

**Safety Training**

In many states, to receive a permit to purchase, the applicant must first complete a gun safety program.

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4 Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York, and North Carolina.
States charge some fees for a permit application, and renewal. These tend to be set to cover the administrative costs associated with the permitting process.

V. Efficacy of Permit to Purchase Laws

In the past decade, large-scale empirical studies have been made of permit to purchase laws. Every study has reported that these laws significantly reduce the rates of both homicide and suicide. By adding requirements such as in-person application, fingerprinting, mandatory gun-safety certification (education and training), and more extensive background checks, persons will be dissuaded from impulsive buying – common in suicide situations – or from buying firearms for a third party who may be a prohibited purchaser, commonly referred to as straw purchases. Guns obtained illegally through a straw purchase are known to disproportionately be involved in criminal activity. It also provides law enforcement with critical information as to whether firearms are potentially present when they are responding to a call, including, for example, in domestic violence situations.

Connecticut Study

In 1995, Connecticut enacted a permit to purchase statute, giving researchers the ability to compare gun violence in Connecticut before and after the law. Looking at the first ten years of the law in effect, researchers found that the enactment of Connecticut’s licensing laws was associated with a 40% reduction in firearm homicide and a 15% reduction in firearm suicide.

Missouri Study

In 2007 Missouri repealed a handgun purchaser license law that had dated back to the 1920s. This allowed researchers to look at the impact of the law’s repeal. Among the key findings, there was a significant increase in the share of guns that were recovered in crime shortly after an in-state retail transfer (i.e., the gun was originally sold in Missouri and was recovered within one year of retail transfer, which is a strong indicator of criminal diversion). In addition to being strongly associated with increases in diversion (indicating the law was protecting against diversion prior to repeal), research has found that removing the requirement for purchasers to obtain a license is associated with significant increases in firearm homicide of 17-27% through 2017. Significantly,

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Missouri's firearm homicide rate increased abruptly in 2008 relative to other Midwest states and the U.S., and this troubling statistic has been sustained through 2017. In addition, the repeal of Missouri’s licensing law was associated with a 16% increase in firearm suicide through 2012, exceeding the rate of increase of firearm suicide nationally.

V. Firearm Permit-to-Purchase Requirements are Constitutional.

While various firearm permitting laws have been subjected to constitutional challenges, courts have uniformly rejected these challenges and found that permitting laws meet constitutional muster.

The Supreme Court, in District of Columbia v. Heller,11 ruled that the Second Amendment protects an individual right, unrelated to militia service, to keep a handgun in one’s home for self-defense. But the Court noted that the Second Amendment, like other constitutional rights, was not absolute and was subject to certain restrictions and regulations. Among the firearm regulations the Court explicitly identified as presumptively constitutional are “longstanding prohibitions on the possession of firearms by felons and the mentally ill” and “laws imposing conditions and qualification on the commercial sale of arms”12

On their face, permit-to-purchase requirements fall into the latter category and help to ensure that the former are effectively enforced. And, indeed, several courts have found that state laws that require licensure to possess a handgun, and that are not arbitrary or capricious, withstand constitutional scrutiny.13 Likewise, a number of cases have upheld fees on possession licenses or background checks required on gun purchases.14

Simply put, there are no legal or constitutional impediments to requiring a permit to purchase a firearm.

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12 Id at 626-627 and footnote 26 (“these presumptively lawful regulatory measures [are identified] only as examples; our list does not purport to be exhaustive.”)
14 See, e.g., Kwong v. Bloomberg, 723 F.3d 160 (2d Cir. 2013) (upholding $340 fee); see also Bauer v. Becerra, 858 F.3d 1216 (9th Cir. 2017) (upholding law requiring all firearm purchasers to pay a $19 background check fee, when a portion of the fee goes to maintaining a database to track prohibited persons who have purchased firearms); Commonwealth v. Cassidy, 81 N.E.3d 822 (Mass. App. Ct. 2017) (summary decision) (rejecting argument that firearm license fee is an “excise tax on [the] fundamental right” of “private gun ownership”), aff’d, 479 Mass. 527 (2018).
VI. Permit to purchase laws are consistent with and build upon existing ABA policy.

Over the past 50 years, the American Bar Association has enacted a range of policies aimed at curbing gun violence. This resolution is a natural extension of these policies. It seeks to keep weapons out the hands of dangerous and unfit individuals by strengthening systems to identify them at the front end, rather than lament tragic shootings at the backend by someone who fell through the cracks. In addition, it will have an impact on negligent homicides and suicides, which have also been the focus of ABA gun violence prevention resolutions.

As early as 1965 the ABA called “legislation amending the Federal Firearms Act of 1934 to, … prohibit sales to felons, fugitives, persons under indictment, adjudicated mental incompetents and minors; …. Reaffirmed in Policy 94M8D. In 1994 the ABA supported the expansion of the list of prohibited purchasers to include “persons convicted of violent misdemeanors; persons convicted of spousal abuse or child abuse; and persons subject to a protective order.” 94A10E.

The ABA has supported different gun licensure requirements. The most recent was in 2011, when the ABA supported granting law enforcement agencies greater discretion in giving concealed carry licenses in those states where they are required, in part making up for gaps in criminal background data systems. 11A115. In 1994 the ABA adopted policy 94A10E to “Require persons to obtain and maintain a current handgun license, with background check, age, residency, safety training and insurance requirements, in order to buy or otherwise receive transfer of any handgun or handgun ammunition.”

The ABA has also supported “enactment of legislation encouraging gun safety education programs”, a key element in some permit to purchase statutes. The ABA has also called for the strengthening of the NICS system so that it as complete and accurate as possible, so that all persons properly categorized as prohibited from buying firearms are included in the NICS system. 11A10A.

The Standing Committee on Gun Violence is also bringing forward resolutions concerning “ghost” guns and safe storage. This resolution would augment those policy objectives.

There is not one single gun violence prevention measure that by itself will solve the public health crisis that gun violence presents. However, this resolution significantly ties together the focus of many of the resolutions the ABA has already passed, and will save lives.

VII. Conclusion

In 2017, nearly 40,000 Americans died from gun violence -14,542 were murdered with a gun and 23,854 died by firearm suicide. Permit to purchase laws significantly reduce

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15 94A10E references handguns only. This resolution covers all firearms, to include long arms.
the rates of homicide and suicide, are constitutional and are consistent with and help implement existing ABA policies that seek to keep persons deemed dangerous, or otherwise unfit, from possessing firearms. For these reasons the ABA urges federal, state, local, and tribal governmental entities to enact laws requiring persons to obtain permits prior to purchasing a firearm.

Respectfully Submitted,

Joshu Harris,
Chair, ABA Standing Committee on Gun Violence
February 2020
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence
Submitted By: Joshu Harris, Chair

1. Summary of Resolution(s).

Urges federal, state, local, territorial, and tribal governments to enact statues, rules and regulations that would require any person seeking to purchase a firearm to apply for a permit from a designated law enforcement or public safety agency; that, at a minimum, the applicant apply in person, be fingerprinted, and be subject to a background and criminal records check; and prohibit the sale, delivery or transfer of a firearm to anyone who does not possess a valid permit.

2. Approval by Submitting Entity.
   November 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?

   This resolution would clarify and supplement the previous policy on Licensing of Handguns (94A10E).

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 programs that the Standing Committee on Gun Violence offers.

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

9. Disclosure of Interest. (If applicable) none
10. Referrals.

Commission on Youth at Risk
Government & Public-Sector Lawyers Division
Health Law Section
Judicial Division
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
        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.)

        Monte E. Frank
        Pullman & Comley
        Bridgeport, CT 06604-7006
        T: 203-330-2000
        mfrank@pullcom.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   Urges federal, state, local, territorial, and tribal governments to enact statues, rules and regulations that would require any person seeking to purchase a firearm to apply for a permit from a designated law enforcement or public safety agency; that, at a minimum, the applicant apply in person, be fingerprinted, and be subject to a background and criminal records check; and prohibit the sale, delivery or transfer of a firearm to anyone who does not possess a valid permit.

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

   Over the years, gaps in the federal background check system have allowed many otherwise prohibited purchasers to acquire firearms, including those in private sales and transfers.

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

   A growing expansion of the federal background check system are state permit-to-purchase laws. This resolution would urge legislation to require a prospective gun purchaser, before going to buy a gun, to first apply for and obtain a permit. Usually this requires an in-person application at the local law enforcement agency allowing for a more direct engagement by the police who may know the applicant and have access to information beyond that contained in the NICS system.

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

   None.
RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact statutes, rules and regulations that: (a) define the requirements of safe storage of a firearm; (b) require firearm owners to meet those requirements; and (c) promote safe storage education for firearm owners; and

FURTHER RESOLVED, That the American Bar Association urges the federal government to incentivize safe storage programs within the states.
I. The Need for Safe Storage Regulations

Safe storage laws are a constitutional means to protect the public from preventable suicides, tragic accidents, and crime, while respecting Americans’ Second Amendment rights. All too often, unauthorized users gain access to guns that are left unsecured in homes or in vehicles and use those guns to harm themselves or others. In homes across the United States, gun owners and non-gun owners alike face the devastating impacts of family fire – a shooting involving an improperly stored or misused firearm in the home that results in injury or death.\(^1\) And, without safe storage, individuals who are too dangerous to possess a gun, and may even be prohibited from legally acquiring one, frequently resort to stealing them from cars and homes. For this reason, several states and municipalities have passed what are known as “safe storage” laws. While safe storage laws vary by location, they generally refer to regulations requiring gun owners to store their weapons unloaded, in locked containers, or disable them with trigger locks to prevent tragedies and save lives.

A. Safe Storage Protects Children

Improperly stored firearms pose a significant threat to children. Not only do 4.6 million children have access to unlocked or unsupervised guns\(^2\) in their homes, but 75 percent of them know exactly where those guns are kept.\(^3\) As a result, family fire unintentionally kills or injures 8 children and teens every day. Indeed, a recent study showed that family fire is one of the single greatest contributors to firearm injury and death among children.\(^4\) That same study also suggested that safe storage practices could cut the rates of unintentional death and suicide by up to a third.

In 2017, firearms accounted for nearly 19 percent of non-interpersonal violence-related deaths (unintentional deaths, suicides, and undetermined deaths) among America’s teenage youth while accounting for only 11 percent of non-interpersonal violence-related deaths among Americans as a whole.\(^5\) In addition, nearly 3,000 children and teens age 1-17 are shot every year in the U.S.\(^6\)

In a country where 4.6 million children live in homes with an unlocked, loaded gun, many are able to easily access firearms in times of crisis. A study of youth gun suicides showed that over two-thirds of youths died by suicide in their own homes, and over half used a firearm owned by a family member.\(^7\)

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\(^1\) [https://www.bradyunited.org/key-statistics](https://www.bradyunited.org/key-statistics)  
\(^4\) [https://jamanetwork.com/journals/jamapediatrics/article-abstract/2733158](https://jamanetwork.com/journals/jamapediatrics/article-abstract/2733158)  
\(^5\) [https://webappa.cdc.gov/sasweb/ncipc/mortrate.html](https://webappa.cdc.gov/sasweb/ncipc/mortrate.html)  
\(^6\) [https://www.bradyunited.org/key-statistics](https://www.bradyunited.org/key-statistics)  
\(^7\) [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3085447/](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3085447/
Safe storage not only prevents unintentional death and suicide, but also mass shootings. In 2018, for example, the Washington Post’s analysis showed that safe storage could have prevented two-thirds of the 145 school shootings that have occurred since Columbine.8

B. Safe Storage Prevents Accidents and Suicides

Safe firearm storage effectively prevents unintentional shootings and suicides. A ten-year study found that a disproportionately large share of unintentional firearm fatalities occurred in states where gun owners were more likely to store their firearms loaded or unlocked.9 The firearm death rate was, on average, four percent higher in states where an additional one percent of gun-owning households stored loaded firearms.10 In the six states where firearm owners were most likely to store loaded firearms, there were twice as many unintentional firearm fatalities compared with the ten states where firearm owners were least likely to store their firearms loaded.11

Readily accessible firearms increase the likelihood that lives will be lost from suicide. Suicide is a significant factor driving the country’s gun deaths. Of the 100 people whom gun violence kills every day, about 61 of them die by suicide. Guns make suicidal ideology especially lethal. Suicides attempted with firearms are fatal 85 percent of the time, compared to just three percent for other common methods such as drug overdose.12 And lethality matters; it is estimated that between .05 percent and 2.0 percent of individuals who make a non-fatal attempt at suicide go on to die by suicide within a year.13 Safe firearm storage that limits access to firearms when a person is in crisis can therefore decrease the number of fatalities caused by suicide.

Further, access to guns specifically increases the likelihood of death by suicide in children and teens. A recent study demonstrates that low emotion-relevant impulse control – or reduced control over how an individual acts in response to an emotion – is associated with an increased risk of a suicide attempt.14 Scientific literature notes that neurobiological development makes children and teens more prone to impulsive behavior, including suicide attempts. The combination of low emotion-relevant impulse control and access to firearms is a lethal combination.

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10 Id.
11 Id.
12 https://www.hsph.harvard.edu/magazine/magazine_article/guns-suicide/
14 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5045310/
C. Safe Storage Prevents Theft from Vehicles

Unsecured guns in vehicles are a separate yet similarly troubling issue. The federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has claimed that lost and stolen guns pose a “substantial threat” to public safety, as well as to law enforcement. “Those that steal firearms commit violent crimes with stolen guns, transfer stolen firearms to others who commit crimes, and create an unregulated secondary market for firearms.”15 Requiring safe storage is critical to protect firearms in vehicles from theft.

A recent survey of select police departments revealed “steady increases in reports of guns stolen from vehicles.”16 In Atlanta, the stolen gun count rose from 439 in 2009 to over 1,000 in 2018. In St. Louis, it increased from 200 to nearly 600 over the same nine-year period. And, in Tennessee, the number of guns reported stolen from vehicles nearly doubled between 2016 and 2017, from roughly 2,200 to over 4,000.17

II. Existing Forms of Safe Storage Regulation

Though federal law has required federal firearms licensees to sell every handgun with a secure gun storage or safety device since 2005,18 buyers do not always use these mechanisms at home or in their vehicles, and federal law does not require them to do so. Therefore, lawmaking and enforcement has historically fallen to the states, but only a handful of them have considered safe storage.

Despite the fact that about 8 in 10 Americans support laws requiring gun owners to keep their guns locked when they are stored,19 only a few states actually legislate safe storage of firearms with locking devices. Massachusetts is the only state in the nation to require that all guns are locked or safely stored at all times and in all circumstances when they are not in use.20 Connecticut recently updated its safe storage law to require gun owners in homes with children to unload their firearms and store them in locked containers.21 Other states, like California and New York, have laws on the books that require safe storage of firearms under certain circumstances - for instance, if someone living in the home is a prohibited purchaser under state or federal law.

Certain municipalities have enacted stricter regulations than their states. For example, even though California does not require owners to safely store every firearms in their home, San Francisco requires owners to store every handgun in their home in a locked container or disable it with a trigger lock (a plastic or metal device that fits over the gun’s trigger and trigger guard to prevent the gun from being fired - they are available in versions with either a key or combination) when in a residence. The city of Sunnyvale in California

17 Id.
18 18 U.S.C. § 922(z)(1)
19 https://www.apmresearchlab.org/locked-gun-storage/
20 Mass. Gen. Laws ch. 140 § 131L
21 https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXX/Chapter140/Section131L
goes one step further, and requires all firearms to be locked in this manner - not just handguns. New York City and Albany also go above and beyond state law in this realm as well, requiring firearm owners to safely store or render inoperable a firearm outside of his or her immediate control.22

Another category of safe storage laws - child access prevention (CAP) laws – is explicitly designed to keep guns out of the hands of those who are most vulnerable to mis-using them: children and teens. From 2013-2017, children and teens made up 20 percent of all fatal unintentional shootings and 15 percent of unintentional shooting injuries nationwide. Accordingly, states distinguish between households with and without children when determining what constitutes safe storage. Unlike general safe storage laws, which have only been adopted by a handful of states and municipalities, 27 states and the District of Columbia have enacted some form of child access prevention legislation to date.

Not all CAP laws are created equal, however. Like many other state gun laws, their strength (and intent) varies considerably. Some states impose criminal liability on individuals who negligently store a firearm that a child could gain access to, even if the child does not actually do so. Others impose criminal liability only in cases where a child actually handles a negligently stored firearm. While others impose criminal liability only in cases where a child not only handles a negligently stored firearm, but also gets injured as a result.

On the more lax end, some states only impose criminal liability on individuals who intentionally, knowingly, or recklessly give a firearm to a minor. This is a much higher threshold than simple negligence, making it more difficult to prosecute under CAP laws in these states. Other states such as California, Illinois, and Nevada, do not impose criminal liability. Instead, these states impose civil liability on individuals who allow a minor to access or use a firearm.

III. Incentivization of Safe Storage Regulation

At the federal level, the House of Representatives has introduced bipartisan legislation that would incentivize retailers to promote safe storage. The Prevent Family Fire Act of 2019, H.R. 4926, gives retailers a tax credit when they sell safe storage devices. The credit is equal to 10% of cost at sale, with a maximum credit of $40 per safe storage device sold domestically. This bill is a lawful means to promote safe storage, by giving retailers an incentive to stock and market safe storage devices, and steer consumers to purchase them.

IV. Constitutionality of Safe Storage Regulation

Arguments that safe storage laws would necessarily violate the Second Amendment, as established in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171

L.Ed.2d.637 (2008) are unavailing. In *Heller*, the United States Supreme Court considered a challenge to the D.C. law that “totally ban[ned] handgun possession in the home,”23 and “requi[red] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.”24 Ultimately, the Court held that law-abiding, responsible citizens have a right to keep a handgun in the home for self-defense.25 At the same time, *Heller* made clear that the Second Amendment is not unlimited, and laws restricting commercial sales are permitted.26 Under this framework, the Court held that D.C.’s law was unconstitutional because it required residents to render their handguns completely inoperable, thereby infringing the Second Amendment right to self-defense. In contrast, Courts across the country have routinely found that safe-storage laws that require practices such as keeping firearms in locked containers or using trigger locks do not infringe on self-defense rights.

In 2014, the Ninth Circuit, for example, upheld a safe storage law, San Francisco Police Code section 4512, noting that “[u]nlike the challenged regulation in *Heller*, section 4512 does not substantially prevent law-abiding citizens from using firearms to defend themselves in the home. Rather, section 4512 *regulates how San Franciscans must store their handguns when not carrying them on their persons.*”27 The Ninth Circuit, therefore, found that requiring people to store their handguns “in a locked storage container or with a trigger lock when not carried on the person is substantially related to the important government interest of reducing firearm-related deaths and injuries.”28 Ultimately, the U.S. Supreme Court declined to review the decision, so the Ninth Circuit’s reasoning still stands.

In addition to San Francisco, several other cities and states have also passed safe storage laws that courts have likewise upheld. In 2010, for example, the Massachusetts Supreme Court upheld a state law requiring firearm owners to either secure weapons in a locked container or equip them with trigger locks “does not require that firearms in the home be rendered and kept inoperable at all times and does not prohibit a licensed gun owner from carrying a loaded firearm in the home” it does not violate the Second Amendment right to self-defense.”29 And in 2012 a New York court found that a New York City law requiring firearm owners to render weapons inoperable by using a safety lock when they are not in possession of the weapon did not violate the Second Amendment, noting that “[u]nlike *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), New

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23 Id. at 2817.
24 Id. (emphasis added).
25 Id.
26 Id. at 2816-2817 (“[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 sale of arms.”) (emphasis added).
27 Jackson v. City & County of San Francisco, 746 F.3d 953, 958 (9th. Cir. 2014) (emphasis added).
28 Id. at 966.
York City’s ‘statute and regulation do not require a licensee to keep any firearm in his possession unloaded and locked.’”30

Respectfully submitted,

Joshu Harris
Chair, Standing Committee on Gun Violence
February 2020

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Gun Violence
Submitted By: Joshu Harris, Chair

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

   Urges federal, state, local, territorial, and tribal governments to enact statues, rules and regulations that would: a) define the requirements of safe storage of a firearm; b) require firearm owners to meet those requirements; and c) promote safe storage education for firearm owners. Further urges the federal government to incentivize safe storage programs within the states.

2. **Approval by Submitting Entity.**
   November 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 approved a number of policies regarding state and federal regulation of firearms. These include: Guns in Classrooms (19M106A), and Gun Violence Restraining Orders (17A118B). Further, the ABA also has policy on School Violence Prevention Education (04M109).

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)**
   H. R. 4926 - Introduced 10/30/2019
   H. R. 4691 - Referred to the House Committee on Energy and Commerce 10/16/2019

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 levels and possible amicus brief applications. It will also be incorporated into programs that the Standing Committee on Gun Violence offers.

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

10. **Referrals.**  
    - Commission on Youth at Risk  
    - Government & Public-Sector Lawyers Division  
    - Health Law Section  
    - Judicial Division  
    - 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  
    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.)  
    Monte E. Frank  
    Pullman & Comley  
    Bridgeport, CT 06604-7006  
    T: 203-330-2000  
    mfrank@pullcom.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   Urges federal, state, local, territorial, and tribal governments to enact statues, rules and regulations that would: a) define the requirements of safe storage of a firearm; b) require firearm owners to meet those requirements; and c) promote safe storage education for firearm owners. Further urging the federal government to incentivize safe storage programs within the states.

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

   All too often, unauthorized users gain access to guns that are left unsecured in homes or in vehicles and use those guns to harm themselves or others.

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

   Urge legislation to create regulations to define safe storage requirements and require them to meet those requirements.

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 federal, state, local, territorial, and tribal governments to enact legislation that provides, at a minimum, for eligible youth between the ages of 16 and 18 to preregister to vote; and

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to automatically add individuals who have preregistered to vote to the voter roll upon reaching their 18th birthday, or upon reaching the legal voting age in the jurisdiction, if earlier; and

FURTHER RESOLVED, That the American Bar Association urges high schools and colleges to provide every eligible student a meaningful opportunity to apply to register to vote, and to vote, when they are eligible; and

FURTHER RESOLVED, That the American Bar Association urges state and local educational institutions to adopt robust civic education programs to promote literacy in the institutions of American government, the methods of active civic participation in elections and governance, and a solid foundational understanding of the role and crucial importance of the rule of law; and

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation, promulgate regulations, and appropriate sufficient funds to implement voter preregistration and civics education as called for by this resolution.
REPORT

Pre-registration is an election procedure that allows eligible individuals younger than 18 years of age to register to vote, so that they are eligible to cast a ballot when they reach legal voting age for all state and federal elections. Typically, a pre-registrant will fill out an application and be added to the voter registration list with a “pending” or “preregistration” status. Upon turning 18, or the legal voting age, the individual is automatically added to the voter registration list and able to cast a ballot. The 18-29 age bracket is consistently under-represented in both registration and turnout rates, and this procedure is designed to increase voter participation by young people.

According to the National Conference of State Legislatures (NCSL), currently at least 14 states (California, Colorado, Delaware, Florida, Hawaii, Louisiana, Maryland, Massachusetts, New York, North Carolina, Oregon, Rhode Island, Utah and Washington) and the District of Columbia permit pre-registration beginning at 16 years old; 4 states (Maine, Nevada, New Jersey and West Virginia) permit pre-registration beginning at 17 years old. Five states set another age at which an individual may pre-register: (a) Alaska permits those under 18 to register anytime within 90 days before their 18th birthday; (b) Georgia, Iowa and Missouri permit registration of those who are 17.5 (if they will turn 18 before the next election); and (d) Texas permits a person who is 17 years and 10 months of age to register. Twenty-six states do not specifically address an age for registration and instead allow individuals to register if they will turn 18 by the next election.

In addition to urging the adoption of pre-registration laws, this resolution would also require schools to provide students meaningful opportunities to register and vote. For example, schools could provide voter registration tables outside the auditorium following an assembly program about the right to vote. Pending federal legislation (H.R. 1637) goes further and designates public high schools as voter registration agencies (just as motor vehicle agencies presently are, and public libraries are in some states) under the National Voter Registration Act; that bill also requires high schools to conduct their own voter registration drives. When students are eligible to vote, as many high school seniors are, the schools must be flexible enough to give the students opportunities to vote, even during school hours if absolutely necessary.

States such as California provide that robust programs to facilitate pre-registration of students and youth ages 16-18 must (a) require every high school, community college,

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1 Although the voting age is generally 18, at least 9 states and the District of Columbia currently permit 17-year olds to vote in primary elections and caucuses if they will be 18 by election day: Connecticut, Indiana, Iowa, Kentucky, Maine, Ohio, Vermont, Virginia, and West Virginia, [https://www.usa.gov/voter-registration-age-requirements](https://www.usa.gov/voter-registration-age-requirements)

2 “Reported Voting and Registration, by Age, for the United States, Regions, and Divisions: November 2018,” [United States Census Bureau](https://www2.census.gov/programs-surveys/cps/tables/p20/580/table03.xlsx)


4 “Preregistration for Young Voters,” [National Conference of State Legislatures](http://www.ncsl.org/research/elections-and-campaigns/preregistration-for-young-voters.aspx)
and state university to make available voter registration forms; and (b) provide notices describing pre-registration eligibility requirements and informing each student that he or she may return the completed form in person or by mail to the applicable election official, or where available, to register using the state’s automated voter registration system specifically tailored for youth pre-registration purposes.⁵

Studies have shown that young people who have preregistered are more likely to vote and vote regularly.⁶ Preregistration engenders anticipation and enthusiasm about voting, which leads to a lifelong sense of responsibility to vote. Inextricably intertwined with the duty to vote is the duty to be informed. This resolution couples preregistration with civic education.

Voting in our democratic system is a principal franchise and responsibility of citizenship. Leading jurists and lawyers recognize that civic education is a prerequisite for meaningful civic participation. Yet, as distinguished former Associate Justice of the United States Supreme Court Sandra Day O’Connor’s iCivics Project notes, “for decades, civic education had largely disappeared from school curricula and the repercussions are undeniable.”⁷

Some states have adopted legislation to promote civic education by connecting voter pre-registration programs to secondary and college civic education programs, as well as authorizing students and youth to serve as poll workers at the polls to enhance their understanding of the electoral process.

This resolution urges governments to promote such programs for the pre-registration of eligible youth at age 16 and combine this effort with the adoption of robust civic education programs in the schools. Many such programs are already available through the network of civic education programs in the United States, such as those conducted by organizations such as IFES (the International Foundation for Electoral Systems),⁸ by the Center for Civics Education, through its Representative Democracy in America Project,⁹ by the iCivics Program supported by former Associate Justice of the United States Sandra Day O’Connor,¹⁰ and by the California Judicial Council’s Civics Education Project.

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⁷ “iCivics is reimagining civic learning,” iCivics (2019), https://www.icivics.org/about
¹⁰ “iCivics is reimagining civic learning,” iCivics (2019), https://www.icivics.org/about
sponsored by California Chief Justice Tami Cantil-Sakayue. These programs are also furthered by the federal appellate courts for the Second, Sixth, Eighth, and Ninth Circuit Courts of Appeals, which offer educational programming, teacher training, and exhibits about the role of the judiciary and the rule of law. The ABA’s Division of Public Education currently participates with or supports some of the federal circuits’ educational programs.

Finally, this resolution urges all jurisdictions to appropriate the necessary funds to implement the preregistration and civic education programs described here. The budget for such programs would undoubtedly be modest. Expenditures might include publication of educational materials, staff time to assist with the registration process (if not provided by volunteers or parents), and costs incident to training staff or volunteers in state and local voting laws. Of course, such local funds could be reimbursed by the U.S. Department of Education, as provided in H.R. 1637, but the moneys must come from somewhere.

Voter preregistration and civic education have been widely and successfully employed throughout the country, usually with bipartisan support. They are small, practical steps we can take toward increasing voter participation and promoting an informed electorate.

Respectfully submitted,

Estelle H. Rogers
Chair, Standing Committee on Election Law
February 2020

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14 Eagleton Courthouse Judicial Learning Center, http://judiciallearningcenter.org
GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Election Law

Submitted By: Estelle H. Rogers, Chair

1. **Summary of Resolution.** This resolution urges governmental entities to adopt laws and policies that provide for voter preregistration for eligible 16-18-year-olds and that they be added to the voter roll upon reaching the legal age for voting; for high schools and colleges to provide students a meaningful opportunity to register and vote and to provide robust civics education to promote well-informed voting; and for governmental entities to appropriate sufficient funds to implement voter preregistration and civics education as called for by this resolution.


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

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** There are many ABA policies dedicated to expanding the franchise and making voting more accessible: for example, for persons with disabilities (14A113B), for racial minorities (13A10E), for the homeless (93A116), and for citizens residing in the District of Columbia (99A115). There are also several existing policies relating to civics education: for example, recommending that bar associations urge the adoption of civics education throughout elementary, middle, and secondary schools. (11A300); requiring civics education and providing for competitive grant funding to meet said requirement (11M300); and supporting public education to foster understanding of the Constitution and the rights and responsibilities of citizenship (adopted February, 1995). No existing ABA policy would be affected by adoption of this resolution.

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

6. **Status of Legislation.**

United States Congress:
- S. 625/H.R. 126: mandating a government-funded pilot program to provide voter registration information to 12th graders
- H.R. 1637: designating public high schools as voter registration agencies pursuant to the National Voter Registration Act and directing high schools to conduct voter registration drives

Pennsylvania:

Tennessee:

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. This resolution would form the basis for public education programs, legislative advocacy, and possible amicus briefs regarding voter preregistration and civics education.

8. Cost to the Association. (Both direct and indirect costs) Only the costs of minimal staff time would be involved. Much of the (state-level) advocacy and programming related to this policy will be conducted by volunteers.

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

10. Referrals.
   - Center on Children and the Law
   - Standing Committee on Public Education
   - Government and Public Sector Lawyers Division
   - Law Student Division
   - Section of Administrative Law and Regulatory Practice
   - Section of State and Local Government Law
   - Young Lawyers Division

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). (Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Estelle H. Rogers, Chair, Standing Committee on Election Law;
CRSJ Section Delegate
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Sharon Terrill, Program Specialist, Standing Committee on Election Law
1050 Connecticut Avenue NW
Washington, DC 20036
Tel.: (202) 662-1970
Email: Sharon.Terrill@americanbar.org
12. Name and Contact 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, Chair, Standing Committee on Election Law; CRSJ Section Delegate
Forestville, CA 95436-9321
Tel.: (202) 337-3332
Email: 1estellerogers@gmail.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution.**
   This resolution urges governmental entities to adopt laws and policies that provide for voter preregistration for eligible 16-18-year-olds and that they be added to the voter roll upon reaching the legal age for voting; for high schools and colleges to provide students a meaningful opportunity to register and vote and to provide robust civics education to promote well-informed voting; and for governmental entities to appropriate sufficient funds to implement voter preregistration and civics education as called for by this resolution.

2. **Summary of the issue that the resolution addresses.**
   The United States suffers from low voter participation levels. Young people 18-29 are particularly unlikely to vote and are registered at the lowest rate of any age demographic. This resolution provides a method for eligible youth aged 16-18 to register early and be added to the voter rolls automatically upon attaining legal voting age. It also addresses the decline in civics education in the schools and increasing “civic illiteracy” in our country.

3. **Please explain how the proposed policy position will address the issue.**
   The policy will allow the ABA to advocate for preregistration and civics education laws and policies on the state and federal levels and to file amicus briefs in litigation related to voter preregistration and civics education.

4. **Summary of any minority views or opposition internal and/or external to the ABA which have been identified.**
   None.
RESOLVED, That the American Bar Association approves the Uniform Automated Operation of Vehicles Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
The evolution of motor vehicle technology is well documented in the United States and is credited for saving hundreds of thousands of lives over the years. Once believed to be controversial, twentieth-century automotive technological developments such as seat belts, air bags and child car seats have now become standard operating equipment – and undoubtedly essential in daily motor vehicle operation. Likewise, early twenty-first century automated vehicle technologies, including automatic emergency braking and lane departure warnings, have already made U.S. roadways safer. Ongoing vehicle automation deployments, including progress toward fully automated vehicles, not only promise to deliver exponentially greater advantages with respect to vehicle and passenger safety, but also will greatly expand transportation alternatives for individuals who are currently unable to fully utilize passenger vehicles, including senior citizens and individuals with visual impairments.

The Society of Automotive Engineers (SAE) International published a report titled “J3016 Levels of Driving Automation” to define six levels of driving automation and establish international engineering standards. The six levels of automation defined in J3016 have become the industry standard, and can be summarized as follows:

- Level 0 – No Driving Automation (a human is driving)
- Level 1 – Driver Assistance (a human is driving, but is assisted with either steering or speed)
- Level 2 – Partial Driving Automation (a human is driving, but is assisted with both steering and speed)
- Level 3 – Conditional Driving Automation (a human is not driving, but in order to maintain safety a human will need to drive if prompted)
- Level 4 – High Driving Automation (a human is not driving, but in order to travel somewhere a human may need to drive if prompted OR a human is not driving, but the vehicle can’t travel everywhere)
- Level 5 – Full Automation (a human is not driving, and the vehicle can travel everywhere)

The Uniform Automated Operation of Vehicles Act addresses a narrow but foundational set of the many legal and policy issues raised by automated driving. It is intended to explicitly accommodate and specifically regulate what it refers to as the automated operation of automated vehicles. Colloquially, these vehicles may also be described as autonomous, driverless, or self-driving. This Act covers the deployment of automated vehicles on roads held open to the public. This Act does not cover automated vehicle testing, remote driving, or vehicles with features that merely assist a human driver. Using terms defined in SAE J3016, the Uniform Automated Operation of Vehicles Act applies to
vehicles that fall within SAE Levels 3 to 5 and leaves vehicles that fall within SAE Levels 0 to 2 to existing law.

The Uniform Automated Operation of Vehicles Act was carefully drafted to respect established state and federal roles in vehicle safety. The Act attempts to reconcile automated driving with a typical state motor vehicle code. Many of the sections—including definitions, driver licensing, vehicle registration, equipment, and rules of the road—correspond to, refer to, and can be incorporated into existing sections of a typical vehicle code.

One key aspect of the Uniform Automated Operation of Vehicles Act—the concept of an “automated driving provider”—is not part of a traditional vehicle code. Under the Act, an automated driving provider declares itself to the state (Section 6) and designates the automated vehicles for which it will act as the legal driver while the automated vehicle is under automated operation (Section 7). In this way, the Act answers a foundational question about the deployment of automated vehicles—who is considered the “driver” when an automated vehicle is under automated operation? Under the Uniform Automated Operation of Vehicles Act, the “driver” in these situations is the automated driving provider.

The core purpose of the Act is to accommodate the development and deployment of automated vehicles in a way that maintains or improves traffic safety (Sections 3, 8 and 9).

The Act clarifies that an enacting state’s vehicle code both continues to apply to automated vehicles and must be interpreted in a way that is not necessarily inconsistent with automated operation of these vehicles (Section 3). The Act specifically addresses provisions common to many vehicle codes, such as a prohibition on unattended vehicles, that might otherwise be construed in a way that is incompatible with automated driving (Section 9). However, this general instruction is intended to account for unique aspects of a state’s law that may not be specifically addressed by the Act and may not be identified in conjunction with the state’s adoption of this Act (Sections 3(c), 8(a), and 9(a)). The Act also explicitly empowers relevant state agencies to administer and enforce this act (Section 3).

Under existing state law, an individual who drives generally needs to hold a valid driving license. Conversely, an individual who does not drive generally does not need to hold such a license. The Act does not change these existing rules. Rather, the Act clarifies that an individual who takes a completely automated trip does not need a driving license, even if the individual sits in the conventional driving position, turns on the vehicle, or performs other actions that may constitute driving in more conventional contexts (Section 4). Conversely, because a state’s existing vehicle code continues to apply, an individual who drives for part of the trip does need a driving license, even if the individual relies on an automated driving system for part of the trip (Section 4).
Under the Act, only an automated vehicle that is associated with an automated driving provider may be registered (Section 5). Once the automated vehicle has been associated with an automated driving provider (Section 7), the Act adopts a state’s existing motor vehicle registration process (Section 5). The Act uses the motor vehicle registration framework that already exists in states—and that applies to both conventional and automated vehicles—to incentivize self-identification by automated driving providers (Section 6).

To qualify as an automated driving provider under the Act, a person must have participated in a substantial manner in the development of an automated driving system, be registered as a manufacturer of motor vehicles or motor vehicle equipment under the requirements of the U.S. National Highway Traffic Safety Administration, or have submitted a safety self-assessment or equivalent report for the automated driving system to the U.S. National Highway Traffic Safety Administration (Section 6). A person is only an automated driving provider if the person makes a declaration to the relevant state agency that the person is an automated driving provider (Section 6).

After the automated driving provider has made a declaration recognized by the relevant state agency (Section 6), the automated driving provider may designate associated automated vehicles by providing notice to the relevant state agency (Section 7).

The Act clarifies the applicability of state vehicle equipment requirements to automated vehicles (Section 8).

The Act clarifies the applicability of the rules of the road to automated vehicles (Section 9). The Act states that an automated driving provider is responsible for a violation of the state’s rules of the road by an associated automated vehicle under automated operation (Section 9).

Fundamentally, the Uniform Automated Operation of Vehicles Act is about the safe and responsible deployment of a revolutionary new technology. Automated vehicles have the potential to drastically reduce traffic fatalities while making motor vehicle travel more accessible to many different populations.\(^1\)

The Uniform Automated Operation of Vehicles Act is the result of three years of work and collaboration with representatives from the ABA (Kelly Donohue, ABA Section of Litigation), American Association of Motor Vehicle Administrators, American Automobile Association, National Council of Insurance Legislators, American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Electronic Frontier Foundation, Alliance of Automobile Manufacturers, National Governors Association, Council of State Governments, Community Transportation Association of America, American Association for Justice, National Automobile Dealers Association, National Conference of State Legislatures, U.S. Department of Transportation, U.S.

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The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Automated Operation of Vehicles Act is available here: https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a78d1ab0-fac8-9ea1-d8f2-a77612050e6e&forceDialog=0

Respectfully submitted,

Carl Lisman
President, National Conference of Commissioners on Uniform State Laws
February 2020
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Carl Lisman, President

1. Summary of the Resolution(s).

The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Automated Operation of Vehicles Act by the American Bar Association (ABA) House of Delegates.

2. Approval by Submitting Entity.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2019 Annual Meeting.

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

No.

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

None relating to this issue.

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

Not applicable.

6. Status of Legislation. (If applicable)

The Uniform Automated Operation of Vehicles Act has not yet been enacted in any jurisdiction.

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

NCCUSL will present the Act to state legislatures for consideration and enactment.

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

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

None.

10. **Referrals.**

Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found here: [https://www.uniformlaws.org/viewdocument/committee-archive-112?CommunityKey=4e70cf8e-a3f4-4c55-9d27-fb3e2ab241d6&tab=librarydocuments](https://www.uniformlaws.org/viewdocument/committee-archive-112?CommunityKey=4e70cf8e-a3f4-4c55-9d27-fb3e2ab241d6&tab=librarydocuments)

11. **Name and Contact Information** (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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12. **Name and Contact 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.*

Carl Lisman, NCCUSL President  
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EXECUTIVE SUMMARY

1. **Summary of the Resolution.**

That the American Bar Association approves the Uniform Automated Operation of Vehicles Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2019 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. **Summary of the issue that the resolution addresses.**

The Uniform Automated Operation of Vehicles Act explicitly accommodates and specifically regulates what it refers to as the automated operation of automated vehicles, commonly called autonomous, driverless, or self-driving cars. The Act reconciles automated driving with a typical state motor vehicle code and respects established state and federal roles in vehicle safety. The Act provides a framework for the registration of automated vehicles that utilizes a state’s existing process for registering conventional vehicles. The Act requires each automated vehicle to be associated with an automated driving provider. The automated driving provider might be an automated driving system developer, a vehicle manufacturer, or another kind of market participant that is willing to self-identify and able to meet the technical and legal requirements specified in the Act. An automated vehicle must be associated with an automated driving provider to be registered, and the automated driving provider is the party responsible for a violation of the rules of the road by an associated automated vehicle under automated operation. Under the Act, a state’s vehicle code continues to apply to automated vehicles without change except to the extent the Act effects a change. In this way, the Act provides a framework for the safe and responsible deployment of automated vehicles.

3. **Please explain how the proposed policy position will address the issue.**

Approval of the Uniform Automated Operation of Vehicles Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

None known.
RESOLUTION

RESOLVED, That the American Bar Association approves the Uniform Electronic Wills Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
The Uniform Electronic Wills Act

A generation ago, nearly all legal documents were printed on paper and existed only in physical form. Today, electronic documents are exceedingly common. Correspondence, financial statements, and even binding contracts are created, signed, and archived in a digital format. But under the law of most states, a person’s last will and testament is only valid in tangible, usually paper, form. Rules for wills differ because the person who made the will is deceased at the time a probate court must determine whether the document is authentic.

Traditionally, wills were not enforceable unless they were in writing, signed by the testator, and witnessed by two other people. These requirements showed the testator had thought about who should receive the testator’s property and made an effort to leave clear, written instructions. If any provision of the will was challenged by an heir, the witnesses could provide evidence to the court that the testator was of sound mind when signing the will, that the document was not fraudulent and accurately reflected the testator’s wishes, and that the testator made the will voluntarily rather than through coercion. These requirements for executing wills are still important, but in the internet age paper is no longer necessary. Electronic documents can also be securely signed, witnessed, and archived until needed.

Studies have shown that fewer than half of all American adults have a will. Moreover, people who regularly use the internet to communicate, shop, and transact business also expect to find legal services online, and may represent an untapped market for estate planners. The Uniform Electronic Wills Act (“E-Wills Act”) brings estate planning into the digital age by allowing the online execution of wills while preserving the legal safeguards to ensure a will’s authenticity.

The E-Wills Act requires a testator to make a will that is readable as text at the time the testator electronically signs the document. The testator’s signature must be witnessed by two people who add their own electronic signatures. Adopting states can opt for a version of the E-Wills Act that requires the witnesses to be physically present with the testator at the time of signing, or for a version that allows remote witnessing.

Like a paper will, an electronic will can be made “self-proving” so the witnesses need not testify in probate court unless the will’s authenticity is challenged. This is done by including sworn, notarized statements by the testator and witnesses. If a state has adopted the Revised Uniform Law on Notarial Acts of 2018, or a similar law permitting remote online notarization, an electronic will can be executed and made self-proving entirely via the internet, with a secure, audio-visual record of the execution attached to the file.
In an effort to attract online estate planning business, a few states have enacted laws that attempt to authorize residents of other states to remotely execute a will under the enacting state’s law. However, some probate courts will not recognize remotely executed wills, setting a potential trap for unwary testators whose carefully considered wills could be deemed invalid. The E-Wills Act provides a useful rule for interstate recognition of wills: the probate court will recognize a will executed under the law of another state only if the testator was either physically present or domiciled in the other state at the time the will was executed.

The E-Wills Act does not require electronic wills to comply with any specific technical standard or process, and therefore will not need to be updated to accommodate future technological developments.

The ABA Advisor to the Drafting Committee was John T. Rogers. The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference.


Respectfully submitted,

Carl Lisman
President, National Conference of Commissioners on Uniform State Laws
February 2020
GENERAL INFORMATION FORM

Submitting Entity: National Conference of Commissioners on Uniform State Laws

Submitted By: Carl Lisman, President

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

   The National Conference of Commissioners on Uniform State Laws (NCCSUL) requests approval of the Uniform Electronic Wills Act by the American Bar Association (ABA) House of Delegates.

2. **Approval by Submitting Entity.**

   The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2019 Annual Meeting.

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

   No.

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

   Technology and Access to Justice (01A105A); Legal Assistance for Active-Duty Military Personnel (90A114); Legal Assistance for Members of the Military Reserves (77M110).

   Approval of the Uniform Electronic Wills Act will allow attorneys in enacting states to provide technology-based access to justice by increasing access to online estate planning services. Estate planning attorneys will be able to offer lower-cost legal services without the necessity for an additional in-person meeting for execution of documents. The act will enable attorneys to provide estate planning services to remotely located individuals, including members of the military serving outside their state of residence.

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

   Not applicable.

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

   The Uniform Electronic Wills Act has not yet been adopted in any jurisdiction, but three states have adopted non-uniform legislation allowing the electronic execution of wills.
7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

   NCCUSL will present the Act to state legislatures for consideration and enactment.

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

   None.

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

   None.

10. **Referrals.**

    Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found at [https://www.uniformlaws.org/viewdocument/committee-archive-113?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71&tab=librarydocuments](https://www.uniformlaws.org/viewdocument/committee-archive-113?CommunityKey=a0a16f19-97a8-4f86-afc1-b1c0e051fc71&tab=librarydocuments).

11. **Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address).** *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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   Chicago, IL 60602  
   (312) 450-6604 (office)  
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12. **Name and Contact 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.*

   Carl Lisman, NCCUSL President  
   Lisman Leckerling, P.C.  
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EXECUTIVE SUMMARY

1. Summary of the Resolution.

That the American Bar Association approves the Uniform Electronic Wills Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2019 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the issue that the resolution addresses.

The Uniform Electronic Wills Act updates the common law rules for execution of wills. Under the act, an electronic will is legally executed and admissible for probate if the will was in a form readable as text at the time of its execution, electronically signed by the testator and two witnesses, and stored in a tamper-evident format. An electronic will can be made self-proving by including notarized affidavits from the testator and witnesses attesting to the validity of the instrument and its execution. The act also provides conditions for recognition of electronic wills executed under the law of another state.

3. Please explain how the proposed policy position will address the issue.

Approval of the Uniform Electronic Wills Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

There is no known opposition within the ABA.
RESOLUTION

RESOLVED, That the American Bar Association approves the Uniform Registration of Canadian Money Judgments Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.
REPORT

Uniform Registration of Canadian Money Judgments Act

Summary

The Uniform Registration of Canadian Money Judgments Act ("Registration Act") creates an administrative procedure to register and enforce a Canadian money judgment in the United States. The act eliminates the need to file a lawsuit to accomplish recognition and enforcement. The Registration Act is designed to streamline the recognition and enforcement process, conserve judicial resources, harmonize with Canadian law, and facilitate commerce between the United States and Canada. Once a Canadian judgment is registered under the Act, it may be enforced in the same way as a judgment rendered in the state of enactment.

The Registration Act supplements the Uniform Foreign-Country Money Judgments Recognition Act ("Recognition Act") by providing an alternative method to seeking recognition and enforcement of a foreign judgment in the United States. The Recognition Act was previously approved by the House as 06M104A.

Section 4 of this new Registration Act describes the steps to register a Canadian judgment and includes a sample registration form. First, the person seeking registration or that person’s attorney must submit the completed registration form and required attachments to the clerk of court or other designated administrative official. Upon receipt of the registration, the clerk must file the registration, assign a docket number, and enter the Canadian judgment in the court’s docket.

A person that registers a Canadian judgment under Section 4 of the Act must cause notice of the registration to be served on the person against whom the judgment has been registered. Section 6 of the Act states the information that must be included in the notice. Certain enforcement actions are prohibited for the 30 days following service of the notice of registration.

Section 7 of the Registration Act permits a person against whom the judgment was registered to petition the court to vacate the registration. A petition may only assert (1) a ground that could be asserted to deny recognition under the Recognition Act; or (2) a failure to comply with the requirements of the Registration Act. A person that files a petition to vacate under Section 7 may also request the court stay enforcement of the judgment pending determination of the petition.

The Registration Act offers an efficient alternative to filing a lawsuit to recognize and enforce a Canadian money judgment in the United States and should be enacted widely.

The work of the Drafting Committee is available at www.uniformlaws.org, the website of the Conference. A direct link to the Uniform Registration of Canadian Money Judgments Act is available here:
Respectfully submitted,

Carl Lisman, President
National Conference of Commissioners on Uniform State Laws
February 2020
The National Conference of Commissioners on Uniform State Laws (NCCUSL) requests approval of the Uniform Registration of Canadian Money Judgments Act by the American Bar Association (ABA) House of Delegates.

The National Conference of Commissioners on Uniform State Laws granted final approval to the Act at its July 2019 Annual Meeting.

No.

The House previously approved a resolution (06M104A) to support the Uniform Foreign-Country Money Judgments Recognition Act, also called the “Recognition Act.” This act being considered by the House of Delegates, the Uniform Registration of Canadian Money Judgments Act, is a companion act to the Recognition Act. This act integrates with the Recognition Act and offers a streamlined method for registering and enforcing a Canadian money judgment in the United States.

Not applicable.

The Uniform Registration of Canadian Money Judgments Act has not yet been enacted in any jurisdiction.

Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
NCCUSL will present the act to state legislatures for consideration and enactment.

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

   None.

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

   None.

10. **Referrals.**

   Pursuant to the agreement between the NCCUSL and the ABA, all members of the House of Delegates and Chairs of all ABA entities were advised of the drafting project, and those that expressed interest were provided with tentative drafts. The Drafting Committee’s work can be found [here](#).

11. **Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address).** *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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12. **Name and Contact 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.*

    Carl Lisman, NCCUSL President
    Lisman Leckerling, P.C.
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    PO Box 728
    Burlington, VT 05402
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EXECUTIVE SUMMARY

1. Summary of the Resolution.

That the American Bar Association approves the Uniform Registration of Canadian Money Judgments Act promulgated by the National Conference of Commissioners on Uniform State Laws in July 2019 as an appropriate Act for those states desiring to adopt the specific substantive law suggested therein.

2. Summary of the issue that the resolution addresses.

The Uniform Registration of Canadian Money Judgments Act (“Registration Act”) creates a simple registration procedure to recognize and enforce a Canadian money judgment in the United States. The act eliminates the need to file a lawsuit to accomplish recognition and enforcement. The Registration Act is designed to streamline the recognition and enforcement process, conserve judicial resources, harmonize with Canadian law, and facilitate commerce between the United States and Canada. Once a Canadian judgment is registered under the Act, it may be enforced in the same way as a judgment rendered in the state. The Registration Act is designed to work alongside the Uniform Foreign-Country Money Judgments Recognition Act, also called the “Recognition Act,” which was previously approved by the House as 06M104A.

3. Please explain how the proposed policy position will address the issue.

Approval of the Uniform Registration of Canadian Money Judgments Act by the American Bar Association House of Delegates would demonstrate to states that the Act is an appropriate approach for addressing the issues described above.

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

None known.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments, and courts and court rule-making entities, to provide courts with discretion to allow defendants to remain on bond pending sentencing following a guilty plea or conviction as long as the court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released, such as by amending 18 U.S.C. § 3143 or similar statutes in other jurisdictions.
This resolution is intended to make clear that judges in federal, state, local, tribal and territorial jurisdictions should have discretion to allow defendants to remain on bond prior to sentencing after a plea of guilty or conviction if the court finds that the defendant is not likely to flee or pose a danger to the safety of the public.

Presently, statutes exist that remove this discretion from the Courts. These statutes require detention even when a defendant has not violated the terms of his/her release and will likely be sentenced to probation. These statutes assist in the over-incarceration of individuals, are unnecessary and should be amended or repealed.

Giving courts discretion to release or detain defendants prior to sentencing as well as before trial is consistent with existing policy.

In August 2017, the ABA enacted policy to encourage the use of pretrial released not dependent upon cash bail and limit the use of detention for those who cannot afford to post cash bail or secure bond. This policy builds upon the Criminal Justice Standards for Pretrial Release that were enacted in 2002. In accordance with longstanding practice, it is presumed that once released by the Court, a defendant will continue on release status unless the conditions of release are violated or the Court orders him or her into custody following a plea of guilty, a conviction after trial, the imposition of a term of imprisonment at sentencing, or the denial of relief upon appeal. Statutes that require automatic detention of defendants without due process should be amended and/or repealed to relieve the over-incarceration of individuals and prevent personal hardships of detention, such as loss of employment, income and family stability.

18 U.S.C. § 3143(a)(2) should be amended to allow judges to continue a defendant on bond pending sentencing unless it finds by clear and convincing evidence that the defendant is likely to flee or poses a danger to the community.

18 U.S.C. § 3143 requires unnecessary mandatory detention of a defendant pending sentencing in a federal district court. 18 U.S.C. § 3143(a)(2) provides that a defendant be detained awaiting the imposition of sentencing unless, “(A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or (ii) an attorney for the government has recommended that no sentence of imprisonment be imposed on the person, and (B) the judicial officer finds by clear and convincing evidence

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1 2017 AY 112C
3 Supra, Standard 10.4-3 (e), noting in the commentary that a record should be made at first appearance because decisions made at that time, including bail, may be reviewed at a later pretrial proceeding, at trial or sentencing, and pending appeal, and citing See 18 U.S.C. § 3145 (1984) (providing for review and appeal of a release or detention order); see also United States v. Dominguez, 783 F.2d 702, 705-06 (7th Cir. 1986) (noting that district courts are required to review magistrates' detention orders under § 3145 (b)).
4 18 U.S.C. § 3143(a)(2)
evidence that the person is not likely to flee or pose a danger to any other person or the community. [emphasis added]”

Under the current language of this statute, a defendant who pleads guilty to a federal drug or violent offense and is eligible to serve a term of probation or supervised release, rather than jail or prison, is subject to mandatory detention pending sentence if the offense to which he or she pleads carries a maximum sentence of ten years or more. This statute requires detention pending sentencing regardless of the fact that they are eligible to serve a sentence of probation or supervised release and are not flight risks or threats to the public.

Further, the section limits judicial discretion by requiring an attorney for the government to make a recommendation that no term of imprisonment be imposed in order to permit the judge to exercise bail status discretion after the guilty plea is entered. Even where the court would find that a defendant poses no danger to the community and is no risk of flight, the court is bound to detain a defendant under the statute unless the government recommends a sentence with no prison or jail. In most districts, such a recommendation by the government is outside the standard authority of the assigned prosecutor. Therefore, as a practical matter, a guilty plea or conviction after a jury trial triggers mandatory detention in a facility pending sentence. The period of detention is largely dictated by the time required for the Probation Department to conduct a presentence investigation – on average, at least three months. Thus, the defendant will be warehoused for three months or more at taxpayer expense until the presentence investigation is completed and a report is submitted to the court.

While the legislative purpose underlying the section has a rational basis, to wit: the acceptance of a guilty plea or conviction after a jury trial to a serious felony charge is a significant change in circumstances for bail purposes, a requirement of mandatory detention is excessive and unnecessarily restrictive when imposed in every case.5

In practice, the problem presented by the statute appears to be sidestepped in some federal districts where courts seem to simply ignore it. In many other districts, the statute creates a serious problem and extra steps are sought by defense counsel to avoid unnecessary incarceration of their client.6 One such technique to circumvent the statutory

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5 An example illustrating the problem with the statute as currently worded is as follows. The defendant has committed a low-level drug trafficking crime. She has no prior criminal record. The offense charged by indictment or negotiated information has a ten-year maximum but no mandatory minimum. Based on the United States Sentencing Guidelines, such a defendant might be at an adjusted advisory guideline level permitting straight probation or probation with home confinement as a sentence. Even though the defendant was unlikely to be sentenced to any federal prison time at all, the law currently mandates that she be detained in a facility until sentence – effectively, warehousing her for three months only to then impose a sentence of probation. Clearly, the current statute as written burdens taxpayers, unnecessarily fills prison beds, and flies in the face of modern principles of criminal justice reform.

6 Should Congress Amend 18 USC § 3143, Bloomberg Law, (Aug. 18, 2018). Attorney Mark Cohen noted that members of the National Association of Criminal Defense Lawyers listserv responded to the article by relating their experiences in the Districts in which they practice. The range of implementation or avoidance
requirement is, through assistance of the court, ordering the presentence report before a plea is even taken and then scheduling the plea and the sentence on the same day. Alternatively, in order to avoid potentially unnecessary incarceration between plea and sentence, District Judges may refer the guilty plea to a United States Magistrate Judge and defer the acceptance of the guilty plea until the date of sentencing, or District Judges may hear a guilty plea and choose to defer acceptance of the guilty plea until the date of sentencing. The need for such legal and judicial machinations urges a legislative fix.

One way to effectuate change is to amend the statute to restore judicial discretion and meet the ends of justice and fairness. The statute could be amended by changing the work “and” after (A)(ii) to “or” and changing (B) to (A)(iii); it would then read in relevant part: 18 USC § 3143(a)(2) provides that a defendant be detained awaiting the imposition of sentencing unless, “(A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial be granted; or (ii) an attorney for the government has recommended that no sentence of imprisonment be imposed on the person, or (iii) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community. [emphasis added]”

This amendment would effectively allow a defendant to remain at liberty without detention in any of three circumstances: if there is a substantial likelihood that a motion for acquittal or new trial will be granted; or if an attorney for the government recommends that no sentence of imprisonment be imposed; or if the court finds by clear and convincing evidence that the person is not likely to flee or pose a danger. In any one of those three circumstances, the defendant would remain at liberty without detention.

The proposed amendment to the statute would not change the provision that defendants who are flight risks or threats to the public would be detained while they await imposition of sentence. The proposed amendment would only apply to defendants who are NOT flight risks or threats to the public. The proposed amendment would simply allow judicial discretion to consider permitting these defendants to remain on the same bail conditions as before the plea or conviction after trial if deemed appropriate by the court.

of the statute demonstrates that enforcement is inconsistent from district to district, and within districts as well. A colleague in the District of New Mexico indicated that the courts there strictly enforce the statute and mused that when a judge in the Western District of Texas tried to buck the mandatory incarceration statute, “… there was a revolt.” Other defense practitioners in the Middle District of Georgia, the Western District of North Carolina, the Eastern District of Kentucky and the District of South Carolina advised that the mandatory detention provision is strictly enforced. Attorneys in the Southern District of West Virginia and the Eastern District of Michigan observed that enforcement varies on a judge-by-judge basis and that one District Judge simply accepts guilty pleas on the date of sentence to avoid practical operation of the statute. Judges in the Middle District of North Carolina have “withd[ ]e[ ]d a factual basis” finding on a guilty plea, i.e. have not accepted a guilty plea until the date of sentence, as “…an end around,” as reported by another colleague. A District of New Jersey defense attorney advised that the statute was regularly not enforced (I have found the same to frequently be true in my own practice in the Eastern District of New York). One Georgia practitioner observed: “I will also say that my subjective impression is that the judges aren’t particularly fond of [the statute] at times.”

7 On April 3, 2019, the Criminal Justice Section of the New York State Bar Association adopted the Resolution Regarding Mandatory Detention Pending Sentence Under 18 USC §3143 recommending this
All governmental jurisdictions and court rule-making entities should review their statutes and rules, respectively, to give courts discretion to allow defendants to remain free on bond pending sentencing following a guilty plea or conviction as long as the court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community.

Respectfully submitted,

Kim T. Parker
Chair, Criminal Justice Section
February 2020

change for two reasons: first, the Southern District of New York enforces §3143 as written and will not consider alternatives to avoid mandatory incarceration, and; second, New York state law, also requires mandatory detention following the entry of a guilty plea and before sentencing in certain felony cases.
GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Kim T. Parker, Chair

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

   This resolution urges federal, state, local, territorial, and tribal governments, and court rule-making entities to provide courts with discretion to allow defendants to remain on bond pending sentencing following a guilty plea or conviction as long as the court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released.

2. **Approval by Submitting Entity.** This resolution was passed by the Criminal Justice Council approved this resolution at the Fall Meeting in Washington, DC, on November 10, 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 Criminal Justice Standards for Pretrial Release states courts should use the least restrictive alternative when considering whether a defendant may be released upon conditions, the posting of cash bail or a secure bond. In 2017, the ABA also enacted policy that courts should limit their reliance on the use of cash bail or bond in order to prevent the unnecessary incarceration of defendants prior to trial. 2017 AY 112C

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.
This policy will be used as a basis of advocacy in federal, state, local, territorial and tribal legislation.

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

No cost to the Association.

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/or interested groups:
Center for Human Rights
Coalition on Racial and Ethnic Justice
Commission on Disability Rights
Commission on Hispanic Legal Rights & Responsibilities
Young Lawyers Division
Commission on Homelessness and Poverty
Commission on Immigration
Commission on Racial and Ethnic Justice
Commission on Youth at Risk
Government and Public Sector Lawyers Division
Judicial Division
Law Practice Division
Section on Civil Rights and Social Justice
Section on Health Law
Section on International Law
Section of Litigation
Section on Science and Technology

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

Rick Collins
COLLINS GANN McCLOSKEY & BARRY PLLC
Mineola, NY 11501
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fax: (516) 294-0477
email: rcollins@cgmbesq.com

Mark Cohen
Cohen Frankel & Ruggiero, LLP
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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T: 202-994-7089
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Neal Sonnett
Miami, Florida 33131-1819
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, local, tribal and territorial governments and court rule-making entities to provide courts with discretion to allow defendants to remain on bond pending sentencing following a guilty plea or conviction as long as the Court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the unnecessary requirement in federal and state statutes to incarcerate defendants between a plea of guilty or trial and sentencing when they are unlikely to flee from the court’s jurisdiction and do not pose a threat to public safety. Certain laws, e.g., 18 U.S.C. §3143, require mandatory detention of a defendant between a plea of guilty and sentencing for certain offenses even when the defendant is likely to receive a probationary sentence or home confinement. These statutes remove discretion from the Court to continue pretrial release orders and create unnecessary incarceration of defendants.

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

The proposed policy can be used by Governmental Affairs to advocate to Congress that 18 U.S.C. §3143 should be amended by the change of “and” to “or” after (A) (ii) and renumbering (B) to (A)(iii). Likewise, state bar associations can review their own statutes or rules for amendment.

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 urges federal, state, local, territorial, and tribal governments, and their respective agencies and departments, to protect real property interests, including common law trespass and privacy rights, with respect to any statute, ordinance, regulation, administrative rule, order, or guidance pertaining to the development and usage of unmanned aircraft systems over private property.
REPORT

I. PURPOSE OF THIS RESOLUTION AND REPORT

The popularity and usage of unmanned aircraft systems (“UAS”), commonly known as drones\(^1\), continues to rise among leisure and commercial users for a variety of uses including package deliveries, aerial photography, surveillance, and general recreation. By the end of 2018, more than 900,000 model owners\(^2\) had registered their model aircraft with the Federal Aviation Administration (the “FAA”) and another 277,000 non-model aircraft had been registered.\(^3\) While UAS offer a variety of beneficial real world applications, they also raise complicated questions about how to resolve the sometimes conflicting interests of UAS operations over private property with those of landowners and legal occupants (collectively including tenants and easement holders). Landowner and legal occupant property and privacy rights traditionally have been protected by the law of trespass.

The purpose of the Resolution and this report is to highlight the real property rights and interests that are being and will continue to be impacted by the emerging and increasing use of UAS and ensure that any legislation, regulation, rule, order, or guidance adequately addresses and protects those rights and interests. Such real property rights are designed to protect the privacy and physical safety of the real property owners, occupants, and users (and of their assets) and to provide clear guidance to drone operators as to operation of drones. A “one-size fits all” approach to rules governing the operation of drones over private property is not appropriate given the variety of concerns and considerations that each drone usage may raise. Emerging technologies such as UAS do not fit squarely within existing trespass and privacy rights laws; however, it is critical that creation of any statute, ordinance, regulation, administrative rule, order, or guidance pertaining to the development and usage of UAS utilize common law trespass and privacy rights concepts as the framework for such efforts to defend existing real property interests of real property owners and legal occupants since history and experience has shown those concepts to be successful and workable protections that are able to evolve over time.

Section II of this report provides a broad overview of the existing regulatory framework that governs UAS usage and the recent efforts to establish a uniform law framework for drone usage. Section III highlights and analyzes specific real property rights, interests, and expectations that should be protected and considered in any future efforts to

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\(^1\) “Unmanned aircraft systems” or “UAS” are the terms of art used to describe drones (both commercial and personal) in current federal legislative and regulatory schemes.

\(^2\) Model aircraft are those UAS used solely for recreation and hobby purposes. Non-model aircraft are those UAS used for commercial, government, or other non-hobby purposes.

\(^3\) Federal Aviation Administration, FAA Aerospace Forecast Fiscal Years 2019-2039, at 41 (2019), available at https://www.faa.gov/data_research/aviation/aerospace_forecasts/media/FY2019-39_FAA_Aerospace_Forecast.pdf. The FAA notes that modelers (i.e. those flying drones for hobby or recreational uses only) are not required to register each individual drone such that the FAA estimates there are around 1.25 million drones identified as model aircraft.
implement and establish further rules governing UAS usage within the United States. The report concludes with Section IV.

II. OVERVIEW OF EXISTING REGULATORY FRAMEWORK FOR DRONES

UAS are defined as aircraft by Congress and therefore UAS regulation is handled by the FAA. The FAA’s general aviation regulations are applicable to all UAS. Such regulations include the prohibition against careless or reckless operation of an aircraft so as to endanger life or property. However, this general prohibition does not constitute a prohibition against flying over or near private property. To date, UAS are almost exclusively operated using line of sight operation (i.e. the UAS is operated within direct view of the operator). This line of sight operation acts as an initial layer of protection of private property rights because third parties can readily identify the UAS operator if police action or legal action is necessary to protect such private property rights. If UAS can be operated outside and beyond line of sight operations such that the UAS operator is no longer readily identifiable, then the legal framework of trespass and privacy rights is necessary to protect real property owners and legal occupants.

As with most emerging technologies, legal regulations have struggled to keep pace with the proliferation of UAS on the federal, state, local, territorial, and tribal levels. The FAA only recently published 14 C.F.R. Part 107 on June 28, 2016 to govern routine, civil small-UAS (“sUAS”) operations. The so-called sUAS rule generally allows recreational and commercial operation of UAS of less than 55 pounds within certain operational requirements and limitations. Such requirements include a mandate that operators must register their sUAS, have a remote pilot certificate, fly below 400 feet above ground level and be within unaided visual line-of-sight, avoid airports and other restricted areas as designated by the FAA, and generally avoid other aircraft. Most recently, the FAA has proposed additional rules to amend 14 C.F.R. Part 107 with respect to certain nighttime operations of UAS and other training requirements, but has specifically conceded that “proposed regulations to address privacy concerns are beyond the scope of the FAA’s mission.” Additionally, while the FAA “has consistently recognized the importance of stakeholder engagement regarding privacy implications associated with UAS integration and incorporated privacy considerations into the UAS Test Site Program and the UAS Integration Pilot Program…. [T]he FAA has never extended its administrative reach to regulate the use of cameras and other sensors extraneous to the airworthiness or safe operation of the aircraft in order to protect individual privacy” because the FAA is specifically focused on the safe and efficient operation of aircraft. The FAA recognizes the ongoing debate regarding privacy rights and UAS and is open to working with “other agencies with the mandate and expertise to identify, develop, and implement appropriate mitigation strategies to address such concerns.” To that end, the FAA has emphasized that state and local government involvement and integration and use of state and local

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4 14 C.F.R § 91.13.
6 84 F.R. 3856.
7 84 F.R. 3856, 3893.
8 84 F.R. 3865, 3893.
police law powers\textsuperscript{9} as part of the UAS Integration Pilot Program to regulate issues such as the “location of aircraft landing sites” will be critical to developing a comprehensive legislative framework for UAS, even though the FAA will retain exclusive authority to regulate aviation safety.\textsuperscript{10}

In addition to federal legislative and regulatory efforts, all states have at least considered laws to regulate UAS, and many states have enacted legislation governing UAS.\textsuperscript{11} However, reliance upon such state action to address and resolve the UAS operation vs. real property rights and interests interplay is less than ideal due to federal preemption concerns as the FAA has “exclusive authority to regulate aviation safety, the efficiency of navigable airspace, and air traffic control”.\textsuperscript{12} It is an open question as to whether the FAA’s authority extends to areas such as one foot above the ground. Thus, even though the FAA has clarified that traditional state police powers related to zoning, privacy, and law enforcement are not federally regulated\textsuperscript{13}, it is apparent that regulatory schemes for UAS will arise at federal, state, territorial, tribal, and possibly local county or municipal levels.

With the aforementioned legislative and regulatory framework as a backdrop, the Uniform Law Commission (the “ULC”)\textsuperscript{14} has recently undertaken efforts to attempt to produce a uniform law related to UAS. The proposed Uniform Tort Law Related to Drones Act\textsuperscript{15} (the “Act”) represents an attempt by the ULC to promulgate a uniform law addressing tort liability, defenses, and general real property rights related to the use of UAS.\textsuperscript{16} At its annual meeting in July 2019, the ULC was not able to complete its review of the Act and

\textsuperscript{9} Including laws related to land use, zoning, privacy, and law enforcement operations, which are areas not subject to federal regulation.
\textsuperscript{10} 84 F.R. 3865, 3893.
\textsuperscript{12} Press Release – FAA Statement – Federal vs. Local Drone Authority (July 20, 2018), available at https://www.faa.gov/news/press_releases/news_story.cfm?newsld=22938. The FAA continued, “State and local governments are not permitted to regulate any type of aircraft operations, such as flight paths or altitudes, or the navigable airspace.” It is less clear, however, whether FAA preemption authority extends to one (1) foot above the ground.
\textsuperscript{14} The ULC was formerly known as the National Conference of Commissioners on Uniform State Laws.
\textsuperscript{15} The current draft was provided for further comment on May 30, 2019 and is available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a870dac3-db42-85cd-197d-abbf2d32e30d&forceDialog=0.
\textsuperscript{16} The various issues under consideration include “acquisition of private information of another by improper means, disclosure or use of private information obtained by improper means without consent, trespass by drone, nuisance by drone, self-help and defense of others, and tort action by any party, including a drone owner operator damaged by tortious behavior which includes the use of an unmanned vehicle.” See Statement of The Tort Law Relating to Drones Committee at https://www.uniformlaws.org/committees/community-home?communitykey=2cb85e0d-0a32-4182-adee-ee15c7e1eb20&tab=groupdetails.
postponed action on it.\textsuperscript{17} It is our belief that the ULC will delay any further action on the Act until the FAA has promulgated rules mandating remote identification on drones. We expect that mandate sometime in 2020.

III. REAL PROPERTY RIGHTS AND INTERESTS RELATED TO UAS USAGE

The tension between the expanding uses of UAS and landowner’s and legal occupant’s exclusive control over their land (including the airspace above the land), their expectations of privacy (including the expectation of privacy in land not visible from a public right of way), and their expectations of safety are rooted in historical trespass law and several basic, accepted, and long-standing concepts of property law.

In general, trespass law grants owners and legal occupants extensive and widespread control over their land and the near airspace above the land. Liability for trespass extends to any physical invasion of land without permission and does not depend on whether one’s actions cause economic harm or actual damage to the landowner or legal occupant.\textsuperscript{18} No bad intent or knowledge is required for a trespass violation and there is no de minimis exception for trespass. Simply being responsible for an object being on someone else’s land is enough to qualify as a trespass. Further, existing trespass law throughout the United States enables A to prevent C from crossing the surface of A’s land to deliver a package to A’s neighbor, B, without A’s prior consent. Trespass law is a basic, understandable concept that has evolved and worked consistently throughout its inception to protect landowners and legal occupants and provides guidance to third parties that interact with such landowners and legal occupants. Extending this example to the UAS context, it is reasonable for a landowner or legal occupant to expect that it could prevent UAS from using and crossing airspace over their land in some form or fashion. The degree to which a landowner or legal occupant can prevent UAS from using the airspace over their land is the key issue.

While trespass law is very categorical and context-insensitive, there are exceptions to the general strictness of trespass law that have developed over time to address emerging technologies or new developments.\textsuperscript{19} For example, the seminal case discussing the interplay of trespass law and airspace rights, \textit{United States v. Causby}, 328 U.S. 256 (1946) specifically rejected the strict trespass common law principle of \textit{ad coelum}.\textsuperscript{20} In \textit{Causby}, the Court held that a landowner’s exclusive control over the surface of its land

\textsuperscript{17} The ULC drafting committee submitted a Memorandum to the Uniform Law Commissioners dated July 8, 2019 setting forth why the drafting committee rejected using trespass and chose to use nuisance as the basis for the proposed uniform law. The position set forth in such Memorandum was rejected by a floor vote at the ULC annual meeting after which further action on the Act was postponed.

\textsuperscript{18} See, e.g. \textit{Jacque v. Steenburg Homes, Inc.}, 209 Wis.2d 605, 563 N.W.2d 154 (1997), where the court upheld an award of punitive damages against company that crossed a farmer’s land delivering a mobile home to a neighbor over said farmer’s objection, even though there was no physical damage or harm.

\textsuperscript{19} These include items such as common law defenses of necessity, and other exceptions imposed by legislation or regulation such as antidiscrimination laws governing public accommodations and right of entry afforded to certain service providers.

\textsuperscript{20} \textit{Ad coelum} is short for \textit{cujus est solum, ejus est usque ad coelum et ad inferos} (i.e. “one who owns the soil owns also to the sky and to the depths.”).
could not be extended to include all airspace above its land. However, the Court recognized and emphasized that a landowner, and by extension a legal occupant, has a legitimate expectation of exclusive control of low-elevation airspace. Specifically, the Court noted:

We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.

The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondents’ land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.

The reason is that there would be an intrusion so immediate and direct as to subtract from the owner’s full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.²¹

Causby’s holding demonstrates that the ad coelum principle could not be used to justify unqualified trespass liability upward without limits. However, and most importantly in the UAS context, the Court emphasized that the use of the airspace in the “immediate reach of the enveloping atmosphere” must be subject to the landowner’s exclusive control while the expectation of control a landowner has in the airspace over its land gradually decreases the higher into the airspace one goes. At a minimum, Causby in the UAS context means that a landowner and legal occupant may reasonably expect that they can prevent UAS from operating at an altitude where UAS could come into contact with people or improvements on the land or otherwise invade the landowner’s or legal occupant’s property and interfere with their reasonable and historically rooted privacy expectations on their own land. Any exception(s) to traditional trespass principles to address and provide for UAS usage over private property must be specific and provide the same types of categorical certainty that have served landowners, legal occupants, and third parties alike so well throughout the development of and history of trespass law.

²¹ United States v. Causby, 328 U.S. 256 (1947), 264-265.
Further, as *Causby* demonstrates, traditional trespass law is flexible and can evolve to successfully address and handle new, emerging technologies that impact landowner’s and legal occupant’s control over their land without having to struggle to create an entirely new regulatory and legal framework. The adaptability feature of trespass law is critical for any future legislation and regulation impacting UAS usage because ultimately the manner with which UAS are able to operate over private property without unreasonably interfering with a landowner’s or legal occupant’s expectation of control of its airspace will depend on the specific, factual circumstances. The concerns of a rural cattle farmer with respect to UAS usage over its land(s) are far different than those of an urban landowner or legal occupant of a small (say 5,000 square foot) tract of land inside a densely-populated municipality. The interests of a co-op and condominium or homeowner’s association related to UAS usage are different than those of a business park owner’s association. The concerns of a single-story building owner or legal occupant seeking to control UAS usage are different from those of the owner or legal occupant of an owner or occupant in a fifty (50) story high-rise. The interests of an owner of a single-family residence related to UAS usage are different from the concerns of an industrial warehouse owner or legal occupant. All of the permutations of varying interests and concerns are too numerous to list here and the foregoing comparisons are included to describe just some of the multitude of interests and concerns that any statute, ordinance, regulation, administrative rule, order, or guidance pertaining to the development and usage of unmanned aircraft systems over private property need to address, consider, and protect. The most effective manner to protect and address landowner and legal occupant interests and concerns related to UAS usage is to use and apply the existing common law trespass principles to protect private property rights with respect this new and emerging UAS technology. Such an approach will avoid the struggles of inventing a new legal framework while taking advantage of the adaptability of trespass law.

Two other property law principles are important to consider in the UAS context and demonstrate why trespass law concepts and principles are the best avenue to guide further legislative and regulatory efforts to govern UAS usage. The first principle is that property rights must be clearly delineated. Property rights are different from other privileges because property is *in rem* (i.e., property rights are valid against the world). Rights of landowners and legal occupants must be objectively clear so that others (e.g., UAS operators) can quickly and effectively understand those rights and make sure they are respecting the same. The common law in general has been very measured in creating any new property rights for this very reason. A failure to include the strict nature of trespass law (albeit with reasonable exceptions) in the UAS context would not meet the general public’s reasonable expectations with respect their real property rights and interests, especially as those rights have developed and been defined by trespass law. The second principle is that property rights are protected by “property rules” and not by “liability rules.” A liability rule approach allows a third party to take portions of ownership from another with such third party only being liable for money or other tort damages that

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are available. In contrast, a property rule enables a landowner or legal occupant to obtain injunctive relief against harm (i.e., the landowner or legal occupant has the exclusive right to protect its property). Ultimately, a clear definition of property rights and an implementation of “property rules” are necessary components to any future UAS governing scheme to ensure that UAS usage considers and respects long-standing real property rights and interests of landowners and legal occupants.

IV. CONCLUSION

This resolution, if adopted, will ensure that existing real property rights and interests are considered and protected in any statute, ordinance, regulation, administrative rule, order, or guidance that seeks to govern and regulate the usage and operation of UAS over private property. Trespass law, through the use of clear, definable “property rules”, should be the framework for any UAS governance because this common law concept has evolved and worked consistently throughout its inception to protect landowners and legal occupants while providing guidance to third parties that interact with such landowners and legal occupants.

Respectfully Submitted,

Jo-Ann M. Marzullo
Chair, Section of Real Property, Trust and Estate Law
February 2020
GENERAL INFORMATION FORM

Submitting Entity: Section of Real Property, Trust and Estate Law

Submitted By: Jo-Ann M. Marzullo, Chair
Section of Real Property, Trust and Estate Law

1. Summary of Resolution.
The Resolution urges federal, state, local, territorial, and tribal governments to protect real property interests, particularly common law trespass and privacy rights, with respect to any statute, ordinance, regulation, administrative rule, order, or guidance pertaining to the development and usage of unmanned aircraft systems over private property.

2. Approval by Submitting Entity.
The Council of the Section of Real Property, Trust and Estate Law approved the filing of this Resolution and Report on November 16, 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?
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 sponsoring entity will work with the ABA Governmental Affairs Office to actively engage federal, state, territorial, tribal, and local legislative or regulatory activities, guidance or orders related to unmanned aircraft systems over private property. The
Section will publish the Resolution on its website and will actively work with federal, state, territorial, tribal, and local governments to address this issue.

8. **Cost to the Association.** (Both indirect and direct 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 ABA entities:

   - ABA Governmental Affairs Office
   - All Sections, Divisions and Forums

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

    Barry B. Nekritz
    Lawrence Kamin
    (312) 469-3202
    bnekriz@lawrencekaminlaw.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.*

    Jo Ann Engelhardt, Delegate
    Section of Real Property, Trust and Estate Law
    Bessemer Trust
    (561)835-8300
    engelhardt@bessemer.com
EXECUTIVE SUMMARY

1. Summary of the Resolution.

The Resolution urges governmental protection of real property interests, particularly common law trespass and privacy rights, with respect to any legislation, statute, regulation, administrative rule, order, or guidance pertaining to the development and usage of unmanned aircraft systems over private property.

2. Summary of the issue that the Resolution addresses.

The popularity and usage of unmanned aircraft systems continues to grow exponentially among leisure and commercial users alike. These unmanned aircraft systems offer a variety of beneficial real world applications; however, they also raise complicated questions about how to resolve the sometimes-conflicting interests of unmanned aircraft systems operating over private property and private property occupants' common law trespass rights and privacy rights. Some form of legal or regulatory framework may be necessary to resolve such competing interests, to protect the privacy and physical safety of the real property owners and legal occupants, and to provide clear guidance to unmanned aircraft systems operators as to operation of such systems.

3. Please explain how the proposed policy position will address the issue.

The Resolution urges that any governmental action defend existing real property interests of real property owners and legal occupants. Specifically, the Resolution advocates that existing frameworks of common law trespass and privacy rights are considered, protected, and provide the framework of any legislative, regulatory, or other method of governing unmanned aircraft systems over private property.

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

No minority view or opposition have been identified within the ABA. Nuisance law instead of trespass law was considered by the Uniform Law Commission as the standard in a draft uniform law that was postponed from consideration.
RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to enact legislation to remove voting barriers for Native Americans and Alaska Natives by:

1. Providing equal access to voter registration and polling sites for Native American and Alaska Natives to increase Native American and Alaska Native access at each stage of the voting process;
2. Ensuring equal treatment for Tribal identification by directing election officials and voting precincts to treat Tribal identification cards like state and local identification cards for purposes of voting and registering to vote;
3. Requiring jurisdictions to give notice and obtain consent from Native Americans and Alaska Native Tribes before eliminating the only polling location or voter registration site on tribal lands; closing or moving a polling place or voter registration site to a location one mile or further from the current location; or other aspects of election administration; and
4. Requiring adequate language assistance by directing states to consult with Tribes on appropriate methods for furnishing instructions, assistance, and other information related to registration and voting under Section 203 of the Voting Rights Act; and

FURTHER RESOLVED, That the American Bar Association urges the federal government to improve voter outreach and access in Indian Country by:

1. Providing Tribal leaders a direct pathway to request Federal election observers;
(2) Requiring the United States Department of Justice to conduct annual voting consultation with Indian Tribes; and
(3) Establishing a Native American Voting Rights Task Force under the Office for Civil Rights at the Office of Justice Programs of the Department of Justice, in coordination with the Department of the Interior, to provide grant funds to Tribal and state consortiums for purposes of boosting Native voter registration, education, and election participation in Tribal communities; and

FURTHER RESOLVED, That the American Bar Association urges Congress to pass the Native American Voting Rights Act of 2019 (H.R. 1694; S. 739), or similar legislation, which removes voting barriers and improve access to voting for Native American and Alaska Native voters.
I. Introduction

The American Bar Association has a history of encouraging and supporting efforts to increase voter participation. This resolution builds upon prior resolutions to ease voter participation, increase voter registration, and encourage efforts to make the opportunity to vote easier consistent with ABA Resolutions 11A121\(^1\) and 99A104.\(^2\)

The right to vote is “a fundamental political right, because [it is] preservative of all rights.”\(^3\) For Native Americans\(^4\), exercising that fundamental right to vote is too often extremely difficult if not impossible. The Indian Citizenship Act in 1924 made all Native Americans citizens of the United States. However, the franchise was not secured that year. In 1948, Native Americans in New Mexico and Arizona litigated their right to vote.\(^5\)[UB] Utah and North Dakota became the last states to afford on-reservation Native Americans the right to vote in 1957 and 1958, respectively.\(^6\) Although by the 1960’s the denial to the right to vote was no longer express in law, other barriers and practices were implemented to disenfranchise Native Americans. Native Americans in Arizona, for example, were not able to fully participate in voting until 1970 when the United States Supreme Court upheld the ban against using literacy tests as a voter qualification.\(^7\) The Voting Rights Act bolstered the Native American franchise by preventing pernicious voting laws and practice from being implemented; however, the Supreme Court in 2013 invalidated the preclearance formula of the Voting Rights Act thus undermining enforcement of its provisions.\(^8\)

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\(^1\) 11A121 (Resolution committing ABA to support efforts to improve voter registration practices).
\(^2\) 99A104 (Resolution seeking to increase number of persons registered to vote).
\(^3\) *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
\(^4\) The term “Native American” and “Indians” used in this resolution refer to Native Americans and Alaska Natives.
\(^8\) *Shelby County v. Holder*, 570 U.S. 529 (2013).
The Native American Voting Rights Coalition (NAVRC) conducted a survey and held a series of hearings across Indian Country documenting problems with voter access.\(^9\) The NAVRC findings revealed the following obstacles, among others:

(A) a lack of accessible registration and polling sites, either due to conditions such as geography, lack of paved roads, the absence of reliable and affordable broadband connectivity, and restrictions on the time and place that people can register and vote, and the manner in which people can register and vote, including unequal opportunities for absentee, early, mail-in, and in-person voting; 
(B) nontraditional addresses for residents on Indian reservations, which make voter registration, acquisition of mail-in ballots, and securing required identification difficult, if not impossible;  
(C) inadequate language assistance for Tribal members, including lack of outreach and publicity, the failure to provide complete, accurate, and uniform translations of all voting materials in the relevant Native language, and an insufficient number of trained bilingual poll workers; and
(D) voter identification laws that discriminate against Native Americans.

Today, the Native American right to vote is undermined by the proliferation of election laws and policies that enact new barriers, change the landscape of elections, and confuse voters all to the detriment of democracy. The goal of this resolution is to ensure that the privileges of citizenship and the rights of Native Americans are safeguarded. Legislation removing barriers to Native American voting is vital for the fulfillment of Congress’ “unique obligation” toward Indians, particularly ensuring that Native American voters are fully included as “qualified members of the modern body politic.” See Board of County Comm’rs v. Seber, 318 U.S. 705, 715 (1943).

The Resolution is consistent with the ABA commitment to increase voter participation and minimize voter suppression. It calls on Congress to adopt legislation that (1) establishes a Native American Voting Rights Task Force, (2) requires jurisdictions to give notice and obtain consent from Tribes prior to changing polling locations on their respective reservations, (3) requires adequate language assistance under Section 203 of the Voting Rights Act, (4) provides Tribal leaders a direct pathway to request Federal election observers, and (5) requires the United States Department of Justice to conduct annual voting consultation with Indian Tribes. It also requires state, local, territorial, and tribal jurisdictions to (1) provide equal access to voter registration and polling sites, (2) ensure equal treatment of Tribal identification when registering to vote and when voting, (3) ensure that voters living in Tribal communities with non-standard residential addresses are not precluded from registering to vote or voting due to their addresses, and (4) ensure that voters without home mail delivery, who rely on post office boxes, have equal access to the ballot and are not subject to mail-only elections.

II. Supportive ABA Policies

The American Bar Association has long supported efforts to increase voter participation, in fact the predecessor entity to the Standing Committee on Election Law was a Special Committee on Election Law and Voter Participation. This proposed resolution fits squarely within long standing Association efforts and policies to increase voter registration and to encourage voter participation by lawyers.

In line with this policy proposal, ABA Resolution 79M127\(^\text{10}\) supports the enactment of legislation that encourages voter participation and urges the state and local bars to aid the ABA in improving voter participation. The ABA also encourages lawyers’ voter participation in Resolution 89A124B\(^\text{11}\), as well as asks lawyers to assist employees of their offices to participate in the election process.

Especially pertinent to the goal of this resolution is ABA Resolution 93A116\(^\text{12}\), which supports efforts to ensure the participation of homeless persons in the electoral process. It states that election regulations regarding residency determination should not prevent registration and voting by homeless persons who are otherwise qualified to vote. Recognizing the reality of residency in Indian Country, the leniency is critical to limiting voter suppression of minority groups and is consistent with previous ABA policies.

There are several ABA resolutions that work to improve the voter registration process, including 99A104\(^\text{13}\), 11A121\(^\text{14}\) and 90A300\(^\text{15}\). Resolution 90A300 supports efforts to increase voter registration and encourage efforts that make the opportunity to vote easy and convenient. Additionally, there are existing ABA resolutions concerning enhancing the Voting Rights Act. Resolutions 05A108\(^\text{16}\), 06BOG2.3\(^\text{17}\) and 13A10E\(^\text{18}\) serve to reauthorize the Voting Rights Act of 1965 and preserve voting rights by legislating a coverage formula.

III. Barriers to Voting

There are 573 Federally Recognized Tribes in the United States and hundreds more State Recognized Tribes. The 2010 census found that 5.2 million people identified as American Indian/Alaska Native alone or in combination.\(^\text{19}\) The largest concentrations of Native

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\(^{10}\) 79M127.
\(^{11}\) 89A124B.
\(^{12}\) 93A116.
\(^{13}\) 99A104.
\(^{14}\) 11A121.
\(^{15}\) 90A300.
\(^{16}\) 05A108.
\(^{17}\) 06BOG2.3.
\(^{18}\) 13A10E.
\(^{19}\) National Congress of American Indians, Tribes & Transportation: Policy Challenges and Opportunities, (November 13, 2013).
Americans/Alaska Natives are found in Alaska (19.5%), Oklahoma (12.9%), New Mexico (10.7%), South Dakota (10.1%), Montana (7.9%), North Dakota (6.4%), Arizona (5.5%), Wyoming (3.3%), Washington (3.0%), and Oregon (2.9%).

American Indians and Alaska Natives nationally are registered to vote at lower rates than non-Hispanic whites, respectively, 26.5% to 34%. As a result, 1.2 million eligible Native American voters are missing from the electorate. Furthermore, voter turnout for Native Americans is 1 to 10% lower than the rate of other racial and ethnic groups. As a consequence, Native Americans are underrepresented in the electorate and in government.

Access to the polls and participation in the political process are impacted by isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, the digital divide, and distance.

Beyond the barriers that exist day to day, Native Americans continue to bear the brunt of new election laws such as voter ID laws. Additional barriers include precinct-based voting system, lack of polling locations on or near Tribal lands, racial gerrymandering, voter intimidation, and racial hostility.

IV. Socioeconomic Barriers

Many Native Americans and Alaska Natives face obstacles in voting as a part of their socioeconomic reality. Nationally, the poverty rate of Native Americans was measured at 28.8% in 2014. Less than half the homes on Tribal lands have access to broadband.

An additional problem impacting many Native Americans is homelessness or near homelessness due to extreme poverty and lack of affordable housing on many reservations. A study by Housing and Urban Development found that between 42,000 and 85,000 people in Tribal areas are couch surfers, staying with friends or relatives only because they had no place of their own. This lack of permanent housing impacts the ability of these Tribal members to have a permanent physical address.

20 Id.
22 Id.
23 Id.
V. Establishing a Native American Voting Rights Task Force

State and Federal Elections are implemented by states and their political subdivisions. The states and their subdivisions do not have authority or jurisdiction on Tribal lands but have the responsibility to provide polling locations for voters living on Tribal lands. Tribal leaders do not have representation or authority over these political subdivisions. States and their subdivisions often neglect to provide the additional effort and funding to increase access to voter registration and voting locations for Native Americans on Tribal lands, and Tribal leaders cannot preemptively compel them to do so. Consequently, Native American voters fall to the wayside and remain under-registered, are left in the informational-dark regarding elections, and turn out to vote in lower numbers.

Congress should establish a Native American Voting Rights Task Force so that States and political subdivisions are better financially and politically equipped to implement policies and efforts to ensure that Native Americans have equal access to voting at all stages.

VI. Accommodating Non-Standard Residential Addresses

Many Native Americans and Alaska Natives live in rural communities where standard residential addresses do not exist. Residents’ homes are usually described in terms of landmarks, cross roads, and directions. Residents rely on P.O. Boxes to receive their mail and do not have the luxury of home mail delivery. For day-to-day life, this is manageable. When voting, this becomes a barrier in jurisdictions with only vote-by-mail elections, and for voting processes that do not accommodate non-standard addresses in voter registration or in voter ID requirements.

For example, in October 2018, a month before the midterm elections, a voter ID law went into effect in North Dakota that required voters to have residential addresses with the approval from the Supreme Court. For the six reservations located in North Dakota, residential addresses did not exist. The Secretary of State told the Tribal leaders that they could call the County 911 coordinator and be assigned an address, but this was a meager solution given that the reservations span multiple counties thus creating inconsistencies and confusion. For Sioux County, where the Standing Rock Sioux Tribe is located, the 911 coordinator is the County Sheriff which posed a deterrent for community members wary of law enforcement. On October 12, when a Standing Rock Sioux Tribal member called to determine her residential address the Sheriff told her that he was transporting prisoners and could not assign addresses that day. One voter was

28 Id.
29 Id.
31 Id.
assigned an address corresponding to a nearby bar, exposing that Tribal member to fraud if he voted based on that addresses.\footnote{Id.}

As a result, North Dakota Tribes had to create emergency plans to produce addresses and corresponding IDs for their members. They kept their offices open for extended hours and began providing free IDs to Tribal members, to the point where the Turtle Mountain Band of Chippewa’s ID machine overheated.\footnote{Id.} Although the Secretary of State never explicitly endorsed the Tribes’ plan, the Tribes were left with no other options and had to undertake the extraordinary effort in order to ensure that their tribal members could vote.\footnote{Id.}

Native American and Alaska Native Voters should not face barriers to voting simply because they do not have a standard residential address. Such requirements for registering and voting in state elections demonstrate a disregard for voters living in Tribal communities and a misunderstanding of the realities of these communities. A residential address cannot be a prerequisite to a right as fundamental as voting and laws should be enacted to guarantee as much.

\section*{VII. Ensure Equal Access to the Ballot for Voters Without Home Mail Delivery}

Native American and Alaska Native voters often do not have at-home mail delivery services and instead have to travel to P.O. Boxes. P.O. Box hours on many reservations are limited to the regular business day and are only open until noon on Saturdays. Regular trips to the P.O. Box can be half a day’s effort due to distance between the home and the Post Office. Consequentially, voting by mail is not a realistic option for voters in Tribal communities. For jurisdictions that conduct mail-only elections or seek to, this could result in wholesale disenfranchisement of Native Americans and Alaska Natives.

For example, in Alaska the state began looking into a vote-by-mail system.\footnote{Id.} Alaska Native voters voiced grave concern because mail delivery to many Alaska Native villages can take 2-3 weeks via air service, but inclement weather can delay mail services even longer.\footnote{Id.} Given that state and federal elections are held in October and November, the chances of inclement weather are even higher making mail-in elections even more concerning.\footnote{Id.}

Furthermore, Native Americans in Arizona, New Mexico, Nevada, and South Dakota have a low level of trust in mail-in voting.\footnote{Id.} This distrust is rooted in the irregularities of the mail

\begin{footnotesize}
\begin{itemize}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\item Advisory Memorandum from Alaska State Advisory Committee on Alaska Native Voting Rights to the U.S. Comm’n on Civil Rights, (Mar. 27, 2018), \textit{available at} \url{http://www.usccr.gov/pubs/2018/05-25-AK-Voting-Rights.pdf}.
\item \footnote{Id.}
\item \footnote{Id.}
\end{itemize}
\end{footnotesize}
delivery services in Tribal communities because voters do not have faith that the mail will be delivered timely; this creates a preference among many Native American and Alaska Native Voters to vote in person.\textsuperscript{39}

Native American and Alaska Natives should not be limited to voting by mail. Aspects of election administration, such as registration or dissemination of election information, should not be limited to mail either. Further, many Native American language translations are only provided orally, requiring in-person language translations of the ballot, which cannot be provided by mail. The law should ensure that voters living in Tribal communities have equal access to all aspects of the election that is not reliant on inconsistent, irregular, and unreliable mail services.

\textbf{VIII. Providing Equal Access to Voter Registration and Polling Sites}

Native Americans and Alaska Natives do not have the same access to voter registration and polling locations as off-reservation voters, and voter turnout for Native Americans and Alaska Natives is the lowest in the country, as compared to other groups. The barriers to registering to vote and reaching polling locations are inherently mired by the lack of broadband, the poor conditions of roads in Indian Country, and lack of transportation. These barriers are further exacerbated by the apathy of election administrators to overcome these problems or to accommodate Native American voters.

For Alaska Native voters, in 2008, the Alaskan government eliminated polling locations for Alaska Native villages as part of a “district realignment” that resulted in voters having to travel by plane in order to vote.\textsuperscript{40}

For the Kaibab Paiute Tribe in Arizona, voters had to travel 280 miles one way in 2016 and 2018 in order to vote early in person. The Pyramid Lake and Walker River Paiute Tribes in Nevada had to sue the state of Nevada before the 2016 general election in order to get polling locations on the reservation.\textsuperscript{41}

Native American voters have a right to equal access to early voting and in-person early voting in their own communities and this needs to be included in law. Tribal governments should not be forced to resort to begging or litigating in order to ensure that their members have equal access to the polls. Legislation ensuring that Native Americans have a statutory right to voter registration and polling sites in Native communities will reduce these barriers.

\textsuperscript{40} Natalie Landreth, Why Should Some Native Americans Have to Drive 163 Miles to Vote?, The Guardian (June 10, 2015), available at https://www.theguardian.com/commentisfree/2015/jun/10/native-americans-voting-rights (“[I]magine if you had to take a plane flight to the nearest polling place because you cannot get to it by road, which was the case for several Native communities in 2008, when the state of Alaska attempted a “district realignment” to eliminate polling places in their villages. And that’s just half the trip”).
\textsuperscript{41} Jennifer Solis, “Tribes get their own polling places, some for the first time,” Nevada Current (Oct. 31, 2018).
IX. Ensuring Equal Treatment for Tribal Identification

There are 35 states in the United States that require some form of identification at the polls when voting. Some states do not explicitly include Tribal Identification amongst their Voter ID requirements and in other states that do, often voters with Tribal ID are wrongfully rejected at the polls due to insufficient poll worker training. Rejecting Tribal forms of identification hinders Native American voters who often lack access to state forms of identification and do not have the access to transportation or funds to acquire state forms of ID.

Native American and Alaska Natives living in jurisdictions with Voter ID laws should not be subject to the indignities of having their Tribal ID rejected and being denied the opportunity to vote. The validity of Tribal IDs should not be questioned. Legislation mandating equal treatment for Tribal identification, putting them on par with other forms of accepted identification, will ensure that Native Americans are not unduly burdened by voter identification requirements. Tribal IDs should be accepted as valid IDs when registering to vote and voting even if the Tribal ID lacks a residential address or an expiration date.

X. Requiring Jurisdictions to Give Notice and Obtain Consent

Polling location decisions are often made without the input of Native Americans and Alaska Natives Tribes. Tribal governments do not have the power to determine polling locations in their communities. When States and political subdivisions decide to change polling locations or other aspects of election administration without Tribal notice and consent, Tribal communities are often left with the burden to overcome barriers.

For example, in 2018 Pima County, Arizona, decided to no longer provide early voting to the Pascua Yaqui Tribe. Tribal members then had to take buses and travel two hours to vote early in person off the reservation.

To ensure that Native Americans have access to voter registration and polling places, Tribes should have the opportunity to request voter registration or polling places on the reservation. Before closing, moving a polling place or voter registration site to another location one mile or further from the existing location, or decreasing the number of hours a site is open, the jurisdiction providing election services should consult with the Tribe and obtain consent.

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44 Id.
By requiring that state governments and political subdivisions give notice and obtain consent before making any changes to polling locations, Tribal communities can have the stability and reliability of consistent polling locations, making voting easier.

XI. Requiring Adequate Language Assistance

There are 357,409 Native Americans and Alaska Natives residing in 57 jurisdictions covered by Section 203 of the Voting Rights Act, which requires that language assistance must be provided for all phases of the voting process. However, some jurisdictions fail to provide effective language assistance.

For example, in Alaska there are 14 census areas that are covered by Section 203 and must provide language assistance in one or more Alaska Native languages. In 2014, after a lawsuit brought by Alaska Native citizens, the United States District Court found that Alaska failed to provide Alaska Natives with voting information equivalent to what English-speaking voters were provided in the covered languages of Gwich’in or Yup’ik.

On the Navajo Nation (which spans Arizona, New Mexico, and Utah), over seventy percent (70%) of the voting age population speaks a language other than English. In 2018, Navajo Voters were unable to read and believed that no one was able to translate, orally, the instructions for casting an early ballot. This resulted in Navajo voters returning early ballots, unsigned, resulting in litigation filed by the Nation.

States and subdivisions should be required to provide adequate language assistance by consulting with Tribes on appropriate methods for furnishing instructions, assistance, and other information related to registration under Section 203 of the Voting Rights Act. Providing in-person translations for the ballot alone are insufficient, when voters have a right to translations related to all aspects of voting.

XII. Providing Tribal Leaders a Direct Pathway to Request Federal Election Observers

Rights secured in law need to be guaranteed by enforcement of those laws. Unfortunately, rights assured by the U.S. Constitution, the Voting Rights Act, the Help America Vote Act, or state law are regularly violated due to insufficient poll worker training or harassment and intimidation at the polls on election day. Voters are regularly denied a ballot despite presenting lawful identification or not offered a provisional ballot.

In order to protect the integrity of elections, the Native American vote, and to instill trust in the government among Native American voters, Tribal leaders need a direct pathway to request Federal election observers from the Department of Justice to observe polling locations in Tribal communities. The VRA should be amended to allow Tribes an

opportunity to submit complaints to the Department of Justice identifying “efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of [the language minority provisions of the Voting Rights Act] are likely to occur.” Federal Observer reports should be publicly available minus any personally identifiable information.

XIII. Requiring Annual Consultation with Indian and Alaska Native Tribes

The right to vote is a federal right as well as a right of state and local citizens. The right is continually under threat. In 2015, the Department of Justice recommended legislation to improve access to voting for American Indians and Alaska Natives. However, despite an awareness of continuing voting rights violations for Native Americans and Alaska Natives, the Department of Justice has not brought a case on behalf of Native American voting rights in nearly 20 years. Requiring the Department of Justice to consult annually with Native American tribes and Alaska Native tribes will ensure that the Department of Justice is consistently made aware of voting rights violations in Tribal communities but also function to create accountability among the Department of Justice to Tribal governments directly. This will facilitate long term cooperation and enforcement of voting rights.

XIV. Conclusion

The federal government has a trust responsibility to ensure that Native Americans have equal access to the ballot as all other Americans. Recent studies and findings demonstrate that many barriers exist to impede the right to vote for Native American voters.

As concerned Americans and members of the legal profession, and as the voice of the legal profession, it is imperative that the American Bar Association take steps to ensure that all citizens have the ability to exercise their right to vote, if they so choose, and be free of any improper impediment to do so. We should take affirmative steps to encourage citizens to choose to exercise their right, privilege and responsibility to vote. Legislative efforts to remove voting barriers for Native Americans and Alaska Natives are consistent with previous ABA policies.

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Respectfully submitted,

Wendy K. Mariner  
Chair, Section of Civil Rights & Social Justice  
February 2020
GENERAL INFORMATION FORM

Submitting Entity: Section of Civil Rights and Social Justice

Submitted By: Wendy K. Mariner, Chair

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

This Resolution calls on federal, state, territorial and local governments to remove barriers to Native American and Alaska Native voter registration and participation, and to establish measures to ensure protections for Native American and Alaska Native voting rights.

2. **Approval by Submitting Entity.**

   The Section of Civil Rights and Social Justice approved sponsorship of the resolution during its Fall Meeting in Atlanta, Georgia on October 26, 2019.

   The Standing Committee on Election Law approved cosponsorship of the resolution by email on November 13, 2019.

   The National Native American Bar Association approved cosponsorship of the resolution during its Meeting on November 18, 2019.

   The Commission on Disability Rights approved cosponsorship of the resolution during its Commission Meeting on November 15, 2019.

   The Commission on Homelessness and Poverty approved cosponsorship of the resolution by email November 20, 2019.

   The Section of State and Local Government Law approved cosponsorship of the resolution by email on November 18, 2019.

   The Commission on Hispanic Legal Rights and Responsibilities approved cosponsorship of the resolution by email on November 20, 2019.

   The Coalition on Racial and Ethnic Justice approved cosponsorship of the resolution by email on November 20, 2019.

   The National Conference of Specialized Court Judges approved cosponsorship of the resolution on November 14, 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?**

Over the last forty years the ABA has supported policy that promotes greater and more equal access to voting, and this Resolution builds upon and strengthens existing policy, including Resolutions 79A127 (voter participation), 93A116 (homeless persons participation), 90A300 (voter registration), as well as existing ABA resolutions concerning enhancing the Voting Rights Act, including Resolutions 05A108, 06BOG2.3 and 13A10E.

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.**

Native American Voting Rights Act of 2019 (H.R. 1694; S. 739)

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.**

Adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. **Disclosure of Interest.**

N/A

10. **Referrals.**

Center for Human Rights  
Commission on Homelessness and Poverty  
Commission on Racial & Ethnic Diversity in the Profession  
Commission on Youth at Risk  
Government and Public Sector Lawyers Division  
Law Practice Division  
National Conference of Federal Trial Judges
Section of Litigation
Standing Committee on Legal Aid & Indigent Defense
Criminal Justice Section

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution calls on federal, state, territorial and local governments to remove barriers to Native American and Alaska Native voter registration and participation, and to establish measures to ensure protections for Native American and Alaska Native voting rights.

2. Summary of the Issue that the Resolution Addresses

Access to voting is a fundamental right as it ensures the capacity for representation and participation. Native Americans and Alaska Natives have continually faced barriers to this fundamental right via (a) inadequate access to polling and registration places due to geography, insufficient broadband connectivity, or travel and transportation obstacles, (b) federal and state address requirements that do not accept reservation addresses, (c) language barriers including insufficient translation and language assistance, and (d) voter identification laws that discriminate against Tribal identification methods.

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

This Resolution aims to remove barriers faced by Native Americans and Alaska Natives to voter registration and participation by providing sufficient access to polling and registration sites at each stage of the voting process, notifying Tribal leaders and obtaining consent prior to changing polling and registration locations, providing adequate language assistance, and accepting all forms of Tribal identification.

Further, this Resolution seeks to establish a Native American Voting Rights Task Force under the Office for Civil Rights at the Office of Justice Programs of the Department of Justice, in coordination with the Department of the Interior, and to establish straightforward procedure for Tribal leaders to request federal election observers. Additionally, the Resolution urges the United States Department of Justice to conduct yearly consultation with Tribal leaders regarding voting access.

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 encourages lawyers in all practice areas to use and promote technology-based platforms that facilitate the efficient, timely, and targeted matching of survivors of human trafficking who have legal needs with lawyers who have the requisite specialization and availability to meet those needs pro bono.
REPORT

Introduction

The American Bar Association has a long history of supporting the provision of pro bono legal services to survivors of human trafficking. Indeed lawyers, law firms, and bar associations nationwide have been engaged extensively in assisting trafficking survivors and remain so today. Yet reliably facilitating the provision of pro bono legal services to survivors in a way that matches a lawyer’s expertise and immediate availability to a survivor’s specific and sometimes complex legal needs has been an enduring challenge. In short, there may well be a supply of lawyers who could provide such pro bono service that current outreach models do not reach, leaving demand (need) unmet.

Recently, however, a replicable, technology-based model1 has emerged to resolve this challenge, matching human trafficking survivors’ specific and urgent requests for assistance on nuts-and-bolts issues spanning family, criminal, civil litigation and commercial/contract areas of law with legal expertise that incorporates a survivor-centric, trauma-informed process. Since 2017, this real-time, needs-matching model has provided unique opportunities for lawyers to provide pro bono services to enhance the ability of human trafficking survivors to rebuild their lives. The model addresses the ABA’s commitment to respond to human trafficking survivors’ high need for pro bono legal services with a technology-based model that more readily and efficiently connects human trafficking survivors and lawyers. Further, the model provides a way to facilitate the participation of pro bono attorneys at-scale on a complex and sensitive area of access to justice.

The model thus offers a technology-based approach by which lawyers can seek opportunities to provide pro bono assistance to trafficking survivors in ways that will maximize the time and resources of all concerned. It should be replicated and expanded nationwide.

I. The Problem

The scale of human trafficking is enormous. Even with the understanding that statistics cannot capture the full extent of a crime that benefits from keeping its victims in the shadows, the latest data from the International Labour Organisation show that, in 2016, globally 40.3 million people were estimated to be in “modern slavery,” a term that reflects 24.9 million in forced labor, bonded labor, forced child labor, and sexual servitude, and 15.4 million in forced marriage.2 Women and girls are disproportionately affected by

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1 The model was developed by the Alliance to Lead Impact in Global Human Trafficking (ALIGHT), based in Denver, Colorado. To date, the model is the only known one of its kind; this report therefore highlights ALIGHT for illustrative purposes only. The model and its platform are not proprietary, and neither the resolution nor this report constitute an endorsement of ALIGHT.
forced labor, accounting for 99% of victims in the commercial sex industry, and 58% in other sectors. Overall, 71% of modern slavery victims are women and girls.3

Walk Free’s 2018 Global Slavery Index estimates that there were approximately 400,000 people “living in conditions of modern slavery in the United States” in 2016.4 There has been criticism of this number because there are currently no universally accepted diagnostic criteria to identify or measure “modern slavery.”5 It is widely acknowledged that the full extent of human trafficking is extremely hard to measure due to its hidden and stigmatized nature. As pointed out by the National Human Trafficking Survivors Coalition, these conservative estimates are just the tip of the iceberg because “statistics are not accurate as they do not reflect the number of survivors who are not coming forward.”6

Beyond the general legal and moral principle that trafficking victims and survivors deserve protection under the law as crime victims, we must also acknowledge and pay special attention to the fact that this crime is predicated on the lack of power of victims relative to traffickers, specifically, and to society and its institutions, generally. Although anyone can be a victim, human trafficking often impacts the most vulnerable. Often individuals are victimized in multiple, overlapping ways such that they experience “poly-victimization.” For example, according to Polaris, a nonprofit that combats human trafficking and operates the National Human Trafficking Hotline, “[r]unaway and homeless youth, as well as victims of domestic violence, sexual assault, war or conflict, or social discrimination are frequently targeted by traffickers.”7

Further, as the ABA has recognized, the re-victimization of survivors in the legal system compounds the injustice, as survivors are often criminalized in that system.8 And many current avenues of relief are inadequate. In 2019, the ABA Survivor Re-entry Project, along with collaborators Polaris, Brooklyn Law School, and the Human Trafficking Prevention Project of the University of Baltimore School of Law, issued an important review of criminal records, laws, and remedies available to survivors state-by-state (“State Report Cards”).9 As the State Report Cards reveal:

3 Id at 9.
9 ABA Survivor Re-entry Project, Polaris, Brooklyn Law School and the Human Trafficking Prevention Project of the University of Baltimore School of Law, State Report Cards: Grading Criminal Record Relief Laws for Survivors of Human Trafficking (2019), available at https://polarisproject.org/sites/default/files/Grading%20Criminal%20Record%20Relief%20Laws%20for%20Survivors%20of%20Human%20Trafficking.pdf.
“Many survivors of human trafficking exploited in the commercial sex industry or other labor sectors have been arrested for offenses stemming from their victimization. Resulting criminal records – both arrest and court documents – then follow survivors and create barriers that impact their independence, stability, and safety.”

The State Report Cards include survivor testimonials that help convey the emotional costs of criminalization on the individuals:

“I used to obsess about my conviction, constantly replaying the situations and the people who trafficked me in my mind. I could never heal from my trafficking experience. But from the day my record was vacated, I never thought about it again.”

The 2016 National Survivor Network Survey of 130 survivors further stresses the continued impact on the individuals’ lives, revealing that 90.8% of respondents reported having at least one criminal record. Nearly 73% of respondents reported losing or not receiving employment because of their criminal records. Furthermore, 58% of respondents suffered barriers to accessing safe and affordable housing due to their past criminal convictions.

II. Using Technology to Assist Trafficking Survivors

As noted, the legal profession long has been committed to providing, in a variety of creative and collaborative ways, pro bono assistance to trafficking survivors to resolve legal issues that impede their restoration to security and independence, and to avoid revictimization. These manifold efforts on behalf of survivors have made two things crystal clear: (1) there is a great need on the part of survivors for pro bono legal services; and (2) lawyers, from small towns to major cities nationwide, want to provide them. As in most areas of human endeavor, however, the power of technology has the potential to powerfully enhance the provision of pro bono assistance to survivors if it can be harnessed in ways that address persistent challenges thereto, including the matching of a lawyer who has the requisite expertise, proximity, and prompt availability to a survivor’s specific and often complex legal needs, and that incorporate supportive social services to provide a comprehensive, cohesive, and ultimately successful approach to the survivor’s situation.

The aforementioned model bridges prior gaps between survivors and lawyers with an app platform that matches survivors’ specific and urgent requests with legal expertise

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10 Id. at 4.
11 Id. at 5.
12 National Survivor Network [hereinafter NSN], NSN Members Survey: Impact of Criminal Arrest and Detention on Survivors of Human Trafficking (August 2016) at 3.
13 Id. at 7.
14 Id. at 7.
through a survivor-centric, trauma-informed process. There are three key players in such a technology-based model: (1) survivors; (2) community partners (social service agencies and other screening partners) who meet with survivors and post requests on their behalf on the platform; and (3) the lawyers who receive and respond to targeted notifications of pro bono opportunities on the platform. The model thus offers a flexible and efficient way to connect survivors to specialized, pro bono legal services from heretofore untapped expertise in the legal community, thus creating a marketplace where survivors are now in the same “place” as lawyers who want to fight for their rights.

Such a real-time, needs-matching model dramatically expands the possibilities to efficiently deliver pro bono legal services to human trafficking survivors. Survivors’ varied and urgent needs drive the recruitment of pro bono lawyers; by automating the matching of available resources to needs on the mobile app platform, the model leverages under-utilized resources and saves precious time.

With an app platform that matches survivor needs (demand) to expertise (supply), such a model offers targeted ways to notify lawyers of pro bono opportunities on discrete matters across a range of legal specializations spanning family, criminal, civil litigation and commercial/contract areas of law, to include:

- Custody, visitation and support
- Divorce
- Security issues involving family members
- Spousal rights
- Tenants’ rights
- Employment
- Benefits issues
- Fraud
- Identity change
- Debtor’s rights
- Personal records issues
- Copyright/Intellectual Property
- Tax issues
- Corporate issues
- Civil litigation - plaintiff
- Civil litigation - defense
- Probate court matters
- Criminal justice advocacy - trafficker-related investigation or prosecution
- Criminal defense - survivor-related prosecution
- Criminal records issues
- Criminal and civil warrant issues

The benefits to attorneys of participating in such a model include:

- Providing services on consequential legal matters to screened human trafficking survivors
• Receiving targeted requests within the attorneys’ areas of expertise, without the need for additional training
• Participating whether as solo practitioners in rural areas or as part of large urban law firms
• Assisting on discrete, rather than open-ended, matters
• Having flexibility to work on matters according to the individual attorney’s bandwidth
• Receiving opportunities to train young attorneys
• Accessing trauma-informed resources to support the client relationship
• Becoming part of a unique community of legal practitioners working on these issues
• More readily meeting state bar *pro bono* requirements

The model also has been tried beyond its origins in Colorado, extending (so far) to California, Missouri, North Dakota, Florida and North Carolina. By supporting technological and innovative approaches that facilitate the ease of attorney participation on various legal issues facing human trafficking survivors, such a model can help free survivors to pursue training, secure jobs, and rebuild lives for themselves and their families. It also leverages what lawyers are excited about – responding to the call to bring justice to human trafficking survivors.

The moment therefore is ripe to embrace such technology-based models to more efficiently and effectively bring the power of the legal profession to bear in rooting out and resolving the legal complexities trafficking survivors confront in this deeply entrenched human rights crisis.

Respectfully submitted,

Hon. James A. Wynn, Jr.
Chair, Center for Human Rights
February 2020
1. **Summary of Resolution(s).**

The resolution encourages lawyers to seek out and promote innovative technologies that enhance the provision of *pro bono* legal services to survivors of human trafficking.

2. **Approval by Submitting Entity.**

The resolution was approved by the CHR Board in November 2019.

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

Numerous resolutions addressing human trafficking have been submitted to the HOD previously.

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

This resolution builds on previously approved resolutions by addressing the use of technology to facilitate pro bono service to survivors of human trafficking.

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 encourage broadly the use and development of technology-based models, such as (though not exclusively) the ALIGHT model/platform, in providing pro bono service to survivors of human trafficking.

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)
   Colleagues at ALIGHT participated in the drafting of the report with resolution by way of describing the finer points of the operation of the ALIGHT model and platform to ensure accuracy.

10. **Referrals.**
    The Resolution with Report will be referred to the Section of Civil Rights and Social Justice, the Section of International Law, the Section of Labor and Employment Law, and the Section of Litigation, the Solo, Small Firm and General Practice Division, the Center for Public Interest Law, the Commission on Domestic & Sexual Violence, and the Commission on Immigration.

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
    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. James A. Wynn, Jr. CHR Chair
    American Bar Association
    Washington, DC 20036
    202/476-1870
    Crystal_Wright@ca4.uscourts.gov (assistant)
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The resolution encourages lawyers to seek out and promote innovative technologies that enhance the provision of *pro bono* legal services to survivors of human trafficking.

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

   Human trafficking continues to be a major human rights crisis worldwide, including in the United States. Survivors of the crime often face complex legal hurdles in restoring their lives and preventing their being trafficked again.

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

   The resolution encourages lawyers' use and promotion of innovative technologies to facilitate such representation.

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

   None received thus far.
RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation that allows for the following general descriptions to be used in lieu of a traditional residential address, if required, for purposes of voter registration and voter identification:

1. post office box;
2. tribally designated building address;
3. general description of physical location where the person resides;
4. shelter address; or
5. local governmental building address; and

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation or promulgate regulations that assign the voter to the precinct in which the person can be found, whether that location is expressed by a traditional address or a description such as (1)-(5) above.
**Summary**

The Resolution urges federal, state, local, territorial and tribal governments to enact legislation to expand the forms of acceptable address identifiers in the voter registration process beyond the physical address requirement to include non-traditional identifiers, including post office boxes, tribal government buildings, general descriptions of physical residences, shelters, and governmental buildings. The Resolution is consistent with the American Bar Association’s commitment to increase voter participation and minimize voter suppression.

**Introduction**

Voting is a fundamental right and an integral responsibility of citizenship. Unfortunately, efforts to undermine that fundamental right have continued since the franchise was achieved in theory for African American men after the Civil War and for women with the passage of the 19th Amendment. The Indian Citizenship Act of 1924\(^1\) granted American citizenship to “Native” Americans less than 100 years ago, which presumes the encompassing right to vote. But, state law largely limited those privileges and suppressed Native American votes. This country’s ineffable violent history of lynching and Jim Crow laws necessitated the passage of the Voting Rights Act of 1965, which sought to remove state and local barriers for African Americans seeking to exercise their 15th Amendment right to vote by providing for broad federal oversight of state and local voting procedures.\(^2\) It was also the Voting Rights Act that finally protected voting access for this country’s Native citizens.\(^3\)

In its 2013 holding in *Shelby v. Holder*, the United States Supreme Court invalidated portions of the Voting Rights Act, specifically Section 4 of the Act – the “coverage formula.”\(^4\) The coverage formula was regarded by many as the most significant portion of the Voting Rights Act because it determined which jurisdictions, based on historical race-based voter discrimination, would be required to “pre-clear” any changes to voting procedures, as prescribed in Section 5 of the Act.\(^5\) The Voting Rights Act, and its pre-clearance provisions, is credited with closing the significant gap between registered white and black voters, particularly in the southern states.\(^6\)

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5. *Id.*
6. *Id.*
In its 5-4 decision, the Court determined that the coverage formula was unconstitutional as applied because it "is based on decades-old data and eradicated practices."\(^7\) Citing its decision in *Northwest Austin Municipal Util. Dist. No. One v. Holder*, the Court states that the requirements of the Voting Rights Act must be "justified by current needs," and that "departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets."\(^8\) The Court stated that while "state legislation may not contravene federal law," states "retain broad autonomy...in structuring their governments and pursuing legislative objectives,"\(^9\) and that the "fundamental principle of equal sovereignty among the states [is] highly pertinent in assessing disparate treatment of states."\(^10\) The Court found that:

The Voting Rights Act sharply departs from these basic principles. It requires States to beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own. And despite the tradition of equal sovereignty, the act applied to only nine States (and additional counties)." That is why, in 1966, this Court described the Act as ‘stringent’ and ‘potent.’ Katzenbach, 383 U.S., at 308

The Court notes that in *Katzenbach*, the Court upheld the Act because in 1966, “the ‘uncommon exercise of congressional power’ could be justified by ‘exceptional conditions’."\(^11\) It rationalized that, at the time of the ruling, in five of the six jurisdictions covered by Section 4, African American voter turnout was higher than white voter turnout.\(^12\) The Court also noted the reduction in the number of changes objected to under Section 5 (14.2 percent in the first decade of the Act to 0.16 percent in the most recent decade) by the U.S. Attorney General.\(^13\) The Court acknowledges that these changes are due to the success of the Voting Rights Act, but also that those successes render the formula contained in Section 4 unconstitutional.\(^14\) While the Court stopped short of referencing a post-racial America, it does state that the kind of “pervasive,” “flagrant,” “widespread” and “rampant” discrimination that prompted the adoption of the Voting Rights Act generally, and Section 4 specifically, no longer existed.\(^15\)

**Post-Shelby Effect**

Despite the Court’s optimism, centuries of race-based discrimination cannot be overcome with 48 years of reformative legislation, and the effect of the *Shelby* decision was immediate. Within 24 hours of the decision, Texas implemented a strict photo ID law, with

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\(^8\) *Id.* at 536; (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder* 557 U.S. 193, 203 (2009)).
\(^9\) *Id.* at 543.
\(^10\) *Id.* at 530.
\(^11\) *Id.*
\(^12\) *Id.* at 535.
\(^13\) *Id.* at 548.
\(^14\) *Id.* at 531.
\(^15\) *Id.* at 554.
other previously covered states like Mississippi and Alabama, quickly following suit. The 2018 Brennan Center Study, *Purges: A Growing Threat to the Right to Vote*, found that not only are jurisdictions previously covered by the pre-clearance requirement improperly purging voters from the rolls (i.e. Texas purged an additional 363,000 voters post-*Shelby*; Georgia purged 1.4 million voters in the four years post-*Shelby*), but previously uncovered jurisdictions like New York, Maine, Indiana, and Arizona have either engaged in unlawful purges or implemented rules to allow for unlawful purges. The Brennan Center 2018 *Report on the State of Voting* found that the last decade “brought a wave of laws restricting voting.” At the time of the 2018 report, Arkansas, Iowa, Missouri, and North Dakota had enacted stricter voter ID laws following the 2016 elections; Texas passed another voter ID restriction; Georgia, Indiana, Iowa, and New Hampshire imposed tougher registration requirements; and Iowa limited the opportunity for early and absentee voting. In addition, Connecticut, Delaware, Florida, Illinois, Kansas, Kentucky, Maryland, Montana, Nebraska, New Hampshire, New York, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming now require a mailing address to register to vote.

Given the increased efforts to impact voting rights in previously uncovered jurisdictions since *Shelby*, it is reasonable to conclude that Section 4 of the Voting Rights Act had an overall prophylactic effect against restrictive voting laws. The *Shelby* decision “neutered the strongest legal protection against voting discrimination” and created a “flood of new barriers to voting that would have otherwise been blocked.”

**The Voter Fraud Myth and the Appearance of Neutrality**

Legislation affecting voting often appears neutral with the stated goal of protecting the sacred institution from fraud. In the introduction to its report *The Truth About Voter Fraud*, the Brennan Center notes that allegations of widespread voter fraud are “frequently used to justify policies that do not solve the alleged wrongs, but that could well disenfranchise legitimate voters.” The report defines the term “voter fraud” as simply fraud by voters, and is often conflated with other forms of election misconduct or intentional

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17 *Purges: A growing Threat to the Right to Vote*, available at: [https://www.brennancenter.org/publication/purges-growing-threat-right-vote](https://www.brennancenter.org/publication/purges-growing-threat-right-vote)
19 *Id.*
22 *Id.*
irregularities,\textsuperscript{24} when in fact, there are only a “handful of substantiated cases of individual ineligible voters attempting to defraud the election system.”\textsuperscript{25} The perpetuation of the voter fraud myth often leads to legislative attempts to address perceived fraud that does not exist with policies that have a disparate impact on distinct segments of potential voters, often persons of color or poor and indigent populations.

Fraudulent residential address claims are one of the oft cited claims. They arise from the belief that voters are using fraudulent addresses, like vacant lots, storage units, or government buildings, when registering to vote, when in fact, these allegations are unsupported, or the purportedly fraudulent address is legitimate.\textsuperscript{26} Note the North Dakota legislation and subsequent litigation, discussed fully below, as an example. In its appeal to the injunction staying implementation of more restrictive address requirements, the North Dakota Secretary of State argued that the “preliminary injunction issued by the district court ‘expressly enables’ fraudulent voting…”\textsuperscript{27} But as noted in the dissent, there was “no evidence of voter fraud in the past and no evidence of voter fraud in 2016.”\textsuperscript{28} In fact, the Heritage Foundation, which tracks and notes successful convictions of voter fraud on its website, listed only three convictions on voter fraud in North Dakota: a 2012 misdemeanor conviction of college students who forged signatures on a ballot petition; a 2017 misdemeanor conviction on voting in dual counties; and a 2018 misdemeanor conviction of a woman who voted in both North Dakota and Minnesota because she believed her Minnesota absentee ballot was invalid.\textsuperscript{29}

On its face, legislation like that in North Dakota appears neutral with equal application to all its citizens. In effect, however, these stricter voter ID laws create a disproportionate burden for distinct populations of voters, specifically Native American communities, persons experiencing or at-risk of homelessness or housing instability less persons, low income groups and people living in rural areas.

**Native American Impact**

Voter turnout by Native Americans is the lowest in the country, as compared to other ethnic groups.\textsuperscript{30} While a number of issues contribute to the low voter turnout, a recent study by the Native American Voting Rights Coalition found that low levels of trust in government, lack of information on how and where to register and to vote, long travel distances to register or to vote, low levels of access to the internet, hostility towards Native Americans, and intimidation are obstacles to Native American voter participation.

\textsuperscript{24} Id. at 4.
\textsuperscript{25} Id. at 7.
\textsuperscript{26} Id. at 15.
\textsuperscript{27} Brakebill v. Jaeger, 932 F.3d 671, 691 (8th Cir. 2019) (Kelly, J. dissenting).
\textsuperscript{28} Id. at 685.
\textsuperscript{29} The Heritage Foundation, available at: https://www.heritage.org/voterfraud/search?combine=&state=ND&year=&case_type=All&fraud_type=All
The study also noted that “many Native American people do not have traditional street addresses.”\(^{31}\) American Indians living on reservations are much more likely to have no traditional street address. As noted in the brief submitted by the National Congress of American Indians in *Crawford v. Marion County*, most roads on the reservation are unimproved dirt or gravel roads, and “many miles of these roads are impassable after rain or snow. Because of the poor quality of the road systems on Indian reservations, many of the roads are unnamed and not serviced by the U.S. Postal Service… A significant number of these reservation residents have no traditional street addresses.”\(^ {32}\) Many homes can only be identified by geographic location, reference to a BIA, state or county road mile marker and/or intersection. Mailboxes may be located on the opposite side of the road from the dwelling and may be associated with the route delivery number, Rural Route or box number.

This problem is not limited to one area of the country. For example, the Navajo Nation, the largest reservation in the United States, does not have an addressing program.\(^ {33}\) In North Dakota, many voters living on rural reservations lack street addresses.\(^ {34}\) In Arizona, where 27% of the land base is tribal lands (including three of the largest reservations in the U.S.), only 18% of reservation voters have physical addresses and receive mail at home.\(^ {35}\)

Due to the lack of traditional addresses, many Native American voters rely on post office boxes to receive their mail and may include a post office box on their state identification. “Most reservation residents do not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation residents may have to travel up to seventy miles in one direction to receive mail.”\(^ {36}\) “On the Navajo Reservation, most people live in remote communities, many communities have little to no vehicle access, only post office boxes, sometimes shared by multiple families.” Similarly, “[t]here is no home delivery in the Tohono O’odham Nation, where there are 1,900 post office boxes and some cluster mail boxes. The postmaster for the Tohono O’odham Nation . . . observes residents come to the post office every two or three weeks to get their mail. Due to the lack of transportation, non-Hispanic white voters have home mail service at a rate 350% higher than for Native Americans. *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 869-70 (D. Ariz.), aff’d, 904 F.3d 686 (9th Cir. 2018), reh’g en banc granted, 911 F.3d 942 (9th Cir. 2019).

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33 Carrie Jung, Home Addresses on Navajo Nation are Rare (Oct 8, 2015), available at: https://kjzz.org/content/202564/home-addresses-navajo-nation-are-rare-officials-working-change.
35 Non-Hispanic white voters have home mail service at a rate 350% higher than for Native Americans. *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 869-70 (D. Ariz.), aff’d, 904 F.3d 686 (9th Cir. 2018), reh’g en banc granted, 911 F.3d 942 (9th Cir. 2019).
36 *Crawford v. Marion County*, Nos. 7-21, 7-25 (Brief of Amici Curiae National Congress of American Indians et al.) at 11-12.
the condition of the roads, and health issues, some go to post office only once per month.”37

The lack of formal addresses in Indian Country makes it especially hard for voters to comply with residential/physical address requirements to register to vote or to produce identification in order to vote on election day.38 Non-traditional addresses for reservation residents create additional registration problems.39 For example, in Arizona the lack of traditional addresses resulted in voters being placed on suspense list or their IDs being rejected at the polls.40

In North Dakota, a physical address requirement was added in 2013, after the Native American vote was credited with securing Senator Heidi Heitkamp’s 2012 victory.41 Prior to 2013, voters could establish their eligibility to vote by either providing certain prescribed forms of identification or swear an affidavit, if prescribed identification was not available.42 In 2013, North Dakota passed HB 1332, a Voter ID law that limited the types of acceptable identification to a state-issued drivers license, non-driver ID, or tribal card.43 This law passed despite testimony that it would disproportionately impact Native American voters. The law was amended in 2015 to further reduce the types of ID acceptable at the polls.

As a result of the 2013 legislation and its subsequent amendments, a lawsuit was filed by members of the Turtle Mountain Band of Chippewa Indians in North Dakota asserting violations of both the U.S. Constitution and Section 2 of the Voting Rights Act.44 The district court agreed and issued a preliminary injunction based on evidence that the requirements were “excessively burdensome requirements on Native American voters in North Dakota.”45 While the injunction was in effect, the North Dakota Governor signed HB 1369, requiring a “valid form of identification” before receiving a ballot. Acceptable forms of identification “were required to include the legal name, current residential street address in North Dakota, and a date of birth,” essentially enacting a more restrictive law than was previously enjoined.46

37 Id.
42 Brakebill at 674.
43 Id.
44 Id.
45 Id. at 674.
46 Id.
The same plaintiffs filed an amended complaint based on the 2017 legislation and the district court again granted the injunction. The second injunction prohibited enforcement of the current address requirements and instructed the Secretary of State to accept identification that includes either a “current residential street address or a current mailing address (P.O. Box or other address) in North Dakota.” On July 31, 2019, a divided Eighth Circuit overturned the district court injunction and allowed the legislation to take effect. The decision acknowledged the potential disenfranchisement of Native American voters but found the injunction overbroad. In its decision, the majority held that the plaintiffs’ “alleged burdens do not justify a statewide injunction…” Relying heavily on the U.S. Supreme Court’s decision in *Crawford v. Marion County Election Bd*, 553 U.S. 181 (2008), the majority reasoned that an “unjustified burden on some voters” does not justify invalidation of the statute, and that the plaintiffs did not present “evidence that the residential address requirement imposes a substantial burden on most North Dakota voters.” The majority reached this decision despite the fact that the “unrebutted statistical evidence demonstrated that 23.5% of Native Americans lack a valid form of identification [as defined in the statute], compared to only 12% of non-Native Americans.”

North Dakota is unfortunately not alone in legislating barriers to indigenous people’s participation in voting. Arizona recently enacted S.B. 1072 and S.B. 1090 which place new voter identification requirements on early and emergency voting. At a field hearing of the House of Representatives Committee on House Administration, Subcommittee on Elections testimony revealed that 13 of 15 Arizona counties had closed polling locations since 2013, reducing the number of polling locations from 403 locations to 60. According to the testimony of Navajo Nation President Jonathan Nez, “Tribal cards do not include addresses, do not have standard county addresses, and many tribal members do not receive mail at their homes.” “Sometimes up to five families have to share a single P.O. Box.” Testimony gathered by the Native American Voting Rights Coalition’s field hearings reflect similar difficulties in tribal communities in Oregon, Alaska, California and North Dakota.

An additional problem impacting many Native Americans is homelessness or near homelessness due to extreme poverty and lack of affordable housing on many

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47 Id. at 675.
48 Id. at 674.
49 Id. at 678.
50 Id. at 681-82 (Kelly, J. dissenting).
reservations. A study by Housing and Urban Development found that between 42,000 and 85,000 people in tribal areas are “couch surfers”, staying with friends or relatives only because they had no place of their own. This lack of permanent housing impacts the ability of these tribal members to have a permanent physical address, but should not impede their ability to exercise their right to vote.

Such laws also impact the ability of other non-Native communities to exercise their right to vote, specifically persons experiencing or at-risk of homelessness or housing instability and those living in some rural communities without a USPS addressing system.

**Impact on Persons Experiencing Homelessness and Poverty**

According to the United States Department of Housing and Urban Development (HUD)’s latest Point-In-Time Count, there were 552,830 people experiencing homelessness in 2018, which is an increase from 2017. It is important to note that HUD’s definition of what constitutes homelessness does not include individuals who are “doubled up” or “couch surfing,” so the number of Americans experiencing housing instability is actually much larger. Without permanent housing, it is difficult to hold a steady job, attend school, stay healthy and exercise one’s right to vote. People experiencing homelessness, housing instability and poverty vote at a lower rate than individuals with stable housing and steady income. According to the Census Bureau’s most recent study on the last presidential election, “85% of people with incomes over $100,000 were registered to vote in 2016 and 74% voted, just 60% of people with incomes below $20,000 were registered and only 38% actually voted.”

This disparity is not the result of apathy towards the electoral process. Rather, studies have shown that “70% of those registered to vote by volunteer efforts in welfare and food stamp offices actually go to the polls and vote in presidential elections.” The disparity is due to special barriers this population faces when registering to vote that lead to lower registration and voter turn-out. As an example, many states allow individuals to list a shelter or service provider’s address at the time of voter registration, oftentimes homeless and low-income citizens are not connected with a shelter, live on the streets, or move frequently. Many homeless and low-income citizens do not have the requisite identification documents, like a driver’s license, utility bill, or official mail, often required by state laws. While some states only require identification at the time of voter registration,

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57 Supra note 55.
others require identification documents at the polls. Furthermore, this population often struggles to take time off work, find transportation to the polls, and lacks the resources to educate themselves on their right to vote, candidates, or ballot measures.

**International Law and the United Nations Declaration on the Rights of Indigenous Peoples**

A growing body of international law grants additional protections to indigenous communities. The United Nations Declaration on the Rights of Indigenous People ("Declaration"), came into force in 2007 when 143 nations voted for the Declaration, with only Canada, New Zealand, Australia and the United States voting against it. New Zealand, Australia and Canada later reversed their position to support the Declaration.

Article 3 of the Declaration recognizes that indigenous peoples have the right to self-determination. Implicit in that right, indigenous people are free to determine their political status and pursue economic, social and cultural development free from state interference.

Article 18 of the Declaration recognizes "indigenous peoples have the right to participate in decision-making matters which affect their rights", through representatives of their own choosing. It also recognizes that indigenous communities may develop and retain their own governmental institutions and methods in accordance with their customs, traditions and beliefs.

Finally, Article 19 requires that state parties "consult and cooperate in good faith" with indigenous peoples and "obtain free, prior and informed" consent before adopting or implementing legislative changes that affect indigenous people and communities.

On January 12, 2011, the United States Department of State, under the Obama Administration, issued a qualified announcement of support claiming that the Declaration’s concept of "self-determination" was limited by existing United States laws and policies. While the Declaration has not been ratified by the Senate, it still creates standards and obligations to which the United States should adhere. As the Declaration has been adopted by 146 member states, the Declaration has become "jus cogens," or customary international law. Once a rule has attained the status of customary international law, it can only be abrogated by a new norm of customary law. The United States is the only state party qualifying the applicability of the Declaration.

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Given the requirements of the Declaration and the accession to it by the United States, states, such as North Dakota, have an affirmative obligation to consult and obtain the consent of indigenous communities regarding legislation that impacts their community’s political participation.

Supportive ABA Policies

The American Bar Association has long encouraged and supported efforts to increase voter participation. During the 1974 Annual Meeting, the House of Delegates adopted the Special Committee on Election Reform’s resolution supporting the enactment of federal legislation facilitating the ability of all citizens to vote in federal elections; and, authorizing the ABA President to urge Congress to enact legislation to simplify the registration process by “providing for the registration by mail for federal elections, the use of federal resources to improve and simplify state and local registration procedures, to extend hours for registration, to provide more registration facilities located in places nearer to the people such as high schools, hospitals and factories and to encourage state and local governments to institute such other voter registration improvements as deemed appropriate.”

In August 1979, the House of Delegates adopted Resolution 79A127 supporting the enactment of legislation that encourages voter participation and urges the state and local bars to aid ABA in improving voter participation. The ABA also encourages lawyers’ voter participation in Resolution 89M124B, as well as asks lawyers to assist employees of their offices to participate in the election process.

The ABA has consistently supported the rights of those who are governed to have the right to vote. First in August 1992, the House of Delegates adopted Resolution 92A10H, supporting an amendment to the United States Constitution to provide for participation of citizens in American territories to vote in national elections. And again in August 1999 when the House adopted Resolution 99A115 supporting the principle that citizens of the District of Columbia shall no longer be denied the fundamental right belonging to other American citizens to vote for voting members of the Congress, which governs them.

Especially pertinent to the goal of this resolution is Resolution 93A116, which supports efforts to ensure the participation of homeless persons in the electoral process. It states that election regulations regarding residency determination should not prevent registration and voting by homeless persons who are otherwise qualified to vote.

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60 ABA Resolution 74A116.
61 ABA Resolution 79A127.
62 ABA Resolution 89A124B.
63 ABA Resolution 92A10H.
64 ABA Resolution 99A115.
65 ABA Resolution 93A116.
There are several ABA policies that work to improve the voter registration process. Resolution 99A104 urges the ABA to oppose legislation that would repeal the National Voter Registration Act.\textsuperscript{66} Resolution 11A121 urges federal, state, local and territorial governments to improve the administration of elections to facilitate voting by all individuals with disabilities, including people with cognitive impairments that increase in frequency with age.\textsuperscript{67} Resolution 90A300 supports efforts to increase voter registration through state and local agencies that have direct contact with the public and encourages efforts that make the opportunity to vote easy and convenient.\textsuperscript{68}

**Conclusion**

We urge the American Bar Association, as the voice of the legal profession, to continue to take steps to ensure that all citizens have the ability to exercise their right to vote, if they so choose, and be free of any improper impediment to do so. In addition to combatting voter suppression, we ask the ABA to take affirmative steps to encourage citizens to choose to exercise their right, privilege and responsibility to vote. Legislative efforts to ease restrictions in voter ID and address requirements are critical to ensuring voting access and is consistent with previous ABA policies.

Respectfully submitted,

Lillian Moy
Chair, Coalition on Racial and Ethnic Justice
February 2020

\begin{itemize}
\item\textsuperscript{66} *Supra* note 2.
\item\textsuperscript{67} *Supra* note 1.
\item\textsuperscript{68} ABA, Resolution 90A300.
\end{itemize}
GENERAL INFORMATION FORM

Submitting Entity: Coalition on Racial and Ethnic Justice

Submitted By: Lillian Moy, Chair

1. Summary of Resolution(s)

The American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation that allows for an individual to use an address other than a physical residential address for purposes of voter registration and urges the enactment of legislation or regulations that assign the voter to the precinct in which the person can be found, whether that location is expressed by a traditional address or description.

2. Approval by Submitting Entity.

The Coalition on Racial and Ethnic Justice approved sponsorship of the amended resolution during its Fall Business Meeting on November 1, 2019.

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

The Coalition on Racial and Ethnic Justice is not aware of a similar Resolution submitted to the House or Board prior to this submission.

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

Over the last forty years the ABA has supported policy that promotes greater and more equal access to voting, and this Resolution builds upon and strengthens existing policy, including Resolution 79A127 (voter participation), Resolution 93A116 (homeless persons participation), Resolution 90A300 (voter registration), as well as existing ABA resolutions concerning enhancing the Voting Rights Act, including Resolution 05A108), BOG 2.3 (2006) and Resolution 13A10E.

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.
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.** *(Both indirect and direct 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.**
    - Standing Committee on Election Law
    - Commission on Disability Rights
    - Commission on Racial and Ethnic Diversity in the Profession
    - Commission on Sexual Orientation and Gender Identify
    - Commission on Disability Rights
    - Council for Diversity in the Educational Pipeline
    - Commission on Women
    - National Native American Bar Association

11. **Name and Contact Information** *(Prior to the Meeting. Please include name, telephone number and e-mail address). Be aware that this information will be available to anyone who views the House of Delegates agenda online.)*

    Selina S. Thomas
    312.988.5736
    Selina.thomas@americanbar.org

12. **Name and Contact 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.)*

    Jared Hautemaki
    773.209.3627
    Email: jared.hautemaki@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

The American Bar Association urges federal, state, local, territorial, and tribal governments to enact legislation that allows for an individual to use an address other than a physical residential address for purposes of voter registration and urges the enactment of legislation or regulations that assign the voter to the precinct in which the person can be found, whether that location is expressed by a traditional address or description.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses physical address requirements in voter registration, and the disenfranchisement of otherwise qualified voters, particularly on Native American reservations, created by such requirements.

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

The Resolution asks the ABA to support legislation and regulations that expand what constitutes an acceptable physical address for the purpose of voter registration, in line with the ABA’s long history of supporting individual voting rights.

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

To date, we are not aware of minority or opposing views.
RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider innovative approaches to the access to justice crisis in order to help the more than 80% of people below the poverty line and the majority of middle-income Americans who lack meaningful access to legal services when facing critical civil legal issues, such as child custody, debt collection, eviction, and foreclosure;

FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve the public; and

FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations both before and after the adoption of any innovations to ensure that changes are effective in increasing access to legal services and are in the public interest.
I. Introduction

Access to affordable civil legal services is increasingly out of reach across the United States. More than 80% of people below the poverty line and a majority of middle-income Americans receive inadequate assistance when facing critical civil legal issues, such as child custody, debt collection, eviction, and foreclosure.\(^1\) Approximately 76% of civil matters in one major study of ten major urban areas had at least one self-represented party.\(^2\) Moreover, in rural areas, there are often few, if any, lawyers to address the public’s legal needs.\(^3\) As a result of these and related problems, the United States ranks 103rd out of 126 countries in terms of the accessibility and affordability of civil legal services.\(^4\)

Traditional solutions to fixing this “access to justice” crisis are not enough. For decades, the legal profession and the organized bar have called for increased funding for civil legal aid, more pro bono work, and the recognition of civil \textit{Gideon} rights that would afford people a right to a lawyer in matters involving essential civil legal needs (06A112A).\(^5\) These efforts are important and have met with some modest success, but they have not come close to fixing the problems that exist. In fact, the problems are becoming more severe.\(^6\)

The legal profession cannot solve these problems alone. The public needs innovative models for delivering competent legal services, and such models require the knowledge and expertise of other kinds of professionals, such as technologists and experts in the design of efficient and user-friendly services.\(^7\) The existing regulatory structure for the legal profession, however, increasingly acts as a barrier to the involvement of other professionals, both within and outside of law firms. Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, have recognized this problem and are working to address it by proposing or adopting substantial regulatory innovations.\(^8\) More U.S. jurisdictions are


\(^{5}\) \textsc{Am. Bar Ass’n, Report to the House of Delegates 06A112A} https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06 A112A.authcheckdam.pdf.

\(^{6}\) See, e.g., Anna E. Carpenter, et al., \textit{Studying the “New” Civil Judges}, 2018 Wisc. L. Rev. 249, 284 (2018) (noting that “[w]here nearly every party was once represented by counsel, today, the vast majority of litigants are pro se”).

\(^{7}\) See generally \textsc{Stanford Legal Design Lab, http://www.legaldesignlab.com/} (last visited Nov. 4, 2019).

considering doing the same. In most cases, these jurisdictions are not considering deregulation, but rather re-regulation. That is, they are working to find ways to revise, rather than eliminate, regulatory structures so that any new services are appropriately regulated in the interests of the public.

The regulatory innovations that are emerging around the United States are designed to spur new models for competent and cost-effective legal services delivery that improve the quality of justice, but it is not yet clear which, if any, specific regulatory changes will best accomplish these goals consistent with consumer protection. More data is needed. For this reason, the Resolution does not recommend amendments to existing ABA models rules, such as the Model Rules of Professional Conduct. The ABA should nevertheless play a leadership role by adopting policies that encourage more state-based regulatory innovations, collecting and analyzing the data from those innovations, and using the resulting data to shape future reform efforts, including appropriate changes to or adoption of new ABA model rules and policies.

II. The Need for Regulatory Innovation

The Resolution calls for U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services and have the potential to improve the accessibility, affordability, and quality of those services while retaining necessary and appropriate client and public protections. This Resolution is consistent with one of the recommendations of the ABA Commission on the Future of Legal Services (Commission), which recommended that “[c]ourts … consider regulatory innovations in the area of legal services delivery.”

As noted above, the evidence is clear that existing solutions to the access to justice crisis are insufficient and that we need new ideas, such as regulatory reforms to unlock...
new delivery models. Although the need for change is compelling, the evidence does not yet support any particular regulatory innovation.

III. Categories of Regulatory Innovation

In general, states are currently considering three broad areas of regulatory reform as part of their efforts to improve the affordability, accessibility, and quality of civil legal services and civil justice.

A. Authorizing and Regulating New Categories of Legal Services Providers

Just as healthcare providers other than doctors can provide services to patients and reduce healthcare costs, some states have concluded that legal service providers other than lawyers can do the same. Two major ABA reports recently made a similar observation, recommending that U.S. jurisdictions consider authorizing and appropriately regulating new categories of legal services providers.

In 2014, the ABA Task Force on the Future of Legal Education concluded that a broader array of professionals should be permitted to deliver legal services:

Broader Delivery of Legal and Related Services: The delivery of legal and related services today is primarily by J.D.-trained lawyers. However, the services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services. The current misdistribution of legal services and common lack of access to legal advice of any kind requires innovative and aggressive remediation.\(^\text{11}\)

More recently, in its final report, the ABA Commission on the Future of Legal Services concluded that it “supports efforts by state supreme courts to examine, and if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal services providers (LSPs).”\(^\text{12}\) The Commission offered several examples of these efforts:

Examples of such LSPs include federally authorized legal services providers [such as those who have long represented individuals before the Social Security

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\(^\text{11}\) ABA TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 3 (2014), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_abatask_force.pdf [hereinafter LEGAL EDUCATION REPORT].

\(^\text{12}\) AM. BAR ASS’N COMM’N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016), supra at 40-41.
Administration] and other authorized providers at the state level, such as courthouse navigators and housing and consumer court advocates in New York; courthouse facilitators in California and Washington State; limited practice officers in Washington State; limited license legal technicians in Washington State; courthouse advocates in New Hampshire; and document preparers in Arizona, California, and Nevada. In some jurisdictions, where courts have authorized these types of LSPs, these individuals are required to work under the supervision of a lawyer; in other in-stances, courts, in the exercise of their discretion, have authorized these LSPs to work independently. In each instance, the LSPs were created and authorized to facilitate greater access to legal services and the justice system, with steps implemented to protect the public through training, exams, certification, or similar mechanisms.13

There is not yet sufficient evidence to endorse any particular LSP model, so the Commission merely called for U.S. jurisdictions to consider authorizing new categories of legal services providers:

The Commission does not endorse the authorization of LSPs in any particular situation or any particular category of these LSPs. Jurisdictions examining the creation of a new LSP program might consider ways to harmonize their approaches with other jurisdictions that already have adopted similar types of LSPs to assure greater uniformity among jurisdictions as to how they approach LSPs. Jurisdictions also should look to others to learn from their experiences, particularly in light of the lack of robust data readily available in some states on the effectiveness of judicially-authorized-and-regulated LSPs in closing the access to legal services or justice gap. The Commission urges that the ABA Model Regulatory Objectives guide any judicial examination of this subject.

The Resolution takes a similar approach and does not endorse any particular model.

B. Experimenting with Variations to Rule 5.4

Rule 5.4 of the Model Rules of Professional Conduct generally prohibits lawyers from partnering and sharing fees with anyone who is not a lawyer. Some have argued that this prohibition impedes the development of innovative legal service delivery models,14 especially those that require the active involvement of other kinds of professionals, such as technologists, or that need substantial outside capital to succeed.

Such arrangements – often called alternative business structures (ABS) – are increasingly common around the world, and jurisdictions adopting ABS believe that they can help to improve access to justice.15 For this reason, several U.S. states recently

13 Id. Since the Commission’s report was written, Utah has created Licensed Paralegal Practitioners starting in 2019 and New Mexico is considering the creation of Limited Licensed Legal Technicians that are similar to those in Washington state.
15 Id.
adopted or are proposing significant liberalization of their versions of Model Rule 5.4.\(^{16}\)

The ABA Commission on the Future of Legal Services called for this kind of review. In its final report, the Commission recommended “continued exploration” of reforms in this area so that “evidence and data regarding the risks and benefits associated with” ABS can be developed and assessed.

This issue also has attracted the attention of United States Supreme Court Justice Neil Gorsuch, who has advocated for change:

All else being equal, market participants with greater access to capital can increase output and lower price. So, for example, optometry, dental, and tax preparation services are no doubt cheaper and more ubiquitous today thanks to the infusion of capital from investors outside those professions. Indeed, consumers can often now find all these services (and more) in their local “superstores.” Yet Rule 5.4 of the ABA’s Model Rules of Professional Conduct — adopted by most states — prohibits nonlawyers from obtaining “any interest” in a law firm. So while consumers may obtain basic medical and accounting services cheaply and conveniently in and thanks to (say) Walmart, they can’t secure similar assistance with a will or a landlord-tenant problem. With a restricted capital base (limited to equity and debt of individual partners), the output of legal services is restricted and the price raised above competitive levels.

Notably, the United Kingdom has permitted multidisciplinary firms and nonlawyer investment since 2007. In the first two years of the program, 386 so-called “alternative business structures” (ABSs) were established. Six years into the experiment, the Solicitors Regulatory Authority analyzed ABSs and found that while these entities accounted for only 3 percent of all law firms, they had captured 20 percent of consumer and mental health work and nearly 33 percent of the personal injury market — suggesting that ABSs were indeed serving the needs of the poor and middle class, not just or even primarily the wealthy. Notably, too, almost one-third of ABSs were new participants in the legal services market, thus increasing supply and presumably decreasing price. ABSs also reached customers online at far greater rates than traditional firms — over 90 percent of ABSs were found to possess an online presence versus roughly 50 percent of traditional firms, again suggesting an increased focus on reaching individual consumers. Given the success of this program, it’s no surprise that some U.S. jurisdictions have appointed committees to study reforms along just these lines.\(^{17}\)

On several occasions, the ABA has considered and rejected amendments to Model Rule 5.4 that would have permitted some form of ABS. The primary argument against such changes was that they would jeopardize a lawyer’s professional independence. In contrast, advocates of change respond that lawyers already exercise professional

\(^{16}\) See ABA CTR. FOR INNOVATION, LEGAL INNOVATION REGULATORY SURVEY, http://legalinnovationregulatorsurvey.info/ (last visited Nov. 4, 2019).

\(^{17}\) NEIL M. GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 258-60 (2019).
independence in conceptually similar situations.\textsuperscript{18}

Advocates for change also point to the lack of evidence of public harm in the increasing number of countries that now permit lawyers to practice in some form of ABS.\textsuperscript{19} The ABA Commission on the Future of Legal Services made a similar observation in its final report:

The Commission’s views [calling for continued exploration of reforms in this area] were informed by the emerging empirical studies of ABS. Those studies reveal no evidence that the introduction of ABS has resulted in a deterioration of lawyers’ ethics or professional independence or caused harm to clients and consumers. In its 2014 Consumer Impact Report, the UK Legal Consumer Panel concluded that “the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised.” Australia also has not experienced an increase in complaints against lawyers based upon their involvement in an ABS.\textsuperscript{20}

Despite these arguments, it is also clear that there is not yet enough data to know whether any changes to Model Rule 5.4 are necessary and, if so, what they should be. For this reason, the resolution does not propose any changes to Model Rule 5.4.

C. New Approaches to the Unauthorized Practice of Law

The resolution also encourages U.S. jurisdictions to reexamine their approaches to the unauthorized practice of law (UPL). U.S. jurisdictions often define UPL broadly or in such an ambiguous way that prospective innovators do not want to risk developing new services and face allegations that they are engaging in UPL.

Other approaches are worth considering. For example, in the United Kingdom, rather than trying to define the practice of law, the Legal Services Act of 2007 provides that anyone can perform law-related activities unless those activities are specifically “reserved” for authorized professionals. That is, the burden is on the profession to identify the specific areas of legal services that only authorized professionals should be permitted

\textsuperscript{18} Justice Gorsuch explains:
For example, we permit third parties (e.g., insurance companies) to pay for an insured’s legal services but restrict their ability to interfere with the attorney-client relationship. We allow in-house counsel to work for corporations where they must answer to executives but require them sometimes to make noisy withdrawals. And we increasingly permit law firms to manage client and personal financial conflicts by screening affected lawyers rather than by banning the firm from representing a client. Of course, in each of these cases lawyers stand to benefit from rules that permit an engagement that might otherwise be forbidden while here, by contrast, they may stand to lose financially. But surely it shouldn’t be the case that we will forgo or lift outright bans in favor of more carefully tailored rules only when it’s in our financial interest.

\textit{Id.} at 260.


\textsuperscript{20} See LEGAL EDUCATION REPORT, supra note 11, at 42.
to perform. There is no evidence of harm in the U.K. from such an approach relative to the much more restrictive approach in the U.S., where the definition of UPL tends to be so vague that it covers a range of services that could be safely performed by professionals other than lawyers.21

Recognizing the problems with existing approaches to UPL, several U.S. jurisdictions have begun to experiment in this area. For example, Utah has developed a so-called “regulatory sandbox” that will allow new kinds of legal services providers to operate on a pilot basis without concerns that they will be accused of UPL.22 Other jurisdictions are seeking to expressly recognize that online legal document providers are not engaged in the unauthorized practice of law in exchange for modest regulation or registration requirements.23

These developments are still in their infancy in the U.S., so as with other regulatory reforms, it is not possible to identify a model approach. (Indeed, such efforts in the UPL particular context may raise antitrust concerns.)24 The point of the resolution is to encourage U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver effective legal services and have the potential to improve the accessibility, affordability, and quality of those services while preserving core protections.25

IV. Data Should be Collected and Analyzed

The final part of the resolution calls for the collection and assessment of data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public. The collection of such data is critical if the legal profession is going to make reasoned and informed judgments about how to regulate the delivery of legal services in the future and how to address the public’s growing unmet legal needs. We need to experiment with different approaches, analyze which methods are most effective, and determine which kinds of regulatory innovations best provide the widest access to legal services, provide continuing and necessary protections for those in need of legal services, and best serve the public interest.

One example of such an effort is the recently launched Unlocking Legal Regulation project of the Institute for the Advancement of the American Legal System.26 Among other

21 Deborah L. Rhode, What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers, 67 S. C. L. REV. 429, 431-33 (2016).
24 ABA CTR. FOR PROF’L RESPONSIBILITY, FTC Letter Opinions on the Unlicensed Practice of Law (June 23, 2016), https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/ftc/.
25 See supra note 9.
26 Institute for the Advancement of the American Legal System, Unlocking Legal Regulation,
initiatives, the project will “assess and support pilot projects for risk-based regulation in Utah and other states, including identifying metrics and conducting empirical research to evaluate outcomes.”

V. Conclusion

Justice Louis Brandeis once wrote that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” The resolution calls for precisely this kind of courageous experimentation.

Respectfully submitted,

Daniel B. Rodriguez
Chair, Center for Innovation
February 2020

https://iaals.du.edu/projects/unlocking-legal-regulation

27 Id.
GENERAL INFORMATION FORM

Submitting Entity: Center for Innovation

Submitted By: Daniel B. Rodriguez, Harold Washington Professor of Law, Northwestern Pritzker School of Law, Chair

1. Summary of the Resolution(s).

Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, are proposing or adopting substantial regulatory innovations in order to address the increasingly dire access to justice crisis in the United States. More U.S. jurisdictions are considering doing the same.

The resolution acknowledges this trend and encourages more U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services, while retaining necessary and appropriate client and public protections.

The resolution also encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public.

2. Approval by Submitting Entity.

On November 15, 2019, the Center for Innovation’s council voted unanimously (with one abstention) to file this resolution for debate by the American Bar Association’s House of Delegates.

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 encourages innovation in the provision of legal services and the collection of data about those innovations. The innovations and related data could eventually impact the Model Rules of Professional Conduct or other model policies.

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.**

    ABA entities (e.g., the ABA Center for Innovation and the Standing Committees of the ABA Center for Professional Responsibility) could offer guidance to jurisdictions seeking input on possible regulatory innovations.

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

    There are no material implementation costs unless the American Bar Association decides to assist U.S. jurisdictions with the collection and analysis of data associated with any regulatory innovations.

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

    None.

10. **Referrals.**

    Administrative Law Division  
    Business Law Section  
    Chicago Bar Association  
    Commission on Interest on Lawyers’ Trust Accounts  
    Coordinating Council for the Center for Professional Responsibility  
    Ethics and Professional Responsibility, Judges Advisory Committee  
    Judicial Division  
    Law Practice Division  
    Oregon State Bar  
    Section of Litigation  
    Standing Committee on the Delivery of Legal Services  
    Standing Committee on Ethics and Professional Responsibility  
    Standing Committee on Legal Aid and Indigent Defendants  
    Standing Committee on Professionalism  
    Standing Committee on Professional Regulation  
    Standing Committee on Lawyers’ Professional Liability  
    Standing Committee on Public Protection in the Provision of Legal Services  
    State Bar of Arizona  
    Utah State Bar  
    Young Lawyers Division

11. **Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). Be aware that this information will be available to anyone who views the House of Delegates agenda online.**

    Name: Daniel B. Rodriguez  
    Phone: 619-871-6990  
    Email: daniel.rodriguez@law.northwestern.edu
12. **Name and Contact 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.

Name: Daniel B. Rodriguez  
Phone: 619-871-6990  
Email: daniel.rodriguez@law.northwestern.edu
EXECUTIVE SUMMARY

1. Summary of the Resolution.

Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, are proposing or adopting substantial regulatory innovations in order to address the increasingly dire access to justice crisis in the United States. More U.S. jurisdictions are considering doing the same.

The resolution acknowledges this trend and encourages more U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services, while retaining necessary and appropriate client and public protections.

The resolution also encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public.

2. Summary of the issue that the resolution addresses.

Traditional efforts to address the access to justice crisis have proven to be inadequate. For decades, the legal profession and the organized bar have called for increased funding for civil legal aid, more pro bono work, and the recognition of civil Gideon rights that would afford people a right to a lawyer in matters involving essential civil legal needs. These solutions are important and have met with some modest success, but they have not come close to fixing the problems that exist. In fact, the problems are becoming more severe.

3. Please explain how the proposed policy position will address the issue.

With necessary and appropriate public protections, regulatory innovations may help to unlock promising new solutions to the access to justice crisis. Because we do not yet know which specific changes to the Model Rules of Professional Conduct or other ABA model polices will prove to be desirable, the resolution does not propose any such changes. Rather, it encourages U.S. jurisdictions to try new approaches and to collect data about those efforts. The data can then be analyzed and used to shape future reform proposals, including appropriate changes to or adoption of new ABA model rules and policies.

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

To date, the Center for Innovation has not heard of any opposition to this resolution.
RESOLVED, That the American Bar Association urges Congress to promptly amend and reauthorize the Violence Against Women Act as reflected in H.R. 1585 (as passed) and S. 2843 (as introduced), or similar legislation, that specifically provides funding to tribal governments and recognizes the inherent authority of American Indian and Alaska Native governments to prosecute non-Indian perpetrators of crimes arising from gender-based violence, such as domestic violence, dating violence, child abuse, elder abuse, sexual violence, stalking, sex trafficking, obstruction of justice, and assaults against law enforcement and corrections personnel, without rolling back existing authority or imposing additional burdens on tribal governments, and while ensuring that due process rights are protected as set forth in section 234(c) of the Tribal Law and Order Act, Public Law 111-211.
The ABA has a long record of supporting efforts to secure access to justice and safety for victims of gender-based violence, including efforts to affirm and support Tribal courts’ authority to adjudicate such cases in Indian country, regardless of the race or citizenship of the accused perpetrator. This Resolution simply brings that history into the present, by articulating clear support for the Tribal jurisdiction provisions of H.R.1585, the House-passed Violence Against Women Reauthorization Act of 2019.

H.R. 1585 was voted out of the U.S. House of Representatives on April 4, 2019 with bipartisan support. On November 13, 2019, a companion to H.R. 1585 was introduced in the Senate as S. 2843. A week later, S. 2920 was introduced, an alternative VAWA reauthorization bill that does not adequately address concerns about gender-based violence in Indian country. At the time of this writing, both Senate bills are pending.

H.R. 1585 and S. 2843, as introduced, continue to build on Congressional strides made with the passage of VAWA in 1995 and its subsequent reauthorizations. The bills restore Tribal jurisdiction over non-Indians for specific crimes involving children and elders, sexual violence, stalking, sex trafficking, obstruction of justice, and assaults against law enforcement and corrections personnel. The bills provide for a $3 million authorization for the Department of Justice’s Tribal Access Program, allowing access to federal criminal databases for Tribal law enforcement personnel. Further, both direct the Government Accountability Office to study law enforcement responses to reports of missing and murdered indigenous women. Finally, they extend protections to victims of violence in Alaska and Maine by including Alaska Native villages and Maine lands in the definition of land eligible for Tribal jurisdiction.

Passage of bipartisan legislation is an essential step in providing Tribes with the resources necessary to address acts of violence, particularly those that are gender-based and co-occurring, and to keep victims and their families safe. H.R. 1585 and S. 2843, as introduced, would provide the most comprehensive step forward.

II. Critical Need

Indians are victims of violent crime at twice the rate of members of any other population. However, violence against Indian women is particularly troubling. In 2010, Congress found that 34% of Indian women will be the victim of rape and 39% will experience domestic violence. Indian women also suffer the highest rate of assault and are stalked.

1 While S. 2920 extends Tribal jurisdiction over non-Indians in gender-based violence cases in many of the same ways as the other two bills, it undermines Tribal sovereignty and ultimately, compromises the ability of tribal governments to keep their communities safe.
4 http://www.ncai.org/attachments/PolicyPaper_tWAjznFslemhAffZgNGzHUqIWMRPkCDipFtxeKEUVKjubxfpGYK_Policy%20Insights%20Brief_VAWA_020613.pdf at 2 (“61 percent of American Indian and Alaska
at the highest rate of women of any racial group.\textsuperscript{5} A 2016 Report by the National Institute of Justice found that 84.3\% of Indian women will experience violence in their lifetime.\textsuperscript{6} Women on some reservations are murdered at a rate 10 times the national average.\textsuperscript{7} Available information on the human trafficking of Indian women indicates it is a tremendous problem.\textsuperscript{8} Congress has described the rate of violence suffered by Indian women as reaching “epidemic proportions.”\textsuperscript{9} Indeed, violence against Indian women is so pervasive that Indian women on some reservations discuss with their daughters what to do when—not if—they are raped.\textsuperscript{10}

The “public safety crisis in Native America”\textsuperscript{11} is a consequence of the confusing jurisdictional scheme and a lack of law enforcement resources in Indian country\textsuperscript{12}. Criminal jurisdiction depends upon whether the victim is an Indian or non-Indian; whether the perpetrator is an Indian or non-Indian; and whether the land where the crime was committed qualifies as Indian country.\textsuperscript{13} Tribes, as a general rule, lack criminal jurisdiction

Native women (or 3 out of 5) have been assaulted in their lifetimes, compared to 52 percent of African American women, 51 percent of White women, and 50 percent of Asian American women have been assaulted.”).\textsuperscript{5} Id., at 3 (“17 percent of American Indian and Alaska Native women reported being stalked during their lifetimes, compared to eight percent of White women, seven percent of African American women, and five percent of Asian women.”).\textsuperscript{6} https://www.ncjrs.gov/pdffiles1/nij/249736.pdf at 2.


\textsuperscript{8} https://www.justice.gov/ovw/page/file/998081/download (“A number of studies from both the federal government and the field have identified high rates of sexual exploitation of Native women and girls, gaps in data and research on trafficking of AI/AN victims, and barriers that prevent law enforcement agencies and victim service providers from identifying and responding appropriately to Native victims.”); https://www.gao.gov/assets/690/687396.pdf at 1 (“Human trafficking—the exploitation of a person typically through force, fraud, or coercion for such purposes as forced labor, involuntary servitude, or commercial sex—is occurring in the United States. According to the Attorney General’s fiscal year 2015 annual report to Congress on human trafficking, traffickers seek out persons perceived to be vulnerable. Vulnerability comes in many forms, including age (minors), poverty, homelessness, chemical dependency, prior experiences of abuse, involvement in foster care programs, and lack of resources or support systems. Native Americans are a vulnerable population.”).

\textsuperscript{9} TLOA, Sec. 202(a)(5)(A), https://www.congress.gov/111/bills/hr725/BILLS-111hr725enr.pdf.


\textsuperscript{11} https://www.aiisc.ucla.edu/iiloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf at 9 of pdf.

\textsuperscript{12} 18 U.S.C. 1151.

over non-Indians due to the Supreme Court’s decision in *Oliphant v. Suquamish Tribe*.\(^{14}\) This means tribes cannot prosecute non-Indians; moreover, tribal police—usually the first responders to Indian country crimes—often cannot arrest non-Indians.\(^ {15}\) Accordingly, tribal law enforcement is dependent upon non-Indian law enforcement, both state and federal, for effective public safety strategies.

Although federal and state law enforcement have jurisdiction over non-Indians in Indian country, federal and state law enforcement have not prioritized Indian country law enforcement efforts. Federal prosecutors decline to prosecute 67% of Indian country sex crimes, according to a 2010 Government Accountability Office report.\(^ {16}\) Prosecutors at the state level also decline to prosecute Indian country crimes at a high rate.\(^ {17}\) Non-Indian law enforcement agencies are often over 100 miles from Indian country, and this makes Indian country prosecutions less appealing than tackling a crime that occurred in the same neighborhood as their office.\(^ {18}\) Compounding the distance is the fact that Indian country roads are in atrocious condition and Indian country homes often have no


\(^{15}\) [http://harvardlawreview.org/wp-content/uploads/2016/04/1685-1708-Online.pdf](http://harvardlawreview.org/wp-content/uploads/2016/04/1685-1708-Online.pdf) at 1688 (“although tribal officers face uncertainty as to their arrest power, which depends on whether a suspect is Indian, their power to stop and detain any individual in Indian country is much more assured.”); Melissa L. Tatum, Law Enforcement Authority in Indian Country: Challenges Presented by the Full Faith and Credit Provisions of the Violence Against Women Acts, 4 TRIBAL L.J. 2, 4 (2004) (stating, “after all, if a tribal officer’s authority is restricted to the tribe’s criminal jurisdiction, then there are many situations, specifically those involving non-Indians, where the police would have no authority to arrest the offender”).


\(^{17}\) Carole Goldberg and Heather Valdez Singleton, Final Report: Law Enforcement and Criminal Justice Under Public Law 280 329 (2007), [https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf](https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf) (“Respondents say tribal members do not report crimes because the police are not responsive to calls, and the courts often do not prosecute cases.”); Crepelle, *Concealed Carry*, at 243 (“Because Indians are usually minorities within their jurisdiction, state abuses of authority are common in PL 280 states, as there is little political incentive for states to appease Indian country populations. Accordingly, non-Indian crimes against Indians often go unpunished”).

address. Furthermore, the boundaries of Indian country are often unclear, forcing police to use a GPS to determine whether they have jurisdiction over a particular piece of land.

The United States Commission on Civil Rights has concluded that “Native Americans have become easy crime targets.” In fact, crime rates soar when non-Indians enter Indian country in large number. Non-Indians are effectively above the law in Indian country due to the Tribes’ lack of tribal jurisdiction over them, and this fact is not lost on them. After committing crimes in Indian country, non-Indians have been known to report themselves to tribal police declaring “[y]ou can’t do anything to me anyway.” Lisa Brunner, an Ojibwe survivor of sexual assault, has summarized the tragic reality Indian

19 Enhancing Tribal Self-Governance and Safety of Indian Roads, Hearing Before the Committee on Indian Affairs United States Senate (Apr. 3, 2019) (statement of Joe Garcia, Co-chair of the NCAI-ITA Tribal Transportation Task Force, Co-chair of the Tribal Transportation Self-Governance Program Negotiated Rulemaking Committee), https://www.indian.senate.gov/sites/default/files/Testimony%20of%20Head%20Councilman%20Joe%20Garcia.pdf (“Altogether, the 42,000 miles of roads in Indian Country are still among the most underdeveloped, unsafe, and poorly maintained road networks in the nation, even though they are the primary means of access to American Indian and Alaska Native communities by Native and non-Native residents and visitors.”); Journey Through Indian Country Part 1: Fighting Crime on Tribal Lands, FBI (June 1, 2012), https://www.fbi.gov/news/stories/journey-through-indiancountry (noting that non-Indian law enforcement often has to travel over 100 miles on unpaved roads to unmarked streets when responding to Indian country calls).

20 Michael Riley, 1885 Law at Root of Jurisdictional Jumble, DENV. POST (Nov. 13, 2007), http://www.denverpost.com/lawlesslands/ci_7422829 (describing how the change in a few feet alters which government has jurisdiction over the land).


22 Louise Erdrich, Rape on the Reservation, N.Y. TIMES (Feb. 26, 2013), http://www.nytimes.com/2013/02/27/opinion/native-americans-and-the-violenceagainst-women-act.html?_r=0; Kathleen Finn, Erica Gajda, Thomas Perin, Carla Fredericks, Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation, 40 Harv. J. L. & Gender 1, 2–3 (2017) (“However, rapid oil and gas development have brought an unprecedented rise of violent crime on and near the Fort Berthold reservation. Specifically, the influx of well-paid male oil and gas workers, living in temporary housing often referred to as ‘man camps,’ has coincided with a disturbing increase in sex trafficking of Native women. There has been a dramatic increase in sexual violence against women and children and, according to the same report, sexual assaults on males on the Fort Berthold reservation have increased by 75%.”); Lailani Upham, Oil Booms, so Does Violence, Char-Koosta News (Dec. 20, 2018), http://www.charkoosta.com/news/oil-booms-so-does-violence/article_0386cf00-0949-11e9-a5df-6ba0e817e8a3.html.

23 Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 (1978) (“Finally, we are not unaware of the prevalence of non-Indian crime on today’s reservations which the tribes forcefully argue requires the ability to try non-Indians.”); H.R. 1585 at p. 141 (13)(B).

24 Angela R. Riley, Crime and Governance in Indian Country, 63 UCLA L. Rev. 1564, 1603 (2016) [Henceforth, “Riley, Crime”]; Lorelei Laird, Indian Tribes Are Retaking Jurisdiction Over Domestic Violence on Their Own Land, ABA Journal (Apr. 1, 2015), http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own [Henceforth, “Laird, Indian Tribes”] (“After one beating, my ex-husband called the tribal police and the sheriff’s department himself, just to show me that no one could stop him,’ she recalled during the signing ceremony for the 2013 reauthorization of the Violence Against Women Act, first passed in 1994.”); Emily Weitz, Native American Women Have Been Saying a Lot More Than #MeToo for Years, Vice (Nov. 23, 2017), https://www.vice.com/en_us/article/evbeg7/native-american-women-have-been-saying-a-lot-more-than-metoo-for-years [Henceforth, “Weitz, Native American Women”] (“Even if you called the police, often they didn’t respond. When they did, they would say, ‘Oh it’s not our jurisdiction, sorry.’ And prosecutors wouldn’t show up.”).
women endure, “We have always known that non-Indians can come onto our lands and they can beat, rape and murder us and there is nothing we can do about it.” Describing the grim situation many Native women experience, President Obama stated that it is “an assault on our national conscience; it is an affront to our shared humanity; it is something that we cannot allow to continue.”

II. VAWA 2013’s Restoration of Tribal Criminal Jurisdiction

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) contained provisions partially reversing the Supreme Court’s decision in Oliphant that Indian tribal courts do not have criminal jurisdiction over non-Indians. VAWA 2013 was a congressional reaffirmation of tribes’ “inherent power” to exercise “criminal jurisdiction over all persons” for domestic and dating violence as well as protective order violations. In order for a tribe to prosecute a non-Indian, the non-Indian must reside in or be employed in the Indian country of the prosecuting tribe, or be an intimate partner of an Indian who is enrolled in or resides in the Indian country of the prosecuting tribe.

Though the Bill of Rights does not apply to Indian tribes, tribes are bound by the Indian Civil Rights Act (ICRA), and ICRA contains provisions analogous to the Bill of Rights. The Supreme Court has noted ICRA provides strong protections for the rights of defendants; accordingly, the Supreme Court has held that convictions in compliance with ICRA are bona fide criminal convictions. Nevertheless, tribal prosecutions under VAWA 2013 provide even stronger procedural safeguards to defendants than ICRA.

In addition to the requirements of ICRA, VAWA 2013 requires tribes to provide defendants with “the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.” Similarly, tribes performing VAWA prosecutions must provide indigent defendants with a licensed attorney at the tribe’s expense. The judge in a VAWA proceeding must be trained to preside over criminal cases and be “licensed to practice law by any jurisdiction in the United States.” VAWA 2013 requires tribes to make their criminal laws, including rules of evidence and

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25 Weitz, Native American Women; see also 160 CONG. REC. S942 (daily ed. Feb. 12, 2014) (statement of Sen. Leahy) (Kimberly Norris Guerrero stating, “[o]ver the years, what happened is that white men, non-native men, would go onto a Native American reservation and go hunting—rape, abuse, and even murder a native woman, and there’s absolutely nothing anyone could do to them”).
32 Oliphant at__.
36 Id.
37 Id.
procedure, publicly available and also requires tribes to record the proceeding.\textsuperscript{38} Juries in VAWA proceedings must be reflective of the community and cannot “systematically exclude” groups such as non-Indians.\textsuperscript{39} VAWA 2013 also contains a catchall that requires tribes to provide defendants “all other rights whose protection is necessary under the Constitution of the United States.”\textsuperscript{40} Furthermore, defendants who believe they have been unjustifiably detained by a tribe have the right to petition for habeas corpus in federal court.\textsuperscript{41}

III. VAWA 2013 Results

The National Congress of American Indians (NCAI) closely followed tribal VAWA implementation and published a five-year report in 2018.\textsuperscript{42} NCAI found that 18 tribes had opted to implement VAWA jurisdiction, and the implementing tribes collectively made 143 VAWA arrests.\textsuperscript{43} Of those, 80 were prosecuted, and 74 resulted in convictions.\textsuperscript{44} Most of the convictions, 73, were the product of guilty pleas\textsuperscript{45} which is common throughout the United States.\textsuperscript{46} A jury trial was responsible for one of the convictions. The other five VAWA jury trials ended in acquittals.\textsuperscript{47} The high jury acquittal rate suggests that the jurisdictional requirement of establishing the romantic relationship between the victim and offender makes obtaining convictions in tribal courts more challenging than in state or federal court. Additionally, acquittals in five out of six trials suggests that tribal court juries are able to treat non-Indians fairly. In fact, no non-Indian has filed a habeas corpus petition to challenge the fairness of the tribal court process, despite tribes’ active encouragement of defendants to file a habeas petition.\textsuperscript{48}

Although VAWA 2013 implementation has widely been considered a great success,\textsuperscript{49} implementation has revealed problems with the law itself. There are 573 federally recognized tribes,\textsuperscript{50} and to date, less than two dozen have opted to implemented VAWA jurisdiction. Tribes are often economically depressed and lack the financial resources to comply with VAWA 2013’s infrastructural requirements.\textsuperscript{51} Likewise, incarceration is expensive: for example, the Eastern Band of Cherokee Indians spent over $60,000 on one inmate’s healthcare.\textsuperscript{52} Most tribes are unable to bear this kind of financial load.

\textsuperscript{38} Id.
\textsuperscript{39} 25 U.S.C. 1304(d)(3).
\textsuperscript{40} 25 U.S.C. 1304(d)(4).
\textsuperscript{41} 25 U.S.C. 1303 and 1304(e).
\textsuperscript{42} http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf
\textsuperscript{43} Id. at 7.
\textsuperscript{44} Id. at 7.
\textsuperscript{45} Id. at 7.
\textsuperscript{46} Id. at 19 (“Just like across the rest of the U.S. judicial system, most convictions happen through plea bargains.”).
\textsuperscript{47} Id. at 7.
\textsuperscript{48} Id. at 19.
\textsuperscript{49} https://www.congress.gov/116/bills/hr1585/BILLS-116hr1585pcs.pdf at p. 140 (5).
\textsuperscript{51} NCAI at 29.
\textsuperscript{52} Id. at 31.
The bigger problem, however, is the limited situations that VAWA 2013 authorizes tribes to prosecute non-Indians—only dating violence, domestic violence, and protective order violations. As everywhere, gender-based violence crimes in Indian country encompass much more than three offenses. For example, 58% of tribal VAWA cases involved children. 53 Drugs or alcohol were involved in 51% of tribal VAWA cases. 54 Under VAWA 2013, tribes cannot even prosecute crimes that non-Indians commit against tribal police officers responding to VAWA calls. 55 Moreover, non-Indians with no prior connection to the tribe remain completely beyond the reach of tribal criminal courts under VAWA 2013. This means a massive gap in Indian country criminal jurisdiction remains.

IV. VAWA 2019 Builds Upon VAWA 2013 Success

With the established success of VAWA 2013 implementation, Congress has moved to refine tribal criminal jurisdiction over non-Indian perpetrators. H.R. 1585, passed by the House in April 2019 and currently before the Senate as S. 2843, increases funding for tribal law enforcement to improve tribal access to state and federal criminal databases like NCIC. 56 These two bills (collectively referred to herein as “VAWA 2019”) also provide additional funding for tribal governments that are exercising VAWA criminal jurisdiction. 57

Most significantly, however, VAWA 2019 amends ICRA by striking “crimes of domestic violence” and replacing it with “crimes of domestic violence, dating violence, obstruction of justice, sexual assault, sex trafficking, stalking, and assault on a law enforcement or corrections officer.” 58 VAWA 2019 makes clear that domestic violence includes violence committed against children and the elderly. 59 Under the amendment, tribes will be able to prosecute non-Indians who commit violence against a child or an elder if the child or elder:

1. resides or has resided in the same household as the offender;
2. is related to the offender by blood or marriage;
3. is related to another victim of the offender by blood or marriage;
4. is under the care of a victim of the offender who is an intimate partner or former spouse;
5. or is under the care of a victim of the offender who is similarly situated to a spouse of the victim under the domestic-or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs. 60

This new definition is important because the romantic partner is often not the only victim in domestic violence. Children and other members of the abuser’s household commonly experience violence at the hand of the abuser as well.

53 Id. at 24; H.R. 1585 p. 140(6).
54 NCAI at 26.
55 Id. at 27.
56 Sec. 902.
57 H.R. 1585 at 152(f).
58 Sec. 903.
60 H.R. 1585 at p.149.
VAWA 2019 restores tribal criminal jurisdiction over assaults on law enforcement officers and obstruction of justice committed by a non-Indian in the course of a VAWA arrest or prosecution.\(^{61}\) Allowing tribal courts to assert criminal jurisdiction over non-Indians who assault police is vitally important because, according to Congress, “domestic violence calls are among the most dangerous calls that law enforcement receives.”\(^{62}\) Likewise, VAWA 2019 authorizes tribes to prosecute non-Indians for obstruction of justice, meaning “interfering with the administration or due process of the tribe’s laws including any tribal criminal proceeding or investigation of a crime.”\(^{63}\) Recognizing tribes’ inherent authority to prosecute non-Indians who obstruct justice is essential if tribes are to provide systemic due process protections.

Finally, VAWA 2019 recognizes that stalking, sexual violence, and sex trafficking are substantially related to domestic and dating violence, and brings them into the ambit of tribes’ criminal jurisdiction.\(^{64}\) Though non-Indian law enforcement have concurrent jurisdiction over these crimes in Indian country, non-Indian law enforcement have persistently failed to prosecute non-Indian sexual predators in Indian country.\(^{65}\) Consequently, it is imperative that tribal courts have criminal jurisdiction over non-Indian sexual predators who commit crimes in Indian country.

V. Reasons Restrictions on Tribal Court Jurisdiction Should be Removed

The rationale for restricting tribal court jurisdiction over non-Indians are rapidly eroding. VAWA 2013 opponents conjured that tribal courts could not treat non-Indian defendants fairly.\(^{66}\) Over five years and 140 VAWA cases reveal this is not true; in fact, tribal juries in VAWA cases have been more likely to acquit non-Indians than convict. According to the NCAI report, no non-Indian has seriously alleged that a tribal court proceeding was unfair in a VAWA case. Indeed, the Supreme Court in *Oliphant* noted that ICRA allayed fears of civil rights violations in tribal courts,\(^{67}\) and VAWA 2013 provides defendants even stronger rights protections than ICRA.\(^{68}\) If anyone believes a tribe has transgressed their rights,

\(^{61}\) H.R. 1585 at p.149-150.
\(^{62}\) H.R. 1585 at p.141 (12).
\(^{63}\) H.R. 1585 at p.150 (5).
\(^{64}\) H.R. 1585 at p.146-148.
\(^{65}\) H.R. 1585 at 141 (10-11).
\(^{67}\) *Oliphant*, 212 (“We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared.”).
\(^{68}\) 25 U.S.C. 1304(d)(4).
the individual has the right to habeas corpus review in federal court. Habeas corpus has long been considered a powerful aegis for civil rights.

Regardless of the effectiveness of tribal courts themselves, some non-Indians have alleged that subjecting non-Indians to tribal law is unfair. The argument is premised on tribal laws being unwritten and rooted in custom and tradition. This argument is irrelevant in VAWA cases because tribes are required by statute to publish their laws in order to implement VAWA criminal jurisdiction. However, it is also worth noting that state and federal courts have long applied unwritten laws—more typically referred to as “common law.” Tribes, like every other government, enact laws that protect people and property. When Dollar General contended that it could not understand Choctaw law and therefore should not be subjected to Choctaw court jurisdiction, the Fifth Circuit stated:

Doe has brought two specific claims, both of which are based on the alleged sexual molestation of a child by a store manager. We suspect that Dolgencorp could have easily anticipated that such a thing would be actionable under Choctaw law.

Remarkably, the United States showed greater respect for tribal court jurisdiction over two centuries ago than it does today. For example, treaties between the United States and Indian tribes in the 1780s and 1790s expressly authorize tribal criminal jurisdiction over non-Indians. The United States even turned over white fugitives to tribes for

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71 E.g., Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring) (claiming tribal law is anomalous because it would be based traditional tribal values “would be unusually difficult for an outsider to sort out.”); Dolgencorp v. Miss. Band of Choctaw Indians, 746 F.3d 167, 181 (5th Cir. 2014) (Smith, J., dissenting) (expressing fear that Dollar General—who consented to Mississippi Choctaw tribal court jurisdiction—would be subject to “Choctaw law [that] expressly incorporates, as superior to Mississippi state law, the ‘customs . . . and usages of the tribes.’”); Reply Brief for Petitioners at 21, Dollar General Corp. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014) (No. 13-1496) (contending it is impossible to know how to apply tribal law).
72 Robert C. Ellickson, A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry, 5 J. L., Econ., & Org. 83, 85 (1989), https://custom.cvent.com/C674EF8FB0604BC9BF9B668FCA89DFEB/files/event/92d3aff7be6343f38b437f77e0379c/d582157a10147d7b610859183953ae3.pdf (“In the dozen reported Anglo-American cases in which ownership of a whale carcass was contested, judges invariably held proven whalers’ usages to be reasonable and deferred to those rules.”); Fletcher, Federal Indian Law 390 (“to say that tribal common law is unwritten is ironic, given that federal common law is unwritten as well, until it is announced by the Supreme Court.”); Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Penn. L. Rev. 1245, (1996) (“The federal courts' application of federal common law appears to threaten legitimate state authority no less than the application of ‘general common law’ under Swift. In both instances, federal courts disregard state law in favor of unwritten law of their choosing.”).
73 Dolgencorp v. Mississippi Band of Choctaw Indians, 746 F.3d 167, n4 (5th Cir. 2014).
74 E.g., Treaty with the Chickasaws, U.S.–Chickasaw Nation, Jan. 10, 1786, art. IV, 7 Stat. 24, 25, http://avalon.law.yale.edu/18th_century/chic1786.asp [Henceforth, “Treaty with the Chickasaws”—“If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands hereby allotted to the Chickasaws to live and hunt on, such person shall forfeit the protection of the United
criminal prosecutions during the early and mid-1800s.\textsuperscript{75} The Court’s decision in \textit{Oliphant} has been the subject of immense scholarly criticism for its flagrant factual errors and the racism underlying its reasoning.\textsuperscript{76} Given the historical reality and the proven effectiveness of contemporary tribal courts, Congress should continue to roll back restrictions on tribal court jurisdiction over non-Indians. Passage of bipartisan legislation that addresses these issues is an essential step in providing Tribes with the resources necessary to address acts of violence, particularly those that are gender-based and co-occurring, and to keep victims and their families safe. VAWA 2019, reflected in H.R. 1585 and S. 2843, provides the most comprehensive step forward.

Respectfully submitted,

Andrew King-Ries, Chair  
Commission on Domestic & Sexual Violence Justice

Wendy Mariner, Chair  
Section of Civil Rights and Social Justice

Rob Saunooke, President  
National Native American Bar Association

Shelbonnie Hall, Chair  
National Conference of Specialized Court Judges

February 2020

\textsuperscript{75} FLETCHER, \textit{FEDERAL INDIAN LAW} 349 (“Moreover, federal officials were aware that the Cherokee courts asserted jurisdiction over non-Indians, and in at least on instance in 1824 turned over an American citizen to the Cherokees for prosecution.”); Spruhan, \textit{Indians, in a Jurisdictional Sense}, at 79 (noting Jacob West, a white man, was hanged sentenced to hang by a Cherokee court, and the federal court refused to grant West habeas corpus in 1844); Ablavsky, \textit{Beyond the Indian Commerce Clause}, at n400 (“It also ignores historical evidence suggesting that the federal government not only permitted, but oversaw, tribal court jurisdiction exercising tribal sovereignty over non-Natives.”).

1. **Summary of Resolution(s).** This Resolution urges Congress to recognize the inherent authority of American Indian and Alaska Native governments to prosecute non-Indian perpetrators of crimes arising from gender-based violence, without rolling back existing authority or imposing additional burdens on Tribal governments, and while ensuring that due process rights are protected as set forth in section 234(c) of the Tribal Law and Order Act, Public Law 111-211.

2. **Approval by Submitting Entities.**
   - Commission on Domestic & Sexual Violence, approved October 4, 2019
   - Civil Rights and Social Justice Section, approved October 26, 2019
   - National Conference of Specialized Court Judges, approved November 10, 2019
   - National Native American Bar Association, approved November 18, 2019

3. **Has this or a similar resolution been submitted to the House or Board previously?** No, but see question 4.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**
   - 15A109C; 10M115; 08A109; 15A113; 15M111A; 12A301; 08A117A. This Resolution is supported by and is the logical extension of these existing ABA policies.

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 Violence Against Women Reauthorization Act (VAWA) of 2019 (H.R. 1585) was passed by the House of Representatives on April 4, 2019. A companion Senate bill (S. 2843) was introduced on November 13, 2019, and an alternative Senate bill (S. 2920) was introduced on November 20, 2019. Both Senate bills are pending. The Justice for Native Survivors of Sexual Violence Act (H.R. 3977, S.288) and the Native Youth and Tribal Officer Protection Act (H.R. 958, S.290) have been introduced in both bodies, and remain pending.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Adoption of the policy would allow both entities, with
GAO oversight and support, to advocate for the named legislation and similar legislation in Congress.

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.**
    - Criminal Justice Section
    - Judicial Division
    - Young Lawyers Division
    - Law Student Division
    - Government and Public Sector Lawyers Division
    - Commission on Youth at Risk
    - Litigation Section
    - Center on Racial and Ethnic Diversity

11. **Contact Name and Address Information. (Prior to House of Delegates)**
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges Congress to recognize the inherent authority of American Indian and Alaska Native governments to prosecute non-Indian perpetrators of crimes arising from gender-based violence, without rolling back existing authority or imposing additional burdens on Tribal governments, and while ensuring that due process rights are protected as set forth in section 234(c) of the Tribal Law and Order Act, Public Law 111-211.

2. Summary of the Issue that the Resolution Addresses

While American Indian and Alaska Native governments have inherent authority to exercise full criminal jurisdiction over all persons on tribal lands, the current statutory scheme has the effect of limiting this authority. The named pending legislation seeks to remove barriers to tribal governments' exercise of jurisdiction.

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

The proposed policy proposition addresses this issue by supporting pending legislation (and similar legislation) that seeks to remove barriers to tribal governments' exercise of jurisdiction

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 the federal government to maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law;

FURTHER RESOLVED, That the American Bar Association opposes the imposition of limitations that restrict eligibility for asylum based on the place or manner of arrival at the U.S. border or submission of applications for protection in countries of transit;

FURTHER RESOLVED, That the American Bar Association opposes the implementation of procedures that allow U.S. immigration authorities to refuse to process asylum seekers arriving at the border or to transfer asylum seekers to other countries for processing of their asylum claims, without regard to the safety situation or the adequacy of the asylum process in those third countries; and

FURTHER RESOLVED, That the American Bar Association opposes procedural restrictions including but not limited to the Migration Protection Protocols ("MPP"), that prevent migrants from remaining in the United States during the adjudication of their asylum claims.
The American Bar Association has long supported policies which ensure that refugees, asylum seekers, and others seeking humanitarian protection (“asylum seekers”) are given fair access to legal protections in the United States. Since 2017, however, several government policies have operated together to severely restrict the ability of asylum seekers to access the asylum system and to receive the due process protections to which they are entitled. While the government has argued that these policies are justified by the high numbers of migrants seeking to enter the United States at the Southwest border, the numbers are not historically high, and thus do not justify such restrictions. In addition to violating fundamental notions of fairness, these policies do not comport with the United States’ international treaty obligations or domestic statutory and regulatory requirements. This resolution urges the government to rescind such policies and restore full and fair adjudication rights for asylum seekers in a manner consistent with U.S. and international law.

While the government has proposed many policies and regulatory changes since 2017 that restrict access to our country’s asylum system, this resolution focuses on several policies that present the greatest threat to asylum seekers’ right to a full and fair adjudication of their claims. These policies are: (1) the Migrant Protection Protocols, or Remain in Mexico policy (MPP); (2) metering, or turning away asylum seekers at ports of entry because of limits imposed on the number of individuals processed through the ports of entry; (3) restrictions on eligibility for asylum for those individuals who did not apply for protection in countries of transit; and (4) the development of international agreements that allow the United States to avoid its international protection obligations by transferring individuals to third countries without conducting an asylum adjudication in this country. Only by rescinding these policies can the government ensure genuine access to asylum, due process, and counsel for asylum seekers in a manner that comports with U.S. and international law.

The ABA is also concerned about any similar government policies that would operate to (1) restrict eligibility for asylum based on the place or manner of arrival at the U.S. border or submission of applications for protection in countries of transit; (2) allow U.S. immigration authorities to refuse to process asylum seekers arriving at the border or to transfer asylum seekers to other countries for processing of their asylum claims, without regard to the safety situation or the adequacy of the asylum process in those third countries and without regard to individual circumstances that may favor adjudication in the United States; or (3) prevent migrants from remaining in the United

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States during the adjudication of their asylum claims. Any such policies would be inconsistent with domestic and international law, and violate asylum seekers’ rights.

I. United States and International Legal Framework

U.S. law has enshrined multiple procedural and substantive protections to ensure that individuals seeking humanitarian protection receive a full and fair adjudication of their claims. These protections derive from international law obligations. The United States is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2-34 of the 1951 Convention Relating to the Status of Refugees. Article 33 of the 1951 Convention provides that “[n]o contracting state shall expel or return ("refouler") 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.” The United States is also bound by Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), which provides that “No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Congress subsequently codified these obligations into law.

All non-citizens who present claims for humanitarian protection in the United States are entitled to proceedings that comport with due process. Relatedly, non-citizens, including those seeking humanitarian protection, have a statutory right to counsel in removal proceedings.

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5 I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999) (noting that one of the primary purposes in enacting the Refugee Act of 1980 was to implement the principles agreed to in the 1967 Protocol, and that the withholding of removal statute, now codified at 8 U.S.C. § 1231(b)(3), mirrors Article 33); Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) § 2242(a), Pub. L. No. 105-277, Div. G Ttle XXII, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

6 Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

7 8 USC § 1362 ("In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."); 8 USC § 1229a(b)(4)(A) (in removal proceedings, the non-citizen “shall have the privilege of being represented, at no expense to the Government, by counsel of the [non-citizen’s] choosing who is authorized to practice in such proceedings”); Gomez-Velazco v. Sessions, 879 F.3d 989, 993 (9th Cir. 2018) ("The right to be represented by counsel at one’s own expense
The ABA has questioned whether some of the statutory and regulatory provisions that purport to implement the United States’ international treaty obligations, as well as those provisions that otherwise govern removal proceedings and the availability of judicial review, truly ensure access to fundamentally fair proceedings. However, several recent government policies present cause for particular concern, because they threaten the very framework of this nation’s asylum system in a manner not seen in more than 20 years. These policies are all the more troubling because they have been imposed by unilateral Executive action, without input from Congress. The ABA has repeatedly emphasized that our government must address the immigration challenges facing the United States by means that are humane, fair, and effective—and that uphold the principles of due process. Until such time, the government must rescind recent policies that violate these principles.

II. Restrictions on Asylum Eligibility

The Department of Justice (DOJ) has narrowed the scope of asylum eligibility since 2017 through a series of precedent decisions that overturned longstanding legal doctrine regarding persecution based on family affiliation, domestic violence, and criminal/gang violence. Consequently, many individuals fleeing from persecution based on these criteria, particularly from Central America, are finding it more difficult to meet even the threshold standard in an initial asylum screening interview, and those who do have a more difficult time establishing eligibility for protection in court.

While these decisions have had a profound impact on asylum seekers, they were nonetheless tied to an analysis of an individual’s particular claim for asylum and did not necessarily restrict an individual’s access to the asylum process. Beginning in 2018, however, DOJ and the Department of Homeland Security (“DHS”) issued two joint regulations precluding eligibility for asylum that restrict access to the process itself, generally by creating categorical bans on asylum eligibility, irrespective of individual circumstances. Both rules share a fundamental disregard for the international protection scheme that the United States embraced following World War II, and that it specifically codified into law with the Refugee Act of 1980. Moreover, each one attempts to deter

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8 See, e.g., 06M107C (Urges an administrative agency structure that will provide all non-citizens with due process of law in the conduct of their hearings or appeals, including full, fair and meaningful administrative and judicial review); 10M114D (supports the restoration of federal judicial review of immigration decisions).

9 In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546, which was the last major revision to procedures related to the asylum statute. These changes included the expedited removal provisions discussed later in this Report.

migration by cutting off access to asylum based on impermissible limitations on the right to apply for asylum in the United States.

A. Asylum Bar Based on Manner of Entry

The first instance of a categorical asylum bar occurred on November 8, 2018 when DHS and DOJ jointly issued an interim final rule banning immigrants from receiving asylum if they were subject to a Presidential Proclamation suspending or limiting entry across the Southern border with Mexico.\textsuperscript{11} It also required asylum officers conducting initial screenings to make a negative finding in cases where an individual was subject to such a ban. The rule set the stage for a Presidential Proclamation issued the next day, which suspended entry of individuals crossing into the United States from Mexico, except at designated ports of entry.\textsuperscript{12} According to the proclamation, such action was necessary to control growing migration flows, particularly organized caravans of migrants who had been traveling through Mexico from Northern Triangle countries. The proclamation, however, was instead the necessary prerequisite to imposing a ban on asylum for anyone who crossed the border irregularly. The regulations and proclamation invoke a general section of the Immigration and Nationality Act (INA), § 212(f), which grants the president authority to impose restrictions on entrants into the United States if he deems their entry detrimental to the United States. This is the same section of the law invoked in issuing the so-called Muslim ban.

The regulation itself became the focus of multiple lawsuits in which plaintiffs sought to establish that the categorical bar on asylum based solely on manner of entry was in direct violation of INA § 208(1), which provides that any non-citizen who is physically present in the United states, or arrives in the United States (whether or not at a designated port of arrival) may apply for asylum, irrespective of such person’s status.\textsuperscript{13} This clear statutory language recognizes the reality for many asylum seekers fleeing persecution: they frequently cannot obtain documentation that enables them to enter the protection country lawfully, precisely because they fear persecution from the very actor that would need to issue them travel documents, the government of the country from which they have fled.

The rule, which had been set to go into effect immediately, was quickly enjoined.\textsuperscript{14} Then, in August of this year, a district court in the District of Columbia vacated the interim final rule, concluding that it directly conflicts with the clear statutory right to apply for

\textsuperscript{11} Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018).

\textsuperscript{12} Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States (Nov. 9, 2018).

\textsuperscript{13} 8 U.S.C. § 1158(a)(1).

asylum regardless of immigration status. As multiple courts now have recognized, any policy that attempts to restrict asylum eligibility based on an individual’s manner of entry into the United States is illegal.

B. Third Country Transit Bar

On July 16, 2019, DHS and DOJ issued another regulation creating a categorical bar to asylum, this time focusing on actions taken by an asylum seeker before entering the United States. This rule bars an asylum seeker—even an unaccompanied child—who enters or attempts to enter the United States at the Southern border from asylum eligibility unless he or she also applied for and was denied asylum in at least one country of transit on the journey to the United States. Other than Mexican nationals, every person fleeing over land to the Southern U.S. border necessarily transits at least one third country. While the rule appears to be aimed primarily at asylum seekers from Honduras, El Salvador, and Guatemala, asylum seekers from all over the world frequently transit through Mexico on their way to the United States. The rule carves out some narrow exceptions, but virtually all asylum seekers crossing the Southern border with Mexico may be denied asylum under this rule.

The rule attempts to justify limiting asylum to those who previously applied in a country of transit by arguing that Congress has already placed certain limitations on asylum seekers who had access to protection in other countries. Under 8 U.S.C. 1158(b)(2)(A)(vi), an individual is ineligible for asylum if he or she has been firmly resettled in a third country, such that he or she has already received a permanent offer of residency or the equivalent in a country prior to arrival in the United States. This law reflects a well-settled principle of international refugee protection which recognizes that the obligation to offer safe haven does not necessarily apply where someone has already been given an offer of permanent refuge. Nowhere, however, does the principle of firm resettlement assume an obligation on an individual’s part to apply for asylum in a country of transit. Moreover, a determination of firm resettlement requires both an individualized assessment and places the initial burden on the government. The rule also violates the

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17 For the bar to apply, the country of transit must be a party to the U.N. Refugee Convention, Refugee Protocol, or CAT. Because Mexico is a party to the Refugee Convention and CAT, the bar applies to all individuals arriving at the Southern border.

18 While individuals impacted by the rule are still eligible to apply for withholding of removal and protection under CAT, see 8 C.F.R. § 208.16, migrants subjected to expedited removal will now need to demonstrate a “reasonable fear” of persecution or torture before being able to present their claim to an immigration judge, which is a higher standard than credible fear. 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B)(v); 8 C.F.R. §§ 208.30(e)(3), 208.31(c), 235.3(b)(4).

Trafficking Victims Protection Reauthorization Act of 2008, because it does not exempt unaccompanied minors, who are not subject to firm resettlement prohibitions.\textsuperscript{20}

The rule remains in effect pending ongoing litigation after the Supreme Court granted the government’s application for a stay of two orders by a district judge in Northern California that enjoined the government from enforcing the interim final rule.\textsuperscript{21} Therefore, as a practical matter, it is now virtually impossible for the thousands of individuals transiting through Mexico and Guatemala to apply for asylum in the United States, despite the clear inadequacy of the asylum systems in these two countries of transit. Guatemala’s asylum system is only two years old; implementing regulations went into effect in early 2019.\textsuperscript{22} Guatemala has only three asylum officers for the entire country.\textsuperscript{23} Guatemala has decided a mere 20 to 30 asylum applications; between March 2018 and May 2019, zero of the hundreds of submitted applications were decided.\textsuperscript{24} Although Mexico’s protection system is more advanced than Guatemala’s, it remains incapable of providing the level of protection that would translate into a truly accessible asylum system. Mexico’s asylum agency has failed to grow to meet increased asylum applications—30 officers are covering a caseload that has increased 300 percent in the past several years, and yet Mexico has reduced the agency’s budget by 20 percent.\textsuperscript{25} Access for unaccompanied children is even more difficult, as only six officers are assigned to interview children.\textsuperscript{26}

The impact of the rule is now being felt, and practitioners have reported a rise in negative credible fear determinations from initial asylum screening interviews. In some cases, asylum seekers are still found to have a reasonable fear of persecution or torture and so may proceed forward with a protection claim in court, but they face a higher burden of establishing their claim and fewer benefits if they are successful in doing so.\textsuperscript{27} Given

\begin{itemize}
  \item \textit{Barr v. East Bay Sanctuary Covenant}, On Application for Stay, No. 19A230, 2019 WL 4292781, 588 U.S. ____ (Sept. 11, 2019). In her dissent (joined by Justice Ginsburg), Justice Sotomayor noted the district court’s principal reasons for finding that the rule was likely unlawful. The district court had found that the rule was likely inconsistent with the asylum statute, which already provides certain narrow exceptions to the general rule that any non-citizen physically present in the United States or who arrives in the United States may apply for asylum. \textit{Id.} at *1.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} ¶ 23.
  \item \textit{Id.}
  \item Compare 8 C.F.R. § 208.16(b)(2) (for a non-citizen to win withholding of removal based on a future threat to her life or freedom she must establish that it is \textit{more likely than not} that she will be persecuted on account of her race, religion, nationality, membership in a particular social group, or political opinion) and \textit{id.} § 208.16(c)(2) (non-citizen must establish that it is \textit{more likely than not} that she will be tortured if removed to the proposed country of removal) \textit{with id.} § 208.13(b)(2) (saying that a non-citizen has a well-founded fear}
\end{itemize}
the high number of individuals, especially from the Northern Triangle, who have historically met the credible fear standard, it is virtually certain that numerous otherwise qualified individuals will be denied the chance to have their asylum cases heard in court, simply because they failed to apply for asylum on their way to the United States.

III. Restriction on Access to United States Protection Process

Asylum seekers have also been prevented from even accessing U.S. asylum proceedings due to government policies implemented at the Southern border. In addition, the Trump administration has pressed for “Safe Third Country” Agreements with Mexico and Central American countries in order to shift responsibility for asylum protection to other countries in the region. These practices are different in nature, but both represent efforts to prevent asylum seekers from accessing available U.S. protection.

A. Metering

In recent years, the government increasingly has relied on the practice of “metering” to turn away asylum seekers at the Southern border of the United States through regulation of the number of individuals processed at ports of entry during any given time period.28 “Metering” describes CBP’s practice of limiting the number of individuals who can seek to be inspected and apply for asylum at a port of entry during a given time period.29 CBP officers stand at the international line in the middle of international bridges connecting the United States with Mexico. Before a non-citizen without proper travel documents can cross onto U.S. soil, even if seeking to apply for asylum, the officers turn the individual away if the limit on the number of persons to be processed that day or that week has been reached.30

While the government claims that the decision is based on operational capacity to process applications for admission in accordance with federal law,31 this practice has turned away many asylum seekers from the border and has forced thousands of individuals to wait months in Mexico for their opportunity to present claims for protection. During this time, individuals of very limited means must keep themselves safe in Mexican

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30 Special Review at 6; The Office of U.S. Senator Jeff Merkley, Shattered Refuge: A U.S. Senate Investigation into the Trump Administration’s Gutting of Asylum 32 (Nov. 2019); Metering Update at 1.

31 Govt. Al Otro Lado Brief at 6.
border cities plagued by rampant crime, and try to find legal assistance.\textsuperscript{32} It has been reported that, as of November 2019, there are more than 20,000 names on unofficial “waitlists.”\textsuperscript{33} This means that, while the government encourages asylum seekers not to enter the United States between ports of entry, it is likely that the practice of metering has led more non-citizens who would otherwise seek to enter the Southern border legally to cross unlawfully between ports of entry.\textsuperscript{34}

And while the numbers of family units who were apprehended at the Southern border reached historic highs in 2019, overall apprehensions did not reach a level that would justify heavy reliance on a practice not used before 2016.\textsuperscript{35} Because the United States is legally obligated to allow asylum seekers into the United States to present a claim for relief,\textsuperscript{36} the government’s recent use of metering at the Southern border improperly minimizes the number of individuals who are able to present claims for relief by limiting the number of individuals who are able to cross the international line into U.S. territory to seek protection.

B. Improper Use of Safe Third Country Agreements to Shift Responsibility

Under U.S. law, a person may be ineligible for asylum if he or she transited through a country that has signed a “safe third country” agreement with the United States.\textsuperscript{37} Such agreements are an acknowledgement by both parties that the countries have fair and accessible asylum systems that afford an asylum seeker full protection and the opportunity for permanent resettlement.\textsuperscript{38} The United States entered into such an agreement with Canada in 2002.\textsuperscript{39} The Trump administration has repeatedly pressed Mexico to sign such an agreement, which has thus far been declined, but on July 25, 2019 the Administration announced that it had signed a safe third country agreement with Guatemala.\textsuperscript{40} Honduras and El Salvador followed suit in September 2019, although the details of those agreements are not known. These agreements permit the United States

\begin{itemize}
  \item \textsuperscript{33} \textit{Metering Update} at 1. These lists generally are not kept by the U.S. or Mexican government, contributing to confusion and the potential for unfairness and corruption. \textit{Metering Update} at 5-15 (describing different practices for keeping wait lists in border cities); \textit{Strangers in a strange land}.
  \item \textsuperscript{34} \textit{Special Review} at 7 (noting evidence that metering leads to increased illegal border crossings).
  \item \textsuperscript{35} See note 1, supra.
  \item \textsuperscript{36} 8 U.S.C. § 1158(a)(1).
  \item \textsuperscript{37} \textit{Id.} § 1158(a)(2)(A).
  \item \textsuperscript{38} \textit{Id.}
\end{itemize}
to send asylum seekers from the Southern border to Central America and force them to apply for asylum there.\textsuperscript{41}

These countries have nascent asylum systems that are incapable of handling the thousands of asylum applicants that could be returned under this agreement. There also is no evidence that the governments of Central America can ensure the safety of asylum seekers, many of whom are Central Americans themselves and are fleeing persecutors who could pursue them into neighboring countries. Rather, the agreements ignore the fact that, in the last year, the majority of asylum seekers arriving at the U.S. Southern border are from the three countries that have signed these agreements—El Salvador, Guatemala and Honduras.\textsuperscript{42} Many of these individuals are fleeing persecution from which these Central American governments have been unable to protect them, demonstrating the inability of these countries to protect nationals of other states who are likely to be even more vulnerable.\textsuperscript{43}

The administration continues to pressure other countries to enter into safe third country agreements, irrespective of the asylum frameworks in those countries. As such, these agreements do not protect asylum seekers or create genuine regional solutions to address migration, but instead simply allow the United States to shift its responsibility to protect vulnerable asylum seekers onto countries that are ill-equipped and unable to ensure protection.

IV. Migrant Protection Protocols

Finally, in January 2019\textsuperscript{44} the government began implementing MPP, a policy that purportedly allows asylum seekers to apply for protection in the United States, but in reality, cuts off any meaningful access by forcing them to remain in Mexico while their claims are pending. MPP deprives asylum seekers of due process, fails to live up to


domestic and international law obligations, and places asylum seekers in grave personal danger.

Traditionally, asylum seekers who enter the United States via the Southern border, whether at or between official ports of entry, are either detained by Immigration & Customs Enforcement (ICE) while they are screened and then present their claims for relief, or released into the United States while their claims are pending in court. Under MPP, DHS officials have the discretion to return to Mexico non-Mexican nationals who seek to enter the United States via the Southern border without proper documentation. CBP issues individuals processed under MPP a Notice to Appear (“NTA”) in an immigration court in the United States, but asylum seekers must remain in Mexico during their court proceedings, which generally involve multiple hearings and many months of waiting.

If an individual placed in MPP expresses a fear of return to Mexico, that individual is supposed to be interviewed by an asylum officer to determine whether she is more likely than not to be persecuted or tortured in Mexico; but these interviews are not always conducted when requested. Attorneys are not always allowed to be present during these interviews. If the asylum officer determines the individual does not show she is more likely than not to be persecuted or tortured in Mexico, which is the result in the vast majority of cases, the asylum seeker is returned to Mexico. As of September 2019, more than 55,000 individuals have been subjected to MPP. The legality of MPP is currently being litigated, but the policy remains in effect.

\[45\] See generally 8 U.S.C. § 1225(b). Traditionally, many asylum seekers also have been eligible to request release from detention while their cases are pending. However, the government takes the position that MPP asylum seekers are not eligible to request bond from an immigration judge, because they are “arriving aliens.” By regulation, arriving aliens—or migrants who seek admission at a port of entry—are not eligible to request bond from an immigration judge. 8 C.F.R. § 1003.19(h)(2)(i)(B). This means that, even if a migrant is subjected to MPP after entering the United States unlawfully between ports of entry, she is not eligible to seek release. Some advocates have been successful in challenging this interpretation, but the great majority of MPP asylum seekers do not have legal representation. See infra page 13.

\[46\] Nielsen Policy Guidance at 1.


\[48\] Nielsen Policy Guidance at n.4; ERO MPP Guidance at 3-4; U.S. Immigration Policy Ctr., Seeking Asylum: Part 2 4 (Oct. 29, 2019) (“Seeking Asylum”) (Only 40% of individuals who were asked whether they feared return to Mexico, and responded in the affirmative, were interviewed by an asylum officer, and only four percent of individuals who were not asked whether they feared return to Mexico, but nevertheless expressed a fear, were interviewed).

\[49\] MPP Assessment at 2 (saying that, in nine months, DHS returned more than 55,000 non-citizens to Mexico under MPP).

\[50\] The U.S. Court of Appeals for the Ninth Circuit heard oral argument on October 1, 2019 in the lawsuit challenging MPP. See Innovation Law Lab v. McAleenan, No. 19-15716 (9th Cir.). In their lawsuit, the plaintiffs argue that MPP is unlawful because it violates the plain language of the INA, violates the United
Those asylum seekers who are returned to Tijuana, Mexicali, and Juarez, Mexico have their cases heard at immigration courts in San Diego, California and El Paso, Texas. For asylum seekers returned to Nuevo Laredo and Matamoros, cities in the state of Tamaulipas, Mexico, the hearings take place in soft-sided tents or “port courts” that are adjacent to the International Bridges that connect Laredo and Brownsville, Texas to the Mexican cities of Nuevo Laredo and Matamoros, respectively. Immigration judges are not physically present for hearings that occur at the port courts; in such hearings the immigration judge and government counsel appear via video conference. Unlike regular immigration courts, the tent courts are closed to the public, including members of the media. Attorneys may enter the port courts only to appear at a hearing for an asylum seeker the attorney already represents. Attorneys are not permitted to enter the port courts to screen potential clients or provide general legal information. Nor are asylum seekers permitted to enter the United States to consult with their attorneys, other than for one hour preceding their scheduled hearings. Attorneys who have appeared at MPP hearings in the tent courts report that simultaneous interpretation is not provided for asylum seekers who are not fluent in English. Generally, the interpreter, who is present with the immigration judge via video conference, interprets only procedural matters and questions directed to the asylum seeker by the immigration judge. Even for those MPP hearings held in regular immigration courts, lawyers have been prohibited from offering legal information or meeting with unrepresented individuals, or even meeting with individuals they represent prior to hearings.

While individuals subjected to MPP wait for their hearings, they are forced to fend for themselves in Mexican border cities, which are notoriously dangerous. The Department of State advises citizens not to travel to Tamaulipas state, where Matamoros and Nuevo Laredo are located, due to “crime and kidnapping.” It has assigned Tamaulipas the highest travel advisory level, Level 4—the same level assigned to countries such as Syria and Yemen. Multiple organizations have documented hundreds

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53 ERO MPP Guidance at 3.

54 Faux Process.


56 United States Department of State—Bureau of Consular Affairs, Mexico Travel Advisory, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (last
of cases of violence suffered by asylum seekers forced to return to Mexico.\textsuperscript{57} Many asylum seekers subjected to MPP also lack basic necessities such as shelter, food, clean water, toilet facilities, and medical care.\textsuperscript{58}

While the government contended that MPP would be “consistent with applicable domestic and international legal obligations,”\textsuperscript{59} the implementation of the policy has prevented MPP asylum seekers from accessing a full and fair adjudication that comports with U.S. and international law. First, because asylum seekers are forced to remain in Mexico for the duration of their proceedings, they do not have meaningful access to counsel to advise them regarding their legal rights and obligations. The same barriers prevent MPP asylum seekers from accessing assistance in completing applications for relief in English, and translating any evidence they may have to support their claims.\textsuperscript{60} DHS provides MPP asylum seekers with lists of U.S.-based non-profit organizations,\textsuperscript{61} but their resources were already stretched beyond capacity before MPP and most of the non-profits do not represent individuals subject to MPP. Private attorneys and non-profit organizations have formed groups of volunteers to provide workshops and other forms of pro se assistance in some Mexican border cities, but these groups do not have the capacity to assist everyone, and do not provide direct representation. The situation in these cities also forces volunteers to work in conditions that are not conducive to confidential communications. And many MPP asylum seekers are afraid to travel from their temporary shelter to the location of these workshops, because of the dangers they face in many Mexican border cities. The data confirms that the barriers MPP places on

\textsuperscript{57} Orders from Above at 3-8 (discussing violence suffered by hundreds of asylum seekers living in Mexican border cities, including rape, kidnapping, and sexual assault); Seeking Asylum at 2 3-5, 9-10 (based on interviews with over 600 asylum seekers subjected to MPP, finding that approximately one out of four had been threatened with physical violence, and that over half of those who had been threatened with physical violence had experienced physical violence). The numbers reported by the U.S. Immigration Policy Center likely underestimate the dangers faced by asylum seekers subjected to MPP because security conditions in Tijuana and Mexicali, Mexico, where the interviews were conducted, are less dangerous than other parts of the border. Seeking Asylum at 9.

\textsuperscript{58} Seeking Asylum at 5, 10 (based on interviews with over 600 asylum seekers subjected to MPP, finding that more than one out of every three had experienced homelessness); Acacia Coronado, the Texas Tribune, “Conditions deteriorating at makeshift camp on the Rio Grande where thousands await U.S. asylum” (Oct. 25, 2019), https://www.texastribune.org/2019/10/25/conditions-deteriorating-migrant-camp-thousands-await-asylum/ (discussing worsening humanitarian conditions for an estimated 2,000 migrants living at a makeshift refugee encampment in Matamoros, Mexico, steps away from the International Bridge).

\textsuperscript{59} Nielsen Policy Guidance at 2.

\textsuperscript{60} Orders from Above at 15.

\textsuperscript{61} Seeking Asylum at 8-9 (only 17% of interview respondents said they were given information by U.S. immigration officials about how to access legal services, and that most who had been given this information were given a list of providers located in San Diego).
meaningful access to counsel are nearly insurmountable. As of September 2019, only two percent of asylum seekers subjected to MPP had secured legal representation.  

MPP also places U.S.-licensed attorneys in untenable situations. Attorneys are either forced to subject themselves to dangerous conditions in Mexican border cities, or risk compromising their professional obligations by preparing complicated asylum cases without a meaningful opportunity to consult in person with their clients.  

The manner in which MPP hearings are conducted also does not comport with fundamental notions of due process. MPP asylum seekers are handed NTAs before being returned to Mexico, but because most do not have stable shelter in Mexico, the government is not able to reliably serve them with notice if their hearing date changes or is cancelled. NTAs served on MPP asylum seekers often contain addresses of shelters that asylum seekers never access, or no address at all. Paperwork that accompanies the NTA instructs MPP asylum seekers to present themselves at International bridges four hours before their hearings. For asylum seekers with early morning hearings, this means traveling through dangerous border cities and waiting at bridges in the middle of the night. If they are unable to make the dangerous journey, they risk being ordered removed in absentia.

If MPP asylum seekers do make it safely to their hearings, they likely will find it difficult to understand what occurs, because many of these hearings lack simultaneous interpretation. The ABA has long supported the use of in-person language interpreters in all courts, including in all immigration proceedings, to ensure parties can fully and fairly participate in the proceedings. This is especially important for non-citizens, who are unfamiliar with the U.S. legal system, and face additional unique barriers to accessing information regarding their legal rights and responsibilities. Video conferencing technology can also be unreliable, leading to disruptive delays that can further harm vulnerable asylum seekers.

It is also problematic that hearings in the tent courts are not open to the public or the press. Public access to judicial proceedings is a cornerstone of the First Amendment. It also helps to further public confidence in proceedings, as well as the appearance of

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63 Orders from Above at 15; “Immigration Judge Slams ‘Remain in Mexico’ Tent Courts”.

64 Orders from Above at 15.

65 90M131 (calling on adopting of recommendations for providing complete and accurate interpretation of all immigration court proceedings, including all testimony); 02M110 (resolving that courts and agencies should provide live in-person interpreters in all cases, except in exigent situations, when technology-based interpretation may be provided); 97A109 (recommending that all courts be provided with qualified language interpreters so that parties and witnesses with no or limited command of English may fully and fairly participate in court proceedings).

66 Orders from Above at 14; Faux Process.
fairness. Proceedings in the tent courts are closed because the facilities are controlled by DHS, rather than the Executive Office for Immigration Review ("EOIR"). EOIR is part of DOJ, and runs the immigration court system. It is problematic enough that DOJ runs the immigration court system. It is even more troubling, however, that DHS, which is charged with apprehending, detaining, and removing non-citizens, controls who can access tent court facilities.

Finally, MPP does not contain sufficient safeguards to comply with the United States’ non-refoulement obligations. Despite widespread danger faced by asylum seekers in Mexico, DHS does not affirmatively ask individuals subjected to MPP whether they fear persecution or torture if returned there. Asylum seekers are afforded a screening interview only if they affirmatively express a fear of return. Many individuals subjected to MPP do not know that they have a right to a screening interview or that they must request one if they have such fear.

Where asylum seekers do express a fear of return to Mexico, they are afforded only short, telephonic screening interviews, without the right to consult with counsel before the interview, or have an attorney represent them in the interview itself. In addition, to be removed from the MPP program, an individual must demonstrate that she is more likely than not to be persecuted or tortured in Mexico. This is the same standard as the individual would be required to meet to be granted withholding of removal or relief under the Convention Against Torture by an immigration judge.

The standard applied in these “non-refoulement” interviews is also higher than the standard used to determine asylum eligibility, as well as for screening interviews in

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68 For this reason, the ABA, among other entities, has called for the creation of an independent court to adjudicate immigration cases. See Letter to Members of Congress from the American Bar Association, the American Immigration Lawyers Association, and the Federal Bar Association (July 11, 2019) (calling on Congress to establish immigration court system that is independent from the Department of Justice).


70 Orders from Above 8-10. The ACLU Foundation of San Diego & Imperial Counties recently filed a class-action lawsuit demanding that MPP asylum seekers who have expressed a fear of return be given access to retained counsel before and during these screening interviews. See Doe et al. v. McAleenan, 3:19cv2119-DMS-AGS (S.D. Cal.). On November 12, 2019, U.S. District Judge Dana Sabraw granted the individual plaintiffs’ request for a temporary restraining order, but he has not ruled on the class claims. See Order Granting Motion for Temporary Restraining Order, Doe et al. v. McAleenan, 3:19cv2119-DMS-AGS (S.D. Cal. Nov. 12, 2019).

71 MPP Assessment at 5.

72 See supra note 27.
expedited removal and reinstatement of removal proceedings, where asylum seekers are screened to determine whether they will be able to present their protection claim before an immigration judge. In those screening interviews, a DHS official must ask the individual whether she has a fear of being returned to her home country or removed from the United States. Individuals also receive notice in advance of the screening interviews, are permitted to consult with an attorney, can be represented at the interview, and are entitled to immigration judge review of any negative determination. None of these due process protections are afforded those in MPP non-refoulement interviews.

Interviews with asylum seekers subjected to MPP demonstrate that the screening process used falls far short of the United States’ obligations under international law. MPP asylum seekers report that, even when they express a fear of return to Mexico, they often are not provided with the screening interviews required under MPP. MPP asylum seekers also routinely fail to pass these interviews even when they already have been victims of violent crime, including rape, kidnapping, and robbery in Mexico. According to DHS only 13% of the individuals who have received these screenings have been given positive determinations.

V. Conclusion

The policies discussed above are fundamentally inconsistent with due process, unduly restrict asylum seekers’ access to counsel, and fail to live up to the United States’ obligations under international law. For these reasons, the ABA urges the federal government to rescind these policies, and to ensure that any future policies addressing the processing of asylum seekers do not: (1) restrict eligibility for asylum based on the place or manner of arrival at the U.S. border or submission of applications for protection in countries of transit; (2) allow U.S. immigration authorities to refuse to process asylum seekers arriving at the border or to transfer asylum seekers to other countries for processing of their asylum claims, without regard to the safety situation or the adequacy of the asylum process in those third countries and without regard to individual circumstances that may favor adjudication in the United States; or (3) prevent migrants from remaining in the United States during the adjudication of their asylum claims.

Respectfully submitted,

Wendy S. Wayne
Chair, ABA Commission on Immigration
February 2020

73 8 C.F.R. § 235.3(b)(2)(i) (discussing form I-867B).
74 8 C.F.R. §§ 208.30(d)(4), (g); 208.31(c), (g).
75 See Seeking Asylum at 4.
76 Orders from Above at 10.
77 MPP Assessment at 5.
THE RESOLUTION URGES THE FEDERAL GOVERNMENT TO MAINTAIN AN ASYLUM SYSTEM THAT AFFORDS ALL PERSONS SEEKING PROTECTION FROM PERSECUTION OR TORTURE ACCESS TO COUNSEL, DUE PROCESS, AND A FULL AND FAIR ADJUDICATION THAT COMPORTS WITH U.S. AND INTERNATIONAL LAW. THIS RESOLUTION ALSO EXPRESSES OPPOSITION TO THE FOLLOWING RECENT GOVERNMENT POLICIES: (1) THE MIGRANT PROTECTION PROTOCOLS, OR REMAIN IN MEXICO POLICY; (2) METERING, OR TURNING AWAY ASYLUM SEEKERS AT PORTS OF ENTRY BECAUSE OF LIMITS IMPOSED ON THE NUMBER OF INDIVIDUALS PROCESSED THROUGH THE PORTS OF ENTRY; (3) RESTRICTIONS ON ELIGIBILITY FOR ASYLUM FOR THOSE INDIVIDUALS WHO DID NOT APPLY FOR PROTECTION IN COUNTRIES OF TRANSIT; AND (4) THE DEVELOPMENT OF INTERNATIONAL AGREEMENTS THAT ALLOW THE U.S. TO AVOID ITS INTERNATIONAL PROTECTION OBLIGATIONS BY TRANSFERRING INDIVIDUALS TO THIRD COUNTRIES WITHOUT CONDUCTING AN ASYLUM ADJUDICATION IN THE UNITED STATES.
victims; and (4) the development of refugee visa and pre-clearance policies to assist refugees in coming to the United States.

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

90M131, 06M107F (above). The adoption of the proposed policy would support and complement existing policy by encouraging the government to rescind recent policies that restrict access to counsel and legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge.

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 the recommendations and effect legislative change or updated policies that reflect due process and fairness in the asylum 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.**

Section of Civil Rights and Social Justice
Section of International Law
Working Group on Unaccompanied Minor Immigrants
Center on Children and the Law
Standing Committee on Pro Bono and Public Service
Commission on Hispanic Rights and Responsibilities
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
Washington, DC 20036
tel 202-662-1006
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.)*
Wendy S. Wayne
Chair, Commission on Immigration
wwwayne@publiccounsel.net
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges the federal government to maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law. This Resolution also expresses opposition to the following recent government policies: (1) the Migrant Protection Protocols, or Remain in Mexico policy; (2) metering, or turning away asylum seekers at ports of entry because of limits imposed on the number of individuals processed through the ports of entry; (3) restrictions on eligibility for asylum for those individuals who did not apply for protection in countries of transit; and (4) the development of international agreements that allow the U.S. to avoid its international protection obligations by transferring individuals to third countries without conducting an asylum adjudication in the United States.

2. Summary of the Issue that the Resolution Addresses

The resolution expresses opposition to several recent government policies which have operated together to severely restrict the ability of asylum seekers to access the asylum system and to receive the due process protections to which they are entitled. The resolution also expresses concern regarding any future government policies that would operate to (1) restrict eligibility for asylum based on the place or manner of arrival at the U.S. border or submission of applications for protection in countries of transit; (2) allow U.S. immigration authorities to refuse to process asylum seekers arriving at the border or to transfer asylum seekers to other countries for processing of their asylum claims, without regard to the safety situation or the adequacy of the asylum process in those third countries and without regard to individual circumstances that may favor adjudication in the United States; or (3) prevent migrants from remaining in the United States during the adjudication of their asylum claims.

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

The proposed Resolution will address the issue by expressing the ABA’s opposition to recent government policies and asserting the ABA’s position that the government should maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law.

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 United States Congress to protect the security and integrity of U.S. federal elections by enacting legislation that authorizes and appropriates necessary funding for the National Institute of Standards and Technology (NIST) to:

(1) Define federal standards for cybersecurity of election systems software, infrastructure, and hardware, whether provided by the government or private sector companies, used in handling, storing, processing, or transmitting data for voter registration, vote tallying, voter polling, vote reporting, or the manufacturing, servicing, or writing of election parameters of voting machines/equipment ("Election Process").

(2) Develop a certification process for the security and integrity of election systems software, infrastructure, and hardware (and associated components and modules) used in the Election Process.

(3) Analyze the private sector's role in the Election Process and recommend any functions or roles that should be changed or restricted to public sector election officials to address issues related to the security and integrity of federal elections;

FURTHER RESOLVED, That the American Bar Association urges the U.S. Congress to allocate adequate funding to protect the security and integrity of the federal Election Process and restrict the use of all such funding to only those election jurisdictions that:

(1) Use such funding for the Election Process in a manner consistent with the NIST federal election standards;

(2) Require annual comprehensive cybersecurity assessments by an independent third party of all systems used in the Election Process in accordance with the NIST federal election standards;
(3) Require annual comprehensive cybersecurity assessments by an independent third party of private sector companies involved in the Election Process in accordance with the NIST federal elections standards and make those assessments available to election officials contracting with them;

(4) Require that only election systems software, infrastructure, and hardware (and associated components and modules) that are certified by an independent third party in accordance with the NIST federal election standards be used in federal elections after October 2022;

(5) Require the deployment of human-readable paper ballots;

(6) Establish requirements for post-election auditing of votes, at least on the level of risk-limiting audits, and make the findings public; and

FURTHER RESOLVED, That the American Bar Association urges state, local, territorial, and tribal legislatures and governments to protect the security and integrity of U.S. election systems by allocating funding for the Election Process consistent with this Resolution.
I. STEPS TO COMBAT IMMINENT THREATS TO U.S. ELECTIONS

The American Bar Association (ABA) strongly supports free, fair, and impartial elections that form the foundation of our democracy. Ensuring trust and confidence in the election system is critical and should be given a high priority by all.

The integrity of the American election process is at risk due to two primary factors:

1. Election vulnerabilities and possible points of exploitation within the various components of the “Election Process,” including security issues with machines and devices, the voter registration process, transmission of votes, tallying votes, voter polling, and the reporting of votes.

   The role of private sector companies in the election process and possible insecurities within their systems and processes are also an aspect of this risk.

2. Disinformation campaigns by nation states and other foreign entities aimed at influencing voters to vote for certain favored candidates and sow discord.

Volumes of evidence establish that Russian cyber operations targeted election infrastructure in the U.S. in order to undermine the integrity and availability of the 2016 elections. Russia is the largest, but not the only, threat. U.S. intelligence agencies and law enforcement have expressed concern “about ongoing campaigns by Russia, China and other foreign actors, including Iran, to undermine confidence in democratic institutions and influence public sentiment and government policies.”

The risk of foreign interference in U.S. elections remains at critical levels. On Election Day 2019 in a joint statement, government leaders of the law enforcement, homeland security and intelligence communities provided observations on election security and their outlook for the 2020 elections. They concluded that “[o]ur adversaries want to undermine our democratic institutions, influence public sentiment and affect government policies. Russia, China, Iran, and other foreign malicious actors all will seek to interfere in the voting process or influence voter perceptions.”

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The Resolution Focuses on Vulnerabilities in the Election Process

This Resolution identifies essential steps that should be taken by Congress, state and local governments, election officials, and private sector entities to secure the “Election Process.” The Resolution consists of three measures designed to address the problem of election security head-on – by leveraging the power of Congress to protect federal elections when appropriating federal funds, drawing on the expertise of NIST (the federal agency designated by Congress to address complex technology issues and develop appropriate cybersecurity standards and certification processes), and recognizing the central role of states and local election officials to conduct federal, state, and local elections.

The Resolution is narrowly tailored to focus on problems within the Election Process that can be exploited to undermine the integrity of federal elections – achievable steps in reducing risks to the American election process.

As defined, the proposed requirements pertain to private sector companies and entities that handle, store, process, or transmit data involved in the Election Process. The Resolution is not intended to apply to small organizations such as grocery stores, Lion’s Clubs, VFW Halls, churches, or the like, that simply serve as a physical location for parts of the Election Process.

The Resolution addresses federal elections because the U.S. Congress has the authority to specify requirements to protect federal interests. This approach is likely to spur reforms in most state and local jurisdictions because they cannot afford to have separate equipment for federal and state elections.

The U.S. government provided $380 million in fiscal year 2018 to state and local election officials to support voting equipment purchases and security enhancements to election systems but did not specify any particular security measures to be taken. For example, the funding could have been spent to purchase voting machines or equipment with known security vulnerabilities. The Resolution requires that federal funding for federal elections be restricted to only those election jurisdictions that are undertaking reforms consistent with NIST standards developed for federal elections. The Resolution also addresses the broad and little-understood role of private sector companies in the election process. These companies – not election officials – are the primary entities involved in wiring or

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4 The Resolution defines “Election Process” as the election systems software, infrastructure, and hardware, including those of private sector companies, involved in handling, storing, processing, or transmitting data for voter registration, vote tallying, voter polling, vote reporting, or the manufacturing, servicing, or writing of election parameters of voting machines/equipment.

5 The Resolution does not address disinformation campaigns that undermine free and fair elections. Solutions to this problem are being developed within the U.S. government, including executive departments and agencies with responsibility for elections, the intelligence community, and law enforcement. This problem involves different considerations from those involving the Election Process and will require further analysis, given the complexity and rapidly evolving nature of the threat and corresponding lack of consensus on effective approaches. The U.S. Department of Homeland Security has declared that “responding to foreign interference requires a whole of society approach.”

writing parameters for election equipment for each election, conducting voter registration, tallying votes, polling voters, and reporting votes. Currently, there are no security requirements or defined security processes for these entities and processes.

The specific proposals in the Resolution are consistent with substantial analysis and research and represent security best practices and election reforms for which there is widespread consensus.

Highlights of the Resolution are –

- Congress should enact legislation that provides funding for the National Institute of Standards and Technology (NIST) to:
  - develop federal standards for cybersecurity of election systems software, infrastructure, and hardware, including those of private sector companies, involved in handling, storing, processing, or transmitting data for voter registration, vote tallying, voter polling, vote reporting, or the manufacturing, servicing, or writing of election parameters of voting machines/equipment (“Election Process”).
  - develop a certification process for the security and integrity of election systems, software, infrastructure, and hardware (and associated components and modules) used in the Election Process.
  - analyze the private sector’s role in the Election Process and recommend any functions or roles that should be changed or restricted to public sector election officials to better ensure election security and integrity.
- Congress should restrict the use of federal election funding to those state and local jurisdictions that follow specified requirements that are accepted as best practices for federal elections.
- State, local, territorial, and tribal legislatures and governments should protect the security and integrity of U.S. election systems by allocating funding for election purposes consistent with the Resolution.

II. IDENTIFIED RISKS TO THE ELECTION PROCESS

In recent elections, 99 percent of votes in the U.S. were cast or counted on computers. Many of the core election systems – voter registration databases, election management systems, voting machines, and vote-counting systems – use aging computer equipment. The systems employ software that can no longer be updated or patched, include databases that have known vulnerabilities, or are managed by third-party vendors where supply chain risks exist.

Independent researchers have demonstrated a wide array of vulnerabilities in the Election Process. "Whether it is e-poll books, paperless voting machines, or ballot marking devices that print unverifiable barcode ballots, far too much of the equipment that American

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democracy depends [on] is fundamentally insecure.” Researchers found that vulnerabilities in voting devices could:

alter stored vote tallies, change ballots displayed to voters, or alter the internal software that controls the machines. In particular, many vectors for so-called “Advanced Persistent Threat (APT)” attacks continue to be found or replicated. This means that an attack that could compromise an entire jurisdiction could be injected in any of multiple places during the lifetime of the system .... However, it is notable – and especially disappointing – that many of the specific vulnerabilities reported over a decade earlier….are still present in these systems today.9

The distributed architecture of elections presents myriad vulnerable points where sensitive voter and candidate data can be stolen or altered, and hackers have successfully targeted state election systems. The July 2018 indictment of 12 Russian intelligence officers detailed how Russian operatives stole voter data, targeted state boards of election, and hacked a voting equipment vendor. It illustrates how future attacks on election infrastructure may occur, whether committed by a domestic or foreign actor.10

Third-Party Risks – Election Management and Voting Administration

The election management systems used to design computer ballots and program voting machines are highly centralized – run by only a few companies nationwide that work for multiple states. If an attacker could hack into one of those companies, voting software and equipment across the country could be compromised.

Outsourcing – The Resolution focuses on a central problem in election security and integrity that has received little publicity but must be addressed in any reform of the voting process. Private companies play an integral role in elections, from manufacturing voting machines and developing software to programming or wiring those machines for each election, designing ballots, tallying votes, and hosting results websites. Third-party vendors are an exploitation point for hackers to target election systems.

Reports that have documented the vulnerabilities and limitations of existing voting machine technology have made it clear that the implementation of new technologies and processes ultimately depends on the companies that design, manufacture, integrate, and support voting machines and the associated technological infrastructure, which have been referred to as the “election technology industry.”11 The firms in the election

9 DefCon 27 Voting Village Report 2019 at 6, supra note 5.
technology industry sell integrated voting solutions, typically including a package of hardware, software, services, and support.

Supply chain risks – Voting machines do not need to be connected to the Internet to be hackable. At points along the supply chain, hackers can infect machine parts and software with malware before they reach the U.S. The small number of companies responsible for the centralized election management systems that control voting and vote-counting machines are prime targets for attackers seeking to impair an election. Experts have shown that an attacker could hack into the company’s systems, install malware on the memory cards used to load ballot design software on voting machines, and potentially change the results of state elections. ¹²

Election management company financed by Russian oligarch – The FBI notified the State of Maryland that a technology company responsible for keeping electronic information on voter registration, election results, and other sensitive data in state elections is “connected to a Russian oligarch who is ‘very close’ to Russian President Putin.”¹³ Such operations need not change votes to be effective. Deleting voter registration information or slowing vote counting could easily undermine confidence in elections.

III. REFORMS TO THE ELECTION PROCESS

The election process in the U.S. is highly decentralized and it is regulated state-by-state. More than 9,000 jurisdictions of varying size administer the country’s elections, with voters casting ballots in 185,000 precincts. Decisions about election technology are typically managed at the county level, although some states provide purchasing support or other central services to facilitate the procurement of election technology (typically coordinated through the office of the Secretary of State).

Elections involve much more than the election day activities that voters see when they cast their votes. Election administration includes pre-election responsibilities such as voter registration, qualifying candidates, preparing voting equipment, and absentee voting; election day voting and vote counting; and post-election certifying of results, audits and re-counts. The Resolution focuses on the various vulnerable points in the “Election Process,” as defined above. These aspects of elections must be addressed in order to ensure security and voting fairness and integrity.

¹³ The Washington Post, Surprise, Maryland: Your election contractor has ties to Russia. And other states also remain vulnerable to vote tampering. Page A12. The vendor ByteGrid LLC hosts the Maryland statewide voter registration, candidacy, and election management system, the online voter registration system, online ballot delivery system, and unofficial election night results website. According to the FBI, ByteGrid LLC is financed by AltPoint Capital Partners, whose fund manager is a Russian and its largest investor is a Russian oligarch named Vladimir Potanin.” Statement by Nikki Charlson, deputy administrator for Maryland’s State Board of Elections. NPR, Maryland Investigates Russian National's Links to State Elections Software, Brakkton Booker (July 13, 2018), available at https://www.npr.org/2018/07/13/628998843/maryland-investigates-russian-nationals-links-to-state-elections-. 
Furthermore, the Resolution builds on and is consistent with the election infrastructure created by Congress in the Help America Vote Act of 2002 (HAVA). HAVA established the Election Assistance Commission (“EAC”), a federal body charged with certifying voting systems and allocating HAVA funds. The Federal Election Commission (FEC) is involved in the financing of federal elections. The EAC was mandated to develop and adopt new voluntary voting system guidelines and to provide for the testing, certification, and decertification of voting systems. HAVA also established the Technical Guidelines Development Committee (TGDC) with the duty of assisting the EAC in the development of the new guidelines. The Director of NIST chairs the TGDC, and NIST was tasked to provide technical support for its work.

The U.S. Department of Homeland Security (DHS) partners with federal, state and local government agencies, election officials, and private sector entities to enhance the security of election systems. Election infrastructure was designated as part of the nation’s critical infrastructure as a subsector under the Government Facilities sector in January 2017. Under the designation, DHS, through its Cybersecurity and Infrastructure Security Agency (CISA), is tasked with providing services to state and local election officials that can help reduce both cyber and physical risks to their election systems and facilities. The designation allows DHS to provide services on a prioritized basis at the request of state and local election officials.

**NIST Plays a Key Role in Cybersecurity and Elections**

Beginning over 30 years ago, NIST has been the federal agency designated by Congress to develop technical, management, physical, and administrative standards and guidelines for the cost-effective security and privacy of sensitive information systems. Over the years, the agency’s mandate has been broadened by Congress to focus on specific

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16 According to DHS, Election Infrastructure includes but is not limited to:
   - Voter registration databases and associated IT systems
   - IT infrastructure and systems used to manage elections (such as the counting, auditing and displaying of election results, and post-election reporting to certify and validate results)
   - Voting systems and associated infrastructure
   - Storage facilities for election and voting system infrastructure
   - Polling places, to include early voting locations
17 NIST was first designated by Congress in 1987 as the agency (then the National Bureau of Standards) within the federal government responsible for addressing complex technology issues and developing security standards and guidelines for federal computer systems. NIST has developed dozens of authoritative publications pursuant to the Federal Information Security Management Act of 2014 (FISMA), 44 U.S.C. § 3551 et seq., Public Law (P.L.) 113-283, that made the agency responsible for developing information security standards and guidelines, including minimum requirements for federal systems (excluding some national security systems). As a key element of the FISMA Implementation Project, NIST developed an integrated Risk Management Framework which effectively brings together all of the FISMA-related security standards and guidance to promote the development of comprehensive and balanced information security programs by agencies. NIST released version 1.1 of its Cybersecurity Framework in April 2018. The framework was developed with a focus on industries vital to national and economic security and has since proven flexible enough to be adopted voluntarily by large and small companies and organizations across all industry sectors, as well as by federal, state and local governments. https://www.nist.gov/cyberframework.
cybersecurity problems and develop best practices and standards to protect the confidentiality, integrity, and availability of all aspects of computer systems.

With respect to elections, under HAVA, Congress tasked NIST with providing technical support to the TGDC, an EAC Federal Advisory Committee to which the NIST Director serves as Chair, in areas such as the security of computers, computer networks, and computer data storage used in voting systems, methods to detect and prevent fraud, protection of voter privacy, the role of human factors in the design and application of voting systems, and remote access voting, including voting through the Internet.

For more than a decade, as directed by both HAVA and the Military and Overseas Voter Empowerment Act (MOVE), the NIST Voting Program has partnered with the EAC to develop the science, tools, and standards necessary to improve the accuracy, reliability, usability, accessibility, and security of voting equipment used in federal elections for both domestic and overseas voters.

In 2005 the EAC adopted Voluntary Voting System Guidelines ("VVSG" or "Guidelines") which increased security requirements for voting systems and expanded access for individuals with disabilities to vote privately and independently. Version 1.1 of the Guidelines, published in 2015, made the Guidelines more testable and improved portions of the Guidelines without requiring massive programmatic changes.

Since 2015, NIST, in consultation with the EAC, has been working with a broad array of stakeholders on the next iteration of the Guidelines, entitled Voluntary Voting System Guidelines 2.0. Seven working groups are focusing on the election process (pre-election, election and post-election), technical underpinnings of the Guidelines (cybersecurity, usability and accessibility, and interoperability), and issues related to testing.

The Guidelines are used by accredited testing laboratories as part of both state and national certification processes; by state and local election officials who are evaluating voting systems for potential use in their jurisdictions; and by manufacturers who need to ensure that their products fulfill the requirements so they can be certified.

The VVSG address many aspects of voting systems, including determining system readiness, ballot preparation and election definition, voting and ballot-counting operations, safeguards against system failure and protections against tampering, ensuring the integrity of voted ballots, protecting data during transmission, and auditing. In addition, the Guidelines tackle physical and systems-level security.

IV. ADDRESSING CYBERSECURITY THREATS – PROTECTION OF FEDERAL ELECTIONS

Significant evidence has been published concerning vulnerabilities in voting machines and equipment, and, in fact, aspects of the voting process have been attacked by foreign actors. Immediate steps must be taken to develop a process and standards for

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certification of voting machines and equipment. Members of Congress introduced a broad range of legislative proposals in the 115th and 116th Congress to address critical election issues (please see summary in the General Information Form on page 17 herein). These types of laws are needed to protect the 2020 election and beyond. Given the significant vulnerabilities in all aspects of the Election Process, the Resolution recognizes that a cybersecurity standard for federal elections must be developed and published. Equally important is the consistent implementation of the standard to strengthen security and integrity throughout the federal election process.

Drawing on the significant work NIST has done on election security since 2005, it is reasonable to recommend that security standards and certification processes be developed and adopted well before the 2022 elections.

The Resolution also asks NIST, as part of its evaluation of the security and integrity of election systems and standards and certification development, to analyze the private sector’s role in election processes and recommend any functions or roles that should be restricted to public sector election personnel to better ensure election security and integrity.

The Resolution focuses on a central problem in election security and integrity that must be addressed in reform of the voting process. Private sector companies have significant roles and responsibilities in elections in every state. Reports that have documented the vulnerabilities and limitations of existing voting machine technology have made it clear that the implementation of new technologies and processes ultimately relies on the companies that design, manufacture, integrate, and support voting machines and the associated technological infrastructure, which have been referred to as the “election technology industry.” Third-party vendors have provided the entry point for hackers to target election systems. To the best of our knowledge, most have never undergone a security review.

Paper Ballots and Post-Election Audits

Replacing aging, outdated, vulnerable voting machines with voter-verified paper ballots or records for every vote cast is a high priority. The National Academies of Sciences, Engineering, and Medicine’s Securing the Vote: Protecting American Democracy recommends that voter-verifiable paper ballots be used everywhere by 2020. Paper ballots or paper voting receipts are integral to election security because they provide a physical trail that can be followed if there is any question about the outcome of an election, or more generally, for audits. The Resolution restricts funding to election

For example, the U.S. House of Representatives passed the Securing America’s Voting Equipment (SAVE) Act, H.R.2722, on June 27, 2019. The bill addresses election security through grant programs and requirements for voting systems and paper ballots.

UPenn THE BUSINESS OF VOTING, supra note 9.


jurisdictions that have adopted requirements for post-election auditing of votes, at least on the level of risk-limiting audits, and make the findings public.

Post-election audits check that voting systems properly counted ballots. Audits involve manually checking a representative sample of paper ballots to confirm that counting software has functioned correctly. Risk-limiting audits, which examine a statistically significant sample of ballots based on the margin of victory, are the state-of-the-art approach.

Secure election systems are chronically underfunded. Adequate funding is needed to support all aspects of the election process, including procuring new voting equipment, as well as programs.

**Funding Restrictions – Well-Established Legislative Approach to Protect Federal Interests in Voting**

The Resolution follows the well-established approach Congress has followed over many years of enacting statutes with funding restrictions that protect federal interests.

Congress has a paramount interest in protecting federal elections and ensuring that they are fair and impartial. Voting is a central aspect of the U.S. Constitution, amendments, and federal laws.\(^{23}\) Constitutional amendments and federal laws to protect the individual’s right to, and integrity in, the vote. From landless white men, ex-slaves, free blacks, cybersecu
23 Constitutional Amendments and Voting Laws

Article 1 of the Constitution gave states the responsibility of overseeing elections. Many Constitutional amendments and federal laws to protect voting rights have been passed since then.

**Constitutional Amendments**

- 15th Amendment: gave African American men the right to vote in 1870.
- 19th Amendment: ratified in 1920, gave American women the right to vote.
- 24th Amendment: ratified in 1964, eliminated poll taxes. The tax had been used in some states to keep African Americans from voting in federal elections.
- 26th Amendment: ratified in 1971, lowered the voting age for all elections to 18.

**Federal Voting Rights Laws – Federal laws passed over the years help protect Americans’ right to vote and make it easier for citizens to exercise that right:**

- The [Voting Rights Act of 1965](https://www.law.cornell.edu/uscode/text/51/section-203) prohibited voter discrimination based on race, color, or membership in a language minority group. It also required certain places to provide election materials in languages besides English.
- The [Voting Accessibility for the Elderly and Handicapped Act of 1984](https://www.law.cornell.edu/uscode/text/51/section-2107) required polling places to be accessible to people with disabilities.
- The [Ununiformed and Overseas Citizens Absentee Voting Act (UO ACA) of 1986](https://www.law.cornell.edu/uscode/text/20/section-2030) allowed members of the U.S. armed forces and overseas U.S. voters to register and vote by mail.
- The [National Voter Registration Act (NVRA) of 1993](https://www.law.cornell.edu/uscode/text/20/section-303) created new ways to register to vote. It also called for states to keep more accurate voter registration lists.
- The [Help America Vote Act (HAVA) of 2002](https://www.law.cornell.edu/uscode/text/25/section-204) authorized federal funds for elections. It also created the EAC that helps states comply with HAVA to adopt minimum standards on voter education, registration, and ballots.
women, and the young attaining legal voting age, to immigrants granted U.S. citizenship, the right to freely participate in the electoral process and the right to vote are the bedrock of our democracy.

In addition to voting, federal legislation to establish requirements applicable to state and local entities has been enacted to address a range of issues, including transportation and highway safety – requiring the use of seat belts, setting speed limits and the drinking age – and establishing nutrition standards for public school lunches. In response to passage of these federal laws, states enacted laws to conform with the federal requirements.

The Resolution urges state, local, territorial, and tribal legislatures and governments to protect the security and integrity of U.S. election systems by allocating funding for elections consistent with this Resolution.

Each state’s chief elections official is obligated to protect voter records and statewide voter registration databases. State cybersecurity officials must continually assess the cyber threat horizon and improve election security by promptly addressing the risks.

**The Resolution Builds on Leading Reports**

The recommendations in the Resolution are sound, building on consensus that has emerged among members of Congress, government officials, and leading organizations as to what must be done to enhance the security of elections. For example, the report by the National Academies of Sciences, Engineering, and Medicine (NAS), *Securing the Vote: Protecting American Democracy* recommends steps the federal government,

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25 In the early 1970s, Congress withheld federal funding from states that did not enact a maximum speed limit of 55 mph. NCLS Speeding Overview (July 10, 2018), available at http://www.ncsl.org/research/transportation/speeding-overview.aspx

26 In 1984, Congress passed the National Minimum Drinking Age Act, which required states to raise their ages for purchase and public possession of alcohol to 21 by October 1986 or lose 10% of their federal highway funds. By mid-1988, all 50 states and the District of Columbia had raised their purchase ages to 21 (but not Puerto Rico, Guam, or the Virgin Islands). National Conference of State Legislatures (NCLS), Social Host Liability for Underage Drinking Statutes (Mar. 27, 2014), available at http://www.ncsl.org/research/financial-services-and-commerce/social-host-liability-for-underage-drinking-statutes.aspx

27 The federal Healthy, Hunger-Free Kids Act of 2010 required the U.S. Department of Agriculture (USDA) to update nutrition standards for school meals based on the 2010 Dietary Guidelines for Americans. The Act also requires each school district participating in a federal food program to implement a local school wellness policy with nutrition and physical activity goals for all schools under its jurisdiction. *State Action* – States have enacted various types of legislation to support these programs, including creating statewide programs and task forces, appropriating funding, creating grant programs and encouraging school gardens.

28 A summary of government and private sector recommendations and reports concerning election security and reform is included at this link.

Elections should be conducted with human-readable paper ballots. Paper ballots form a body of evidence that is not subject to manipulation by faulty software or hardware and that can be used to audit and verify the results of an election. Human-readable paper ballots may be marked by hand or by machine (using a ballot-marking device), and they may be counted by hand or by machine (using an optical scanner), the report says. Voters should have an opportunity to review and confirm their selections before depositing the ballot for tabulation. Voting machines that do not provide the capacity for independent auditing – i.e., machines that do not produce a printout of a voter’s selections that can be verified by the voter and used in audits – should be removed from service as soon as possible.

States should mandate a specific type of audit known as a “risk-limiting” audit prior to the certification of election results. By examining a statistically appropriate random sample of paper ballots, risk-limiting audits can determine with a high level of confidence whether a reported election outcome reflects a correct tabulation of the votes cast. Risk-limiting audits offer a high probability that any incorrect outcome can be detected, and they do so with statistical efficiency; a risk-limiting audit performed on an election with tens of millions of ballots may require examination by hand of as few as several hundred randomly selected paper ballots. States should begin with pilot programs of risk-limiting audits and fully implement these audits for all federal and state election contests – and local contests where feasible – within a decade.

V. REFORMS REQUIRED FOR THE 2020 ELECTION AND BEYOND

Frameworks, Standards, And Best Practices

Election officials have little time to prepare for the 2020 elections. While cybersecurity challenges may seem daunting, they can leverage existing frameworks, standards, and best practices that provide a roadmap to reduce the risks to election systems substantially. The NIST Cybersecurity Framework enables organizations to apply the principles and best practices of risk management to improve the security, integrity and resilience of election systems.30 States have legislation and policies to secure the voting process.31

The DHS Cybersecurity and Infrastructure Security Agency (CISA) published Best Practices for Securing Election Systems in May 2019.32 This guidance, which can be

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implemented at little or no cost, focuses on these important steps election organizations can take to harden their enterprise networks and strengthen election infrastructure: software and patch management; log management; network segmentation; block suspicious activity; credential management; baseline for host and network activity; organization-wide information technology guidance and policies; and notice and consent banners for computer systems.

Videos developed by the Federal Bureau of Investigation (FBI) for the Protected Voices initiative address the most urgent cybersecurity issues that may leave a political campaign or other election organization’s computer networks vulnerable to attacks. The EAC has published checklists for election officials on important election security topics. In this time of scarce resources, it is important to prioritize security resources so the most critical and vulnerable aspects of election systems are addressed first. Focusing on the most common attacks such as phishing, ransomware, and stolen credentials, as well as known vulnerabilities in websites, databases, and servers that can put VRDB at risk is critical. Election officials should not purchase or implement devices, software, or systems with known vulnerabilities. The procurement process is an opportunity to strengthen election security by specifying cybersecurity requirements that third-party vendors must meet.

VI. EXISTING ABA POLICY

Since 1989, the ABA House of Delegates and the ABA Board of Governors have passed Resolutions and adopted policies to strengthen the election process. The ABA has also adopted several policies regarding cybersecurity and lawyers’ use of technology. This Resolution builds on and is consistent with those existing ABA policies, while also taking a more comprehensive approach to the recent emerging threats to election security.

These ABA policies include the following:

Adopts Election Administration Guidelines and Commentary, dated August 2005, to supplant the Ballot Integrity Standards Applying to Election Officials, dated August 1989, and the Election Administration Guidelines and Commentary, dated August 2001, and recommends that all election officials ensure the integrity of the election process through the adoption, use and enforcement of these Guidelines. Urges federal, state, local and

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territorial governments to provide state and local election authorities with adequate funding in order to ensure the integrity and efficiency of the electoral process. 05A102; amended 08A119A; amended 09A116

Supports state and federal initiatives to modernize and improve voter registration practices, databases and networks and urges an independent technical and security assessment of statewide voter registration databases as well as supporting efforts to achieve ongoing improvements to such databases. Delegation to a federal agency with expertise in technical standards the duty to specify minimum, uniform technical, security including defense-in-depth, and privacy standards and reporting for statewide voter registration systems, including the certification of database software, provided that a State may exceed such minimum standards. 10A114

Supports technological improvements to provide statewide database access in real time to all polling places. 13A110

Urges states, localities and territories to develop written contingency plans detailing what should be done to preserve the election process in the event of an emergency. 14A112B

Supports efforts to improve voter registration practices by a) ensuring the accuracy of voter registration rolls using existing government lists or databases and b) streamlining the procedures whereby changes in voter rolls and voter registration information are made. Urges commitment by states and local election jurisdictions to develop the necessary compatible technology and resources to improve their voter registration practices. Urges federal legislation or administrative action creating incentives to encourage election jurisdictions to adopt the above improvements. 11A121

Urges review of laws related to election and campaign activity on the Internet and application of those laws in a manner that does not discourage political activity through this medium, upholds First Amendment guarantees of free speech and association, and seeks to eliminate opportunities for unfairness, corruption or undue influence through the use of this medium. Urges appropriate steps to encourage and facilitate the use of the Internet by all segments of society in order to promote widespread, fair and equitable citizen participation in the political process. Urge five specified actions to promote the availability and reliability of political information and discourse on the Internet. 00A107

VII. CONCLUSION

This Resolution provides recommendations for essential steps that should be taken by Congress, state and local governments, election officials, and private sector entities to secure the Election Process.

Respectfully Submitted,

Martha Chumbler, Chair, State and Local Government Law Section
Julie Fleming, Chair, Science & Technology Law Section
Ruth Hill Bro and Thomas J. Smedinghoff, Co-Chairs, ABA Cybersecurity Legal Task Force

February 2020
1. Summary of Resolution(s).

The Resolution identifies essential steps that should be taken by Congress, state and local governments, election officials, and private sector entities to secure the “election process” in federal elections. It consists of three measures designed to address the problem of federal election security and integrity head-on – by leveraging the power of Congress to protect federal elections when appropriating federal funds, drawing on the expertise of NIST (the federal agency designated by Congress to address complex technology issues and develop appropriate cybersecurity standards and certification processes), and recognizing the central role of states and local election officials to conduct federal, as well as state and local elections.

2. Approval by Submitting Entities.

The State and Local Government Law Section voted to sponsor this Resolution on November 20, 2019.

The Science & Technology Law Section voted to sponsor this Resolution on December 18, 2019.

The Section of Civil Rights and Social Justice voted to co-sponsor this Resolution on October 27, 2019.

The Criminal Justice Section voted to co-sponsor this Resolution on December 19, 2019.

The Senior Lawyers Division voted to co-sponsor this Resolution on November 14, 2019.

The Standing Committee on Election Law voted to co-sponsor this Resolution on October 16, 2019.

The Cybersecurity Legal Task Force voted to sponsor this Resolution on November 20, 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?
Since 1989, the ABA House of Delegates and the ABA Board of Governors have passed Resolutions and adopted policies to strengthen the election process. The ABA has also adopted several policies regarding cybersecurity and lawyers’ use of technology. This Resolution builds on and is consistent with those existing ABA policies, while also taking a more comprehensive approach to the most recent emerging threats to election security. These policies include:

- **Address chronic underfunding of elections** - *ABA Election Administration Guidelines, 7.2 Ballot Machinery*

- **Enhance cybersecurity protection of election systems**
  - Secure voter registration systems and e-pollbooks - 13A110
  - Replace outdated voting machines and databases - 13A110
  - ABA Election Administration Guidelines - 11A121
  - Develop security standards for voting equipment and infrastructure - 10A114
  - ABA Election Administration Guidelines: 7.2 Ballot Machinery, 7.3 Pre-Vote Checking

- **Develop the capacity to respond to and recover from cyber incidents** - 14A112B

- **Enhance cybersecurity resources and expertise, and increase training** - Resolution 109 (2014)

- **Increase resilience and ensure any attacks are detectable—use voter-verified paper ballots**

- **ABA Election Administration Guidelines**: 7.2 Ballot Machinery

- **Conduct post-election audits—audit the paper trail to high confidence**
  - ABA Election Administration Guidelines - 7.7 Ballot Audit, 7.8 Physical Security of Ballots and Voting Equipment

- **Expand and learn from coordinated information sharing** - Policy Adopted by the ABA Board of Governors (Nov. 2012):
  
  http://www.americanbar.org/content/dam/aba/marketing/Cybersecurity/aba_cyber_security_res_and_report.authcheckdam.pdf

5. **What urgency exists which requires action at this meeting of the House?**

On Election Day 2019 in a joint statement, government leaders of the law enforcement, homeland security and intelligence communities provided observations
on election security and their outlook for the 2020 elections:38 They concluded that "[o]ur adversaries want to undermine our democratic institutions, influence public sentiment and affect government policies. Russia, China, Iran, and other foreign malicious actors all will seek to interfere in the voting process or influence voter perceptions."

6. Status of Legislation. (If applicable)
A summary of election security legislation proposed by members the United States Congress is set forth below.

National Defense Authorization Act for Fiscal Year 2020

Title LXV—Election Matters

Companion bill: S. 2035, 115th Congress (James Lankford (R-OK), Amy Klobuchar (D-MN), Lindsey Graham (R-SC), Kamala Harris (D-CA), Susan Collins (R-ME), and Martin Heinrich (D-NM))

For the People Act, HR. 1, 116th Congress – “Make It Easier, Not Harder, to Vote”

Election Security Act, S. 2261, 115th Congress (James Lankford (R-OK), Amy Klobuchar (D-MN), Lindsey Graham (R-SC), Kamala Harris (D-CA), Susan Collins (R-ME), and Martin Heinrich (D-NM))


Honest Ads Act – S. 1989, 115th Congress (Mark Warner (D-VA), Amy Klobuchar (D-MV), John McCain (R-AZ))

Defending Elections from Threats by Establishing Redlines (DETER) Act. (Marco Rubio (R-FL) and Chris Van Hollen (D-MD))

Defending American Security from Kremlin Aggression Act (DASKA) of 2019 – S. 482, 116th Congress (Bob Menendez (D-N.J.), Lindsey Graham (R-S.C.), Cory

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Gardner (R-Colo.), Ben Cardin (D-Md.), and Jeanne Shaheen (D-N.H.), Feb. 13, 2019

Foreign Influence Reporting in Election (FIRE) Act, S. 1562

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

   The Resolution will be distributed to members of Congress and private and public sector organizations, and other stakeholders in order to alert them to the ABA’s newly-adopted policy and encourage them to take action consistent with the ABA policy.

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


10. **Referrals.**

    - Section of State and Local Government Law
    - Science & Technology Law Section
    - ABA Cybersecurity Legal Task Force
    - Antitrust Law Section
    - Criminal Justice Section
    - Section on Civil Rights and Social Justice
    - Business Law Section
    - Infrastructure and Regulated Industries Section
    - Section of Public Contract Law
    - Section of Intellectual Property Law
    - Section of Litigation
    - Section of Environment
    - Energy, and Resources
    - Section of Administrative Law and Regulatory Practice
    - Section of International Law
    - Tort Trial and Insurance Practice Section

    **Standing Committees:**
    - Law and National Security
    - Disaster Response and Preparedness
    - Technology and Information Systems
    - Lawyers’ Professional Liability
    - Center for Professional Responsibility
    - Solo, Small Firm, and General Practice Division
    - Judicial Division
    - Law Practice Division
    - Law Student Division
    - Young Lawyers Division
11. **Contact Name and Address Information.** (Prior to the meeting)

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Thomas J. Smedinghoff  
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12. **Contact Name and Address Information.** (Who will present the report to the House?)

Lucy Thomson, Livingston PLLC, Washington, D.C.
Lucythomson1@mindspring.com  
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EXECUTIVE SUMMARY

1. **Summary of the Resolution**
   The Resolution identifies essential steps that should be taken by Congress, state and local governments, election officials, and private sector entities to secure the “election process” for federal elections. It consists of three measures designed to address the problem of election security head-on – by leveraging the power of Congress to protect federal elections when appropriating federal funds, drawing on the expertise of NIST (the federal agency designated by Congress to address complex technology issues and develop appropriate cybersecurity standards and certification processes), and recognizing the central role of states and local election officials to conduct federal, as well as state and local elections.

2. **Summary of the Issue that the Resolution Addresses**
   Volumes of evidence establish that Russian cyber operations targeted election infrastructure in the U.S. in order to undermine the integrity and availability of the 2016 elections. Russia is the largest, but not the only threat. U.S. intelligence agencies and law enforcement have expressed concern “about ongoing campaigns by Russia, China and other foreign actors, including Iran, to undermine confidence in democratic institutions and influence public sentiment and government policies. The risk of foreign interference in U.S. elections remains at critical levels.

2. **Please Explain How the Proposed Policy Position Will Address the Issue**
   The Resolution identifies essential steps that should be taken by Congress, state and local governments, election officials, and private sector entities to secure the “Election Process.” It consists of three measures designed to address the problem of election security head-on – by leveraging the power of Congress to protect federal elections when appropriating federal funds, drawing on the expertise of NIST (the federal agency designated by Congress to address complex technology issues and develop appropriate cybersecurity standards and certification processes), and recognizing the central role of states and local election officials to conduct federal, as well as state and local elections.

4. **Summary of Minority Views**
   No minority views have come to our attention with respect to this Resolution and Report.
RESOLVED, That the American Bar Association urges Congress to collect data and prepare a report on how youth experiencing mental health problems as a result of racism, poverty, and living in high crime communities have access to, and are receiving, adequate mental health screenings, interventions, and evidence-based treatment from school-based mental health service providers; and

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to appropriate and allocate funds to identify and address, in the school setting, mental health problems experienced by youth as a result of racism, poverty, and living in high crime communities.
I. Introduction

The purpose of this resolution is to ensure that children who experience mental health problems as a result of racism, poverty, and living in high crime communities 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 service 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 report that discusses whether youth experiencing mental health problems as a result of racism, poverty, and living in high crime communities have access to, and are receiving, adequate mental health screenings, interventions, and evidence-based treatment from school-based mental health service providers. The American Bar Association seeks the appropriation and allocation of funds to support mental health services based upon the federal government’s findings. By way of example, the funding could 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.

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. These discriminatory policies and practices have created inequalities in several areas of life for racial minorities. Racial minorities face structural barriers when it

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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 than 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, although the rate of youth confinement has significantly declined between 2003 and 2013, the racial gap between Black and American Indian youth compared to White youth has increased. Black and Brown youth are 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 3.1 times as likely, and Hispanics are 1.5 times as likely.

Employment for Black men has been 11 to 15 percentage points lower than other men’s employment in every month since January 2000. These descriptive trends are not sufficient to establish cause-and-effect relationships, but research designed to isolate the causes of black men’s worse employment outcomes consistently finds significant effects of racial discrimination, arrest records, and, for older men, weaker educational credentials. Michael Hout, The Stanford Ctr. on Poverty and Inequality, State of the Union 2017 Employment 1 (2017), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_employment.pdf.

See Sean F. Reardon, et al., The Stanford Ctr. on Poverty and Inequality, State of the Union 2017 Education 1 (2017), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_education.pdf (explaining determinants of unequal educational opportunities for minority students are persistent racial and ethnic disparities in family resources and segregation patterns).

See Rucker C. Johnson, The Stanford Ctr. on Poverty and Inequality, State of the Union 2017 Housing 1 (2017), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_health.pdf (“These disparities emerge because of racial differences in childhood conditions, such as parental income, access to health care, neighborhood poverty rates, and other childhood family and neighborhood factors.”).

Mathew Desmond, The Stanford Ctr. on Poverty and Inequality, State of the Union 2017 Housing 1 (2017), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_housing.pdf (“Racial and ethnic gaps in homeownership, housing wealth, and tax expenditures on housing are still very wide. Whereas 71 percent of White families live in owner occupied housing, only 41 percent of black families and 45 percent of Hispanic families do.”).


Id.


The Sentencing Project, supra note 9, at 1–3 (based on data from 2013).
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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12 Rachel Wilf, Ctr. For Am. Progress, Disparities in School Discipline Move Students of Color Toward Prison, Mar. 2012, https://www.americanprogress.org/issues/race/news/2012/03/13/11350/disparities-in-school-discipline-move-students-of-color-toward-prison/. According to the U.S. Department of Education Office for Civil Rights, disparities in school suspension rates between White students and students of color are seen as young as pre-school. Although studies fail to show that Black students misbehave at higher rates than White students, Black students are three times more likely to be suspended or expelled.

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. National Public Radio, Robert Wood Johnson Found., Discrimination in Am.: Experiences And Views of African Am. 1–2 (Oct. 2017), https://www.npr.org/assets/img/2017/10/23/discriminationpoll-african-americans.pdf.


15 Id.

16 Id.

races live below the poverty line.\textsuperscript{18} With regard to crime victimization, research shows that people living below the federal poverty level have more than double the rate of violent victimization as people in high-income households.\textsuperscript{19} Specifically for Black children, they are more likely to be victims of child abuse/neglect, robbery, and homicide.\textsuperscript{20} In fact, homicide is the leading cause of death among Black males between the age of 15 to 34;\textsuperscript{21} it is the second leading cause of death for Black females between the ages of one to four and 15-24.\textsuperscript{22} 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.\textsuperscript{23} 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.\textsuperscript{24}

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.”\textsuperscript{25} Racial trauma—or race-based traumatic stress—is the stressful impact or emotional pain that

\textsuperscript{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 suggest that 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

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26 Id.
27 Id.
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.\textsuperscript{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.\textsuperscript{33} Consequently, this resolution calls for federal, state, local, territorial, and tribal governments to appropriate and allocate 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 urges 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,

Logan Murphy
Chair, Young Lawyers Division
February 2020


GENERAL INFORMATION FORM

1. **Summary of Resolution**

   This recommendation seeks to ensure that children who experience mental health problems as a result of racism, poverty, and living in high crime communities 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**

   Yes.

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

   Yes. Former House Resolution 109A at the 2019 Annual Meeting was withdrawn to allow for the formation of a working group to review and revise. This resolution is being resubmitted upon consensus.

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.

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.**

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.

9. **Disclosure of Interest.**

None.

10. **Referrals:**

- ABA Center on Children and the Law
- ABA Section on Civil Rights and Social Justice
- ABA Commission on Disability Rights
- ABA Commission on Homelessness and Poverty
- ABA Criminal Justice Section
- ABA Commission on Youth at Risk
- ABA Litigation Section
- ABA Judicial Division
- ABA Law Student Division
- ABA Science and Technology Law
- ABA Health Law

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

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EXECUTIVE SUMMARY

1. **Summary of Resolution.**

   This recommendation seeks to ensure that children who experience mental health problems as a result of racism, poverty, and living in high crime communities receive the in-school mental health services needed to maintain or restore good health. It further urges federal, state, local, territorial, and tribal governments 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 mental health problems triggered by racism, poverty, and living in high crime communities. 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.
Recommendation regarding requests from the California Lawyers Association and the North Carolina Bar Association for Primary State Bar Association Designation and Acquisition of Additional Delegate Seats in the House of Delegates

I-CALIFORNIA DELEGATION

The Credentials and Admissions Committee recommends approval of the California Lawyers Association as the primary state bar in the HOD California delegation (State Bar of California to remain in the House as the secondary state bar in the California delegation, with 1 delegate seat), and that CLA receive 2 of the SBC’s delegate seats, inclusive of the seats’ current terms which will conclude at the end of the 2020 Annual Meeting.

II-NORTH CAROLINA DELEGATION

The Credentials and Admissions Committee recommends approval of the North Carolina Bar Association as the primary state bar in the HOD North Carolina delegation, and that, NCBA receive the 5 seats that were relinquished by the North Carolina State Bar Association, inclusive of the seats’ current terms as follows:

(3) with term to end at the conclusion of the 2020 Annual;
(1) with term to end at the conclusion of the 2021 Annual, and
(1)-YLD with term to end at the conclusion of the 2021 Annual

In addition, the Committee recommends that it be allowed to report/make a motion for approval of both of the above recommendations, at the start of the House 2020 Midyear proceedings, so that the additional delegates for each organization may be officially certified and seated in the well of the House as voting delegate representatives of the organizations for the 2020 ABA House of Delegates Midyear Meeting.
I-CALIFORNIA DELEGATION

In October 2017, California enacted a new law, Senate Bill 36, mandating that the State Bar of California (“SBC”) spin off its sections into an independent voluntary bar association, while retaining its licensing and discipline functions. The statute directed the SBC to enter into a memorandum of understanding with the new organization regarding the terms of separation and the transfer of the functions and activities of the existing bar sections.

Under that memorandum of understanding, the former Sections of the SBC became the California Lawyers Association (“CLA”) on January 1, 2018. The California Young Lawyers Association (“CYLA”) is part of the CLA. The CLA’s stated mission is, “Promoting excellence, diversity and inclusion in the legal profession, and fairness in the administration of justice and the rule of law.”

On October 26, 2018, the CLA’s President and Vice President, both of whom are ABA members, wrote the Chair of the House of Delegates Credentials and Admissions Committee petitioning for the CLA’s admission to House. The petition proposed that the House of Delegates (“House”) admit the CLA as the secondary state bar in the California Delegation and allocate to it five of the eleven delegate seats currently held by the SBC. One of the CLA’s seats would be for a young lawyer delegate.

On October 30, 2018, the SBC’s Executive Director and the President of its Board of Trustees wrote the Chair of the Credentials and Admissions Committee to “support wholeheartedly” the CLA’s petition for representation in the House, including the proposal to transfer five of the SBC’s eleven delegates to the CLA.

On January 27, 2019, the American Bar Association House of Delegates approved Resolution 200, transferring 5 of the State Bar’s 11 delegates to CLA and admitting the California Lawyers Association to the House. as follows:

- At the conclusion of the 2019 Annual Meeting, the CLA will be eligible to certify 3 of SBC’s current delegate seats for two-year terms that would expire at the conclusion of the 2021 Annual Meeting;

- At the conclusion of the 2020 Annual Meeting, the CLA will be eligible to certify 2 of SBC’s current delegate seats, including its one young lawyer seat, for two-year terms that would expire at the conclusion of the 2022 Annual Meeting.

By letter dated November 13, 2019 the President of CLA wrote the Chair of the House of Delegates Credentials and Admissions Committee petitioning for the CLA’s designation as the primary state bar association in the California delegation, and the transfer of five of the remaining six SBC delegates to CLA, with one remaining with SBC. This agreement was effectuated through resolutions of both the SBC Board of Trustees.
and CLA’s Board of Representatives. The petition requested that the transfer be effective immediately because “(d)uring the 2019 Annual Meeting of the House, the State Bar delegates were advised by the State Bar not to vote on 33 of the 57 resolutions because they were not germane to, or otherwise proper for consideration by, a regulatory agency.”

This petition was supported by a letter dated November 13, 2019 from the SBC’s Executive Director to the Chair of the House of Delegates Credentials and Admissions Committee. That letter noted that SBC’s Board of Trustees passed a resolution, at its September 19, 2019 meeting directing staff of SBC to "work with the American Bar Association, the California Lawyers Association, and other stakeholders as appropriate to effectuate the transfer of five of the State Bar's six appointments to the American Bar Association House of Delegates to the California Lawyers Association as soon as reasonably possible."

The Committee conducted an assessment of CLA’s data summation provided in CLA’s November 13, 2019 letter requesting the remaining SBC delegates seats in the House that are based on ABA membership, and SBC’s agreement to relinquish all but one of the remaining seats (SBC will remain active in the House as the secondary state bar with one delegate seat). Based on the assessment CLA provided data of 86,425 members, of which for this process, 10,878 were an applicable match as ABA lawyer members, which qualified CLA for 2 additional delegates, based on ABA membership.

The Committee therefore recommends approval of the California Lawyers Association as the primary state bar association in the HOD California delegation, and that 2 of SBC’s delegate seats be transferred to CLA. The 3 remaining seats are to remain with SBC until the end term/conclusion of the 2020 Annual Meeting because CLA is not yet eligible for them. The Committee further recommends that the term for these 2 additional CLA seats are to remain with even year terms, effective immediately, ending at the conclusion of the 2020 Annual Meeting, and that CLA provide certification credentials for the delegate representatives that it would like to appoint to said additional seats. In addition, the Committee recommends that it be allowed to report/make a motion of all of the above, at the start of the House 2020 Midyear proceedings, so that the additional delegates may be seated in the well of the House as voting delegates for CLA.

II-NORTH CAROLINA DELEGATION

The Executive Director of the North Carolina State Bar (“NCSB”), in an August 28, 2019 letter to the Chair of the ABA House of Delegates, Secretary of the ABA and Chair of the House of Delegates Credentials and Admissions Committee, served notice that NCSB had decided to relinquish all six of its delegate seats in the ABA House of Delegates (HOD) effective as of the close of business at the ABA 2019 annual meeting. This includes a young lawyer delegate seat.

On October 30, 2019, the Executive Director of the North Carolina Bar Association (“NCBA”) wrote to the Chair of the House of Delegates Credentials and Admissions
Committee requesting that NCBA become the representative state bar organization of record for North Carolina in relation to the assignment of delegates for the ABA House of Delegates, and to claim the delegate positions that are available to the representative state bar of North Carolina. Pursuant to Section 6.4(a) of the Association’s Constitution, NCBA has 1 delegate in the House of Delegates.

The Committee conducted an assessment of NCBA’s data which revealed that there are 19,389 NCBA member of which only 2,640 were actually ABA lawyer members. Based on this assessment NCBA is qualified to receive the 5 additional delegate seats. However, NCBA’s number of ABA lawyer members is below the required 5,000 ABA member threshold, therefore NCBA does not qualify for an additional delegate based on ABA membership.

Therefore, because the North Carolina State Bar relinquished its seats and entity status in the House, the Committee recommend approval of the North Carolina Bar Association as the primary state bar association in the HOD North Carolina delegation. The Committee further recommends that, effective immediately, NCBA receive the 5 relinquished NCSB seats that were based on lawyer membership, and that the allocation of terms for these seats remain the same with (3) with term to end at the conclusion of the 2020 Annual, (1) with term to end at the conclusion of the 2021 Annual, and (1)-YLD with term to end at the conclusion of the 2021 Annual. In addition, the Committee recommends that it be allowed to report/make a motion of all of the above, at the start of the House 2020 Midyear proceedings, so that the additional delegates may be seated in the well of the House as voting delegates for NCBA.

Respectfully Submitted,

Committee on Credentials and Admissions
Eileen M. Letts, Chair
Robert N. Weiner, Vice Chair
Michael G. Bergmann
Stephen E. Chappelear
Harold D. Pope III
Carlos A. Rodriguez-Vidal
Jennifer A. Rymell
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